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Our ref: 18019/021722/MH

The Secretary  
An Bord Pleanála  
64 Marlborough Street  
Dublin 1

07<sup>th</sup> March 2022

**Re: Section 177D Planning & Development Act 2000 – 2009  
Application for Substitute Consent  
Infilling of Land at Tulla Road, Knockanoura, Ennis, County Clare**

Dear Sir / Madam,

We confirm that we have been appointed by Valley Healthcare Fund - Infrastructure Investment Fund ICAV, Unit 1D, The Liffey Trust Building, 117-126 Upper Sheriff Street, Dublin (the applicant) to make this application for substitute consent under Section 177D of the Planning & Development Act 2000, as amended (the Act), in respect of development comprising infill groundworks at Tulla Road, Knockanoura, Ennis, County Clare.

We attach herewith a cheque in the sum of €80.00 to cover the application fee. As required in the decision letter received from An Bord Pleanála (the Board) dated 23<sup>rd</sup> September 2021, the wording of the public notice was agreed with the Board by email dated 14<sup>th</sup> December 2021, in advance of publication

This application is made subsequent to Board Order ABP-307172-20 which granted leave to apply for substitute consent by the 16<sup>th</sup> December 2021, as it determined that exceptional circumstance exist by reference to the fact that:

- Regularisation of the development would not circumvent EIA or Habitats Directive;
- Ability to carry out EIA or AA and provide for public participation has not been substantially impaired;
- The applicant reasonably expected that development was capable of being regularised; and



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- The limited nature of the actual/likely significant effects on a European site resulting from the development.

Whilst the original Board Order (ABP-307172-20) stated that a Remedial Environmental Impact Assessment Report was not required but that a Remedial Natura Impact Statement would be required, it was clarified by email, dated 21<sup>st</sup> October 2021, that an error occurred in the covering letter issued with the Board's Order which requested the preparation of both assessments. The email clarified that in accordance with the Board Order, a Remedial Natura Impact Statement only was required.

A Board Order (ABP-311859-21) was made extending the time for lodging an application for substitute consent on the 8<sup>th</sup> December 2021. The last date for the making of an application is the 16<sup>th</sup> March 2022.

A Remedial Natura Impact Statement (rNIS) accompanies the planning application. The findings of the report is supported by a Trial Hole Assessment Report which was prepared to determine the nature of fill material underground and to give an estimation of proportion. This report also undertook a groundwater analysis. A Flooding Report has been prepared by Horganlynch Consulting Engineers to retrospectively assess any potential impacts that may have arisen in respect of flooding and displacement of waters associated with filling the land.

The status of the fill on site needs to be regularised before our client can lodge a planning application with Clare County Council for the development of a primary care centre on the land. An application for substitute consent is therefore being sought for the filling of land and the raising of ground levels to provide a level hardcore surface, intended to facilitate future development, in accordance with the proper planning and sustainable development of the area.

Notwithstanding that the subject land and associated works has already gone through the process of 'Leave to apply for Substitute Consent' which included consideration of 'exceptional circumstances' the applicant is mindful of recent amendments to Section 177 of the Planning & Development Act 2000 as amended. The amendments provide that the Board at the '*substantive*' application stage can only grant substitute consent where it is satisfied that "exceptional circumstances" exist which would justify the grant of such consent. Accordingly, it is considered necessary to restate the 'exceptional circumstances' which has led to the applicant being in the position whereby regularisation of works is necessary in advancement of lodgement of a planning application for a medical centre.

This report sets out the 'exceptional circumstances' which have led to this application for substitute consent and demonstrates how the current owner purchased the land in the belief that the works undertaken to fill the land were done in accordance with relevant statutory provisions. This report also sets out relevant planning policy for the area demonstrating that this land is intended to accommodate future development, commensurate with adjoining commercial development to the west.

## **1.0 Site Location & Context**

The applicant owns a 0.32 hectare rectangular site, situated in the north-eastern environs of Ennis town centre on the southern side of the Tulla Road. The levels of the site vary, with levels of +4.8m at the western corner on the Tulla road falling to approx. +3.7m at the eastern corner of the site. The extent of land subject to this application is defined on the attached planning application Site Location Map and is detailed in Figure 1.0.

The land is currently undeveloped and filled with hardcore material. The land fronts onto the Tulla Road with the suburban estate of Castle Rock located to the east of the subject site and a filling station located to the west. Cloverhill housing estate is located across the road to the north with a single storey house located adjacent to the entrance to Cloverhill to the east. The subject site can best be described as being located within an urbanised area with highly modified/artificial habitats.

The land, which has been filled over a period of time, is part of an overall landholding in separate ownership, which extends to the Fort Fergus Stream. However, this extended landholding, located to the rear of the petrol filling station is not included within this application.

There is an established entrance into the site, located at the north eastern corner of the site. A low blockwork stonewall defines the eastern site boundary and a low rubble stone wall, partially demolished in places, defines the northern site boundary adjoining the Tulla Road. A row of mature trees defines the western boundary with the filling station, whilst the southern site boundary remains open.

## **2.0 Site Ownership & Basis for Application**

The subject site and adjoining land which extends to the Fort Fergus Stream, was previously part of one overall landholding, referred to herein as the Glynn landholding. The site, then in third party ownership, was previously used as a compound for the River Fergus Lower (Ennis) Certified Drainage Scheme and was also used as a compound for a Clare County Council/Ennis Town Council drainage project. The lands were subject to importation and deposition of extensive volumes of hard core materials to infill the lands, creation of a hard standing area, raising of ground levels to create an access route and compound area. The groundworks comprised '*development*' within the meaning of section 3 of the Planning and Development Act 2000 (as amended) (hereinafter referred to as "the Act"), however no planning permission was obtained and the previous parties involved operated on the basis that the works were exempted development



 Site Boundary



Figure 1.0 Site Location & Context

On foot of a number of complaints relating to the fill of land, the planning authority opened an enforcement file and following correspondence with the owner of the overall landholding concluded that the work carried out constituted development which is exempted development by reason of Article 8 of the Planning and Development Regulations 2001 (as amended). Notwithstanding this, further complaints were received, and Clare County Council subsequently sought a declaration from An Bord Pleanála (RL 03RL.3611). The intention was to bring finality to the alleged uncertainty surrounding the legality or otherwise of the carrying out of the infill groundworks on land abutting / adjacent the River Fergus and in or immediately adjacent the Lower River Shannon SAC, which covers part of the lands

The applicant the subject of this application, entered into a contract with the owner of the overall landholding to purchase the area comprising the subject site, which was zoned for commercial development, comprising 0.32 hectares. The contract was entered into in 2018. The sale of the land was delayed pending the outcome of the Section 5 Referral made by Clare County Council to An Bord Pleanála in respect of the status of the infill works.

An Bord Pleanála issued a Declaration confirming the infill groundworks as exempted development. This Order delivered certainty as to the planning status of the site and cleared the path for the applicant to purchase the lands and make an application for planning permission. Our client purchased the land in February 2019 and made a planning application to Clare County Council in May 2019 for a substantial primary care centre on foot of a contract with the HSE to deliver same (P19/409). In the interim, unbeknownst to our client, judicial review proceedings were brought against the Section 5 Declaration decision of An Bord Pleanála in March 2019, calling into question the planning status of fill on the land (High Court Record No: 2019 JR 144). In consultation with Clare County Council our client withdrew the planning application for the primary care centre, pending the outcome of the High Court. In February 2020, the High Court issued an Order of Certiorari quashing the decision of the Board.

The planning status of these past works are centrally important to the applicant's ability to develop these lands and this application for substitute consent seeks to regularise such works. As detailed above, the applicant purchased the subject site on the stated basis that the filling of lands was exempted development and that the land and associated works were in full accordance with relevant statutory provisions. The quashing of the An Bord Pleanála decision by the High Court has contributed to the 'exceptional circumstances' that the applicant now finds himself in and the associated need to regularise past works through the substitute consent process.

This application does not seek to regularise the totality of infill works, undertaken over a period of time, by a third party. Rather it solely seeks to regularise those works relating to an area of the site measuring 0.32 hectares in area and which has been zoned for a development use in the Clare County Development Plan 2017 – 2023.

### 3.0 Evolution of Works

As the applicant purchased the subject site with the infill works in place, the precise record of events is reliant on third party information. A review of planning history files has been undertaken along with a review of the Section 5 Referral to An Bord Pleanála in order to determine the extent and timing of works undertaken. The extent and timing of works has been sourced from the planning file and in particular, a letter from Brendan McGrath & Associates dated 1<sup>st</sup> September 2017 detailed in Appendix 2.0 of this submission. In consideration of the sequence of events and the filling of land, consideration has been given to the extent of the subject land only.

The only record available providing an indication as to what original levels on the land may have been is that relating to a planning application on the subject land in 1997 (P97/21061), when planning permission was sought to construct a retail warehousing schemes and light manufacturing units. The Site Layout Plan provides spot levels throughout the site although it is not entirely clear if these are existing or proposed levels. There is no topographical survey available on the file. The spot levels indicated range between 3.02m – 3.12m throughout the site. See Appendix 6.0 for a copy of the Site Layout Plan prepared at that time.

In 2005, a planning application was made on land adjoining the subject site (P05/21142) for the demolition of existing retail/commercial buildings and the construction of a mixed use building. Although no development was proposed on this land, the application did provide spot levels on the subject site ranging from 4.25m – 3m. See Appendix 7.0 for copy of mapping.

It would thus appear that some level of infill works may have occurred sometime between 1997 and 2005 on the lands, but the extent and scope of such works is unclear. Further, the reasoning for such works is also unclear.

It is noted that the then owner of the Glynn landholding (includes the subject site and adjoining land) applied for planning permission in 2001 to retain the infilling of land (P01/21152) and it would appear that such an application was made in response to an enforcement notice. It is noted that the application did not include the subject site and only relates to land located to the rear of the petrol filling station and adjoining the Fort Fergus Stream.

Historic photos of the site, extracted from Google Maps Street View dated 2011 and detailed in Appendix 4, shows the subject site to be overgrown with scrub, with possible mounds of material to the front. The site does not appear to be filled in these photos.

Based on information detailed in the Section 5 Referral submitted to An Bord Pleanála by the then owner (RL 03RL.3611), it is understood that the site was cleared, levelled and additional hardcore material was imported and deposited within the site between 2013 – 2015 at a time when the land was used as a means of access to facilitate works under the Certified Drainage Scheme. Further in 2015, the site was used as a temporary compound by contractors for

improvements to a water supply scheme, with further works to the land undertaken at this time.

The whole or nearly the whole of the subject site was filled with material imported onto the site as part of the Certified Drainage Scheme (See Appendix 1.0). This work took place between February 2013 and April/May 2015. An email copied from the Referral File from a Mr. Richard Long is provided in Appendix 2.0 and confirms the timing of works. The work was undertaken by the OPW on foot of an agreement to facilitate an access route through the lands to complete construction of the Certified Drainage Scheme. The extent of these works is detailed in photos provided in Appendix 3.

In 2015 a contractor (Ward and Burke Ltd) carrying out a water supply upgrade scheme in Roslevan for Ennis/Clare County Council, requested permission from the then landowner, to use the land as a compound for the water supply scheme (See Appendix 5.0). This necessitated the importing of 15 truckloads of gravel to enable the site offices to be constructed. These are the works carried out after the flood relief scheme, referred to in item 2 of Richard Long's email

For either / both these civil works, the lands were subject to importation and deposition of extensive volume of hard core materials to infill the lands, creation of a hard standing area, raising of ground levels to create an access route and compound area.

As the owner of the Glynn landholding was notified by the OPW of its intention to enter the lands in question to carry out works under Section 9 of the Arterial Drainage Act 1945 (see Appendix 1.0), it is understood that the owner believed that the activities in question constituted works which were exempted development under Article 8 of the Planning and Development Regulations 2001 and Section 4(1)(g) of the Planning and Development Act 2000.

These are the works for which an application for substitute consent is now being made.

#### **4.0      Extent of Works**

The ground is made up of deposited materials mainly inert material such as soil, stone, gravel and boulders, built up to an estimated level of between 1.4 – 1.7m above ground level.

The extent of works undertaken on the land has been estimated based on the planning history of the site and drawings prepared in 1997 and 2005, detailed in Appendix 6.0 & 7.0. The 1997 spot levels are used as a baseline, notwithstanding it is unknown if the spot levels represented on the Site Layout Plan represent existing or proposed site levels. Further, the accuracy of the spot levels is unknown. Irrespective, this application can be considered a 'worst-case' scenario.

The drawings prepared by Reddy Architecture + Urbanism have taken baseline ground levels of between 3.02m and 3.12m and when considered in the context of existing levels of between

4.4m and 4.8m, it is suggested that ground levels across the site have been raised by between circa 1.4m and 1.7m, integrating with existing levels on the adjoining commercial site to the west. Whilst the topographical survey provides levels on the Tulla Road to the east, there are no levels detailed on the private adjoining land to the east, save for the eaves and ridge levels of neighbouring properties. Using this information, it is estimated that the filled land is circa 0.75m higher than adjoining land to west.

Based on calculations undertaken by Horganlynch Consulting Engineers, it is estimated that the site has been filled with 4,129 tonnes<sup>1</sup> of imported material.

A block boundary wall, hedging and thick natural hedgerow which runs along the line of an existing drainage channel currently screens the subject land from the adjoining residential property to the west.

Should substitute consent be granted by the Board, it is the intention of the applicant to immediately re-lodge a planning application for a primary care centre, previously submitted to Clare County Council under P19/409. For this reason, there are no proposals to restore the land to greenfield use. However, should the Board consider the restoration of land (grass seeding) necessary, we consider that this requirement could be imposed via condition.

## **5.0 Planning Policy**

### **5.1 National Policy**

The National Planning Framework (NPF) seeks to achieve more compact and sustainable growth through consolidating a greater share of future development within the existing built footprint of settlements, to include new homes, businesses and amenities. The NPF sets national targets for brownfield/infill housing development in towns (30%) to support the regeneration of existing urban areas. NPF compact growth objectives together with Town Centre First principles are focused on the reuse of previously developed buildings and land and building up 'infill' sites, especially those that are centrally located in settlements at all scales.

The subject site is located within the established Ennis Urban area, surrounded by residential and commercial development and within easy walking distance of existing services and facilities. The land is accessible with a footpath fronting the site and with adequate water services and facilities. The principle of developing this land has always been acceptable, with the land zoned for commercial purposes. Filling the land as proposed has the effect of raising the land level with the public road and with adjoining commercial properties to the east, thereby enabling future development and facilitating the provision of a coordinated streetscape.

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<sup>1</sup> Volume of fill has been calculated at circa 2,700m<sup>3</sup>.

Assuming a figure of 15 kn/m<sup>3</sup>, this equates to a weight of 40,500 KN, which equates to 4,129 tonnes.

The future development of this land for commercial purposes (intended primary care centre), as an extension to existing commercial development will support the compact growth and town centres first agenda, which is also a key dynamic in addressing climate change, through reducing dependence on car-based transport, the extent of green-field land consumption and costly and inefficient infrastructure provision and use. In this instance, a framework for development can be delivered, which ensures a close correlation between facilitating a PCC on land with infrastructural capacity whilst also ensuring a substantial element of future growth occurs within an urban centre.

## 5.2 Regional Policy

Ennis is identified as a Key Town in the Regional & Economic Spatial Strategy for the Southern Region (RSES). The RSES seeks to deliver the objectives for compact growth set out in the NPF, at a regional level. Regional Policy Objective 13 seeks to support Ennis as a self-sustaining, regional economic driver and as a key location for investment choice in the Region, to support its enhanced development based on its strategic location relative to Limerick and Galway Cities and Shannon International Airport, as well as its role as a centre of employment and economic activity within the Region.

Ennis town has been identified for substantial growth. Infill sites, such as the subject site, have been identified to accommodate future growth in accordance with the principle of promoting compact growth as identified in the NPF.

## 5.3 Local Policy

Within the Ennis Municipal District Settlement Plan, which is part of the Clare County Development Plan (CDP), the site is zoned for commercial use. Section 19.4 of the CDP confirms 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 park/office type uses as appropriate. Retailing is open for consideration on 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 subject site comprises part of an overall 'opportunity site' OP18. The OP18 designation also includes the adjoining site to the north east, which comprises a number of uses including a petrol station and forecourt with ancillary shop and car wash, as well as a number of smaller retail/commercial units. The CDP requests that future development proposals must be accompanied by a masterplan for the overall redevelopment of the site.

It states that, *"the 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”.*

It is further noted that the commercial zoning has been carried forward into the Draft Clare County Development Plan 2022 – 2028.

The subject site has been identified for development purposes. The filling of land will adequately raise the land to enable development, facilitating connection into public sewerage and surface water network on the Tulla Road by gravity. The filling of land will therefore be absorbed into any development proposal going forward, similar to the finished floor levels of neighbouring commercial property to the east, in accordance with the proper planning and sustainable development of the area.

## **6.0 Exceptional Circumstances**

Section 177K(1A)(a) of the Planning & Development Act states that *“the Board shall not grant substitute consent (whether subject to conditions or not) unless it is satisfied that exceptional circumstances exist that would justify the grant of such consent by the Board”.*

Whilst there is no definition provided in that section of the Act as to what constitutes ‘exceptional circumstances’, Section 177D(2) of the Act does provide some guidance. It states that in considering whether exceptional circumstances exist the Board shall have regard to the following matters:

- a. whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;
- b. whether the applicant had or could reasonably have had a belief that the development was not unauthorised;
- c. 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;
- d. 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;
- e. the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;
- f. whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;
- g. such other matters as the Board considers relevant.

It is proposed to address each of these matters in turn.

In advance detailed consideration is given to the requirement or otherwise for either or both Environmental Impact Assessment and /or Appropriate Assessment. It should be noted that the Direction from the Board as detailed on Board Order (ABP-307172-20) confirmed that a Remedial Environmental Impact Assessment Report was not required but that a Remedial Natura Impact Statement would be required

#### 6.1 Requirement for Environmental Impact Assessment

Schedule 5 Part 1 and 2 of the Planning and Development Regulations 2001 (as amended) does not have a class of development relating to the infilling of lands. Accordingly, the requirement for EIA does not apply for the activity of infilling the lands.

In consideration of other potential classes of development which could require mandatory EIA, Schedule 5 Part 2 Class 11(b) requires EIA for installations for the disposal of waste with an annual intake greater than 25,000 tonnes. It is noted that the Trial Hole Assessment Report prepared by Southern Scientific confirms that the ground is made up of deposited materials mainly inert material such as soil, stone, gravel and boulders. Five trial holes were excavated to a depth of 6m and the soil extracted was classified in accordance with the Waste Acceptance Criteria (WAC) limits. All tests except for those representing carbon and one sulphate test indicated an inert waste categorisation under the WAC Directive.

In consideration of Schedule 5 Part 2 Class 11(b) regard is had to the threshold of 25,000 tonnes annual intake. Whilst the subject site accepted waste for the purpose of infilling, the subject site over a possible eighteen year period (1997 – 2015) has only accepted circa 4,129 tonnes of material.

In consideration of the above criteria and thresholds, it must be recognised that the subject site comprising 0.32 hectares is the only land that is in the ownership of the applicant and that the land was acquired at a specific point in time when it had been determined (erroneously) by the Board that the infilling of lands was exempted development. The applicant has no control or interest in the remaining, adjoining land.

#### 6.2 Determination as to Whether EIA is Required

The subject site of 0.32 hectares is located approximately 66m from the banks of the Fort Fergus Stream and the Lower River Shannon SAC. It is evident from the historical records of the site, as detailed in Section 3.0 & 4.0 of this report and verified by others, including the planning application for retention of infill works on neighbouring lands ((P01/21152), that works occurred on land adjoining the Fort Fergus Stream in the first instance, followed then by works to the subject site.

With respect to the substantive infill works undertaken between 2013 – 2015 on the subject site, an EIA was undertaken in respect of the Certified Drainage Works. Although the infill works were outside the scope of the EIA, such works are likely to have benefitted from the mitigation measures associated with the Certified Drainage Scheme which involved

construction of an embankment and the construction of headwalls which necessitated piling (See Drawings in Appendix).

The subject site is small scale in nature (0.32 hectares), is located in an urban environment and is zoned for commercial development. It adjoins an operational petrol filling station and other commercial and residential buildings. The site is not subject to flooding nor was it subject to flooding as detailed in the report from Horganlynch Engineers. There are no known national designations on the site. The proposed development is not located within any Natura 2000 sites. There are no protected structures, protected features or protected landscapes within or in proximity to the subject site. No landscapes of historical, cultural or archaeological significance are likely to be impacted by the proposed development. The site is not located within the *Zone of Notification* for any Recorded Monuments.

The Trial Hole Assessment Report prepared by Southern Scientific confirms that the made-up material consisted predominantly of soil, gravel, stone and boulders, mostly limestone in origin. The report concludes that there was little or no waste of an extraneous nature, no traces of putrescible or degradable waste. Methane was not detected at any level at each trial hole. All soil tests except for those representing carbon and one sulphate test indicated an inert waste categorisation under the WAC Directive. The presence of carbon as Dissolved Organic Carbon, (DOC) and Total Organic Carbon (TOC) near ground level and below 3m in the virgin soil indicate sources that are topsoil organic matter and native peat. The low DOC values demonstrate that the material represented at these levels is decidedly inert. A single elevated sulphate test result infers a categorisation of the material as stable non-reactive, however, the absence of gypsum board, the absence of sulphide indicators confirms that no biodegradation has occurred and there is no potential for its occurrence into the future.

With regard to the groundwater analysis, a water table was observed across the site at 2.8 - 3.4 metres. The report confirms that a wide range of parameters covered by the groundwater regulations were found to be safely below the limit values imposed. These parameters include the more toxic organic and persistent organic pollutants. Eutrophication inducing parameters phosphate and nitrate are also absent. The test parameters that were found to exceed the groundwater limits with the exception of lead have natural as well as anthropogenic sources and therefore can be considered acceptable in the present context. The occurrence of lead at a value twice the groundwater regulation limit, whilst it is not naturally occurring, is acceptable having regard to the multiple sources of lead in the urban environment.

All these facts would indicate that the development is unlikely to have had significant effects on the environment and that the need for sub-threshold EIA is not required.

### 6.3 Requirement for AA

A rNIS as requested by the Board, has been prepared by Southern Scientific.

The report confirms that the subject site is not located within a Natura 2000 site. However, it is located within 100m of the Lower River Shannon SAC (002165) and 4.3km north of the River Shannon and River Fergus Estuaries SPA (004077). The most likely impacts were assessed to be on the neighbouring SAC. These were considered to arise from the potential for silt, other sediment and pollutants to enter the Fort Fergus Stream, which forms part of the SAC.

The report concludes that EPA datasets for water quality within the Fort Fergus Stream indicate that the water was of 'Poor' or 'Moderate' quality during the period 1991 – 2019. The Q-value assigned to the Fort Fergus Stream over this period remained low (Q2 & predominately Q3), however the last monitoring event has increased the Q-value Q3-4, indicating moderate water quality. It would appear that no significant impacts have occurred to affect the quality status of the Fort Fergus Stream. This evidence suggests that there has not been any significant negative impact arising from the development to date.

The report concludes that it can be reasonably concluded from the assessment that was carried out that the development has not had an adverse impact on the integrity of a European site.

#### 6.4 Exceptional Circumstances

Our client submits to the Board that exceptional circumstances exist based on the following considerations.

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

As detailed earlier in Section 6.1 of this report, Schedule 5 Part 1 and 2 of the Planning and Development Regulations 2001 (as amended) does not have a class of development relating to the infilling of lands. Further, the development proposal is sub-threshold the mandatory requirement for EIA having regard to Schedule 5 Part 2 Class 11(b) which requires EIA for installations for the disposal of waste with an annual intake greater than 25,000 tonnes.

On balance, therefore, it is submitted that the regularisation of the development would not circumvent the purpose and objectives of the EIA Directive.

In relation to the Habitats Directive, it follows from the circumstances of works and the genuine belief that such works were exempted development under Article 8 of the Regulations, discounting any requirement of Appropriate Assessment (AA), that regularisation of the development could not be considered to circumvent the purpose and objectives of that Directive. In this regard and to ensure the retrospective assessment of such works a rNIS has been prepared.

##### 6.4.2 Whether the applicant had or could reasonably have had a belief that the development was not unauthorised

The circumstances regarding works have been clearly set out in the preceding paragraphs. It would appear that the landowner at the time firmly believed that the works were exempt by

virtue of being ancillary works covered by Ministerial Order in accordance with the Arterial Drainage Act of 1945.

Indeed the Section 5 Declaration issued by An Bord Pleanála under RL03.RL3611 did confirm that the groundworks undertaken including the importation and deposition of fill, the creation of a hardstanding area and the raising of ground levels were works carried out as part of the River Fergus Lower (Ennis) Certified Drainage Scheme under the Arterial Drainage Act of 1945 were exempt under Article 8 of the Regulations and that the use of the lands as a temporary compound associated with improvements in the water supply network fall within works which are exempted under the provisions of Section 4.(1)(g) of the Planning and Development Act 2000 (as amended) and Class 16 of Part 1 of Schedule 2 of the Planning and Development Regulations 2001 (as amended).

A review of ABP Ref. No. RL24.RL2945 notes that the Board has previously found that the exemption provided by Article 8 of the Regulations can be construed as being particularly wide-ranging in that it extends to cover works which, whilst not specifically identified in an approved scheme, would nevertheless be incidental thereto.

The applicant in this instance did not carry out the works but purchased the land in the firm belief that the works were exempted development.

6.4.3 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

It is submitted that the ability to carry out an assessment of the development for appropriate assessment purposes has not been impaired.

The Trial Hole Analysis Report provides adequate information on the quality of fill and demonstrates that there was little or no waste of an extraneous nature, no traces of putrescible or degradable waste. In respect of groundwater, the analysis further confirms that a wide range of parameters covered by the groundwater regulations were found to be safely below the limit values imposed. The Flood Report confirms that the site was not subject to flooding, even before the land was filled and that no displacement of flood waters is likely to have occurred. EPA Water Quality Monitoring provides further evidence that no significant impacts have occurred to affect the quality status of the River Fergus.

The Technical Studies attached to this application are intended to facilitate and allow the Board to undertake appropriate assessment retrospectively and to determine whether there were effects on the integrity of the European sites at this location.

It is submitted that given the scale and nature of the development, it is considered that there is no impairment to enable the Board to undertake an Appropriate Assessment of the development and for public participation in this process.

6.4.4 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

The subject site is located in an urban location and is zoned for commercial development and prior to its zoning would have undergone Strategic Environmental Assessment (SEA). It adjoins an operational petrol filling station and other commercial and residential buildings. The site is not subject to flooding. There are no known national designations on the site. The proposed development is not located within any Natura 2000 sites.

The site is located within 100m of the Lower River Shannon SAC (002165) and 4.3km north of the River Shannon and River Fergus Estuaries SPA (004077). The most likely impacts were assessed to be on the neighbouring SAC. These were considered to arise from the potential for silt, other sediment and pollutants to enter the Fort Fergus Stream, which forms part of the SAC.

The Trial Hole Test Analysis Report and Water Quality Assessment confirms that there was little or no waste of an extraneous nature, no traces of putrescible or degradable waste deposited on the development site. Methane was not detected at any level at each trial hole. In addition, regarding groundwater analysis, a wide range of parameters covered by the groundwater regulations were found to be safely below the limit values imposed.

In effect the trial hole data provides the most up-to-date picture of what is currently happening on the site. It shows that the material is inert and that the groundwater is not being impacted.

During construction there may have been potential for sediment to enter the river and potential for hydrocarbons to enter the river due to leakage/spills from machinery on site. However, the rNIS concludes that direct surface water run-off from the site to the Fort Fergus Stream is considered unlikely to have occurred, is occurring, or likely to occur in the future due to the infilling works due to the separation distance. In addition, the construction of a berm as part of the River Fergus (Ennis) Certified Drainage Scheme separates the infilled site from the SAC and stream. Indirect impacts are also unlikely as there is a lack of evidence of a hydraulic connection between the development site and the Fort Fergus Stream.

The rNIS recommends that a monitoring programme for noxious weeds and invasive species be put in place to control noxious weeds and invasive species that may be dormant or suppressed by recent weed control.

The rNIS reasonably concludes that the development has not had an adverse impact on relevant adjacent Natura 2000 sites.

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

The rNIS has reasonably concluded from the assessment that was carried out that the development has not had an adverse impact on the integrity of a European site and as a result remediation is not necessary.

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

The applicant purchased this land on the assumption that the fill and groundworks were authorised. The applicant has not carried out unauthorised development. Rather the applicant wishes to advance development on the land for the purposes of construction of a primary care centre, under contract with the HSE.

6.4.7 Such other matters as the Board considers relevant

An application for substitute consent is solely sought on 0.32 hectares of land, on that part of the overall site located outside the identified flood zone and zoned for commercial development in the Clare County Development Plan 2017 – 2023. It is that part of the overall landholding that is furthest removed from the SAC and is surrounded by existing commercial and residential development.

It would appear from previous correspondence on file and from communications, including formal pre planning with the planning authority in respect of the planning application for the primary care centre (P19/409), that the planning authority would welcome development on the subject site. This of course is also reflected in the commercial zoning afforded to this part of the overall landholding, which has been carried forward into the Draft Clare Development Plan 2022 – 2028.

## **7.0 Conclusion**

We trust that the above information is of assistance to the Board in the determination of the application. However, should you require clarification on any issue please do not hesitate to contact me.

Yours sincerely,



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Mary Hughes/MIPI

HRA Planning Chartered Town Planning Consultants



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**Durra House,  
Spencil Hill,  
Ennis,  
Co. Clare.**

**Attn: Mr Noel Glynn**

*Date: 13<sup>th</sup> of March 2014*

*Ref: Y13102/5.1/0202 RL (email)*

**RE: RIVER FERGUS LOWER (ENNIS) CERTIFIED DRAINAGE SCHEME**

Dear Sir,

J.B. Barry and Partners Limited in association with Byrne Looby Partners Water Services Ltd. are acting as Agents of the Office of Public Works.

With the above noted please be advised that the flood relief works for the River Fergus Lower (Ennis) Certified Drainage Scheme have been underway in Ennis since February 2013, with some works associated with the scheme having been undertaken in the Cappahard area over the last number of months.

The above mentioned Certified Drainage Scheme has been confirmed by a Ministerial Order in accordance with the Arterial Drainage Act of 1945. Further to the confirmation of the River Fergus Lower (Ennis) Certified Drainage Scheme by the Minister of Finance under the Arterial Drainage Act of 1945 and the resultant powers conferred on the Commissions of the Office of Public Work, notice is hereby given that under Section 9 & 52 of the Act, The Commissioners and its contractors, Wills Bros Limited (under Section 43 of the Act), will enter onto your property to construct, execute and complete the work specified under the Scheme.

For the record, please find attached extracts of Section 9 & 52 of the Arterial Drainage Act of 1945.

We note that we previously entered your site as of Feb'13 and have carried out various works to date under Section 9 and 43 of the Arterial Drainage Act of 1945. For the avoidance of doubt please be advised that Wills Bros Limited intend on re-entering your property on the 20<sup>th</sup> March'14 in order to carry out the remaining works for that of the Cappahard Embankment's Type 1 & 2 under Section 9 and 43 of the Arterial Drainage Act of 1945.

Please refer to drawings 530 Rev2 & 537 Rev2 for details of the above mentioned works.

The manner and sequence in which these works will be carried out is a matter for Wills Bros Limited to confirm.

Finally, please note that the OPW valuer will make contact with you over the coming days in order to address issues pertaining to your entitlements arising from the above mentioned drainage scheme. Regardless of agreement, please be advised that Wills Bros Limited intend on re-entering your property on the 20<sup>th</sup> March'14.

Yours Sincerely,



---

**Richard Long – Senior Employer’s Site Representative**  
**J.B. BARRY and PARTNERS LIMITED**  
**In association with**  
**BYRNE LOOBY PARTNERS WATER SERVICES LTD.**

Encl. Dwg 530 Rev 2 – Castlerock, Whitepark, Cappahard Embankment Overall Layout Plan, Dwg 537 Rev 2 – Cappahard Embankment Strip Plan & Cross Section Sheet 1 and Arterial Drainage Act of 1945 extracts Section 9 & 52.

Cc. Brendan McDermott, Tony Brew, Cian O’Domhnaill, Mary Nugent, John Dowds (OPW), Tom McKeown, Jonathon Noonan, Bryan Harrington, Michael Naughton, (JBB), Kieran Thornton (BLP), Tom Tierney (CCC), Eamon O’Dea (ETC), Malcolm Duncan, Michael Carroll, Donal Kearney (WBL).

## **Section 9 – The Carrying out of a Drainage Scheme**

When the Minister has made an order confirming a drainage scheme, the Commissioners shall proceed to carry out the scheme, and for that purpose the said order shall operate to confer on the Commissioners power—

(a) to construct, execute, and complete the drainage works specified in the scheme with such additions, omissions, variations, and deviations as shall be found necessary in the course of the work, and

(b) to enter on any land and there do all such acts and things as shall be necessary for or incidental to the construction, execution, or completion of the said drainage works with such additions, omissions, variations, and deviations as aforesaid, and

(c) to acquire compulsorily the several lands, easements, fisheries, water-rights, navigation-rights, and other rights proposed in the scheme to be so acquired, and, if the Commissioners think fit so to do, to enter on any such lands or exercise any of such easements, fisheries, water-rights, navigation-rights, and other rights before the conveyance or ascertainment of price of such lands, easements, fisheries, or rights, and

(d) to interfere substantially with any land proposed in the scheme to be so interfered with and, if the Commissioners so think fit, to enter on and so interfere with such land before any ascertainment of compensation in respect thereof, and

(e) to restrict, terminate, or otherwise interfere with any easements, fisheries, water-rights, navigation-rights, or other rights proposed in the scheme to be compulsorily restricted, terminated, or interfered with, and to divert, remove, or otherwise interfere with any roads or bridges proposed in the scheme to be diverted, removed, or interfered with, and, if the Commissioners so think fit, to do any of the things aforesaid before any ascertainment of compensation in respect thereof, and

(f) for the purpose of the due carrying out of the scheme to do all or any of the following things, that is to say:—

(i) take from any land all sods and other material required for the said purpose,

(ii) deposit on any land all spoil or other material produced in the course of such carrying out,

(iii) utilise for the said purpose all or any spoil, gravel, stone, rock, or other matter removed in the course of such carrying out, and

(g) to do all such other acts and things as shall, in the opinion of the Commissioners, be necessary or proper for or incidental to the due carrying out of the scheme and are not specifically provided for by this Act.

**Section 52 - Offences and Penalties.**

(1) Every person who shall do any of the following things shall be guilty of an offence under this section, that is to say:—

(a) wilfully obstruct the Commissioners or any of their officers, agents, or servants in the exercise of any of the powers or the performance of any of the duties conferred or imposed on the Commissioners or any of their officers, agents, or servants by or under this Act, or

(b) pull down, remove, or injure any works constructed or in course of construction by the Commissioners under this Act or transferred to the Commissioners by or under this Act, or

(c) remove, injure, or deface any poles, pegs, marks, or other similar things erected, placed, or made by the Commissioners or any of their officers, agents, or servants for the purpose or in the course of the exercise of any of the powers or the performance of any of the duties conferred or imposed on the Commissioners or any of their officers, agents, or servants by or under this Act, or

(d) throw or put any weeds or any stones, soil or other solid matter or cause or permit any weeds or any such solid matter to fall or pass into any watercourse in respect of which any works have been constructed by or transferred to the Commissioners or are about to be or are being constructed under this Act so as to cause obstruction, hindrance, or delay in the construction or operation of such works, or

(e) without the consent of the Commissioners, place or erect any dam, weir, or other obstruction in any watercourse in respect of which any works have been constructed by or transferred to the Commissioners or are about to be or are being constructed under this Act, or

(f) obstruct the flow of water to, through, or from any drainage works constructed by or transferred to the Commissioners by or under this Act so as to prevent or hinder the efficient operation of such works or to cause flooding of such works or of any land drained thereby.

(2) Every person guilty of an offence under this section shall, on summary conviction thereof, be liable to a fine not exceeding fifty pounds or, in the discretion of the Court, to imprisonment for a term not exceeding six months or to both such fine and such imprisonment and shall also be liable, in the case of a continuing offence, to a fine not exceeding five pounds for every day during which the offence is continued.



## Appendix 2

### Correspondence between Richard Long, J B Barry and Partners, Consulting Engineers and Brendan McGrath, planning consultant, in August 2017

Brendan,

Please note the following in relation to questions asked in your correspondence below Re: Noel Glynn's site on the Tulla Rd, Ennis.

Item 1 –

Site Clearance works got under way for the site in question during the last few days of February 2013 with site clearance being carried out along the old river embankment and open drain. Access for this was via the laneway by the Tyre Shop and the Petrol Station. The main civil works followed on shortly after this with access to the site being from the Tulla Rd at the site entrance gate. I believe that the bulk of the flood defence works were completed by August 2014 but some minor works /close out of various items happened after this with all works closed out/completed by October 2014.

Item 2 –

In relation to the hard stand that is on site at the moment, I am not aware of the time line from October 2014 that Mr Glynn placed additional material onto the site in order to have the full site hard surfaced. Following the completion of the flood relief works Mr Glynn had another contractor on the site who were carrying out the water main rehab works in Ennis. In relation to the segment that was carried out by WBL during the flood scheme, the section up by the road was carried out early on during their WBL's time on site with the land cleared and stoned around September /October 2013. In relation to segment by the new river embankment and over the twin ogee pipe this was finished off around June/July 2014.

Item 3 -

As previously discussed Mr Glynn was compensated for the works and interference caused to this property. I do not have any of the documentation around the final agreement between Mr Glynn and the OPW. As mentioned before all accommodation works requested by Mr Glynn would have been taken into account during this process. I am of the impression that this was closed out in April/May of 2015.

In relation to photos of the site pre- works, I don't seem to be able to put my hands on to many of them at the moment. Attached are photos what I have to hand. I haven't put any in of the actual flood relief works just those around the site access and the leveling out the area outside of the works area up at the Tulla Rd. This was carried out as requested by Mr Glynn as part of accommodation works.

If you wish to discuss further please do not hesitate to contact me.

Regards

Richard

Richard Long  
Senior Employer's Site Representative  
J.B. Barry and Partners Limited  
Tel: + 353 87 2537829  
E-mail: rlong@jbbarry.ie  
Website: <http://www.jbbarry.ie>

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J.B. Barry & Partners Limited is registered in Ireland #121649  
Registered Office: Classon House, Dundrum Business Park, Dundrum, Dublin 14

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Please consider the environmental before printing the e-mail.

**From:** [Brendan McGrath](#)

**Sent:** Monday 21 August 2017 16:24

**To:** [Richard Long](#)

**Subject:** Tulla Road site

Hi Richard,

If possible, before the end of this week, if possible, I'd like to know

1. when (month) work stopped on Noel Glynn's land
2. by when (month) the site was infilled and hard surfaced as we see it today
3. the nature of the compensation determined for Noel Glynn.

If you had any photography of the works that would also be appreciated.

Thanks again for the help.

Regards,

Brendan

Brendan McGrath and Associates,  
Planning Consultants,  
Riverstown Cottage,  
Corrofin,  
Co. Clare  
Tel: 065 6837555

<mailto:brendan@bmcgrathplanning.ie>

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This email has been checked for viruses by Avast  
antivirus software.

<https://www.avast.com/antivirus>

# Appendix 3.0



Photo A

04.09.2013 13:10



04.09.2013 13:10

Photo B



09.09.2013 12:27

Photo C



16.09.2013 15:27

Photo D



Photo E



20.09.2013 11:54

Photo F



24.09.2013 09:42

Photo G



H

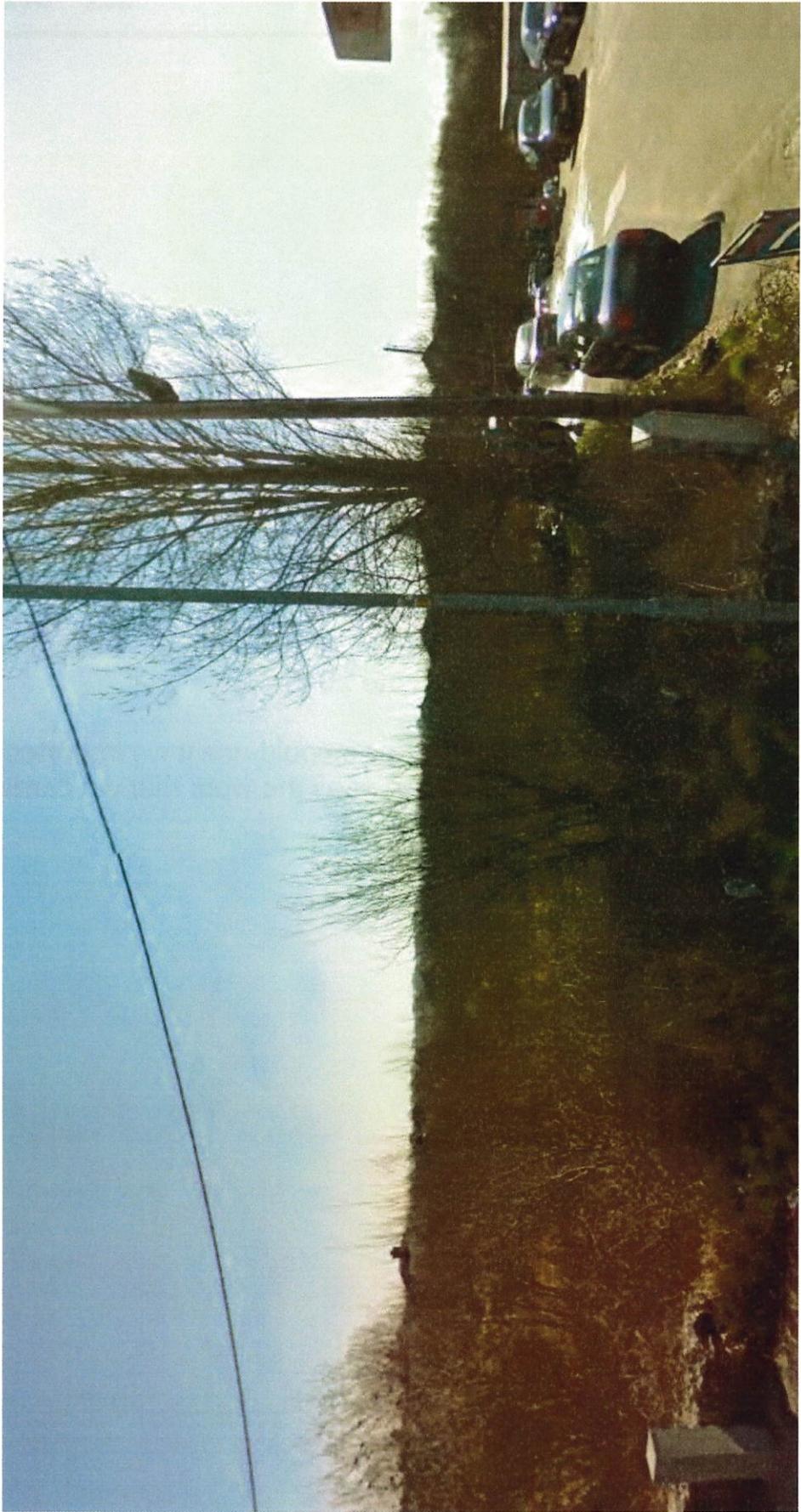


M



**Appendix 4.0**





Dear Howard,

Re Mr Noel Glynn site on the Tulla Road Ennis County Clare

Ward and Burke Construction can confirm that we requested to use Mr Noel Glynn's site as a compound for the duration of our works on the water main rehab on the Tulla road Ennis County Clare Late 2015.

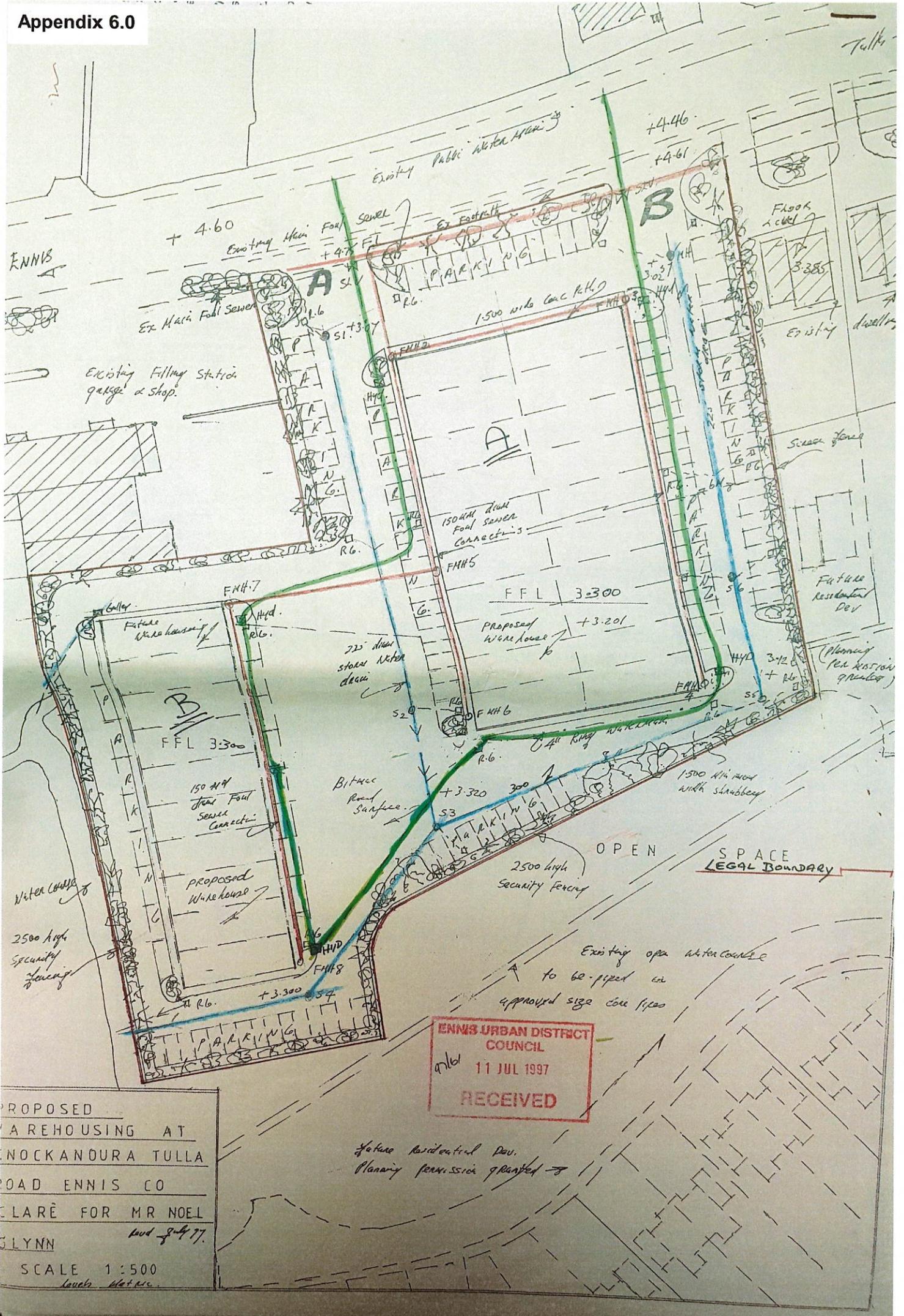
To level the site and make it safe before we could use it we imported 15 loads of stone onto the site. Mr Glynn was aware of all the work that we carried out on site.

Regards

Patrick Barrett

Site Agent 086 8383375

Appendix 6.0



ENNIS URBAN DISTRICT COUNCIL  
 11 JUL 1997  
 RECEIVED

PROPOSED  
 WAREHOUSING AT  
 NOCKANDOURA TULLA  
 ROAD ENNIS CO  
 CLARÉ FOR MR NOEL  
 GLYNN  
 Land July 77.  
 SCALE 1:500  
 Levels Met etc.

Future Residential Dev.  
 Planning permission granted

