

An Bord Pleanála  
64 Marlborough Street  
Dublin 1  
D01 V902

2 November 2020

Our ref: MAUR  
Your ref: ABP-308071-20  
LCCC ref: EC34/20

<b>AN BORD PLEANÁLA</b>	
LDG-	_____
ABP-	_____
09 NOV 2020	
Fee: €	_____ Type: _____
Time: _____	By: <u>post</u>

**Re: Whether the laying underground cables in an SPA from Mauricetown Windfarm, Mauricetown, Ashford, Ballagh Co. Limerick for grid connection purposes is or is not Development or is or is not Exempted Development**

Dear Sir or Madam,

Highfield Energy Services Limited (**HESL**), as project manager for Mauricetown Wind Farm, has been instructed to make a submission to An Bord Pleanála (**the Board**) in relation to the above matter by and on behalf of Mauricetown Wind Farm Limited (**Mauricetown**).

The precise matter of this exact underground duct and cable connecting Mauricetown Wind Farm to the electricity grid was the subject of an unappealed and unchallenged Section 5 Declaration made by Limerick City and County Council (**LCCC**) over three and a half years ago which determined that the matter at hand is Development and is Exempt Development. Specifically, Section 5 Declaration Ref: EC16/59 in 2017 (the **2017 Section 5 Declaration**, included in Schedule 1).

By way of background, on 20 December 2016, HESL, as agent for Mauricetown, made a Section 5 Application to LCCC. The 2017 Section 5 Declaration was issued on 2 February 2017 declaring that the laying of underground ducting and cabling as described in the 2017 Section 5 Declaration, is Development and is Exempt Development. In reliance on, and in accordance with, this Section 5 Declaration, the ducting and cabling was installed almost 2 years ago, without concern or complaint. Mauricetown was unaware of the recent Section 5 Declaration Ref: EC34/20 issued on 14 August 2020 until it received notice of the current referral from the Board.

Therefore, it is quite clear that the subject of this referral has already been determined. We can definitively confirm that the relevant planning facts and circumstances in relation to the underground duct and cable have not changed since the 2017 Section 5 Declaration was made.



We are advised that, consistent with recent case law on this matter, the 2017 Section 5 Declaration, which was neither appealed nor judicially reviewed, and upon which Mauricetown relied when installing the underground duct and cable, cannot be the subject of a belated collateral attack such as this which seeks to indirectly challenge the validity of a decision made over 3 and a half years ago, in particular, when the underlying facts and circumstances remain as they were at the time the declaration was made.

More specifically, we refer to the High Court decision in *Narconon Trust v An Bord Pleanála* [2020] IEHC 25 (**Narconon**) in which the High Court held that, by seeking section 5 declarations on a question which had already been the subject of a separate prior section 5 declaration, the relevant parties were "questioning the validity" of the decision made by the relevant planning authority in the prior section 5 declaration.

We are advised that this judgment is clear authority for the position that the effect of section 50 of the Planning and Development Acts 2000 (as amended) (**the Planning Acts**) is such that, when performing its functions in accordance with Section 5, An Bord Pleanála lacks the jurisdiction to decide a question if that question is, in fact, an attempt to question the validity of a prior decision by a local authority made by it in the performance of a function under the Planning Acts, other than in accordance with the mandatory requirements of section 50.

As such, subject to our advice, it is our respectful submission that An Bord Pleanála does not have jurisdiction to determine this appeal, given the absence of any change in relevant facts or planning circumstances, and where no application for judicial review of the 2017 Section 5 Declaration was filed.

Notwithstanding and without prejudice to our stated position above, we have for completeness provided the information and details below which serve to highlight the lack of substance or foundation to this specific matter.

#### **Irrelevant and Invalid Grounds of Appeal**

We submit that the grounds of appeal are either irrelevant or invalid or both as the sole question to be determined under section 5 of the Planning Acts is whether a particular set of works is or is not Development or is or is not Exempted Development and that matter has been determined as set out above

Setting the existing determination aside, the simplest way to demonstrate that this referral is unfounded and spurious is to reproduce a series of before and after colour photographs of the relevant section of public road that passes through the SPA (Natura 2000 Special Protection Area). Please see these photographs, which are included in Schedule 2 and set out:

- Photograph 1: The position (at Area B) before May 2018 prior to commencement of the wind farm works;
- Photograph 2: The position (at Area B) on 19 October 2018, when the site preparations were completed;
- Photograph 3: The position (at Area B) in the week ending 18 November 2018 with the installation of underground duct in accordance with Section



5 declaration EC16/59; and

- Photograph 4: The position (at Area B) on 20 October 2020 with the underground duct and cable works reinstated and the vegetation on roadside bank recovered to its original condition.

Together, these photographs clearly illustrate the sequence of events and the absence of any significant impact associated with the underground duct or cable.

The fact that an element of the grid connection ducting and cabling is within an SPA is not new information. The position is quite the opposite. To the extent that the grid connection was laid within the side of the public road which is situated within an SPA, the underground duct and cable has been constructed in line with the details submitted for the Section 5 Declaration EC16/59, which clearly and unambiguously stated that local clearance of roadside verges and hedges to accommodate the underground cable may be required and assessed this in the AA screening.

#### **Attachment No. 2**

Attachment No.2, as labelled and submitted with the referral, is a letter with accompanying drawings from Nora M. Curtin, Planning Consultant.

Other than the drawings/aerial photographs serving as a general indication of the route of the underground ducting and cable at the location shown, this material is irrelevant insofar as it appears to relate to a complaint in relation to individual property ownership rights. This is not a relevant matter for consideration under section 5.

Notwithstanding that this is not a valid ground of appeal, we confirm that the cable is within the curtilage of the public road at the location in question (note Photograph 3, Schedule 2), and all statutory consents required for the installation of the underground duct and cable were secured, including a road opening licence granted by LCCC and section 48 and 49 consents from the Commission for the Regulation of Utilities. The works were carried out along the public road in full view of the public and without concern or complaint.

#### **Attachment No. 3**

Attachment No.3, as labelled and submitted with the referral, is a 'Site Damage Assessment Report' (the **Report**) which is irrelevant and invalid in relation to this referral as it draws its conclusions based on a factually incorrect description of the local public road in question prior to commencement of construction activity (as clearly evidenced by the photograph taken prior to the laying of the grid connection).

The Report indicates that an inspection of the public road was purportedly carried out on 11 December 2018. Some six months passed before the Report was produced. Almost a further year passed before the section 5 application for EC34/20 was submitted, including this report. For context, it is currently over 3 and a half years since the 2017 Section 5 Declaration was made.



The Report references two points at which the public road containing the underground duct and cable crosses the SPA, 'Area A and B' as per the report.

The report states that at 'Area A' the underground duct and cable works "is not considered to be likely to have a significant effect on the SPA". Therefore no additional comment on this matter is required.

At 'Area B' The Report states "Accordingly, its removal [the fence-bank] is considered to have had a significant effect. This is likely to de-exempt the works and planning permission was probably required"

Mauricetown strongly disagrees with this conclusion and makes the following points:

1. The existing environment at 'Area B' has been completely misrepresented:
  - a. There was no hedgerow on the southern side of the road.

It is noted that Fig 6 from the report shows the fence to the south of the road and states there was hedgerow removed.

It is further noted that Fig 6 has been reproduced in the original application to LCCC for EC34/20 with handwritten notes added by the Conservation Ranger. There is an area hatched on the photograph labelled as "Hedgerow Removed, cables under S.P.A. Road widening no planning no Ministerial consent". The relevant page is reproduced in Schedule 3.

**It is a matter of fact that there was no existing hedgerow present at this location and these statements are not correct.**

This is clearly and unambiguously evidenced by Photograph 1 in Schedule 2 from May 2018 and the photographic record of Google Street View dating to April 2010 included in Schedule 4.

- b. A part of the northern boundary is not within the SPA; and
  - c. The part of the road boundary that is within the SPA consisted of a roadside bank with significant seasonal variation of vegetation coverage and not a hedgerow.
2. There has been a conflation of different activities that took place at 'Area B'. To separate these matters to allow for accuracy and clarification:

Firstly and importantly, with respect to the laying of underground ducting and cable in isolation, there has been zero interference with any fence-bank or hedgerow at this location. The cable has been installed entirely in line with the details submitted for Section 5 Declaration EC16/59.





Secondly, this local road is the exclusive access way to the wind farm site. To facilitate the safe access and egress of construction traffic to the site along this road, preparatory activity was carried out at 'Area B'. This involved:

- Scraping back of material at the edges of the road surface to allow the full width of the existing road to be used;
- Removal of more mature vegetation outside the SPA at this location;
- Compression of loose material along the roadside bank resulting in a temporary reduction of vegetation but no significant disruption to the existing seed bed;
- Placing of stone at the edges of the existing carriageway to protect and maintain the roadside bank from encroachment and erosion.

In summary, as a matter of fact no hedgerow was removed within the SPA, and the matter of ministerial consent does not arise. As demonstrated by the before and after photographs and the Google Street View screengrab, the laying of the grid connection cable almost 2 years ago in the side of the public road located within the SPA had demonstrably no significant effect, as predicted. In any event, the question of whether ministerial consent is or is not required is not a valid ground of appeal as it is not a relevant matter for consideration under section 5.

#### **Attachment No.4**

Attachment No.4, as labelled and submitted with the referral, is a letter from LCCC to NPWS confirming that a warning letter was sent to Mauricetown. The question of whether a warning letter was issued is an irrelevant and invalid ground of appeal in the context of section 5.

Notwithstanding this, we confirm that the warning letter was received on 5 September 2019. Mauricetown investigated and was unable to identify the alleged unauthorised development. No further enforcement steps were taken. Furthermore, LCCC have themselves issued a Section 5 Declaration, Ref: EC34/20, since the issuance of the warning letter. Please see relevant correspondence at Schedule 5.

#### **Attachment No.5**

Attachment No.5, as labelled and submitted with the referral, is a report from Donal Brosnan Architectural Design and Development Limited.

The location that is the subject of the report is not within any SPA designation, the ownership matter highlighted is not relevant to the matter at hand and the foregoing comments in relation to Attachment No.2 above are reiterated.



### Summary

The question to be determined under section 5 is whether a particular set of works is or is not Development or is or is not Exempted Development.

This precise question with respect to this exact underground duct and cable connecting Mauricetown Wind Farm to the electricity grid was already the subject of the unappealed and unchallenged 2017 Section 5 Declaration.

Having regard to the *Narconon Case*, we are advised that the 2017 Section 5 Declaration, upon which Mauricetown relied in installing the underground duct and cable, cannot be the subject of a belated collateral attack such as this which seeks to indirectly challenge the validity of a decision made over 3 and a half years ago, in particular, when the underlying facts and circumstances remain as they were at the time the declaration was made.

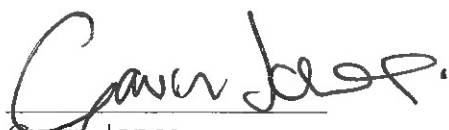
As such, due to the advice received on this matter, it is our respectful submission that An Bord Pleanála has no jurisdiction to determine this referral.

For this reason, and also because the grounds of appeal are irrelevant and invalid matters for determination under section 5 (for the reasons set out above), we respectfully request the Board to dismiss this appeal under section 138 of the Planning Acts for two reasons.

Firstly, Mauricetown considers that the grounds of appeal are vexatious, frivolous and without substance or foundation.

Secondly, Mauricetown considers that the Board may be satisfied that, in the particular circumstances, the appeal should not be further considered having regard to the nature of the appeal and the question which is raised by it – i.e. it is seeking to ask the Board the same question which was already posed to and determined by LCCC in the 2017 Section 5 Declaration in respect of the same works.

Yours faithfully,



Gavin Jones  
Project Manager  
Highfield Energy Services Limited



## Schedules

1. Schedule 1 - Limerick City and County Council Section 5 Declaration on Development and Exempted Development EC16/59 dated 2 February 2017 [and relevant drawing]
2. Schedule 2 - 'Area B' Photographs from before, during and after the installation of the underground duct and cable at one of the locations that has prompted this referral
3. Schedule 3 – Extracts from LCCC Section 5 File EC34/20
4. Schedule 4 - Google Street View Screengrab 'Area B'
5. Schedule 5 – Warning Letter Correspondence



**Schedule 1 - Limerick City and County Council Section 5 Declaration on  
Development and Exempted Development EC16/59 [and relevant drawing]**





**PLANNING & DEVELOPMENT ACTS 2015**

**PLANNING & DEVELOPMENT REGULATIONS, 2015**

**SECTION 5 – DECLARATION ON DEVELOPMENT AND EXEMPTED DEVELOPMENT**

**DECLARATION NO.**

**EC16/59**

**Name and Address of Applicant:**

Mauricetown Wind Farm Ltd., Design Studio 7, Old  
Castle View, Kilgobbin Road, Dublin 18.

**Agent:**

Highfield Energy Services Ltd, Design Studio 7, Old  
Castle View, Kilgobbin Road, Dublin 18.

Whether the laying of underground MV ducting and cabling linking existing and proposed substations at Glenduff, Domdeeven and Mountplummer, Co. Limerick is or is not Development or is or is not Exempted Development. The works as described on the plans submitted with the application on the 21<sup>st</sup> December 2016.

**AND WHEREAS** the Planning Authority has concluded that the laying of underground MV ducting and cabling linking existing and proposed substations at Glenduff, Domdeeven and Mountplummer, Co. Limerick comes within the scope of exempted development as defined by Class 26 of Part 1 of Schedule 2 of the Planning and Development Regulations 01 as amended.

**NOW THEREFORE** the Planning Authority in exercise of the powers conferred on it by Section 5(2) (a) of the Planning and Development Act 2000-2015 hereby decides that the said development as described above is **Development and is Exempt Development.**

Signed on behalf of the said Council

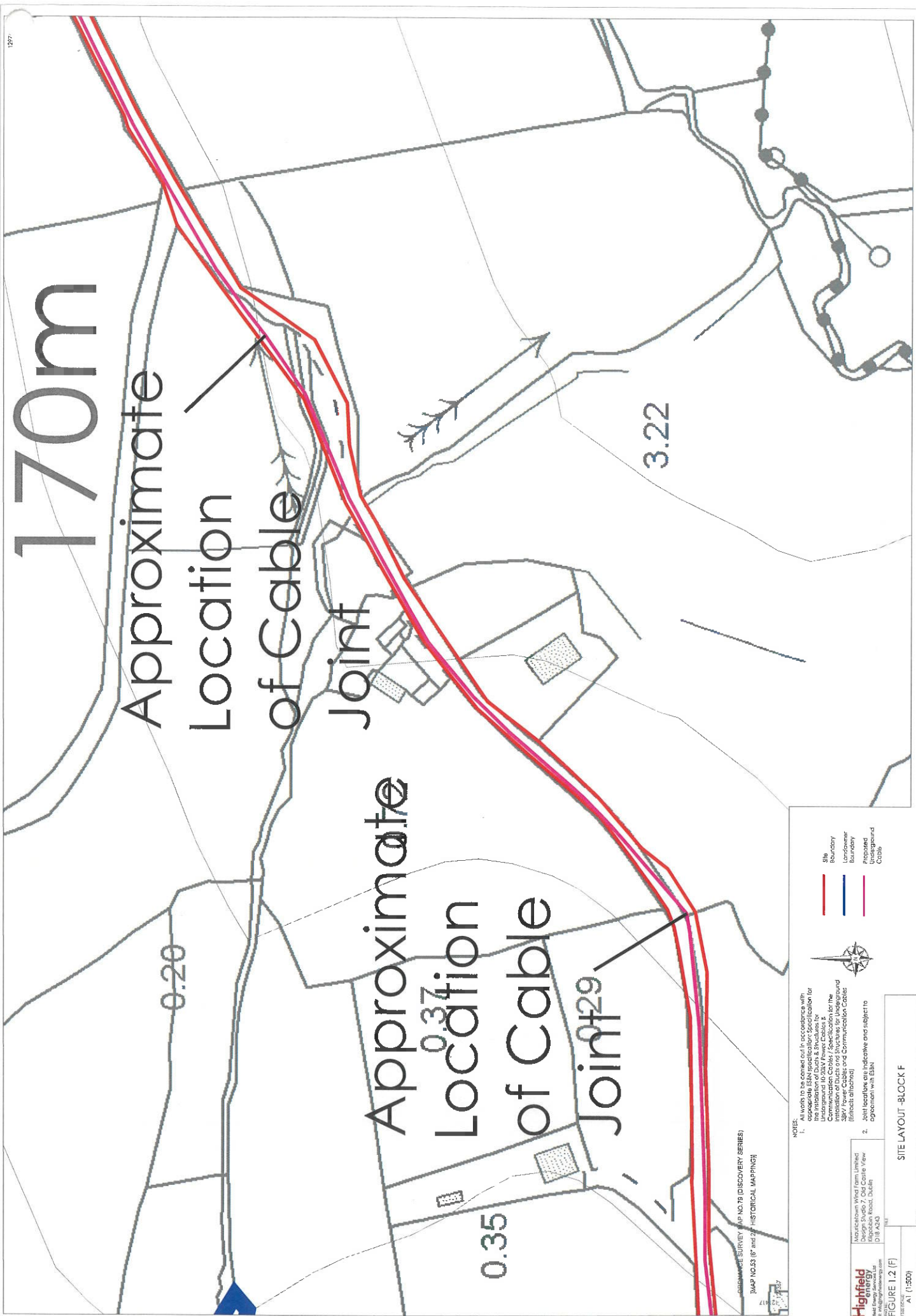
V. Reev

Date:

2/2/17

**NOTE:** A Declaration on Development or Exemption Issued by Limerick City & County Council may be referred to An Bord Pleanála on payment of €220 for review within 4 weeks after the issuing of the declaration.





1377

170m

Approximate Location of Cable

Joint

Joint

Approximate Location of Cable

Joint

3.22

0.20

0.37

0.35

ORdnance SURVEY (MAP NO.79 DISCOVERY SERIES)  
 (MAP NO.83 (8' and 2 1/2" HISTORICAL MAPPING))

- NOTES:
- All works to be carried out in accordance with appropriate ESN specification; specification for installation to be provided by the contractor to be used in conjunction with the relevant ESN specification for Communication Cables / Specification for the Installation of Cables and Structures for Underground (refer to attached).
  - Joint locations are indicative and subject to agreement with ESN.

Legend:

- Site Boundary (Red line)
- Landscape Boundary (Blue line)
- Underground Cables (Pink line)

Highfield Energy  
 29/11/2016  
 A (J8)

PROJECT NO:	29/11/2016
DATE:	29/11/2016
PROJECT NAME:	CABLE CONNECTION ROUTE
PROJECT LOCATION:	0.35
PROJECT SCALE:	A1 (1:500)
FIGURE NO.:	FIGURE 1.2 (F)
FIGURE TITLE:	SITE LAYOUT - BLOCK F

scale 1:500  
 25 m 50 m 75 m 100 m

Ordnance Survey Ireland Licence No. 510725/15  
 © Ordnance Survey Ireland/Government of Ireland



Schedule 2 - 'Area B' Photographs from before, during and after the installation of the underground duct and cable at one of the locations that has prompted this referral







**Photograph 1: BEFORE - May 2018, Pre-commencement at 'Area B' looking East. Note that there is NO hedgerow/bank/vegetation on the right hand (south) side of the road and the underground duct has not been installed**







**Photograph 2: 19 October 2018, Site Preparations completed on the left hand (north) side of the road at 'Area B' to facilitate safe access and egress of construction traffic to the Mauricetown Wind Farm site, note no duct installation works present on the right hand (south) side of the road.**







**Photograph 3: Week Ending 18 November 2018, installation of underground duct in accordance with Section 5 declaration EC16/59. Note the bituminous bound surface of the road has been cut and imported granular material that pre-existed the trench excavation is visible on the 'outside' face of the trench, i.e. the trench has been cut into the road.**







**Photograph 4: AFTER - 20 October 2020, Underground duct and cable works reinstated, vegetation on roadside bank recovered to original condition**



**Schedule 3 - Extracts from LCCC Section 5 File EC34/20**







→ Hedge row  
Removed  
Cable work  
S.P. 00  
Road widening  
No planning  
No riparian  
Consent

Fig. 6. Road widened and hedgerow removed within SPA (Area 2) (NPWS, 11.12.2018)



S.P.A

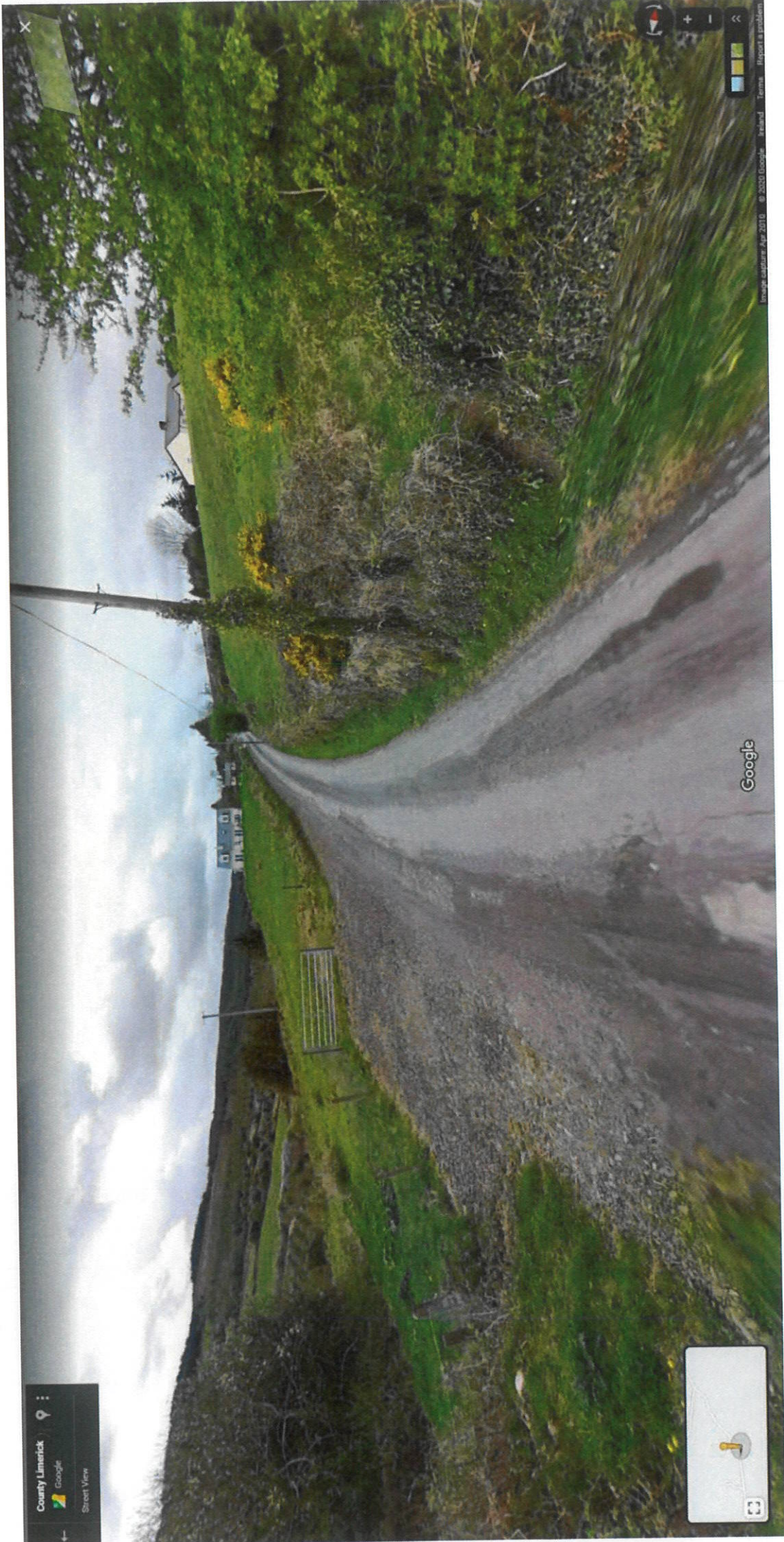
South of road, within SPA (Area 2) (NPWS, 11.12.2018)



Schedule 4 - Google Street View Screengrab 'Area B'







County Limerick  
Google  
Street View

Google

Image captured Apr 2010 © 2020 Google Ireland - Report a problem



**Schedule 5 – Warning Letter Correspondence**







Comhairle Cathrach  
& Contae Luimnigh

Limerick City  
& County Council

Seirbhísí Pleanála agus Comhshaoil,  
Comhairle Cathrach agus Contae Luimnigh,  
Tuar an Daill,  
Luimneach

Planning and Environmental Services,  
Limerick City and County Council,  
Dooradoyle,  
Limerick

EIRCODE V94 WV78

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## PLANNING & ENVIRONMENTAL SERVICES

DC-270-19

Mauricetown Wind Ltd  
Design Studio 7  
Old Castle View  
Kilgobblin Road  
Dublin 18

### WARNING LETTER

#### UNDER SECTION 152(1) OF THE PLANNING AND DEVELOPMENT ACTS 2000 as amended

Dear Sir/Madam,

- (A) You are the owner/occupier of certain lands situate at Glenduff, Ballaugh, Co. Limerick (hereinafter referred to as "the said lands") which lands are shown coloured red on the map attached hereto.
- (B) It has come to the attention of Limerick City & County Council as the Planning Authority that an unauthorised development may have been/is being/or may be carried out on the said lands, namely carrying out of works the removal of the roadside bank/ditch within an SPA for which there is no record of a Planning Permission being granted and therefore the said works are unauthorised
- (C) You being the person served with this warning letter may make submission or observations in writing to the said Planning Authority regarding the purported offence referred to in paragraph (B) not later than four weeks from the date of service of this warning letter



- (D) You are advised that if the said Planning Authority considers that an unauthorised development is being carried out an Enforcement Notice under the provisions of Section 154 of the Planning and Development Act 2000 as amended may be issued.
- (E) Officials of the said Planning Authority may at all reasonable times, enter the said lands for the purposes of inspection.
- (F) We also wish to point out that in the event of the Court holding that an offence has been committed under Section 151 or Section 154 you can be liable: -
- a. On conviction on indictment, to a fine not exceeding €12,697,380.78, or to imprisonment for a term not exceeding 2 years, or to both, or
  - b. On summary conviction, to a fine not exceeding €5,000, or to imprisonment for a term not exceeding 6 months, or to both.
- (G) The costs reasonably incurred by the said Planning Authority in relation to Enforcement proceedings may be recovered from you in the event of an Enforcement Notice being served on you or where a Court action is taken.

Any queries in relation to this matter should be addressed to Seamus Martin, Development Inspector.

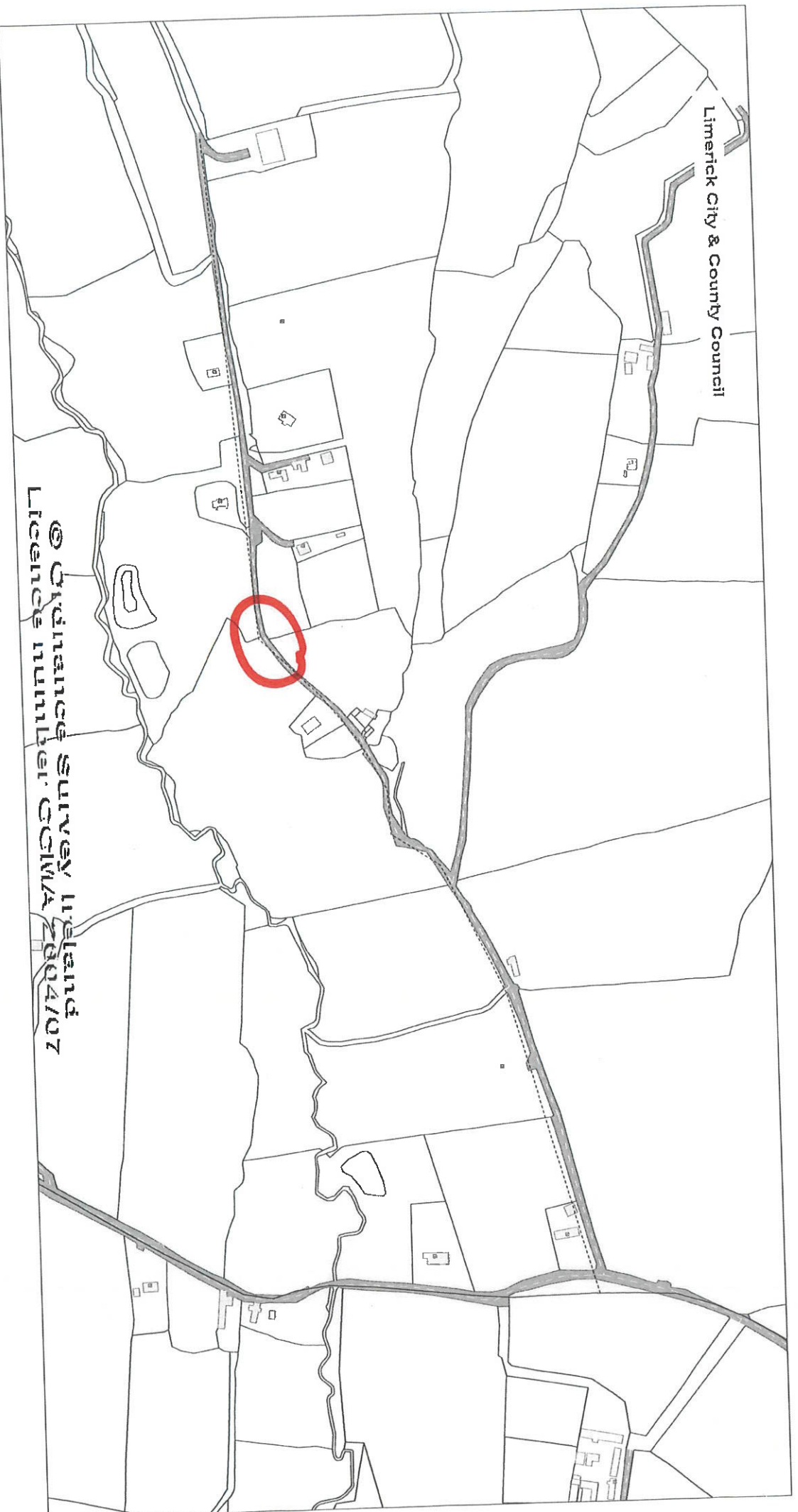
Dated this 5<sup>th</sup> day of September 2019

Signed on behalf of the said Council.

U. Cera  
For Director of Service  
Planning & Environmental Services



# Planning Site Analysis



Ordnance Survey Ireland  
Licence number: GOM/A 2004/07



Planning and Environmental Services  
Limerick City and County Council  
Dooradoyle  
Limerick V94 WV78

30 September 2019

Our ref: MAUR  
Your ref: DC-270-19

**Re: Warning Letter issued by Limerick County Council**

Dear Sir/Madam,

We act as the Project Managers for Mauricetown Wind Farm which is being constructed at Glenduff, Ballagh, Co. Limerick. We have been provided with a copy of correspondence from Limerick County Council dated 5 September 2019 in relation to this project.

A map was provided with the above correspondence indicating a general area on the local road in proximity to the project site. We have surveyed the location indicated and have not been able to identify the alleged unauthorised development carried out at this location.

I note that the principal contractors engaged to perform the construction works for this project have appointed Environmental Managers to monitor the works and ensure that all activities are carried out in line with the relevant planning consent and the Construction Management Plan.

Yours faithfully,



John O'Connor  
Highfield Energy Services Limited







Comhairle Cathrach  
& Contae **Luimnigh**

**Limerick City**  
& County Council

Seirbhísí Pleanála agus Comhshaoil,  
Comhairle Cathrach agus Contae Luimnigh,  
Tuar an Daill,  
Luimneach

Planning and Environmental Services,  
Limerick City and County Council,  
Dooradoyle,  
Limerick

**PLANNING & ENVIRONMENTAL SERVICES**

EIRCODE V94 WV78

**DC-270-19/SM/CL**

22<sup>nd</sup> October 2019

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John O' Connor  
Highfield Energy Services Ltd  
Design Studio 7  
Old Castle View  
Kilgobbin Road  
Dublin  
D18 A243.

**Re: Warning Letter – DC-270-19**

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Dear Sir/Madam,

I refer to your correspondence dated 30<sup>th</sup> September 2019 and enclose herewith a detailed map with road numbers and location shown for the unauthorised works, which have taken place.

You are hereby put on notice that this matter should be regularised in order to avoid further Enforcement proceedings being initiated.

Any further queries in relation to this matter should be addressed to Seamus Martin, Development Inspector.

Yours faithfully,

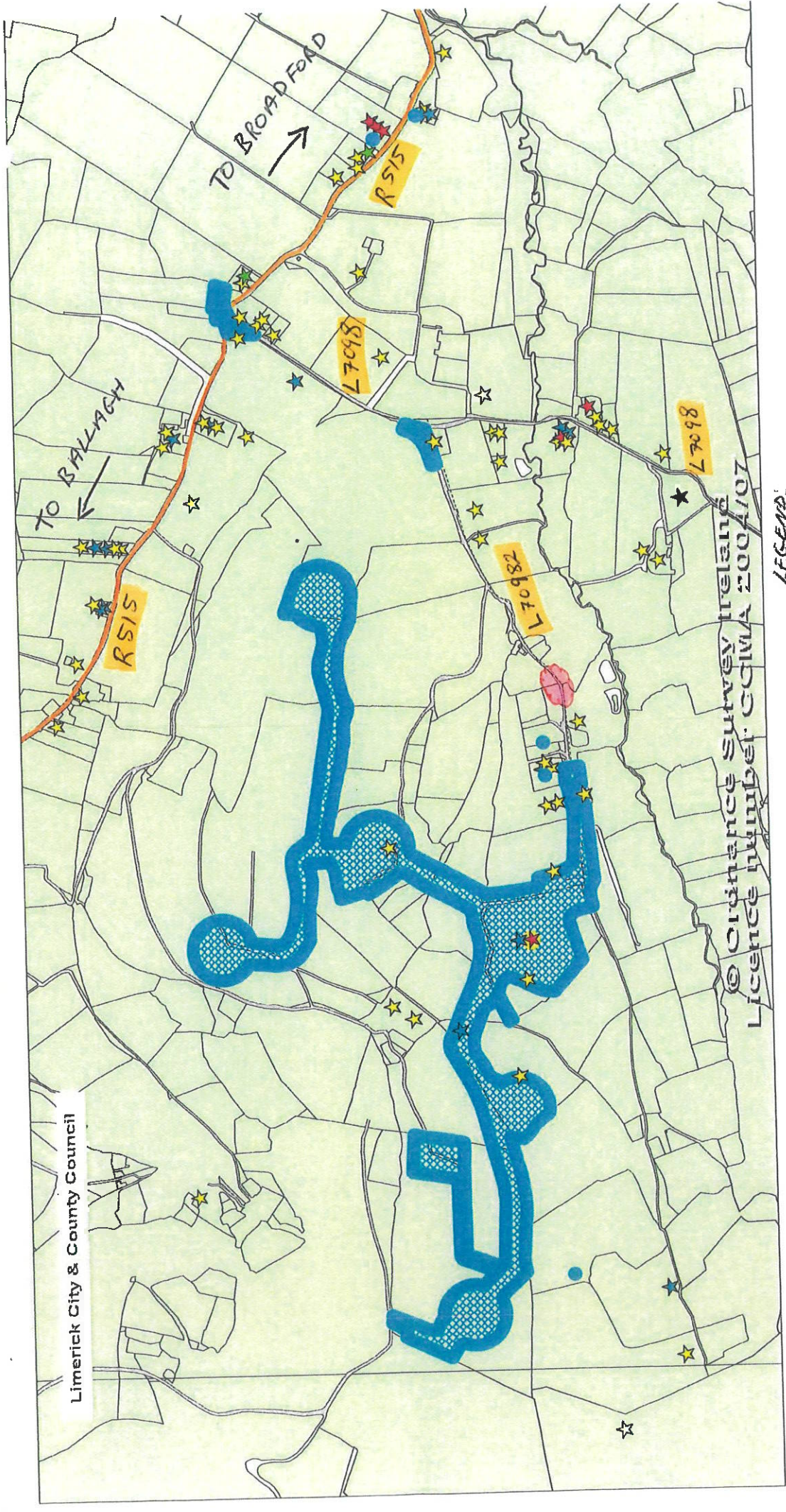
For Director of Service  
Planning & Environmental Services





PL13.1 910  
12/379




# Planning Site Analysis



SCALE 1 : 11,218



### LEGEND:

-  - PLANNING BOUNDARY REF. 12/379 / PL.13.2004
-  - LOCATION OF UNAUTHORISED WORKS
-  L70982 - PUBLIC ROAD NUMBER





Planning and Environmental Services  
Limerick City and County Council  
Dooradoyle  
Limerick V94 WV78

31 October 2019

Our ref: MAUR  
Your ref: DC-270-19

**Re: Warning Letter issued by Limerick County Council**

Dear Sir/Madam,

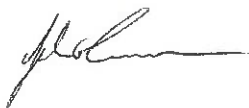
Further to my correspondence of the 30 September 2019 I have received your letter dated 22 October 2019.

Based on the information provided previously it was not possible to identify the alleged unauthorised development.

Nonetheless, I have initiated a further investigation of this matter based on the further information that you have provided and I will contact you in due course when I have the result of that process.

I would reiterate my previous point that the principal contractors engaged to perform the construction works for this project have appointed Environmental Managers to monitor the works and ensure that all activities are carried out in line with the relevant planning consent and the Construction Management Plan.

Yours faithfully,



John O'Connor  
Highfield Energy Services Limited

