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An Bord Pleanála
64 Marlborough Street,
Dublin 1.
D01 V902

AN BORD PLEANÁLA
LDG- 081436 -22
ABP- _____
21 APR 2022
Fee: € 200 Type: CHEQUE
Time: 16:03 By: HAND

20th April 2022

My Ref: 1916/Rathcairn

REFERRAL – Section 5 Planning and Development Act 2000, as amended

Re: Section 5 Declaration Application – Meath County Council Planning Reference No: KAS52214.

The Question: “Whether the gate at entrance sited on south-eastern boundary of lands in Folio MH 56744F on Local Road No. L40042 in Rathcairn, Athboy, is development and, if so, is or is not exempted development.”

Declaration of Planning Authority: The subject gate sited on the south-eastern boundary of lands in Folio MH 56744F on Local Road L40042 in Rathcairn, Athboy, is development requiring planning permission as per the Planning and Development Regulations.

Date of Declaration: Friday, 25th March 2022.

Dear Sir/Madam,

Introduction

1. I act on behalf of Mr Colm Griffin, Rathcairn, Athboy, Co. Meath. Following the service of a Warning Letter on my client, I was requested to make an application on his behalf to Meath County Council for a declaration under section 5 of the Planning and Development Act 2000, as amended, on the above-mentioned question: - “Whether the gate at entrance sited on south-eastern boundary of lands in Folio MH 56744F on Local Road

- No. L40042 in Rathcairn, Athboy, is development and, if so, is or is not exempted development.”
2. Meath County Council in its determination of the application declared that the entrance as described in the subject application constitutes development and is not exempted development (**Refer: Appendix 1 – Copy of Declaration**). My client does not accept this declaration and has instructed me to refer it, on his behalf, under section 5 of the Planning and Development Act 2000, as amended, to An Bord Pleanála on the grounds that the entrance sited on Local Road No. L40042 along the south-eastern boundary of his lands contained in Folio MH 56744F in Rathcairn, Athboy, Co. Meath, does not constitute development as defined in section 3(1) of the Planning and Development Act 2000, as amended, and, accordingly, does not require planning permission, and that the erection of a replacement gate at that entrance constitutes development, which is exempted development under the relevant provisions of the Planning and Development Regulations 2001, as amended.
 3. In the event of An Bord Pleanála determining that the entrance constitutes development, it would be my submission that it constitutes exempted development, by reason of its inclusion in Class 9 of Part 1 of the Schedule 2 of the Planning and Development Regulations 2001, as amended, and that the restrictions on exempted development in Article 9 of the aforementioned Regulations are not applicable thereto.
 4. I enclose herewith the sum of €220.00 in payment of the prescribed fee for making the referral.

The Submission

5. The subject entrance is located on Local Road No. L40042 along the south-eastern roadside boundary of my client's land held under Folio MH 56744F in Rathcairn, Athboy, Co. Meath. It is my understanding that the entrance in question has been in existence for about 100 years. I refer in this context to the attached affidavit sworn by my client (**Refer: Appendix 2 – Copy of Affidavit and attachments**). It indicates that the entrance in question is known locally as “Geata Na Sli” (the resting gate) and that it has existed for approximately one hundred years. Over the years, the entrance/ gateway was used by farmers and passing trade who would let their livestock drink from the watering hole located on the land. In support of his declaration my client has attached a photograph taken from within his lands of the gate at the entrance, prior to it being

replaced and a copy of a street view of the roadway, dated 2018, which clearly shows the entrance and gap in the treeline along the roadside boundary. It is his sworn declaration that an entrance has always existed at that location, which is supported by the maps/photographs attached to his affidavit. He also declares that he recently cleaned up the entrance and fitted a new gate and hanging posts to replace the original gate along with some "stone way" for ease of access.

6. The Council's response to this submission, as set out in its Planning Report on the declaration application, is as follows: -.

"The applicant has provided a photo of the entrance from inside the field highlighting a gate at the entrance location. Google street view from 2018 and 2009 indicate a dip in the hedgerow, which potentially was the location of a previous entrance.

*The entrance may have been in use many years ago, however from recent street views evidence the use of the entrance has been abandoned and hasn't been in use for a considerable period of time and the construction of a new gate and entrance **could represent a material change of use.**"*

7. In the 'Conclusion and Recommendation' to the Report, the Council's view became more definitive on the issue of abandonment in that it is observed that: -

*"I note the applicant has stated the entrance has been in use for over 100 years, however, from the photographic evidence submitted and the google street view from 2009 and 2018 the use of an entrance has been abandoned and hasn't been in use for a considerable period of time and the construction of a new entrance and gate **are considered to be a material change of use.**"*

8. The Council's view on my client's application is that the use of the subject entrance has been abandoned, as it has not been used for a considerable period of time. My client does not accept this determination. He has sworn an affidavit to the effect that there has been a field entrance at this location for over 100 years. The best evidence of its existence is that there was a gate in place at this entrance as evidenced by the photograph from within the field of the subject gate – this is acknowledged, as indicated above, by the Council. Both the aforementioned photograph and the streetside photograph submitted by my client, show a clear gap in the hedgerow which delineates the field's boundary, the extent of which coincides with the width of the gate referred to above. It is referred to in the Council's Planning Report as a "*dip in the hedgerow which*

potentially was the location of a previous entrance". I would submit in the alternative that this description does not accurately describe the nature of the space between the roadside hedgerows, and that the existence of the gap and the gate, and the sworn affidavit of my client represent substantial evidential grounds that there was an entrance at that location. The critical issue to be determined by the Board is, in my submission, whether or not the subject entrance was, in a planning and development context, abandoned.

9. The concept of abandonment relates to the scenario where a use may have been discontinued for a period of time resulting in the abandonment of the use and leaving the land with a nil use. For guidance in this matter, I refer to the following quotation from 'Simons on Planning Law (Third Edition) David Browne': -

"The mere suspension of a development will not, generally amount to abandonment. It has been held, however, that where a previous development has not merely been suspended for a temporary and determined period but has ceased for a considerable time, with no evinced intention of resuming it at any particular time, it is a question of fact whether or not the former use has been abandoned."

(Dublin County Council v Tallaght Block Company Limited [1982] I.L.R.M. 535 to 540: unreported Supreme Court May 1983)

10. I would also, in this context, refer to the following extract on the subject of 'abandonment' from "Irish Planning Law and Procedure" – Eamon Galligan which states that: -

"The abandonment of a use, as with abandonment at private law, involves an actus and animus. A use which has been discontinued is regarded as having been abandoned if there is: -

- (i) a factual cessation of activity.*
- (ii) an intention not to resume that activity.*

The property or site involved is deemed to have "no use".

The matter of whether or not it was intended to resume the development is, therefore, a critical consideration in determining whether or not a use has been abandoned.

11. The Council in its determination of this issue with regard to my client's entrance, as indicated above, has concluded, based on two street views of the area of the entrance from 2009 and 2018, that it was abandoned and hadn't been in use for a considerable period of time. There is, incidentally, only one street view – 2018 – presented in the Report. I would suggest that if reference is made to a particular street view to support a

proposition being presented in a report, that it should be included, otherwise the point grounded on it should be disregarded.

12. It is accepted that the entrance has not been in active use for a period of time, and that poor maintenance of the roadside area in its vicinity resulted in it becoming overgrown. The critical question is, however, whether or not it was ever intended to resume its use as an entrance. I would submit that the retention of the gate at that location, as shown in the photograph attached to my client's affidavit, represents clear evidence that it was not the intention to cease to use it at any stage in the future. The gate was retained to allow the entrance to be used, should its use become necessary for any particular reason e.g. to facilitate access of agricultural machinery to the field. It is interesting to note that the Council in its assessment of the subject application, as I have indicated previously, did recognise the existence of the gate on foot of the above-mentioned photograph, but made no comment as to its significance.
13. It is my submission on behalf of my client, that the subject entrance, which has been in place for approximately 100 years, as testified to by my client's affidavit, was in existence on 1st October 1964, and, on the basis of the reasons and considerations set out above, has not been abandoned as contended by the Planning Authority, and its use as an entrance for the purpose of gaining access to and egress from the field served by it, does not, therefore, require planning permission.
14. On the question of whether or not "development" as defined in section 3(1) of the Planning and Development Act 2000, as amended, i.e. *"the carrying out of works on, in or over land or the making of any material change in the use of any structure or other land"*, has taken place at the above-mentioned entrance, it is accepted the erection of the new gate does fit within that definition. Details of the gate and its dimensions are shown on the drawing "Plan, elevation and photo of Existing Gate" lodged with the application, a copy of which is enclosed with this Referral (**Refer: Appendix 3**). The gate is c.4.75m in width and 1.2m in height. It is hanging on a wooden post c.1.5m high and a steel girder, 1.9m in height. It is set back c.3.5m from the edge of the road. The area at the gate i.e. the gateway, has been re-surfaced with compacted stone to facilitate agricultural traffic movements into and out of the field. The question now to be considered is whether or not its development constitutes exempted development.
15. Article 6(1) of the Planning and Development Regulations 2001, as amended, provides that, subject to the restrictions on exempted development provided for in article 9 of the Regulations, development of a class specified in Column 1 of Part 1 of Schedule 2 of the

Regulations shall be exempted development for the purposes of the Planning and Development Act 2000, as amended, subject to the development complying with the conditions and limitations specified in column 2 of Part 1 of Schedule 2 opposite the mention of that class in column 1.

16. The Council, in its assessment of the declaration application, raised the question as to whether or not *"Class 9 of Schedule 1 of Part 3 of the Planning and Development Regulations 2001, as amended, were applicable in this case"*.
17. It is my submission that the above-mentioned subject reference is incorrect, and should relate to Class 9 in Part 1 of Schedule 2 of the Regulations which refers, under the heading of "Sundry Works", to *"The construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate, or gateway"*.
18. The Council in its assessment of the application accept that the development, as described above, could be defined under Class 9. It is my submission on behalf of my client that it does come within that class of development, being a gate, not bounding or within the curtilage of a house and not exceeding 2m in height.
19. The next issue to be addressed relating to the development of the gate is whether or not any of the restrictions on exempted development, as referred to above, which are set out in Article 9 of the Planning and Development Regulations 2001, as amended, would be applicable.
20. The Council, in its consideration of this issue, focused on the restriction set out in Article 9(1)(a)(ii) of the Regulations. This relates to a situation where the carrying out of such development would *"consist of or comprise the formation, laying out or material widening of the means of access to a public road, the surfaced carriageway of which exceeds 4m in width"*.
21. The Council's view is that this restriction is applicable, given its contention that a new entrance has been formed at the subject location, and the surfaced carriageway of the public road exceeds 4m in width.
22. It is my submission, in the first instance, given that the development at issue comprises the replacement of an existing gate by a new gate – it does not *"comprise the formation, laying out or material widening of a means of access to a public road"* as the entrance, as per my client's affidavit, already exists and, therefore, the restriction is not applicable.

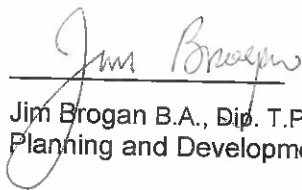
23. Without prejudice to my contention as set out above that the making of the entrance does not require planning permission, as it is an existing entrance. I wish to address this issue on the basis that the Board may accept the Council's proposition that a new entrance is being made because the previous entrance was abandoned. If that is the case, it is my submission on behalf of my client that the above-mentioned exemption as detailed in Class 9 of Part 1 of Schedule 2 of the Regulations, as referred to above, is applicable in this case.
24. The Council's view, as I have indicated previously, is that the exemption is not applicable because the surfaced carriageway of the adjoining public road exceeds 4m and the restriction on exempted development in Article 9(1)(a)(ii) is operative in this case. It should be noted that the width of the metalled carriageway of the road in the vicinity of the entrance is represented as being 3.96m on the above-mentioned drawing lodged with the declaration application (Refer: Appendix 3). There is, however no comment on this fact in the Council's Planning Report on the application, nor does the Planning Report state what is the actual width of the carriageway as measured by the Council. I would submit that where the width of the road is the critical point at issue, there is an onus on the Planning Authority to clearly state and provide evidence, in light of the above, as to what it understands to be the actual width of the surfaced carriageway.
25. I have re-visited the site following receipt of the Council's declaration, and conducted measurements at three different locations on the metalled carriageway i.e. the surfaced carriageway, of the public road opposite the centre of the gate and the two structural supports on which it is hung, I recorded its width as c.3.96m, as indicated in the lodged drawing. Even allowing for a slight variation in the above, none of the measurements exceed 4.0 metres. Given this fact, the restriction as specified above is not applicable in this case.
26. It should be noted that this was the only restriction from Article 9 cited by the Council in its Report on the Declaration application. There is no reference in the Council's Report or its Declaration to any other restrictions on exempted development as set out in the aforementioned Article. It is reasonable, therefore, in my submission, in light of that fact, to assume that none were deemed applicable by the Council. I concur with this determination.
27. To conclude, it is my submission on behalf of my client with regard to this issue, that in the event of the Board deciding to reject my proposition that the entrance was not abandoned and does not require planning permission, that, having regard to the reasons

and considerations as outlined above, its formation and all the related works constitute exempted development.

Conclusion

28. In conclusion, it is my submission on behalf of my client that (a) the entrance, detailed in the application made for a section 5 Declaration to Meath County Council and on the enclosed drawing existed on October 1st 1964; that it was not "abandoned" in the interim, and that it does not constitute an unauthorised entrance and its use does not, therefore, constitute development for the purposes of the Planning and Development Act 2000, as amended, and that (b) the erection of the replacement gate at that entrance constitutes development which is exempted development for the reasons and considerations set out above, and in the event of An Bord Pleanála determining that the entrance constitutes development, that it constitutes exempted development by reason of its inclusion in Class 9 of Part 1 of the Schedule 2 of the Planning and Development Regulations 2001, as amended, and that the restrictions in Article 9 of the aforementioned Regulations are not applicable for the reasons and considerations outlined above.

29. I request, therefore, that An Bord Pleanála, having regard to the reasons and considerations outlined above, determine this referral to that effect.



Jim Brogan B.A., Dip. T.P., M.I.P.I., Dip. L.S., Dip. Arb., B.L.
Planning and Development Consultant

Appendix 1

Decision of Meath County Council re: Section 5
Declaration Application – Planning Register
Reference No: KAS52214.

MEATH COUNTY COUNCIL

Planning Department

Buvinda House

Dublin Road

Navan

Co Meath

046 - 9097500

Planning & Development Act 2000- 2021

DECLARATION

**To: Colm Griffin,
C/O Jim Brogan, Planning & Development Consultant,
Unit B1 Laurel Lodge,
Castleknock,
Dublin 15.**

PLANNING REFERENCE NUMBER:	KAS52214
APPLICATION RECEIPT DATE:	01/03/2022
FURTHER INFORMATION DATE:	N/A

In pursuance of the powers conferred upon them by the Planning and Development Act 2000-2021, Meath County Council has by order dated 25-03-22 decided to Declare the proposed development is **development requiring planning permission**, in accordance with the documents submitted namely: Whether the gate at entrance sited on south-eastern boundary of lands in Folio MH 56744E on Local road No: L40042 in Rathcairn, Athboy, Co. Meath is development and if so, is or is not exempted development. This is development requiring planning permission as per the Planning and Development Regulations 2001- 2021.

WHEREAS in considering this application, regard has been had to Section 2, 3, 4 of the Planning and Development Act 2000-2021, Article 9 and Schedule 2 of the Planning and Development Regulations 2001-2021.

The "works" incorporate the following:

"construction & replacement of a gate".

These works constitute 'development' which comes within the scope of Section 3 of the Planning and Development Act 2000-2021.

The development could be defined under Class 9 of Schedule 2, Part 1 of the Planning and Development Regulations 2001-2021 refer to "*The Construction, erection, renewal or*

replacement, other than within or bounding the curtilage of a house, of any gate or gateway". However, the development does not comply with Article 9(1)(a)(ii) consists of or comprise the formation, laying out or material widening of a means of access to a public road the surfaced carriageway of which exceeds 4 metres in width.

I note the applicant has stated the entrance has been in use for over 100 years, however, from the photographic evidence submitted and the google street view from 2009 & 2018, the use of an entrance has been abandoned and hasn't been in use for a considerable period of time and the construction of a new entrance and gate are considered as a material change of use.

Therefore, the proposed development is considered to be development and not exempted development under Class 9 of Schedule 2, Part 1 of Planning and Development Regulations 2001-2021 and Article 9(1)(a)(ii) of Planning and Development Regulations 2001-2021 and it is recommended that a Section 5 Exemption Certificate be refused.

NOT

NOW THEREFORE Meath County Council, in exercise of the powers conferred on it by Section 5(2)(a) of the Planning and Development Act 2000 (as amended), hereby decides that the said development as detailed on particulars submitted 01/03/2022 is 'Development' and is 'Not Exempted Development'.

Date: 25.03.22

R. O'Connell
On Behalf of Meath County Council

NOTE:

1. Any appeal against a Declaration of a Planning Authority under Section 5, sub-section 3(a) of the Planning and Development Act 2000 may be made to An Bord Pleanala by the applicant WITHIN FOUR WEEKS beginning on the date of issue of the Declaration.
2. Appeals should be addressed to An Bord Pleanala, 64 Marlborough Street, Dublin 1. An appeal by the applicant should be accompanied by this form. The fee for an appeal against a Declaration of the Planning Authority is € 220.

For more information on Appeals you can contact An Bord Pleanala at:

Tel: 01 - 8588100 or LoCall: 1890 275 175

Fax: 01 - 8722684

E-mail: bord@pleanala.ie

Web: www.pleanala.ie

Appendix 2

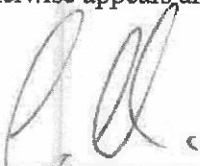
Affidavit of Mr. Colm Griffin, Rathcairn, Athboy, Co. Meath
re: lands in Folio MH 56744F in Rathcairn, Athboy, Co.
Meath.

AFFIDAVIT OF COLM GRIFFIN

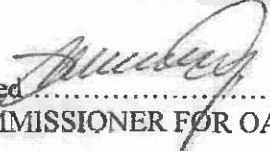
I, Colm Griffin of 5 Rathcairn, Athboy, County Meath aged eighteen years and upwards make oath and say;

1. This affidavit relates to lands situate at Rathcairn, Athboy, County Meath which are comprised in Folio MH56744F (hereinafter called "the lands"). I refer to a copy of the Land Registry Map for the lands attached hereto and in particular to an area on plan reference: BJM65 and which I have marked with the letter "B".
2. I say that this area marked with the letter "B" comprises a gateway and entrance into that portion of the lands and is known locally as "Geata Na Sli" (the resting gate). I say that from my own knowledge and from inquiries which I have made locally, that this entrance has been in existence for approximately one hundred years, I say that down the years this entrance and gateway was used by farmers and passing trade who would let their livestock drink from the watering hole located on the lands.
3. I say that in recent times I have cleaned up the entrance which had become overgrown and I fitted a new gate and hanging posts to replace the existing gate along with some stone way for ease of access. I beg to refer to a photograph of the original gate prior to it being replaced and which I have marked with the letter "A". I also refer to a street view map of the roadway dated 2018 and which clearly shows the entrance and gap in the tree line, and I have marked this map with the letter "B".
4. I say that it is clear from the maps and photographs furnished that this gateway has been in existence for one hundred years or more and does not constitute a new entrance.

I make this affidavit from facts within my own knowledge save were otherwise appears and where so appearing I believe the same to be true.


.....
Colm Griffin

Declared by the said Colm Griffin at Athboy in the County of Meath this ^{26th} day of January 2022 before me a Commissioner for Oaths and I know the Declarant.


Signed,
COMMISSIONER FOR OATHS

MEMORANDUM FOR THE RECORD

DATE: 1/15/54

TO: SAC, [illegible]

FROM: SA [illegible]

RE: [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Folio Number: MH56744F

Folio Number: MH56744F

Folio Number: MH56744F

675590 mE, 763690 mN

Application Number: P2017LR015468A

Application Number: P2017LR015468A



The Property Registration Authority
An tÚdairís
Cíártháin Maoine

Folio: MH56744F

This map should be read in conjunction with the folio.

Registry maps are based on OSI topographic mapping. Where registry maps are printed at a scale that is larger than the OSI published scale, accuracy is limited to that of the original OSI map scale.

For details of the terms of use and limitations as to scale, accuracy and other conditions relating to Land Registry maps, see www.land.ie.

This map incorporates Ordnance Survey Ireland (OSI) mapping data under a licence from OSI. Copyright © OSI and Government of Ireland.

(centre-line of parcel(s) edged)

- Freehold
- Leasehold
- Subleasehold

Burdens (may not all be represented on map)

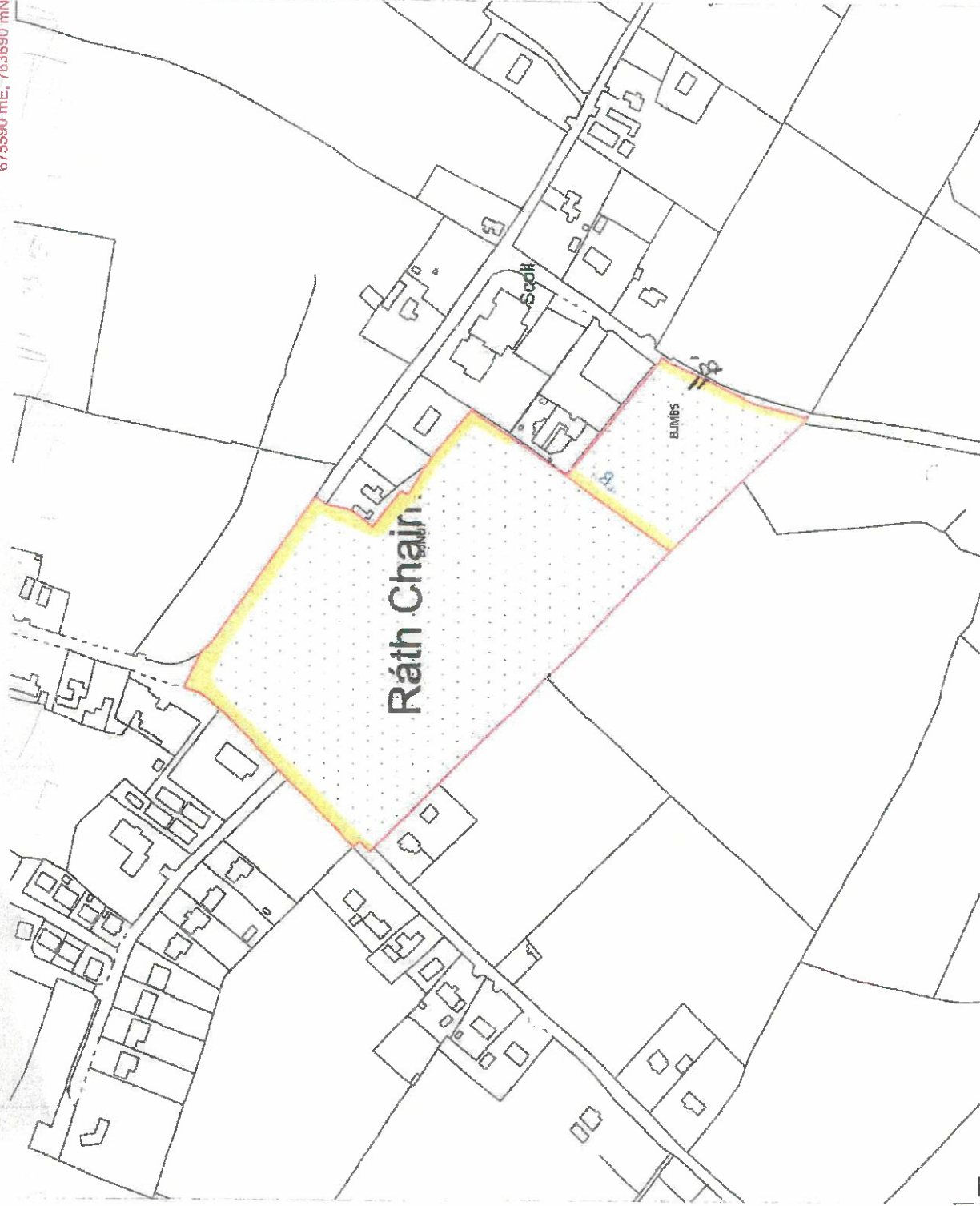
- Right of Way / Wayleave
- Turbary
- Pipeline
- Well
- Pump
- Septic Tank
- ▽ Soak Pit

A full list of burdens and their symbology can be found at: www.land.ie/ie

The registry operates a non-conclusive boundary system. The Registry Map identifies properties not boundaries meaning neither the description of land in a register nor its identification by reference to a registry map is conclusive as to the boundaries or extent. (see Section 85 of the Registration of Title Act, 1964). As inserted by Section 62 of the Registration of Deed and Title Act 2006.



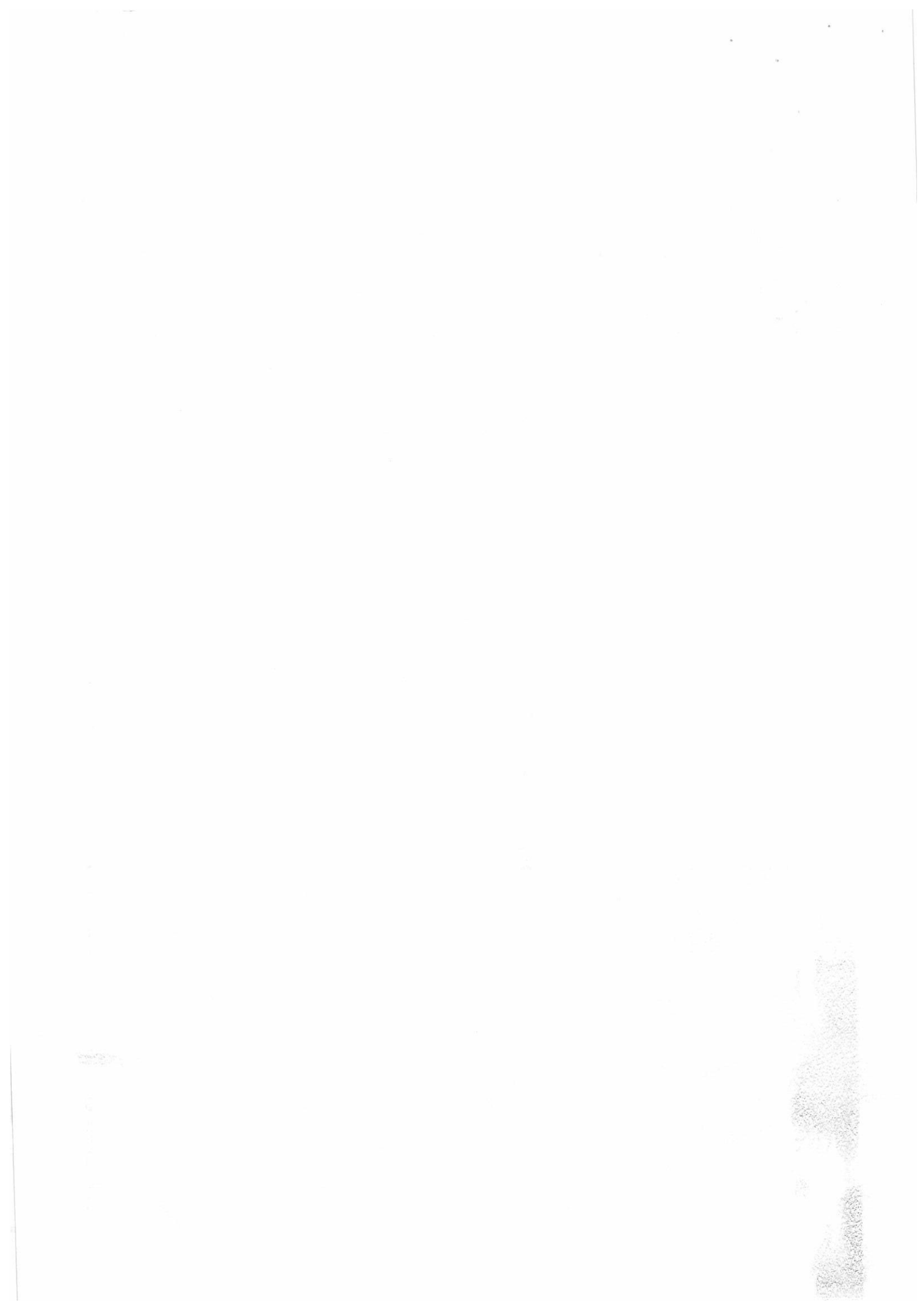
1:2500 Scale



674790 mE, 763040 mN
Date Printed: 23/02/2017

Creation Date: 23 February 2017 15:15:00

Application Number: P2017LR015468A





"A"



81

AN BORD PLEANÁLA

21 APR 2022

LTR DATED _____ FROM _____

LDG- _____

ABP- _____

Appendix 3

- Site Location Map.
- Plans, Elevation and Photo of Existing Gate.

