

# EIA Pre-screening – EIAR Not Submitted

|  |  |  |  |
|--|--|--|--|
| An Bord Pleanála Case Reference  |  | ABP-309494-3   |  |
| Development Summary  |  | whether completion of works is or is not development or is or is not exempt development<br>Droichead na h-Éireann, Liscarrow Co. Kerry |  |
| 1. Does the proposed development constitute an EIA project?<br>(that is involving construction works, demolition, or interventions in the natural surroundings)                      |  | Yes  | <input checked="" type="checkbox"/>  |
|  |  | No   |  |
| 2. If YES, does the proposed development, or any part of it, fall within a class of development set out in Part 1 or Part 2, Schedule 5 of the Planning and Development Regulations? |  |  |  |
| Tick   | Threshold                                  | Comment<br>(if relevant)   | Conclusion   |
| No   | N/A  |  | No EIAR or Preliminary Examination required  |
| Yes  | If YES, tick one of the following:         |  |  |
|  | Exceeds /<br>Is equal to /<br>No Threshold |  | EIAR required  |
|  | Sub threshold                              |  | Preliminary Examination required<br>(Issue letter to EPA if IED/ IPC/ Waste licence) |
| 3. If Preliminary Examination is required, has Schedule 7A information been submitted?   |  |  | Yes<br>No<br>N/A   |

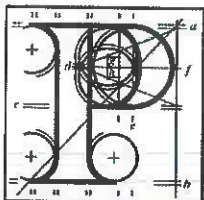
EO/SEO

*[Signature]*

Date:

11/3/20





An  
Bord  
Pleanála

## Observation on a Planning Appeal: Form

### Your details

#### 1. Observer's details (person making the observation)

Your full details:

(a) Name

Bluebell Wood & River Walk Action Group

(b) Address

Bluebell Woods & River Walk Action Group,  
C/O John Hillard, Skehenerin Lower, Listowel, Co.  
Kerry

### Agent's details

#### 2. Agent's details (if applicable)

If an agent is acting for you, please **also** provide their details below. If you are not using an agent, please write "Not applicable" below.

(a) Agent's name

Not applicable

(b) Agent's address

**AN BORD PLEANÁLA**  
LDG- 037  
ABP- \_\_\_\_\_  
18 MAR 2021  
Fee: € 50 Type: M.O.  
Time: AM By: Courier

AN DORD FLEANAALA

LOG- \_\_\_\_\_

ABR- \_\_\_\_\_

18 MAR 2021

Page: \_\_\_\_\_ Type: \_\_\_\_\_

Time: \_\_\_\_\_ By: \_\_\_\_\_

## Postal address for letters

3. During the appeal we will post information and items to you or to your agent. For this observation, who should we write to? (Please tick ☐ one box only.)

You (the observer) at the address in Part 1

☒

The agent at the address in Part 2

☐

## Details about the proposed development

4. Please provide details about the application you wish to make an observation on. If you want, you can include a copy of the planning authority's decision as the appeal details.

**(a) Planning authority**

(for example: Ballytown City Council)

Kerry County Council

**(b) Planning authority register reference number**

(for example: 18/0123)

EX877

**(c) Location of proposed development**

(for example: 1 Main Street, Baile Fearainn, Co Ballytown)

Dromin Lower, Listowel, Co. Kerry

## Observation details

5. Please describe the grounds of your observation (planning reasons and arguments). You can type or write them in the space below or you can attach them separately.



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## 1 Grounds for Observation

Four observations are based on schedule 1 of EX877.

The main plank of our observation relates to the conclusion on Appropriate Assessment and EIA and the adherence to the requirements EU Habitats Directive 92/43/EEC section 6.

The fifth observation relates to the site of the development being subject to legal rights-of-way associated with *profit-a-prendre* rights, bestowed to numerous landowners.

### 1.1 Observation 1: Points (a) & (b) Schedule 1 EX877 KCC

It is clear the existent palisade fence is works and would constitute development as per the requirements of the Planning and development Act 2000-2010.

### 1.2 Observation 2: Point (c) Schedule 1 EX877 KCC

***"The construction of a fence would generally come within the scope of exemption provided at Class 4, schedule 3, Part 2 of the Planning and Development Regulations, 2001-2020".***

KCC have made an error since the development is not, nor could be deemed exempted as no such exemption is provided by schedule 3, Part 2 of the Planning and Development Regulations, 2001-2020. Schedule 3 refers to site notices nor has a part 2!

In addition the palisade fence would not be exempted within the scope of agricultural use as per section 4 (1)(a) or section 4(1)(l) of the Planning and Development Act 2000.

### 1.3 Observation 3: Point (d) Schedule 1 EX877 KCC

Article 9(i)(a)(x) certainly applies as we have been enjoying this riverside walkway un-impeded for over 70 years.

### 1.4 Observation 4 Point (e) Schedule 1 Schedule 1 EX877 KCC

***"The proposed works do not require a Stage 2 Appropriate Assessment. Therefore, the provisions of Section 4(4) of the Planning and Development Act, 2000-2021, do not apply"***

Kerry County Council is erroneous in this declaration as their Appropriate Assessment Screening Report and sub-threshold Environmental Impact Assessment (EIA) Screening exercise (both original 2017 and 2021 reports), are defective in adherence to the requirements EU Habitats Directive 92/43/EEC section 6.

#### 1.4.1 Deficiencies of Appropriate Assessment Screening Report

The location of the fence is in a Special Area of Conservation (SAC) hence a Natura 2000 site; therefore, falls under the remit of the EU Habitats Directive 92/43/EEC section 6 and the relevant adoptions into Irish law of the directive, refer to **Figure 1**.

KCC cannot conclude that a Stage 2 Appropriate Assessment is not required as they have not undertaken an adequate assessment as required by EU Habitats Directive 92/43/EEC since the site is a Natura 2000 site which was not considered in their AA screening assessments in 2017 and



2021, refer to **Figure 4**. KCC acknowledge the site is an SAC but fail to define the site as a Natura 2000 site in itself; and focus their assessment from that perspective.

Article 6(3) stipulates the **likelihood** not the certainty of **significant** effects; such significant effects were (are) clearly obvious from the development in question (European Commission, 2018).

The purpose of the appropriate assessment is to assess the implications of the development in respect to the site's conservation objectives (European Commission, 2018). The screening report does not define the site's conservation objectives; a basic requisite to assess the likelihood and significance of effects of the development.

Section 3 of the AA screening report concludes that "interference with the movement of key species within, between or in the vicinity of Natura 2000 sites is not likely" refer to **Figure 6**. No consideration was made to the impact a palisade fence (no access at ground level) would have on the movement of the abundant local otter population. The extent local otter population was attested by the developer in a recent submission to KCC on another planning issue, refer to **Figure 12**. The preservation of otter and otter habitat are conservation objectives for the lower Shannon SAC, refer to **Figure 13**.

In addition, the NPWS AA guidelines for Planning Authorities states that *"unless the screening assessment can establish that there is no likelihood of any significant effect on a Natura 2000 site, then an AA must be carried out"* (NPWS, 2009).

It is not that KCC didn't have recent experience with a fence development in a SAC. The 2015 ABP "Fenit Island" case [08.RL.3219] findings should have been fresh in KCC's "corporate" memory when doing the screening exercise in 2017 and should have adopted its findings, refer to **Table 1**.

The overall conclusion from KCC's Appropriate Assessment Screening is that there is no potential for significant effects to Natura 2000 sites, refer to **Figure 8**. This conclusion was flawed as the subsequent development of the fence involved the use of a mechanical excavator to excavate foundations for the fence posts, and the uprooting of trees and plants and would impede the free movement of otter along the riverbank.

#### **1.4.2 Deficiencies in sub-threshold Environmental Impact Assessment (EIA) Screening**

Section 2 of the EIA screening report acknowledges that Nature 2000 sites exist in the "wider area" but does not state explicitly that the location of the development is a Natura 2000 site, refer to **Figure 3**, **Figure 4** and **Figure 5**. Hence, not adequately addressing potential impacts to a Natura 2000 site that may require an EIA.

Section 3's determination is that "it is not anticipated that many people will be adversely affected by the proposal", refer to **Figure 14**. The failure of KCC's analysis of the proposal to realise that a



very popular habitually open walkway was in danger of being permanently blocked highlights the lack of efficacy of such desk-based analysis.

The subsequent Senior Planner's report (25/1/21), following on-site inspection concludes correctly that:

- "The walkway is regularly in use" – even in the depths of mid-winter (30/12/20).

Therefore, above based conclusion should have led to an update to the conclusion in the 2017 deskbound assessment with the factual 2021 findings.

Section 4 of the Sub-threshold EIA Screening analysis concludes that an EIA is not required based on the nature, scale and location, refer to **Figure 9**. KCC deem that a proposal of this nature is unlikely to have significant effects, implying the size of the development is a mitigating factor in their conclusion. **Article 6** does not limit the requirement for assessment based on the scale of activity as the European Court of Justice has ruled, refer to **Figure 2**.

When the assessment process ends at the screening stage it is necessary "to provide supporting evidence and objective criteria" refer to **Figure 11**. There is no cogent supporting evidence documented to support the conclusions of the screening activity undertaken by KCC.

Overall, the fundamental precautionary principal enshrined in the Habitats Directive appear to have been ignored at every stage in KCC's assessments of this proposal, refer to **Figure 7**. Hence, according to the "precautionary principle; it is unacceptable to fail to undertake an appropriate assessment on the basis that it is not certain that there are significant effects" refer to **Figure 10**.

### **1.5 Development land subject to Profit-a-prendre Rights**

The site of the development is formerly part of the Ballinruddery estate, owned by the Knight of Kerry and is designated as plot 27 on the deed of sale map of 1923, refer to **Figure 15**.

The Fitzgerald family sold the Ballinruddery estate land to their then tenants in 1923. In addition, they also bestowed upon the purchasers (the former tenants) the right to fish the waters of River Feale within the former Ballinruddery estate. This obviously necessitated the establishing of rights of way along the riverbank for the purchasers to exercise their right.

These profit-a-prendre rights not only pertain to fishing rights (and right of way to exercise them) but also allow the removal of sand and gravel. Thus, each deed to each parcel of land was subject to rights and easements e.g., the right to fish within the estate but the easement to allow others with the right to fish to pass over the land.

These profit-a-prendre rights still exist for beneficial owners today and therefore the palisade fence is a wrongful interference with those rights. These rights are both secured "*at common law and by virtue of S.13 of the Irish Land Act 1903, to a right of access to the bank of the river for the purpose of exercising these fishing rights*" (Gannon v Walsh, 1998).

In addition, the exercise of such legal rights could be interpreted as lawful use pertaining to Article 9(1)(a)(x) of the Planning and Development Regulations.



## 2 Conclusion

### It is this groups contention that the following should be decision on the development

The erecting of the 2-metre-high palisade fence in the "Blue Bell Woods" within a designated SAC:

1. Would constitute both works and development within the scope of the Planning & Development Act 2000-2010.
2. Comes within the scope of the restrictions on exemption under article 9(1)(a)(x) of the Planning and Development Regulations 2001, as amended.
3. Requires Appropriate Assessment and therefore, comes within the restriction on exemptions under section 4(4) of the Planning & Development Act, 2000.
4. Does not come within the scope of the exempted development for agricultural use as specified under Section 4(1)(a) or Section 4(1)(l) of the Planning and Development Act 2000 as amended.





### 3 Other ABP cases with fence development in SAC.

| Case Description  | ABP reference | Main Findings  |
|---|---------------|--|
| Fenit Fence, Fenit Island, Co. Kerry                              | 08.RL.3219    | The said erection of the fencing (partly) within a designated Special Area of Conservation requires Appropriate Assessment and therefore, comes within the restriction on exemptions under section 4(4) of the Planning & Development Act, 2000. |
|   |               | the erection of a fence constitutes “works” that comes within the meaning of “development” in section 3(1) of the Planning and Development Act, 2000, and is development.  |
|   |               | the said erection of fencing around the coastline of Fenit Island comes within the scope of the restrictions on exemption under article 9(1)(a)(x) of the Planning and Development Regulations 2001, as amended.                                 |
| Standard wooden post and wire sheep fencing, Louisburgh, co. Mayo | 16.RL.3154    | The erection of the fence constitutes “works” that comes within the meaning of development as set out in Section 3(1) of the Planning and Development Act 2000 as amended.   |
|   |               | The erection of the said fencing does not come within the scope of the exempted development for agricultural use as specified under Section 4(1)(a) or Section 4(1)(l) of the Planning and Development Act 2000 as amended.                      |
|   |               | The works come within the scope of the restrictions on exemption under Article 9(1)(x) of the Planning and Development Regulations, 2001 as amended.   |
|   |               | [ABP] hereby decides that the said erection of a standard wooden post and wire sheep fencing at Corragan, Thallabawn, Louisburgh, County Mayo is development and is not exempted development.  |

Table 1 ABP cases with fence development in SAC



### 3.1 Figures

importance for rare and threatened habitats and species across the EU. In Ireland, the Natura 2000 network of European sites comprises Special Areas of Conservation (SACs, including candidate SACs), and Special Protection Areas (SPAs, including proposed SPAs). SACs are selected for the conservation of Annex I habitats (including priority

**Figure 1 What constitutes a Natura 2000 site in Ireland (NPWS, 2009)**

The Court has also ruled that the size of the project is not relevant as it does not in itself preclude the possibility that it is likely to have a significant effect on a protected site (Case C-98/03, Case C-418/04 paragraph 244).

**Figure 2 ECJ Judgement on irrelevance of project size relating to Article 6 of 92/43/EEC (European Commission, 2018)**

|  |  |
|--|--|
| <ul style="list-style-type: none"> <li>o Wetlands</li> <li>o Coastal zones</li> <li>o Mountain and forest areas</li> <li>o Nature reserves and parks</li> <li>o Natura 2000 sites</li> <li>o Areas in which</li> </ul> | <p>A number of environmentally sensitive sites are located in the wider area, including Natura 2000 sites, wetlands, lands designated for landscape and archaeological purposes and mountain / forest areas. It is considered that these are unlikely to be significantly affected by way of a proposal of this nature at this location.</p> |
|--|--|

**Figure 3 Failure to acknowledge development site is a natura 2000 site (Kerry County Council, 2017) (KCC, 2021)**

| Appropriate Assessment Screening Report  |                                       |
|--|---------------------------------------|
| Planning Reference Number:   | EX 877                                |
| Description of the proposed development (including a brief outline of its nature and size):                                  | 2m high palisade stock-proof fencing. |
| Is the proposed development directly connected with or necessary to the nature conservation management of a Natura 2000 site | No.                                   |

**Figure 4 Failure to acknowledge that the site is a Natura 2000 site (Kerry County Council, 2021)**



# 1. Proposed development site location relative to that of Natura 2000 Sites

Description of the development site location, relative to Natura 2000 sites, having particular regard to Natura 2000 sites located within 15Km of the proposed site or within the same water catchment as the proposed site

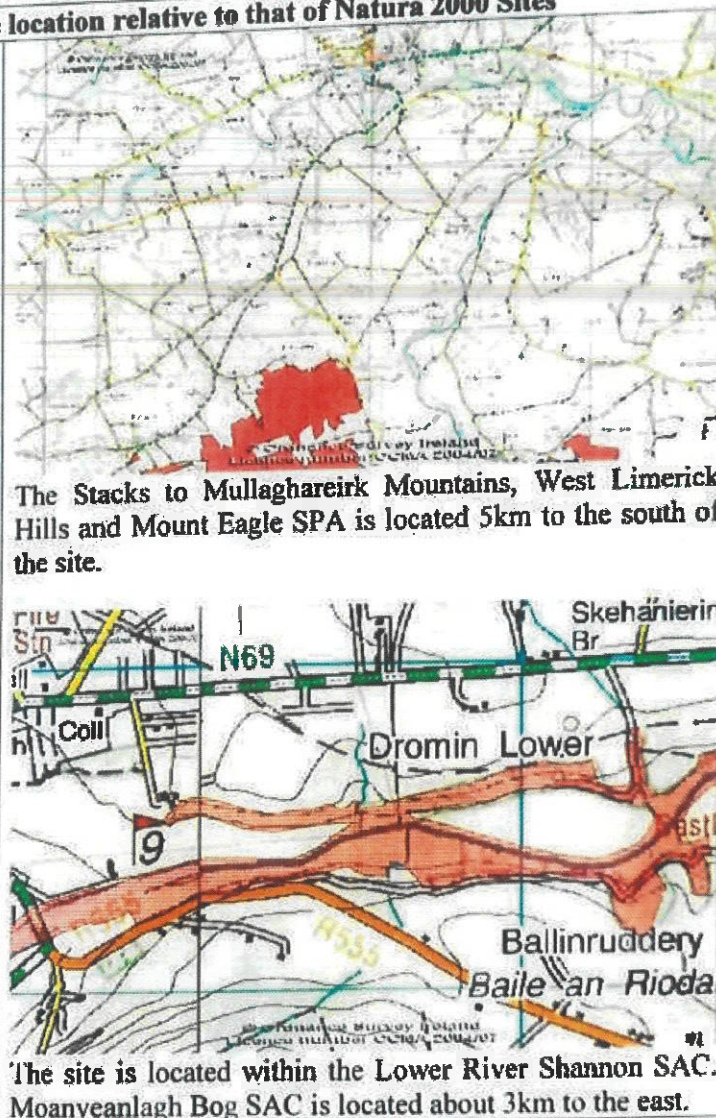


Figure 5 Failure to acknowledge that the site is a Natura 2000 site (Kerry County Council, 2021)

|   |            |
|---|------------|
| within Natura 2000 sites  |            |
| • Interference with the movement of key species within, between or in the vicinity of Natura 2000 sites | Not likely |
| • Interference with the   | Not likely |

Figure 6 Flawed conclusion on serious impact palisade fence would have on key species (otter) in this Natura 2000 site (Kerry County Council, 2021)





**Screening for appropriate assessment:** the screening of a plan or project to establish if an appropriate assessment of the plan or project is required. Unless the screening assessment can establish that there is no likelihood of any significant effect on a Natura 2000 site, then an AA must be carried out.

*Figure 7 Guidance for Planning Authorities on Appropriate Assessments (NPWS, 2009)*

#### 4. Conclusion (a, b, c or d)

(a) The proposed development is directly connected with or necessary to the nature conservation management of a Natura 2000 site<sup>1</sup>

b

(b) There is no potential for significant effects to Natura 2000 sites<sup>1</sup>

*Figure 8 Flawed Conclusion of Appropriate Assessment Screening Report (Kerry County Council, 2021)*

No significant impacts anticipated.

4. Recommendation and conclusion

Having regard to the above and in particular to the nature, scale and location of the proposed project, it is considered that an EIA is not required in this instance.

*Figure 9 Appropriate assessment Screening Report: Recommendations & Conclusions (Kerry County Council, 2017)*

The safeguards set out in Article 6(3) and (4) of the Habitats Directive are triggered not by certainty but by the possibility of significant effects. Thus, in line with the precautionary principle, it is unacceptable to fail to undertake an appropriate assessment on the basis that it is not certain that there are significant effects.

*Figure 10 Precautionary Principle Approach of Habitats Directive (NPWS, 2009)*





### 3.2.5. Screening Conclusion and Statement

The findings and conclusions of the screening process should be documented, with the necessary supporting evidence and objective criteria. This is of particular importance in cases where the AA process ends at the screening stage because the conclusion is that no significant effects are likely.

Figure 11 Requirement for supporting evidence when AA process ends at screening (NPWS, 2009)

14. The Screening Statement submitted by the applicants to : 201274 make reference to the fact there was no presence of otters along the River Feale. This is incorrect there are in fact large numbers of otters and minks living along the River Feale and their dens are clearly visible along the river.

Figure 12 Developer's submission of objection to KCC planning No. 201274 on 21 Jan 2021

#### Conservation objectives for: Lower River Shannon SAC [002165]

1355 Otter *Lutra lutra*

To restore the favourable conservation condition of Otter in the Lower River Shannon SAC, which is defined by the following list of attributes and targets:

Figure 13 Example of conservation of otter as objective of Lower Shannon SAC (NPWS, 2012)

Magnitude and complexity of the impact

It is not anticipated that many people will be adversely affected by the proposal. The magnitude of impacts is not considered to be overly great or complex.

Figure 14 Section 3 of the Sub-threshold EIA Screening analysis (Kerry County Council, 2017) (KCC, 2021)



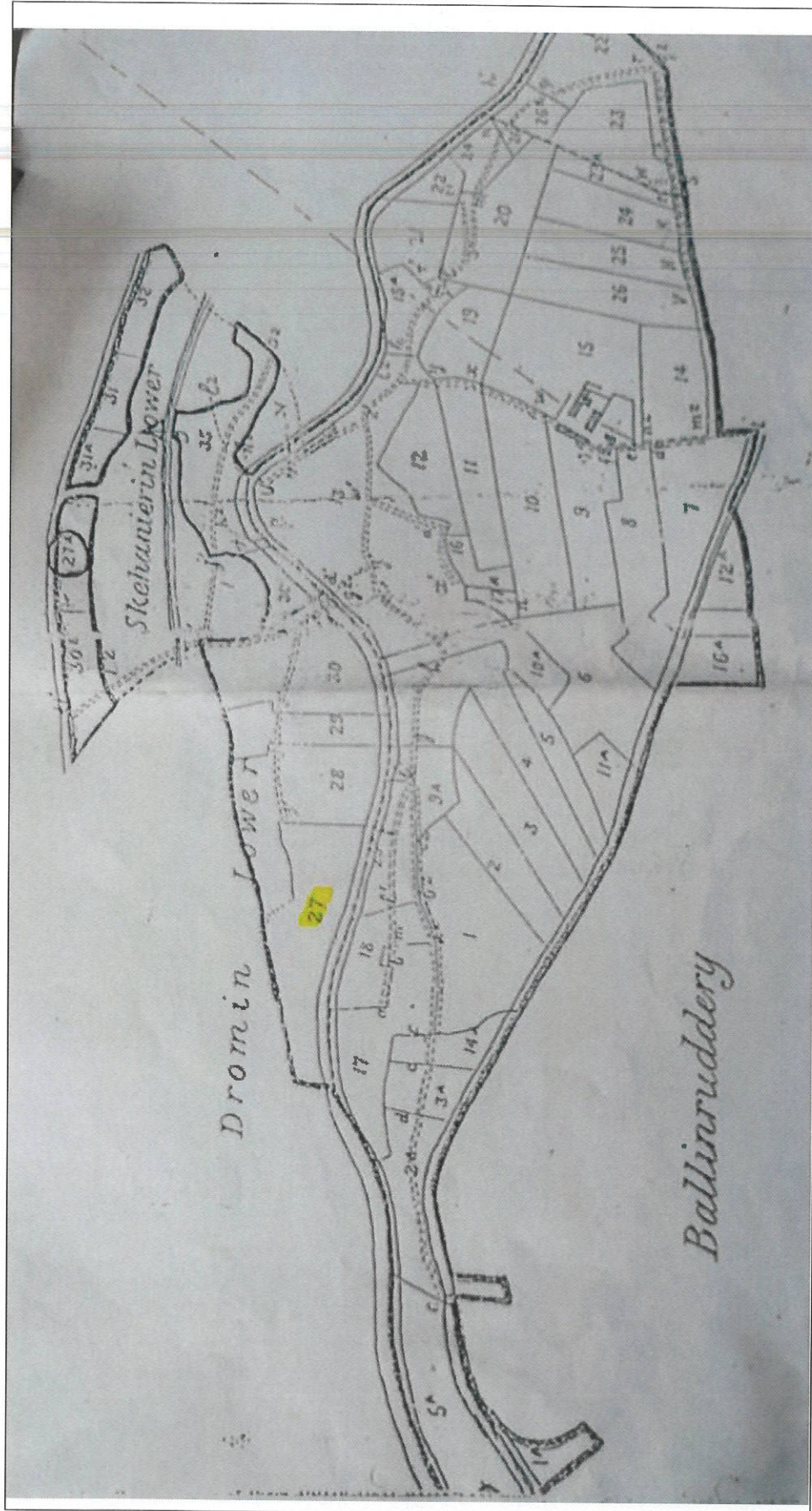


Figure 15 1923 Deed map showing plots of land within the Ballinruddery estate.



#### 4 References

European Commission. (2018). *Managing Natura 2000 Sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC*.

Gannon v Walsh, IR 245 (High Court June 20, 1998).

KCC. (2021). *Sub-threshold Environmental Impact Assessment (EIA) Screening Exercise*.

Kerry County Council. (2017). *Declaration & Referral on Development EX624 PL/17/1328*.

Kerry County Council. (2021). *Appropriate Assessment Screening Report for EX 877*.

NPWS. (2009). *Appropriate Assessment of Plans and Projects in Ireland; Guidance for Planning Authorities*.

NPWS. (2012). *Conversation Series; Lower Shannon SAC 002165*.





## Supporting material

6. If you wish you can include supporting materials with your appeal.

Supporting materials include:

- photographs,
- plans,
- surveys,
- drawings,
- digital videos or DVDs,
- technical guidance, or
- other supporting materials.

## Fee

8. You **must** make sure that the correct **fee** is included with your observation.

You can find out the correct fee to include in our [Fees and Charges Guide](#) on our website.





NALA has awarded this document its Plain English Mark Last  
updated: April 2019.



