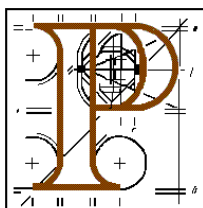


An Bord Pleanála



Inspector's Report

Compulsory Purchase Order: Knockeenduff Burial Ground
Compulsory Purchase Order no. 1 of 2017.

Local Authority: Kerry County Council.

Location of Lands: Knockeenduff, Killarney

Objectors P.J. Lynch

Date of Site Inspection: 26th July 2017

Date of Oral Hearing: 29th August 2017

Appendices Submissions to Oral Hearing

Inspector: Kenneth Moloney

1.0 INTRODUCTION

1.1 This is an application by Kerry County Council for confirmation by the Board of a Compulsory Purchase Order entitled 'Knockeenduff Burial Ground Compulsory Purchase Order no. 1 of 2017'.

1.2 The purpose of the CPO is to provide for a proposed burial ground.

1.3 One objection was received to the CPO. A hearing to consider the objection was held on 20th August 2017 at the Malton Hotel, Killarney, Co. Kerry.

2.0 DETAILS OF CPO

2.1 The CPO relates to the compulsory purchasing of lands for providing a burial ground.

2.2 The land to be acquired consists of 3 no. separate plots representing three separate landowners involved. One landowner owns more than one plot.

2.3 The various reports / documents prepared by the Council about making of the CPO and forwarded to the Board include:

2.4 Memo by the A/Senior Planner

This confirms that the proposed graveyard and location is in accordance with the Objectives SC53, SC55 and SC58 as set out in the Kerry County Development Plan, 2015 – 2021.

It is also stated that the consent process was carried out in accordance with Section 179 of the Planning and Development Acts, 2000 – 2016 and Articles 79 – 85 of the Planning and Development Regulations, 2001 – 2015.

2.5 Memo by Director of Services

It is contended that the current site is the correct option based on an appraisal and consideration of alternatives.

It is submitted that the subject lands are necessary to provide for the burial facility and are required to provide for the current and future needs of Killarney town and its environs.

It is submitted that there has been extensive engagement with Mr. Lynch to acquire the lands at Knockeenduff however acquisition on a reasonable voluntary level has not been possible and CPO is necessary.

It is submitted that Kerry County Council acquire the lands required for the scheme, to be effected by a CPO.

2.6 Operations, Capital Infrastructure and Safety

It is submitted that the lands are the correct option having regard to alternatives considered.

Planning consent has been obtained for the Scheme in accordance with the provisions of Part 8.

The acquisition of the lands is necessary for the development in question.

It is submitted that there has been extensive engagement with Mr. Lynch to acquire the lands at Knockeenduff however acquisition on a reasonable voluntary level has not been possible and a CPO is necessary.

It is submitted that the lands are necessary for the scheme and they are suitable for the proposed development.

It has been confirmed by the A/Senior Planner that the proposed scheme is in conformity with the County Development Plan.

2.7 Chief Executive's Order

The Chief Executive issued an order on the 2nd day of May 2017 directing the acquisition of lands by means of compulsory purchase order and submission of CPO to An Bord Pleanala for confirmation.

Other documentation forwarded to the Board by the Local Authority included CPO Schedule, deposited maps and newspaper notices.

3.0 GROUNDS OF OBJECTIONS RECEIVED BY THE BORAD

3.1 There is one objection on the file and the following is the summary of an objection submitted by **P.J. Lynch**.

- The objector has been in negotiation with Kerry County Council over the sale of the subject lands since May 2014.
- Appendix A includes a dialogue of meetings / correspondence between the Council and the objector and highlights the delays and lack of competence on behalf of the Council.
- The Board are urged to refuse the CPO as the Council have failed to justify the CPO.
- It is submitted that the lands the subject of the CPO went up for auction in September 2013 however the Council did not purchase the said lands.
- In May 2014, the objector contacted the Council with a view to offering land for a burial ground at Knockeenduff.
- The County Council later contacted the objector and a representative of Kerry County Council walked the lands with the objector with a view to purchasing the lands.
- There were further discussions between the objector and Kerry County Council regarding the land in January and February 2015.

- In March 2015 Kerry County Council contacted the objector in relation to alternative land.
- Kerry County Council produced a layout drawing showing the proposed burial ground and the parties had an understanding as to an agreed price. The town councillors were briefed on this.
- In July 2015, a subsequent meeting with a valuer from the Council tabled two options of land however these options were not consistent with the land agreed 4 months earlier.
- An Engineer in the County Council Water Services took over the matter and assessed other lands within the objector's landholding and disregarded the original 5 acres.
- In December 2015, the County Council agreed to purchase 5 acres across the southern portion of three fields as shown in Appendix D.
- However, after this and in December 2015 the Council decided to take an alternative 5 acres as indicated in Appendix G.
- On the 22nd December 2015, a land acquisition agreement was signed between the objector and Kerry County Council.
- In January 2016 contracts were issued for sale and the County Council excavated trial holes in February 2016. The trial holes failed mainly due to the wettest winter ever recorded.
- Some of the trial holes were in the same location as those undertaken by the Town Council in March 2015. The objector understands that the trial holes were 4 to 5 ft deeper than the trial holes undertaken by the town council.
- It subsequently transpired that 40% of land agreed to be purchased in March 2015 failed trial hole tests.
- Between February to May 2016, land areas situated in the higher level northern land were considered by Kerry County Council and a provisional new area of land was agreed with Kerry County Council. Trial hole tests were conducted for this land and returned excellent results.
- Kerry County Council requested that the car park in the front field be kept as far south as possible to keep a minimum distance from neighbouring houses.
- A revised contract was issued on 22nd June 2016.
- Archaeological testing was undertaken in July 2016.
- The damage due to archaeological testing and trial holes remains.
- The application for a Part 8 was made in October 2016 and approved in February 2017.
- It is submitted that the objector sought an increased price for the superior land which the council now required. Negotiations continued with the Council making a slightly increased offer in February 2017.
- Notwithstanding all the above the Council issued a CPO for the lands in May 2017.
- It is submitted that in exercising its CPO powers that the Council is operating in a discriminatory manner.
- It is contended that there is another much more suitable lands in the environs of Killarney for the proposed burial ground.

Technical and Legal Matters concerning the proposed CPO

Omission of land

- The Part 8 application was for a larger site than which the Kerry County Council now wish to acquire.
- The Part 8 application included a strip of 25 metres long x 3.5 metres wide from the edge of the roadside along the objectors retained land located to the south of the proposed burial ground.
- This roadway strip is not included in the CPO and is necessary to achieve required sightline provision for the burial ground.
- It is submitted that without the roadside strip referred to in the Part 8 application the CPO land cannot achieve appropriate sightline provision.

Incorrect ownership listing

- Mary Lynch has been listed as owner of folio KY21688. This is incorrect as Mary Lynch has the right to live in the property on the land.
- The objector is the owner of the land since 5th April 2012.

No guidance from Kerry County Council

- Kerry County Council typically send an information pack regarding CPO to landowners or property owners the subject of a CPO.
- This information fully informs the landowner / property owner of what to expect in the upcoming process.
- The objector did not receive any information pack.

Alternative land available

- It is submitted that there are more appropriate sites available to the Council.
- Killarney Municipal District Area was informed in June 2016 that there are 9 potential sites available to the Council.
- This includes Aghadoe Lawn Cemetery, Aghadoe Graveyard, Killarney.
- A deal was struck between the owners of Aghadoe Lawn Cemetery and the Council 2014. It was reported that the Council were prepared to pay €500,000 for 2.5 acres of the remaining burial space.
- This space would provide for approximately 800 burials and would be sufficient for 40 years.
- The signing of the contract to sale ran into difficulties in December 2014.
- It is contended that the owners of Aghadoe Lawn Cemetery which adjoins a public cemetery, are still interested in selling to the Council.
- It is submitted that the lands at Aghadoe Lawn Cemetery offer an excellent opportunity site as they adjoin the public cemetery.
- It is estimated that Aghadoe Lawn Cemetery would offer 1,575 plots in the 2.5 acres whereas the CPO lands offers 2,315 burial plots on 3.75 acres.
- The cost per burial plot for Aghadoe should be much lower.
- It is submitted that there is land located directly opposite the public road from the existing Aghadoe Public and Private Cemeteries which are better suited to a burial ground.

- It is considered that the Council could not proceed with these lands as there was no agreement on price with the owner. The Council did not test these lands or consider a CPO.
- The St. Finian's land-bank is an alternative option. The former vacant psychiatric hospital has significant good quality land surrounding the hospital building.
- Kerry County Council has held meetings with the HSE.
- It is hard to believe that this land is too expensive to develop. The site is bounded on all 4 sides by public roads and is flat, quality land.
- It is submitted that the CPO of this land would make far more sense than Knockeenduff, some 3km further out the town.

4.0 County Policy Context

4.1 Kerry County Development Plan, 2015 – 2021

The subject site is situated in a rural area and the zoning objective 'Rural General' would apply to the CPO site. The landscapes in these areas have a higher capacity to absorb development than other rural designations. Development should be integrated into the surroundings in these landscapes.

In accordance with the settlement strategy Killarney is designated a 'Hub Town'. In accordance with the Table 3.1 the function of a Hub Town is a '*key destination, economically active, supporting surrounding area, located on multi-modal transportation corridor*'.

Chapter 9 – Social Infrastructure and Community Development

Section 9.11 states that Local Authorities have a statutory responsibility to provide burial grounds.

The relevant policy objectives in the County Development Plan include;

- SC53 – Facilitate provision of new burial grounds to cater for the needs of the County
- SC54 – Protect historical, cultural and historic heritage
- SC58 - Facilitate the sustainable provision of car parks at burial grounds.

Chapter 11 - Heritage / Archaeology

The relevant policy objective is;

- H-28 – This policy ensures the protection and preservation of archaeological material and features, as yet not listed in the RMP and SMR and as yet unrecorded, through ongoing review of archaeological potential in the plan area.

Chapter 12 – Landscape

- In accordance with the Volume 3 of the County Development Plan the subject is not afforded any landscape designations nor is the site protected by any designated 'views and prospects'.

4.2 Killarney Town Development Plan, 2009 – 2015

The CPO site is located outside the boundary of the Killarney Town Development Plan.

5.0 DESCRIPTION OF LANDS

5.1 The subject site is in a rural area and is situated approximately 1.2km north of Killarney. The predominate land-uses in the local area is agriculture with sporadic rural housing located in the general vicinity of the CPO lands.

5.2 The subject site is currently used as agricultural land and comprises of two separate fields. A public road adjoins the entire western boundary of the subject site.

5.3 The size of the CPO lands is approximately 2.023 ha (4.998 acres) and the shape of the subject site is approximately square.

5.4 The topography of the CPO lands is undulating in nature.

5.5 The CPO lands are part of two separate fields, a western most field and an eastern most field. The westernmost field is enclosed by mature hedgerows on all four sides. The easternmost field is also enclosed by mature hedgerows on all four sides. On the day of my site inspection livestock were grazing in this field.

5.6 The alignment of the public road adjoining the western boundary of the CPO lands is generally straight.

6.0 THE OBJECTOR'S PROPERTY

6.1 There is a single objector to the proposed CPO and the following is a brief description of the property belonging to the objector which is the subject of the CPO.

6.2 P.J. Lynch

This objector owns plot 100a and plot 100b.

Plot 100a agricultural land situated to the centre of an existing field. The western side of the field adjoins the public road. The eastern side of the field is enclosed by mature hedgerow. The gradient of the field is generally even. This plot of land measures approximately 0.512 ha (1.264 acres) and is rectangular.

Plot 100b is half the public road adjoining the western side of plot 100a. The area of this plot is 0.026 ha (0.065 acres).

7.0 THE ORAL HEARING

7.1 INTRODUCTION

7.1 An oral hearing, in respect of the file 08.CH3331, was held in the Malton Hotel, Killarney on 29th August 2017. An Appendix to this report is attached which contains a signed sheet of attendees and a list of documents presented to the hearing. The proceedings were digitally recorded and a copy is also attached to this file. There was one objector present at the hearing and he outlined his objection during the proceedings.

7.2 Proceedings got under way with my opening statement. Participants were informed that the purpose of the oral hearing is an information gathering exercise to assist me in considering the merits of the case and in drafting my report and recommendation to the Board in relation to the CPO order. Participants were reminded that there will be no decision on the matter at the hearing and that the Board has no role or jurisdiction in the determination of compensation.

7.3 With respect to the format of the hearing, the Local Authority was first asked to state their case. The Local Authority's engineering witness was then cross-examined by the objector's barrister. Following this I asked the Local Authority some questions and the objector subsequently made his submission. The Local Authority then questioned the objector. The hearing concluded with closing statements from the Local Authority, the objector and myself.

7.4 Esmonde Keane, BL, on behalf of Kerry County Council, introduced the Local Authority officials who would be making presentations at the hearing. The objectors introduced themselves and indicated who would be presenting their case.

7.5 THE LOCAL AUTHORITY'S CASE. Mr. Keane in opening the Local Authority's case outlined the legal provisions to facilitate the proposed Compulsory Purchase Order. Mr. Keane outlined that the size of the site is 2.08ha and the site is in the townland of Knockeenduff and it is proposed to use the subject lands as a burial ground. Mr. Keane also outlined that

the CPO process was not an environmental impact assessment of the proposal and therefore it was not necessary to consider all alternatives.

7.6 Submission from **Paul Neary** – Senior Engineer, Kerry County Council, Mr. Neary read his submission¹ into the record. This submission outlined the legislative provisions for the CPO process and the statutory provisions for the provision of burial grounds. The submission outlined that Kerry County Council, following lengthy negotiations with the owner of a suitable plot of land for a burial ground, were not successful in agreeing a voluntary purchase price for subject plot of land. The submission outlines the need for a burial ground in the town of Killarney and in this regard the overall population of the town was considered having regard to the annual deaths per 1,000, which in Killarney is higher than the national level. The submission notes that there are currently three burial grounds in the town of Killarney and considers current capacities. Of the three burial grounds the submission notes that there is a collective capacity of approximately 800 burials which effectively is about 9 year's capacity for Killarney and its environs. It is contended that should the proposed burial ground at Knockeenduff proceed it would serve the town for approximately 35 years.

7.7 The submission summarises the chronological timeline in which the Local Authority sought to acquire the subject site, firstly on a voluntarily basis. Kerry County Council (formerly Killarney Town Council) sought to acquire the land through public auction however were unsuccessful. Kerry County Council also considered the purchase of a private burial facility at Aghadoe in 2014. The Council then pursued the voluntary purchase of the lands at Knockeenduff, as referred to above, for the burial ground and a draft legal contract was prepared subject to environmental investigation of land. A Part 8 application was approved by the Council for a burial ground on lands at Knockeenduff and as part of this planning process it was determined by means of AA Screening that no significant effects were identified on any Natura 2000 site. Furthermore, an EIA Screening determined that no significant effects on the environment were likely. Following the Part 8 approval it was not possible to agree with the owner a purchase price for the lands in question. The submission outlines that overall 13 no. sites were considered for the proposed burial ground and these are documented in the submission. In considering these 13 sites and in relation to the Aghadoe Private Burial Ground it was concluded that having regard to limited available capacity and high groundwater vulnerability that the purchase of this site was not feasible. In addition, site no. 1, of the 13 sites considered, was considered unsuitable due to its proximity to existing houses and site no. 8 (St. Finan's Hospital) was considered unsuitable due to access constraints, proximity to housing estate and the site is in an area of high ground water vulnerability. The preferred site was site no. 4, i.e. lands at Knockeenduff.

7.8 The submission reviews concerns expressed by elected members in relation to the site at Knockeenduff (site no. 4). It is noted that there is a

¹ Document no. 1 presented to the hearing.

private water supply located 213m north of the proposed burial ground however this is located up hydraulic gradient from the proposed burial ground. Given that groundwater flow will be to the south and south west concerns are therefore addressed. In relation to a watercourse situated along the eastern boundary it is submitted that a 10m buffer will apply to mitigate any potential risk to the surface water drain in that location. In relation to concerns regarding a regional water supply scheme it is noted that this is located over 9km from the CPO site. It has also been proposed to install a borehole on the north-east corner of the site to provide for monitoring of groundwater quality for a period of 5 years after opening the new facility. The purpose of the monitoring is to ensure that the proposed burial ground will not compromise drinking water quality. It is submitted that the proposal provides adequate car parking provision and sightline provision. It is submitted that the CPO lands will provide 2,300 burial plots and will meet the needs of Killarney for at least 35 years. It is submitted that counter to the submitted objection in relation to sightline provision additional land is not required to achieve appropriate sightline provision. It is submitted that Mary Bridget Lynch has been appropriately named the owner of lands in folio KY21688. In conclusion, it was submitted that there is a demonstrable need for the proposed burial ground.

7.9 Submission² from **Michael J. Lynch** – Senior Executive Engineer, Kerry County Council. Mr. Lynch read his submission into the record. The submission outlines the relevant development plan zoning objectives, relevant development plan policy objectives. The submission states the subject site is zoned ‘Rural General’ in the Kerry County Development Plan, 2015 - 2021. The submission concludes that the proposed development is in accordance with proper planning and sustainable development of the area.

7.10 Michael Munnely, BL, on behalf of Mr. P.J. Lynch, sought clarification from Kerry County Council in form of questions prior to making his presentation. Firstly Mr. Munnely outlined that it is his client’s position that An Bord Pleanala should annul the CPO. In summary Mr. Munnely outlined the background to discussions between his client and Kerry County Council regarding the plot of land which is the subject of the CPO and the attempts to agree a price voluntarily. It was argued by Mr. Munnely that Kerry County Council did not take appropriate steps to purchase the lands on voluntary terms. Mr. Munnely then questioned the investigations and considerations of sites no. 1 to 6 in Mr. Neary’s submission and the level environmental investigation carried out by the Council in relation to these sites. Following questioning Mr. Munnely noted that only trial hole investigations were undertaken for three sites out of the thirteen sites considered. In response Mr. Neary outlined that initial site investigations involved a review of GSI maps and it was possible, having regard to ground water vulnerability, to determine whether further investigations was necessary. Mr. Munnely noted that the consulting

² Document no. 2 presented to the hearing.

engineers³ were only retained for one additional site to the subject CPO site. Mr. Munnelly, BL, claims that it is extraordinary that the objector's site is the only suitable site for the burial ground in the environs of Killarney. In response Mr. Neary informed the hearing that Killarney and its environs has a high level of high to extreme groundwater vulnerability. Mr. Munnelly outlined that his client, Mr. P.J. Lynch, has prepared a document for the hearing which identified 39 no. suitable sites for a burial ground within Killarney and its environs and requested to refer to this document as part of his cross examination of Mr. Neary. Mr. Keane, BL, stated that it was not the function of Kerry County Council to carry out an exhaustive consideration of alternative sites during the CPO process. It was agreed that Mr. P.J. Lynch could refer to this document during his submission to the hearing. Mr. Munnelly states that Kerry County Council has not taken appropriate steps to identify an appropriate site before it decided to CPO the objector's property. Mr. Munnelly claims his client will submit that Kerry County Council in seeking to CPO his property should have considered alternative sites. Mr. Neary in response submits that the criteria for considering alternative sites includes ground water vulnerability, national routes / access, national parks, planning permissions and archaeological potential. Mr. Munnelly asks Mr. Neary directly was there other sites that could have been considered and Mr. Neary responds by stating yes. Mr. Munnelly further states that proper consideration was not given to other sites other than the CPO site however Mr. Neary refutes this. Mr. Munnelly then questions whether any of the other landowners approached Kerry County Council with a view to selling and Mr. Neary confirmed one landowner, that he is aware of, however this site was ruled out due to ground water vulnerability and rock present close to the surface. Mr. Munnelly claims that as his client approached Kerry County Council with a view to selling his land for a burial ground this negated Kerry County Council to consider alternative sites. This point was counter argued by Mr. Keane, BL, on behalf of Kerry County Council, who submitted that Kerry County Council carried out an extensive consideration of alternative sites. Mr. Munnelly concludes that the objector's submission is that the Board should not approve the CPO due to the way the CPO arose and does not dispute that his lands are suitable. As such An Bord Pleanala should annul the CPO process in this regard.

7.11 Objector's Case – This submission was presented by **P.J. Lynch** who is the owner of two plots which are the subject of the CPO. The submission was accompanied by a map and a document entitled 'Alternative Land Options for a Burial Ground within the Environs of Killarney'⁴. In summary Mr. P.J. Lynch outlines the background to the negotiations between himself, as landowner, and Kerry County Council. Mr. P.J. Lynch claims that he was poorly treated in terms of delays by Kerry County Council and that the people of Killarney are the losers with no new burial ground in place. Essentially he states that if the Council are

³ O'Callaghan Moran & Associates

⁴ Documents no. 3 & no. 4 presented to the hearing.

not satisfied with the negotiations they will then use the CPO functions to acquire land which sets an undesirable precedent nationally.

7.12 The submission then commented on the 13 sites presented by Mr. Neary as to their suitability for the proposed development. In summary Mr. P.J. Lynch concluded that except for the sites no. 1, 4 and 5 that all other sites were not suitable for the proposed development having regard to the following;

- Site no. 2 (field too near a river and ground conditions not good).
- Site no. 3 (no access onto the Tralee Road)
- Site no. 6 (located behind an ESB substation)
- Site no. 7 (poor drainage, rushes present on the site)
- Site no. 8 (site dismissed as new roundabout would be required and therefore too expensive).
- Site no. 9 (site located at the end of an industrial estate, surface water issues and planning permission granted for an industrial use)
- Site no. 10 (this is a former landfill site and location is too far from Killarney)
- Site no. 11 (this site was refused planning permission by Kerry County Council for a private burial ground for multiple reasons)
- Site no. 12 (unsuitable due to proximity of housing)
- Site no. 13 (proximity to a halting site, extreme hilly land and access difficult to the site).

Mr P.J. Lynch concluded that Kerry County Council did not consider alternative sites and the sites chosen in the alternatives considered were obviously unsuitable.

7.13 Mr. P.J. Lynch submitted document no. 4 to the hearing. This document entitled 'Alternative Land Options for a Burial Ground within the Environs of Killarney'. This document considered 39 no. alternative sites to the selected CPO site within the environs of Killarney. The document includes photographs of the 39 no. sites which were taken in the week prior to the hearing. In his submission, Mr. P.J. Lynch, outlines in summary that these sites are as suitable for the proposed burial ground as the subject CPO site. The objector refers to sites no. 2 as a fine agricultural site and has good proximity to the town centre. The objector refers to site no. 4 as a good location just off the Killarney bypass in a good location relative to the town centre and the site is also good agricultural land. The objector refers to site no. 21 and 22 as prime agricultural land and the owner was never approached by Kerry County Council. The objector also refers to site no. 34 as a fine field on the Cork Road with access possible within the 50 kmph zone. The objector concludes that in England a criteria assessment is used to consider alternative sites however in the current case the CPO process is being used because of time pressure to deliver a burial ground and that these time pressures were caused due to delays by Kerry County Council.

7.14 Following Mr. P.J. Lynch's submission **Mr. Keane**, BL, on behalf of Kerry County Council, cross-examined his evidence. Mr. Keane states that he refutes the claim that Mr. P.J. Lynch was bullied by the Council and notes that the objector's primary concern is in relation to compensation and reminds the hearing of Section 216 (1) (c) of the Planning and Development Act, 2000, (as amended). Mr. Keane informs the hearing that should the Board believe any objection solely relates to matters of compensation which can be dealt with by a property arbitrator then the Board can inform the Local Authority and the Local Authority shall confirm or confirm with modifications the CPO. Mr. P.J. Lynch asks the question how would an elderly landowner defend himself or herself. Again Mr. Keane, BL, refutes any form of bullying by Kerry County Council. Finally, Mr. P.J. Lynch acknowledges that his site is one of the more suitable sites however the site at St. Finian's Hospital is probably a better site.

7.15 Finally, I asked Mr. P.J. Lynch to describe into the record his plots that were the subject of the CPO and he described his plots accordingly.

7.16 Closing statements Mr. Keane, BL, on behalf of Kerry County Council submitted that the need for the proposed burial ground is not contested and that there is a desire to provide a public burial ground for the town of Killarney. It is outlined that the Local Authority pursued the option of purchasing an existing cemetery however this would only provide capacity for approximately a 9 – 10-year period whereas the CPO lands would provide a capacity for 35 years. It is stated that the suitability of the CPO lands is not in question and that a Part 8 application is approved for a proposed burial ground on the CPO lands. It is outlined that issues in relation to the ownership portfolio of Bridget Lynch has been addressed. It is submitted that claims that the Council have acted as a bully are simply untrue and that the Council have attempted to purchase the lands voluntarily but that this was not possible. The Council have an obligation to their rate payers to spend money efficiently and it is perfectly normal to proceed with a CPO process. In relation to the claim that the Council have delayed matters it is submitted that the Local Authority have taken appropriate tests to determine the suitability of the site in question and the fact that it has taken some time to determine the most suitable plot of land is entirely appropriate. In considering alternative sites, it is submitted that the site at St. Finian's Hospital maybe a suitable location with proximity to the town centre however having regard to ground water vulnerability this site is unsuitable. It is not being suggested that no other site is more suitable than the chosen CPO site however this should not be a blockage on the CPO process nor is the Local Authority required to engage in an exhaustive process of considering alternative sites. The availability of other alternative sites should not militate against the progress of the CPO. It is recommended that the CPO is appropriate and necessary and the CPO should be confirmed.

7.17 M. Munnally, BL, outlined, in his closing statement, that his client does not dispute the relevant legislative provisions that facilitates a CPO. However, his client is of the view that An Bord Pleanala should annul the

CPO. M. Munnelly reads into the record a passage of text from the publication 'Compulsory Purchase and Compensation in Ireland: Law and Practice', 2013, by Eamon Galligan and Michael McGrath⁵. Mr Munnelly confirms that his client has no objections that there is a community need that will be met by the CPO of the subject lands. He also states that his client accepts that the property is suitable to meet that community need. However, there are alternative methods to meet the community need by purchasing some alternative lands which would meet the needs for a burial ground. It is submitted that Kerry County Council must satisfy An Bord Pleanala that it has utilised demonstrably more alternative means to satisfying the public need and that the burden of proof lies with the Local Authority. It is questioned what appropriate steps Kerry County Council has taken to ensure that there are not demonstrably more desirable steps to the CPO process than the subject site. It is claimed that Kerry County Council have not taken any alternative steps before discounting the possibility of acquiring the subject site. It is submitted that of the 13 no. sites considered that two sites were industrial sites, one site was refused planning permission for a burial ground and it is claimed that Mr. Neary could essentially discount these 13 sites based on too close to a river or too close to a road or too wet and that these alternative sites were not real options in the first place. It is concluded by Mr. Munnelly that these alternative sites were simply padding to justify the CPO of the objector's property. It was contended that the overall environmental assessment of alternative sites was limited with the retention of a hydrologist and engineering consultants on a limited basis. It is stated that on this basis An Bord Pleanala should not be satisfied that any alternative method of meeting the community need had been demonstrated as a less preferable to taking the CPO of the objector's site. It is stated by Mr. Keane, BL, that the consideration of alternatives is not something that the Board should consider itself. However, in support of his argument Mr. Munnelly refers to a high court ruling. Mr. Munnelly refers the Oral Hearing to *Selina McKeen v Meath County Council*⁶. This case relates to a District Court ruling whereby the District Court Judge ruled that it was not permissible for Meath County Council to enter the applicant's lands for the purpose of carrying out trial hole tests without their permission. The High Court Judge disagreed with this ruling but importantly refers to when a CPO process is initiated, arguments may be made at that stage as to the suitability of alternative sites.

7.18 In this case Kerry County Council initiated this CPO and the board are referred to the burden of proof when An Bord Pleanala are requested to approve a CPO. Having regard to *Clinton V an Bord Pleanala*⁷ it is determined that the burden of proof rests with the acquiring authority. Therefore, Kerry County Council must satisfy An Bord Pleanala that the CPO must be confirmed and that the acquisition of the property is satisfied by the common good and this needs more than a cursory consideration by An Bord Pleanala. It is stated that the common good must not be

⁵ Document no. 5 presented to the hearing.

⁶ Document no. 6 presented to the hearing.

⁷ (2007) 4 IR 701, paragraph 52

vindicated by confirming this CPO. An Bord Pleanala have a responsibility to ensure that Kerry County Council act properly. It is submitted that Kerry County Council decided that they did not want to proceed with a voluntary purchase of the subject land and then proceeded with a CPO, probably due to time constraints. It is submitted that Kerry County Council did not carry out any proper investigation as to whether the public good could be satisfied in another method. It is contended that the consideration of the 13 no. sites is not strong evidence. It is stated that An Bord Pleanala should not stand over this CPO and that the confirmation of this CPO would set an undesirable precedent. It is claimed that who would now approach Kerry County Council with a view to doing a land deal as should negotiations fail the Council would simply proceed to initiating a CPO of the same land without properly considering other alternatives. It is concluded that An Bord Pleanala should not approve this CPO.

7.19 There was a closing argument between Mr. Munnely and Mr. Keane regarding the extent of burden of proof that lies with the acquiring authority and also in relation to the level of demonstration required to satisfy that any alternative methods of meeting the community needs have been considered but are not demonstrably preferable. Mr. Munnely closes by stating that An Bord Pleanala should be satisfied that the approval of the CPO is in the common good. However, Mr. Keane states that there is an error in relation requiring the Council to demonstrate that there is not a better alternative site available.

7.20 The hearing concluded with my closing statement.

8 ASSESSMENT

In establishing whether to confirm a CPO it is considered that the pertinent considerations in this instance are:

- Development Plan Compliance
- Community Need
- Suitability of the property for the need and alternatives considered

8.1 Development Plan Compliance

8.1.1 Firstly, it is important from the Board's perspective to note that it was evident from the proceedings of the oral hearing and the written submissions that neither the acquiring authority nor the objector disputes that the provision of a burial ground would be inconsistent with the provisions of the Kerry County Development Plan, 2015 - 2021. Notwithstanding this the Board is required to satisfy itself that the proposed burial ground would comply with the statutory development plan objectives.

8.1.2 The site is located within the environs of Killarney, which is rural in character, and the lands proposed for CPO has no designated land-use zoning objective. The existing use on the site is agriculture.

8.1.3 However, Michael J. Lynch, Senior Executive Engineer Kerry County Council, submitted to the hearing that the subject site is designated 'Rural General'. I clarified by way of question at the hearing that this designation is a landscape zoning rather than a land-use zoning. Nonetheless 'Rural General' is the third category of landscape zoning in the Kerry County Development, 2015 – 2021, and therefore the least sensitive of the three landscape designations. The landscapes in these areas have a higher capacity to absorb development than other rural landscape designations and it is recommended that development should be integrated into the surroundings in these landscapes. It is also important to note that in accordance with Volume 3 of the County Development Plan the subject site is not protected by any designated views or prospects. I would consider that the proposed burial ground, having regard to established hedgerows and mature boundaries would not adversely impact on the landscape character of the local area.

8.1.4 There are several policy objectives within the Kerry County Development Plan, 2015 – 2021, that are relevant to a proposed burial ground. The relevant policy objectives in the County Development Plan include;

- SC53 – Facilitate provision of new burial grounds to cater for the needs of the County
- SC54 – Protect historical, cultural and historic heritage
- SC58 - Facilitate the sustainable provision of car parks at burial grounds.

8.1.5 The provision of a burial ground as proposed development is consistent with the policy objectives outlined above.

8.1.6 As the subject site is situated in a rural area with no land-use zoning objective the primary use can be assumed to be that already existing in the area. In this particular instance the primary use is agriculture. In general development proposals in rural areas without any land-use zoning are open for consideration.

8.1.7 Overall I would consider that the proposed burial ground at the subject site would be consistent with the provisions of the Kerry County Development Plan, 2015 – 2021.

8.2 Community Need

8.2.1 When considering the community need for the proposed development I would acknowledge that the demand for a proposed burial ground would be an important element in this consideration. In the submission to the hearing presented by Mr. Neary, Senior Engineer, I would note that the demographics of Killarney and the available capacity of burial plots are set out. It is submitted that Killarney has a population of approximately 14,000 persons and there are between 90 and 110 bereavements within the environs of Killarney annually.

8.2.2 There are three established burial grounds serving the town of Killarney and these include;

- Aghadoe (public)
- Upper Coolcorcoran (public)
- Aghadoe (private)

8.2.3 Aghadoe private cemetery has a capacity of 700 – 800 burials and overall this amounts to a capacity of approximately 9 years for Killarney and its environs. It is submitted that given the amount of capacity that would be available at Knockeenduff it would provide a capacity of approximately 35 years.

8.2.4 It is also worth noting that Kerry County Council has been in negotiations with Mr. P.J. Lynch regarding a voluntary purchase of his lands since 2014. I would also note that neither of the parties dispute the community need for a burial ground within the town of Killarney.

8.2.5 I would consider that there is a demonstrable need for the proposed burial ground and the CPO for the subject lands, before the Board, would serve that community need.

8.3 Suitability of the property for the need and alternatives considered

8.3.1 This CPO case is different than a typical CPO case for a road scheme in which the Board are required to confirm or confirm with modifications or annul. In the case of a CPO for a road scheme usually the lands the subject of the CPO relate to an off-line or on-line route. Whereby an off-line route is a new road which would have regard to the established network of roads and access to established or projected development. Whereas an on-line route would have regard primarily to the existing road and usually relates to the widening of lanes to increase capacity or in other cases compulsorily purchasing lands to improve alignments and therefore enhance safety. As such there is a terms of reference for the future requirement of land for the CPO scheme relating to a road project.

8.3.2 The proposed development, for which the current CPO is required would not have the same terms of reference as a road scheme. The local authority outlined to the hearing that the basic criterion in considering the suitability of lands for a burial ground include the following;

- Access onto / off the public road
- Proximity to the town Cathedral
- Hydrology of the land
- Hydrogeology of the land
- Proximity to housing
- Proximity to other urban sites
- Gradient of the land
- Archaeological Potential

- Planning History
- Capacities for Graves
- Flood Risk

8.3.3 I would note that there is no guidance in Ireland in relation to ‘burial grounds’ or ‘cemetery’ developments however on several occasions at the hearing a document entitled ‘*Cemeteries and Burials in the Water Environment – A good practice guide for applicants and planning authorities when planning cemetery developments or extensions, 2016*’, Northern Ireland Environment Agency (NIEA) was referred to. As part of my assessment I have reviewed this document. This guidance document primarily considers the impact of new cemeteries on groundwater. I would consider that the Local Authority evidence as presented to the hearing has had regard to this guidance document.

8.3.4 The local authority made a case for the suitability of the subject CPO lands for a burial ground. In this case, they considered 13 no. sites including the subject site and used criteria similar to that outlined above to select the most suitable site for the proposed burial ground. These sites are considered in more detail in Mr. Paul Neary’s (Senior Engineer, Kerry County Council) submission⁸ to the hearing. In response, the objector and his barrister argued that these 13 no. sites were in effect a ‘red herring’ and many of the sites chosen for consideration were totally unsuitable due to proximity to established uses and poor surface water and groundwater drainage and it was agreed this would be evident from a visual observation of these sites. The adequacy of the 13 no. alternative sites considered by the Local Authority were highly criticised by the objector. It is also notable that the objector submitted a document (document no. 4 “Alternative Land Options for a Burial Ground within the Killarney Environs”) which selects 39 no. sites within the environs of Killarney and the objector considers that these sites are all suitable for the proposed burial ground.

8.3.5 This argument became the central theme in the objector’s case that the CPO should be annulled. Essentially it was claimed, during the hearing, that the level of consideration by the Local Authority in relation to alternative sites considered was inadequate to satisfy An Bord Pleanála. In this regard, it was claimed, the acquiring authority must demonstrate that the selected site is the most suitable site. This claim was defended by Kerry County Council and a legal argument arose between the two parties as to the level of consideration required by the acquiring authority in relation to alternative sites. The question arose whether the chosen site is the most suitable site or whether there are many other suitable sites within the environs of Killarney. A question also arose as to the extent of how exhaustive a search for an alternative site should be pursued by Kerry County Council. I would acknowledge that these questions do not generally arise when considering a CPO for a roads scheme given the terms of reference referred to above.

⁸ Brief of Evidence Knockeenduff Burial Ground CPO no. 2017

8.3.6 I would accept that Kerry County Council have considered alternative sites for the proposed burial ground in addition to the acquiring site and I would also acknowledge that the objector has submitted a document outlining that there are 39 no. suitable sites in the environs of Killarney for a burial ground. I would take the view that Kerry County Council, as the acquiring authority, is required to consider alternatives in concluding that the selected CPO lands are suitable for the needs of the scheme. However, there is no requirement that this must be an exhaustive consideration of all alternative sites. The fact that the Local Authority has considered 13 no. sites would, in my view, demonstrate that the local authority has given due regard to the consideration of alternative sites. However, I would acknowledge that it is evident from a desk-top review and a visual observation that some of the alternative sites considered would be unsuitable and it is questionable whether they are real alternative options to the site chosen for CPO. This is the central argument by the objector who essentially argues that as the landowner volunteered his land for sale to the County Council and that this negated Kerry County Council considering realistic alternative sites. However, in defence of the Local Authority, I would acknowledge that there is no national guidance in relation to the level of consideration given to alternative sites and as the proponent of the project it is their judgement to select the appropriate site for CPO as an alternative to other sites considered. I would also acknowledge that there is no requirement to ensure that the selected site is the most suitable site in all the environs of Killarney. I would accept that it is likely that there would always be a better site than the chosen site for CPO however it is the requirement of the acquiring authority to ensure that the selected site is suitable for the needs of the scheme. The suitability of the selected site is not in doubt as both parties have accepted its suitability and this was confirmed at the hearing. The only dispute is that the chosen site is not the most suitable site in the environs of Killarney and the consideration of alternative sites did not adequately consider realistic alternative sites. I would accept that some of the 13 no. sites can be discounted without a thorough consideration and I would also accept that it is possible that some of the 39 no. sites referred to by the objector would be a more suitable site for the need of the CPO.

8.3.7 However, in considering whether the site is suitable I would also have regard to the other criteria in deciding to confirm a CPO and this criterion, referred to previously, include development plan compliance, community need and suitability of site. It is notable that both parties concur that the selected site for a CPO would meet all other criterion and this in my view should add considerable weight to the Board's consideration of this CPO.

8.3.8 In conclusion and on the balance of evidence provided I would be satisfied that the land is suitable to meet the identified community need.

9.0 CONCLUSION AND RECOMMENDATION

I am satisfied that the process and procedures undertaken by the Local Authority have been fair and reasonable and that Kerry County Council have demonstrated the need for the lands and that all the lands being acquired are both necessary and suitable. I consider that the proposed acquisition of these lands would be in the public interest and the common good and would be consistent with the policies and objectives of the County Development Plans. I recommend that the Board confirm without modification the compulsory purchase order for the reasons and considerations set out below.

10.0 REASONS AND CONSIDERATIONS

Having considered the objection made to the compulsory purchase order and the report of the person who conducted the oral hearing into the objection and having regards to;

- (i) the purposes of the compulsory acquisition for the provision of a burial ground;
- (ii) the provisions of the current Kerry County Development Plan 2015-2021;
- (iii) the community need, public interest served and benefits to be achieved from use of the acquired lands for the purpose identified in the order;

It is considered that the acquisition of the lands in question by the local authority is necessary for the purpose stated in the order and the objection cannot be sustained having regard to this necessity.

Kenneth Moloney
Planning Inspector
8th September 2017