



An
Bord
Pleanála

Inspector's Report

ABP-315440-22

Development	Construction of a house and all associated site works
Location	Cnoc Alainn, Ballycar, Newmarket-on-Fergus, Co. Clare
Planning Authority	Clare County Council
Planning Authority Reg. Ref.	22905
Applicant(s)	Alanna Fox
Type of Application	Permission
Planning Authority Decision	Refuse
Type of Appeal	First Party
Appellant(s)	Alanna Fox
Observer(s)	Pat Sheedy Yvonne Madden and James Coffey
Date of Site Inspection	31 st October 2023
Inspector	Ciara McGuinness

1.0 Site Location and Description

- 1.1. The site is located in the townland of Ballycar approximately 1km to the east of Newmarket-on-Fergus. It is located within the Cnoc Alainn development, an established residential scheme comprising 6 houses with a shared access road. The R470 road bounds the Cnoc Alainn development to the north, however access to the development is from the L7168 Local Road to the south. The site is an undeveloped area of land identified as open space in the development. It is to the west of the Cnoc Alainn access road, close to the entrance of the development.
- 1.2. The site is rectangular in shape and extends over an area of 0.3 hectares. Ground levels slope downwards at a moderate gradient away from the access road. The site is bound to the west and the north by existing residential developments. It is bound to the south by the L7168 road and to the east by the Cnoc Alainn access road. There is an existing mature hedgerow along the western and southern boundaries of the site.

2.0 Proposed Development

- 2.1. Permission is sought for the construction of a two-storey dwelling house, wastewater treatment system and new entrance. The proposed house has a stated floor area of 255sqm and a maximum ridge height of 8.29m. It is proposed to provide the proposed treatment system and percolation area in the northeast corner of the site. The proposed development would be served by a group water scheme. Information submitted with the application include details of family land ownership, the applicant's connection with the area and a site suitability test report. A letter was enclosed from the applicant's mother in which it was stated that she is giving permission to her daughter to apply for planning permission and build a house.

3.0 Planning Authority Decision

3.1. Decision

The planning authority decided to refuse permission for the following reason;

Having regard to the planning history of the site in particular P01/2382 whereby the subject site forms part of the public open space to serve the houses in the wider development, it is considered that the proposed development would materially contravene Conditions 1 and 3 attached to that permission. The proposed development would, therefore preclude the provision of this area of the public open space serving the overall development thus reducing to an unacceptable level the quality of public open space within the development, and would therefore be prejudicial to the amenities of the occupants of adjacent properties and would be contrary to the proper planning and sustainable development of the area.

3.2. Planning Authority Reports

3.2.1. Planner's Report - The Planner's Report noted that the proposed development is for a dwelling on lands identified as open space in the development and that the proposed development would therefore be contrary to Conditions 1 and 3 of P.A. Ref 01/2382 in this regard. Furthermore, the proposed development would have a significant negative impact on the residential amenities of the area as a result of the diminished level of open space. It is noted that the applicant is compliant with rural housing policy. It is also considered that in the event of a grant of permission, further information would be required on the proposed development and its impact on surface water flows and flooding.

3.2.2. Other Technical Reports

Environmental Section – The site suitability assessment and proposed treatment system were considered acceptable subject to condition.

Estate Team – The proposed house is on an area identified as 'open space' on the taking in charge map prepared when the Cnoc Alainn estate was taken in charge on the 15th of July 2015. The vesting of this area to Clare County Council has still not been completed.

3.3. Prescribed Bodies

Irish Aviation Authority – No observation on this application

3.4. Third Party Observations

There was one third party observation by Yvonne Madden & James Coffey. The issues raised are summarised below;

- The site is a 'Phantom Site'. The validity of the sale, purchase and transfer/register of the site is queried.
- A planning application for the removal of the designated open space was refused in 2013.
- The proposed site is designated as open space and not zoned for development.
- The open space is a turlough which was covered by soil from a group scheme over 20 years ago. The Turlough has connections to surrounding lakes with far reaching ramifications. The position of the turlough is shown on OS maps.
- The proposed development contravenes Environmental Protection Agency Policy.
- There is a history of flooding associated with the site. Photographic evidence from 2009 is submitted.
- Details on the site characterisation form are queried.

4.0 Planning History

Subject Site

P.A. Ref: P04/2185 – Refused in 2004 – construction of a gate lodge, treatment plant and connection to services including ancillary site works as an additional dwelling to the cluster development granted under P04-139 and utilising access road, entrance and common services.

P.A. Ref: P13/374 – Refused in 2013 - to remove "open space" from development as granted in planning permission P04-139.

Wider Development Site

P.A Ref P01/2382 – Outline Permission Granted in 2003 - to construct 8 no. dormer style dwellinghouses including garages, connect to proprietary treatment system, connect to public water supply and connect to all public services (tel, and electricity).

P.A. Ref P04/139 – Permission Granted in 2004 - to construct 6 no. dwelling houses, including garages, connect to proprietary treatment system, connect to public water supply and connect to all public services (tel, and electricity).

P.A Ref P08/215 - Granted for Extension of Duration – of P.A Ref P04/139 until 5th May 2009.

P.A. Ref P09/443 - Permission granted to extend the period of validity of Planning Permission P04-139 until 5th May 2010.

5.0 Policy Context

5.1. Development Plan

5.1.1. The site is situated in a rural area under strong urban influence as identified on Map H8 of the County Development Plan. In these areas, the key objectives of the Council are:

- a) To facilitate the genuine housing requirements of persons with a demonstrable economic or social need to live in these rural areas.
- b) To direct urban-generated development to areas zoned for new housing development in the adjoining urban centres, towns, villages and clusters as identified in the County Settlement Strategy and to seek to enhance the vitality and viability of these settlements.

CDP 4.10 It is an objective of Clare County Council: To ensure that the countryside continues to play its role as a place to live, work, recreate and visit, having careful regard to the viability of smaller towns and rural settlements, the carrying capacity of the countryside, siting and design issues and environmental sensitivities

CDP 4.14 It is an objective of Clare County Council:

- i. In the parts of the countryside within the 'Areas of Special Control' i.e.:
 - Areas Under Strong Urban Influence

- Heritage Landscapes
- Sites accessed from or abutting Scenic Routes

To permit a new single house for the permanent occupation of an applicant who meets the necessary criteria as set out in the following categories.

- ii. To ensure compliance with all relevant environmental legislation as outlined in Objective CDP3.1 and to have regard to the County Clare House Design Guide, with respect to siting and boundary treatments.

Category A – Economic Need

- i. Such persons shall be defined as persons who by the nature of their work have a demonstrable economic need to reside permanently in the rural area close to their place of work. Such circumstances will normally encompass persons involved in full-time farming, horticulture, forestry, bloodstock or marine-related activities as well as others who can demonstrate a genuine need, because of their occupation or business (not including bed and breakfasts) to live in a specific rural area. Similar part-time occupations can also be considered where it can be demonstrated that it is the predominant occupation and that the ancillary occupation(s) are located within a reasonable daily commuting distance from the site or alternatively may be facilitated through remote working. The applicant must not already own or have owned a house in the surrounding rural area (except in sub-category iii as set out under the Social Need criteria) and needs the dwelling for their own permanent occupation. Where a person's economic need relates to their engagement in farming or bloodstock they shall have a minimum farm size of 12.5 hectares within the local rural area. Where this minimum requirement is not achieved favourable consideration will only be given where a business plan can satisfactorily demonstrate that the person's predominant occupation relates to farming or bloodstock activities on their landholding and which also demonstrates the viability of the activity(s).

Or

- ii. An applicant who is considered ineligible under the preceding category may be considered for the construction of a permanent home in the rural Area Under Special Control, subject to being able to satisfy the Planning Authority of their commitment to operate a full-time business (not including bed and breakfasts), from their proposed home in a rural area, as part of their planning application, in order for example, to discourage commuting to towns or cities. The applicant must not already own or have owned a house in the surrounding rural area (except in sub-category iii as set out under the Social Need criteria) and needs the dwelling for their own permanent occupation. Applicants must be able to submit evidence that:
- Demonstrates that the nature of their employment or business is compatible with those specified in the demonstrable economic need criteria for rural Areas Under Special Control (i.e. that they are serving a predominantly local rural business need).
 - Their business will contribute to and enhance the rural community in which they seek to live.

Category B – Social Need

- i. A person who is an intrinsic member of a local rural community who was born within the local rural area, or who is living or has lived permanently in the local rural area for a minimum of 10 years either as one continuous period or cumulatively over a number of periods prior to making the planning application and who has a demonstrable social need to live in the area. This includes returning emigrants seeking a permanent home in their local rural area who meet these criteria. It also includes persons who were born or lived in a rural area for substantial periods of their lives and where that area is now within an urban settlement boundary/zoned land. The applicant must not already own or have owned a house in the surrounding rural area (except in the exceptional circumstances as set out in sub-category iii below) and needs the dwelling for their own permanent occupation.

Or

- ii. Special consideration shall be given in limited cases for persons who need a dwelling for permanent occupation in a rural area for exceptional health reasons. Any application for permission in this category shall be accompanied by a report or recommendation (and other relevant supporting documentation) from a registered medical practitioner outlining the reasons why it is necessary for the applicant to live in the rural area or to reside near family/carer support (or alternatively requires care support to live in close proximity to them). Where applicable the applicant shall demonstrate why their existing home cannot be adapted to meet their needs and shall also demonstrate why their need for a house cannot be accommodated either in an existing settlement or in the countryside outside of the Areas of Special Control. In instances where the house is proposed to accommodate the person that will provide care for a person already residing in the rural area (such as elderly persons who have resided in the area over 10 years, and/or persons who qualify due to exceptional health reasons) the new dwelling must be sited adjacent to the existing dwelling, which shall be taken to mean sites that are in close proximity to the dwelling of the person that will be cared for.

Or

- iii. A person who is an intrinsic member of a local rural community, who was born within the local rural area or who is living or has lived permanently in the local rural area for a minimum of 10 years at any stage either as one continuous period or cumulatively over a number of periods prior to making the planning application, who previously owned a home and is no longer in possession of that home due to the home having been disposed of following legal separation / divorce / repossession and can demonstrate an economic or social need for a new home in the rural area.

5.1.2. Section 2.8 of the plan contains policies and objectives relating to Flood Risk Management including;

Development Plan Objective: Flood Risk Assessment and Management CDP2.6

- It is an objective of Clare County Council: a) To ensure development proposals have regard to the requirements of the SFRA and Flood Risk Management

Guidelines; and where required are supported by an appropriately detailed hydrological assessment / flood risk assessment.....

- 5.1.3. **Development Plan Objective: Storm Water Management CDP2.11** - It is an objective of Clare County Council: a) To ensure that adequate storm water infrastructure is in place to accommodate the planned level of growth in the Plan area; b) To require all new developments to provide a separate foul and surface water drainage system; c) To ensure the implementation of Sustainable Drainage Systems (SuDS) and in particular, to ensure that all storm water generated in a new development is disposed of on-site or is attenuated and treated prior to discharge to an approved storm water system; and d) To request the submission of details regarding Surface Water Attenuation Systems that take account of the potential future impact of climate change for multi-unit development applications in the plan area. Development will only be permitted in areas where sufficient surface water capacity exists.

Development Plan Objective: Flood Risk Management, Green Infrastructure & Biodiversity CDP2.12 - It is an objective of Clare County Council: a) To facilitate and implement green infrastructure developments as a means of managing flood risk and enhancing the natural environment in the plan area in compliance with Objective CDP 3.1; and b) To avail of opportunities to enhance biodiversity and amenity and to ensure the protection of environmentally sensitive sites and habitats where flood risk management measures are planned subject to the requirements of the Habitats Directive.

5.2. **Natural Heritage Designations**

Ballycar Lough pNHA (000015) – 0.3km to the north of the site

Fin lough pNHA (001010) - 1.3km to the east of the site

Lough Gash Turlough SAC (000051) – 1.5km to the west of the site

Lough Gash Turlough pNHA (000051) - 1.5km to the west of the site

Fergus Estuary And Inner Shannon, North Shore pNHA (002048) – c. 5km to the west/south of the site

River Shannon and River Fergus Estuaries SPA (004077) – c. 5km to the west/south of the site

Lower River Shannon SAC (002165) - c. 5km to the west/south of the site

5.3. **EIA Screening**

See completed Form 2 on file. Having regard to the nature, size and location of the proposed development, and to the criteria set out in Schedule 7 of the Regulations I have concluded at preliminary examination that there is no real likelihood of significant effects on the environment arising from the proposed development. EIA, therefore, is not required.

6.0 **The Appeal**

6.1. **Grounds of Appeal**

The main points of the appeal may be summarised as follows;

- A summary of the history of the site is provided. The proposed development must be considered in this context, as the single grounds of refusal relating to the original Outline Planning Application P01/2382.
- The nature of any subsequent planning application seeking a variation from what was originally proposed will contravene conditions of the previous application. If no variation can be permitted which would contravene previous conditions of planning, then it would prohibit most new developments.
- Use of the proposed site as open space would be injurious to the adjacent properties. The use of this space could compromise the privacy of adjacent residents and could result in noise, dust or other disturbance to their amenity. The rear of the site is not overlooked and could give rise to anti-social behaviour.
- The extent of open space is not warranted due to the density of the development and the large plots associated with each dwelling.
- There is an undeveloped area amounting to 0.63ha in Cnoc Alainn at present. The subject site equates to an area of 0.3 ha leaving a further area of 0.33ha

undeveloped equating to 15% of the overall 2.2 ha site of the wider development.

- Examples of comparable clusters of development are provided, where no public open space is provided. The clustering of developed is utilised as an alternative to Ribbon Development.
- The owners of the site have kept it under liability insurance. There is a direct conflict with this area being used as open space given the lack of maintenance and associated ambiguity with liability for any injuries or damages that could occur on the site.
- Ballycar Lake is no longer used as a supply of water for the group scheme. Flood relief works have been carried out to alleviate flooding at the railway line in Ballycar. Since then, there has been no evidence of water lying in the area where the turlough was previously evident.
- The proposed site was never intended to be used as open space and was excluded from development by the presence of the Turlough on site. The restrictions relating to the turlough have been clarified and no longer apply.
- The Landscape Plan submitted with the P04/139 application shows the area fenced off with an access gate for maintenance. The Landscape Plan submitted with the P01/2382 application shows tree planting arranged around the perimeter of the site to create an enclosed open space. This is a contradiction of the intended use of open space.

6.2. Planning Authority Response

- The Planning Authority note that the planning history is one of the central issues raised in the appeal. The Planning Authority refer to the attached site layout plan submitted under P04/139, which indicates the area to which this appeal refers is designated as open space. The proposed development is contrary to the agreed plans, would diminish the level of open space and would preclude this area of open space serving the overall development. This would be prejudicial to the amenities of the occupants who would have a

reasonable expectation that identified areas of open space within the development would be retained for such use.

- The appellant has stated that the land the subject of this appeal has not been taken in charge by Clare County Council. This is an inaccurate statement. On July 15th 2015, the planning authority published note of their intention to declare the roads in the development to be public roads. At a meeting of Killaloe Municipal District of July 15th 2015, it was agreed that 'Clare County Council in accordance with Section 11 of the Roads Act, 1993 declare the road in the housing estate of Cnoc Alainn, Newmarket-on-Fergus, Co. Clare to be a public road. A copy of the resolution and taking in charge map are included with the response for the Boards consideration.
- In accordance with Section 180(4)(a) of the Planning and Development Act 2000 (as amended), where an order is made under Section 11 of the Roads Act 1992, the planning authority shall, in addition to the provisions of that section, take in charge-
 - (i) Any sewers, watermains or service connections within the attendant grounds of the development, and
 - (ii) public open spaces or car parks within the attendant grounds of the development.

While it is noted that the vesting process is not complete, the Cnoc Alainn estate has been taken in charge by Clare County Council in accordance with the map attached to the response.

- The Cnoc Alainn development is not a designated cluster and is therefore not comparable to the examples provided.

6.3. Observations

Pat Sheedy

- The proposed development is contrary to previous planning permissions which designate this area as open space.

- The proposed development would materially contravene Condition No.1 of P.A. ref P04/139.
- Planning application to remove open space was refused.
- Flooding and waterlogging have been witnessed on this site multiple times over the last decade.

Yvonne Madden & James Coffey

Issues raised by Yvonne Madden and James Coffey in their observation on the planning application were reiterated. There is no ambiguity with regards to the site. From the outset, the site was deemed as open space, and this was used as one of the primary selling features by the developers. Noted that enforcement action has been taken in relation to the construction of a post and rail fence on the site. The site has been maintained and used by local residents.

7.0 Assessment

7.1. I consider that the main issues in the assessment of this appeal are as follows;

- Principle of development
- Flood Risk
- Rural Housing Policy
- Appropriate Assessment

7.2. Principle of Development

7.2.1. I have reviewed the Planning History associated with the file. The subject site is clearly designated as the main area of public open space to serve the residential development permitted under P.A. Ref P04-139, in accordance with Condition 1 of the permission and the landscape plan submitted with the application. It is also clear the intention of the development was to be built in its entirety as a single residential estate and not as six separate sites in accordance with Condition 4 of P04/139. No subsequent planning history has materially altered or revoked the use of this site as open space. In this regard, I note permission was refused for the removal of the 'open space' from the development under P.A. ref 13/274. Notwithstanding the claims from the appellant with regards to the intended use of the site, it remains a

fact that the site in question was intended to provide public open space to serve the development and this open space was considered to be an integral part and indeed a requirement on which the grant of planning permission was based. I also note the response by Clare County Council which confirms that although the vesting process is not complete, the Cnoc Alainn estate including the public open space, has been taken-in-charge by Clare County Council. Having regard to the above, I consider that the proposed development would materially contravene Conditions 1 and 4 attached to P.A. Ref P04/139.

7.2.2. The appellant also suggests that the use of the site as open space is not warranted due to the density and quantity of houses and the large plots associated with each dwelling site. It is also suggested that the site is not suitable for open space and may injure the residential amenity of neighbouring occupants. I consider that public open space is required in an estate for outdoor interaction between residents. I note that the Development Plan does not specify a required quantum of open space for each house. I consider the open space sufficient in size, accessible and adequately overlooked to serve as public open space. Furthermore, I concur with the Planning Authority, that the residents of the existing development have a reasonable expectation that the subject site would be retained for open space purposes having regard to the Condition no.1 and no.4 in respect of Reg. Ref. P04/139. Houses within the estate, particularly houses in close proximity to the subject site may have been purchased on the understanding that the lands in question would be kept free from development and developed as public open space.

7.2.3. I consider that permission in this instance would set an undesirable precedent in terms of non-compliance with planning conditions, particularly in terms of finishing estates, providing appropriate infrastructure including landscaping and open space. I consider that permission should be refused on the above grounds.

7.3. **Flood Risk**

7.3.1. The OPW's flood maps do not show the site as being the subject of any identified flood risk. Furthermore, my site visit was carried out following a prolonged period of heavy rain and I found no evidence of ponding and the site was firm underfoot. Notwithstanding, the proposed development is located on a site that was previously considered unsuitable for residential development by the Planning Authority, for

reasons related to flood risk and there would need to be a material change in circumstances to render the proposal acceptable in principle. The appellant states that flood relief works have been carried out in the area and that there has been no evidence of water lying in the area where the turlough was previously evident. However, the applicant has not submitted any evidence to substantiate these claims. The Planning Authority considers that further assessment is required in relation to the proposed developments impact on surface water flows and flood risk. In view of the history of flooding on this site, I would agree with the Planning authority's assessment. On the basis of the information lodged with the planning application and in response to the appeal, I consider that the applicant has not demonstrated that the proposed development would not give rise to a heightened risk of flooding either on the proposed development site itself, or on other lands.

7.4. Rural Settlement Policy

- 7.4.1. Section 4.2.6 of the Clare County Development Plan 2023-2029 sets out policy in relation to single houses in the countryside. The site is located at Ballycar, Newmarket-on-Fergus, Co. Clare within the countryside. Within the open countryside, the Plan identifies two types of areas for rural housing: 1. Areas under strong urban influence and 2. Remaining rural areas. As illustrated on Map H7 of the Plan the appeal site is located with the Area of Strong Urban Influence. Areas under Strong Urban Influence are also Areas of Special Control and as such Objective CDP 4.14 of the plan applies. Part (i) of this objective states that applicants for a new single house for permanent occupation in areas under strong urban influence must meet either the economic or social criteria set out in the categories under that objective as detailed in Section 5.1 above.
- 7.4.2. The applicant is Alanna Fox. The site is owned by Alanna's mother and a letter of consent to make the application is noted on file. As detailed in the application form the applicant resides at her family home and has lived there since 2005. The applicant has submitted her birth cert and a letter from her primary school confirming she attended school locally. The applicant currently lives at the family home which is within 10km of the site.
- 7.4.3. In relation to CDP 4.14, Category B – Social need (i) refers to persons with a demonstrable social need to live in a particular local rural area and who have never

owned a house in the rural area and who wish to build their first home on a site within their rural area, which is deemed as being within 10km of where they have lived permanently, for a minimum of 10 years. In relation to the issue of a demonstrable social need, the applicant states that she has never owned a home, and she wishes to build her first home on a site that is within 10km from her family home, where she has lived since 2005.

7.4.4. On the basis of the information provided on file, the applicant has demonstrated that she has a housing need for the specific area, and I conclude that the applicant falls into a category provided for in Objective CDP 4.14 of the Clare Development Plan 2023-2029. Therefore, I conclude that the applicant meets the qualification criteria to build a rural dwelling at this location in accordance with the provisions of the Development Plan.

7.5. Appropriate Assessment

7.6. Having regard to the nature and scale of the proposed development, and the separation distance to any European site, and in the absence of any hydrological or other connections to European Sites, no Appropriate Assessment issues arise, and it is not considered that the proposed development would 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. I recommend that planning permission be refused for the reasons and considerations set out below.

9.0 Reasons and Considerations

1. Having regard to the planning history of the site whereby the subject site forms part of the public open space to serve the houses in the wider development, the proposed development would materially contravene conditions attached to an existing permission for development namely, condition number 1 and 4 attached to the permission granted by Clare County Council on the 16th day of September 2004 under planning register reference

number P04-139. The proposed development would therefore be contrary to the proper planning and sustainable development of the area.

2. The proposed development is in an area which previously contained a turlough. The Board is not satisfied, on the basis of the information lodged with the planning application and the appeal, that the proposed development would not give rise to a heightened risk of flooding either on the proposed development site itself, or on other lands. The proposed development would, therefore, be prejudicial to public health and contrary to the proper planning and sustainable development of the area.

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.

Ciara McGuinness
Planning Inspector

15th November 2023

Appendix 1 - Form 1

EIA Pre-Screening

[EIAR not submitted]

An Bord Pleanála Case Reference			
Proposed Development Summary	Construction of a house and all associated site works		
Development Address	Cnoc Alainn, Ballycar, Newmarket-on-Fergus, Co. Clare		
1. Does the proposed development come within the definition of a 'project' for the purposes of EIA? (that is involving construction works, demolition, or interventions in the natural surroundings)		Yes	✓
		No	No further action required
2. Is the proposed development of a class specified in Part 1 or Part 2, Schedule 5, Planning and Development Regulations 2001 (as amended) or does it equal or exceed any relevant quantity, area or limit where specified for that class?			
Yes		Class.....	EIA Mandatory EIAR required
No	✓		Proceed to Q.3
3. Is the proposed development of a class specified in Part 2, Schedule 5, Planning and Development Regulations 2001 (as amended) but does not equal or exceed a relevant quantity, area or other limit specified [sub-threshold development]?			
		Threshold	Comment (if relevant)
		N/A	Conclusion
No			No EIAR or Preliminary Examination required
Yes		Class 10(b)(i) Construction of more than 500 dwelling units - Sub Threshold	Proceed to Q.4

4. Has Schedule 7A information been submitted?

No	✓	Preliminary Examination required
Yes		Screening Determination required

Inspector: Ciara McGuinness Date: 15th November 2023