



## Comhairle Chontae Chill Chainnigh

Hall an Chontae Sraid Eoin Cill Chainnigh  
R95 A39T

Pobail agus Áiteanna Inbhuanaithe a Chruthú

### Registered Post

## Kilkenny County Council

County Hall John Street Kilkenny  
R95 A39T

Creating Sustainable Communities and Places

Kilkenny

An Bord Pleanála  
64 Marlborough Street,  
Dublin 1.

6<sup>th</sup> May 2022,

**Our Ref DEC 685    Your ref ABP-313221-22**

Dear Sirs

I refer to your letter of the 6<sup>th</sup> April last in relation to a referral by Kilkenny County Council in connection with a site at Lismaine County Kilkenny.

I now enclose a cheque for €110 in accordance with Section 127(1)(f) of the 2000 Act.

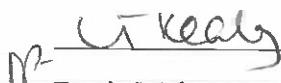
This referral has resulted from a referral to Kilkenny County Council by Mr. Aidan Brophy in relation to activity at a quarry at Lismaine county Kilkenny.

The questions raised by Mr Brophy relate to (a) historical quarrying activity at Lismaine and (b) intensified quarrying works at Lismaine.

Kilkenny County Council under previous correspondence dated 16<sup>th</sup> March 2022 has posed similar questions to An Bord Pleanála relating to recent works at the quarry (the construction of lagoons) and the operation of the quarry.

Having reviewed Mr Brophy's question to Kilkenny County Council and the question posed by the Council on the 16<sup>th</sup> March and having regard to the provisions of the Act under Section 5 in particular Section 5(4) the Planning authority considers it appropriate that Mr Brophy's question is also referred to An Bord Pleanála.

Regards

  
Denis Malone  
Senior Planner

<b>AN BORD PLEANÁLA</b>	
LDG- _____	
ABP- _____	
09 MAY 2022	
Fee: € <u>110</u>	Type: <u>cheque</u>
Time: _____	By: <u>Res Post</u>







COMHAIRLE CHONTAE CHILL CHAINNIGH  
Kilkenny County Council  
County Hall  
John Street  
Kilkenny



Tel: 056 7794000 / Fax: 056 7794004  
Email: [Planning@kilkennycoco.ie](mailto:Planning@kilkennycoco.ie) /  
Website: [www.kilkennycoco.ie](http://www.kilkennycoco.ie)

**Application Form for Declaration and Referral on  
Development and Exempted Development under  
Section 5 of the Planning and Development Acts 2000 (as amended)**

KILKENNY COUNTY COUNCIL  
PLANNING SECTION

16 MAR 2022

RECEIVED

*(This is a non-statutory advice application prepared by Kilkenny County Council for the purpose of advising people what information is required for a decision to be made under Section 5. This document does not purport to be a legal interpretation of the statutory legislation nor does it state to be a legal requirement under the Planning and Development Acts 2000 (as amended))*

**APPLICANT DETAILS:**

Applicant Name	AIDAN BROPHY
Address:	KNOCKROE, JENKINSTOWN, CO. KILKENNY, R95 AF30
Contact Telephone No:	
Fax No. or E-mail Address, if any:	

**PERSON/AGENT ACTING ON BEHALF OF APPLICANT (IF ANY):**

Name	NOT APPLICABLE
Address:	
Telephone No:	
Fax No. or E-mail Address:	
Should all correspondence be sent to the Agents address? Yes { } No { }	



Section 5 of the Planning and Development Acts 2000 (as amended) states that if any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of these Acts, any person may, on payment of the prescribed fee, request in writing from the relevant Planning Authority a declaration on that question, and that person shall provide to the Planning Authority any information necessary to enable the authority to make its decision on the matter:

Sample Question: Is the construction of shed at Hebron Road, Kilkenny development and if so, is it exempt development?

PLEASE STATE THE SPECIFIC QUESTION FOR WHICH A DECLARATION IS SOUGHT:

(1) ARE HISTORICAL QUARRYING WORKS AND USE AT LISMAINE EXEMPT DEVELOPMENT?; (2) ARE INTENSIFIED QUARRYING WORKS AND USE AT LISMAINE EXEMPT DEVELOPMENT? SEE SUBMISSION  
Completion of this question is essential. Failure to do so will invalidate your application.

ADDITIONAL INFORMATION WHICH MAY ASSIST THE PLANNING AUTHORITY:

SEE COMPREHENSIVE SUBMISSION ATTACHED.

The Applicant is advised to set out the matter on which the declaration is sought, as comprehensively as possible using additional pages if necessary and should use additional material including plans and drawings as appropriate to give as full account as possible on this matter.



**LOCATION ADDRESS OF DEVELOPMENT:**

Site Location Map must be attached

LISMAINE TOWNLAND, BARONY OF FASSADININ

LOCATION MAP INCLUDED IN SUBMISSION (LAND REGISTRY MAP)

**SITE AREA:**

Area of site to which the application relates in hectares

ha

3.03

**WHERE THE APPLICATION RELATES TO A BUILDING OR BUILDINGS IF AVAILABLE:**Gross floor space of any existing building(s) in m<sup>2</sup>:Gross floor space of proposed works in m<sup>2</sup>:Gross floor space of work to be retained in m<sup>2</sup> (if appropriate):Gross floor space of any demolition in m<sup>2</sup> (if appropriate):

Overall height of any existing structure in metres:

Overall height of any proposed structure in metres:

Distance of existing or proposed structure to nearest dwelling(s) not being the applicants, where appropriate:

**WHERE THE APPLICATION REFERS TO A MATERIAL CHANGE OF USE OF ANY LAND OR STRUCTURE OR THE RETENTION OF SUCH A MATERIAL CHANGE OF USE:**

Details of Existing or Previous use:

AGRICULTURE

Proposed use (or use it is proposed to retain)

QUARRYING

Nature and extent of any such proposed use (or use it is proposed to retain)

3.03 HECTARES

**LEGAL INTEREST OF APPLICANT IN THE LAND OR STRUCTURE:**

Please tick appropriate box to show applicant's legal interest in the land or structure

A. Owner

B. Occupier

C. Other

NEIGHBOUR

Where legal interest is 'Other', please expand further on your interest in the land or structure:

NEIGHBOUR CONCERNED AT UNAUTHORISED DEVELOPMENT.



Name & Address of Landowner and/or Occupier if not the Applicant:

SEE LAND REGISTRY DETAILS IN APPENDICES TO

ATTACHED SUBMISSION.

**DEVELOPMENT DETAILS**

Please tick appropriate box	Yes	No
Does the proposed development consist of work to a <b>protected structure</b> and/or its curtilage or proposed protected structure and/or its curtilage?		<input checked="" type="checkbox"/>
Does the proposed development involve the <b>demolition of any habitable house or part thereof?</b>		<input checked="" type="checkbox"/>

Are you aware of any valid planning applications previously made in respect of this land/structure?  
Yes [ ] No [☒]

If Yes – Please provide Planning Register Ref. No(s) if known:

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The Applicant is advised that notwithstanding the completion of the above application form, that the Planning Authority may require the Applicant to submit further information or particulars with regard to the request in order to enable the Planning Authority to issue the declaration on the question.

The Applicant is also advised that the Planning Authority may request other person(s) other than the applicant to submit information on the question which has arisen and on which the declaration is sought.

Subject to the above, the Planning Authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request and where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.



**APPLICATION FEE ATTACHED:**

Fee payable €80.00: Payment must be made by Cash or Cheque which should be made payable to  
Kilkenny County Council

I hereby declare that, to the best of my knowledge and belief, the information  
given in this form is correct and accurate:

Signed: *Aidan Bradley*  
*Applicant or Agent as appropriate*

Date: 14<sup>TH</sup> MARCH 2022

Failure to complete this form or attach the necessary prescribed documentation,  
or the submission of incorrect information or omission of required information  
will lead to the invalidation of your application.

**THE FOLLOWING DOCUMENTATION IF AVAILABLE SHOULD BE  
SUBMITTED WITH YOUR APPLICATION:**

- Site Location Map (1:2500 Rural Areas) (1:1000 Urban Areas) with location  
of works clearly marked in red
- A Site Layout Plan (Scale 1:500)
- Drawings of the development (Scale 1:50)
- All drawings to differentiate between the original building, all extensions  
and proposed development
- Copy of Planning Permission, Fire Safety Certificate or any other statutory  
approval already obtained, where applicable
- Prescribed Fee of €80.00 Euro

**COMPLETED APPLICATIONS TO BE RETURNED TO:**

Kilkenny County Council  
Planning Department  
County Hall  
John Street  
Kilkenny



Att: Administrative Officer,  
Planning Section,  
Kilkenny County Council,  
County Hall,  
John's Street,  
Kilkenny  
February 2022

14<sup>th</sup> March 2022

Re: Section 5 Declaration with respect to quarrying works and use at Lismaine Townland in the Barony of Fassadinin, Co. Kilkenny

Dear Sir or Madam,

### 1. Section 5 Questions for Declaration

I wish to apply for a Section 5 Declaration (fee enclosed) with regard to the works and use of a site at Lismaine Townland in the Barony of Fassadinin, Co. Kilkenny; the site is the subject of the current ongoing enforcement action by Kilkenny County Council (reference 7 2021/00036 Kilkenny County Council -v- Kilkenny Asphalt Roofing Ltd and Donal O'Regan ).

The questions for Section 5 Declaration are as follows:

- (i) Are the historical quarrying works and use of the site development and are they exempt development?
- (ii) Are the intensified quarrying works and use of the site (including water discharge) since 2018 development and are they exempt development?

### 2. Introduction

The subject matter of this complaint concerns the development of a site at Lismaine Townland, County Kilkenny, within the ownership of Mr. Donal O'Regan and Mr. John O'Brien.

The site is that registered as Folio 14635F in the County of Kilkenny, i.e. KK14635F, and measures 3.003 hectares or thereabouts, see Appendix 1 for Folio Location Map and Land Registry Details. It is not mentioned as being a gravel pit or rock quarry.

This folio by purchased by the current owners in June 1994 from the owners of the adjacent gravel pit and developed post 2005 as a rock quarry.

The following analysis looks at the status of the site from original land purchase to its current state of development.

The context of the land purchase and now second quarry site is shown at Appendix 2 Site Location Map (Larger Scale).

### 3. 1994 Status

Though the adjacent pit may have been a bona fide pre-63 user in 1994, the existing pit as of June 1994 was a considerable distance from the land sold to O'Regan and O'Brien, and no pit face had reached the boundary of the land sold. Consequently, development of the sold land as a quarry constituted a new quarry, the pre-63 user rights of the existing pit not having transferred or been shared/diluted. The reasoning of *Waterford County Council v John A Wood Ltd* [1998] SC 32 precludes the forming of two pits with the purchase of the undeveloped land by generation of a wholly new extraction point unrelated to anything which had gone before, and it clearly was not the continuance of the existing pit as of the date of purchase.



#### 4. Section 261 Registration

Section 261 provided an opportunity for existing sites to register details of existing operations, a 'snapshot' of operations as of the date of registration. It is noted that there was an attempt to register the site as an operating quarry which was deemed late, i.e. details were submitted beyond the 27<sup>th</sup> April 2005. It is also noted that the Circuit Court recently (2021) ordered the retrospective registration of the site on the basis that *Browne v Kerry County Council* [2009] IEHC 552 provides for an extra nine days per year of planning process, thereby suggesting the last date for registration would have been 6<sup>th</sup> May and crucially after the date the attempt to register was made.

Section 261 related to operational details as of the original timeframe (2005), and the subsequent decision in *Pierson & Ors. v Keegan Quarries* [2010] IEHC 404 was determinative that the act of registration did not authorise any form of development which was not authorised by bona fide pre-63 user or a planning permission. Therefore, the O'Regan and O'Brien site may be Section 261 registered on foot of the recent decision of the Circuit Court but that does not mean that the development is authorised, nor can it become authorised merely by the imposition of operating conditions by Kilkenny County Council in compliance with the order of the Circuit Court.

A photographic history of development at the O'Regan and O'Brien site is attached at Appendix 3. This shows a small incursion in the north-west corner of the site; it is understood that this incursion was made to provide rock for the O'Regan and O'Brien activities within the adjacent site (operation of a business in the large shed and vicinity identifiable in the 2005 photograph and was not commercial quarrying for the purposes of operating a pre-63 user pit. Objectively, this appears to have been opportunistic development, carried out in order to seek to register the folio under Section 261.

Without prejudice to the above analysis, if the recent decision of the Circuit Court ordering the imposition of Section 261 conditions on the site is taken as lawful, then these conditions must relate to the 2005 state of development in accordance with the Section 261 legislation, and that the site was deemed a pre-63 user at that time. Therefore, at the very least, the subsequent development must be assessed within the context of the rules applying to pre-63 user, particularly the doctrine of intensification.

#### 5. Development 2005 to 2018

The site appears to have been developed sporadically between 2005 and 2018, with little or no activity in 2015 to 2018. However, by 2015, extraction at the site had clearly breached the water table, see Appendix 3. This constituted a material change in use in that the site developed in a manner inconsistent with the 2005 nature of development (now below water table). Such a change in use is outside any legitimate pre-63 use. It is not clear when the discharge of groundwater started.

The treatment of the site under Section 261A is unclear and ultimately immaterial to the current state of development as the area then developed by 2012 was less than the minimum EIA screening level of 2.5 hectares and there is likely no proof of a discharge at that time which might have required full Appropriate Assessment.

The 2018 photograph shows less than half of the site under development and a sizeable pond in the north-west corner of the site. Even at this stage, given the tiny incursion into the field in 2005 which would have formed the legitimate 'snapshot' if Section 261 registered then, the relative increase in scale was sufficient to breach the pre-63 user now claimed by the owners.



## 6. Development 2018 to Date

The drone photograph of 2021 shows the entire 3 hectares under development; this happened following the development of the site by commercial quarry operators. The site more than doubled in size in two to three years, thereby confirming intensification post 2005 and even separately again post 2018.

A significant discharge was ongoing to operate the site in 2021 with a large area clearly extracted to below the water table. This discharge impacted significantly on adjacent dwellings with septic tanks being flooded, leading to a very substantial human impact as well as a very likely impact through contamination of groundwater. This water ultimately runs to the nearby Nore SAC and SPA.

Consequently, it is clear that:

- i) while the site appears to have been developed without any rights, any pre-63 user rights which the Circuit Court has inferred into the site were intensified in scale and area since 2005 at an alarming rate rendering the site unauthorised;
- ii) the development of a rock quarry below the water table is a material change of use also rendering the site intensified and unauthorised;
- iii) the 3.0 hectare level of extractive development now present is above the sub-threshold EIA screening threshold which constitutes an EIA offence;
- iv) the development of an unauthorised discharge causing substantial harm to neighbouring septic tanks with the soiled water than running in an uncontrolled manner to a Natura site cannot be screened out for Appropriate Assessment and so constitutes an NIA offence associated with the development.

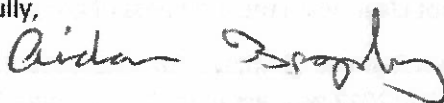
## 7. Conclusions

Retrospective Section 261 registration must reflect the development as of 2005, and the site is subject to all doctrines and jurisprudence pertaining to a pre-63 user. The site is now a substantial multiple of the 2005 scale and has even doubled in size in the last three years, with a material change to the nature of the development, including development below the water table and a significantly impactful unauthorised discharge.

Thus, the site is unauthorised, regardless of Section 261 registration status or attached conditions, and has incurred both EIA and NIA offences. Consequently, the site cannot be regularised under Section 34, see provisions of Section 34(12).

Find enclosed Section 5 application fee of 80 euro.

Yours faithfully,



Aidan Brophy,  
Knockroe, Jenkinstown, Co. Kilkenny R95 AF30

Appendix 1: Folio KK14635F Location Map and Current Land Registry Details

Appendix 2: Site location Map (Larger Scale)

Appendix 3: Photographic History of Site Development 2005-2021



## Appendix 1

### Folio KK14635F Location Map and Current Land Registry Details



# The Property Registration Authority An tÚdaráis Clárúcháin Maoinne



## Official Property Registration Map

This map should be used 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 or other conditions relating to Land Registry Maps, see [www.pra.ie](http://www.pra.ie).

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

(Acronyms of parcels assigned)

- Freehold
- Leasehold
- Subleasehold
- 'S' Register

(see Section 60(9) of Registration of Title Act 1964 and Rule 224 & 225 Land Registration Rules 1972 - 2010).

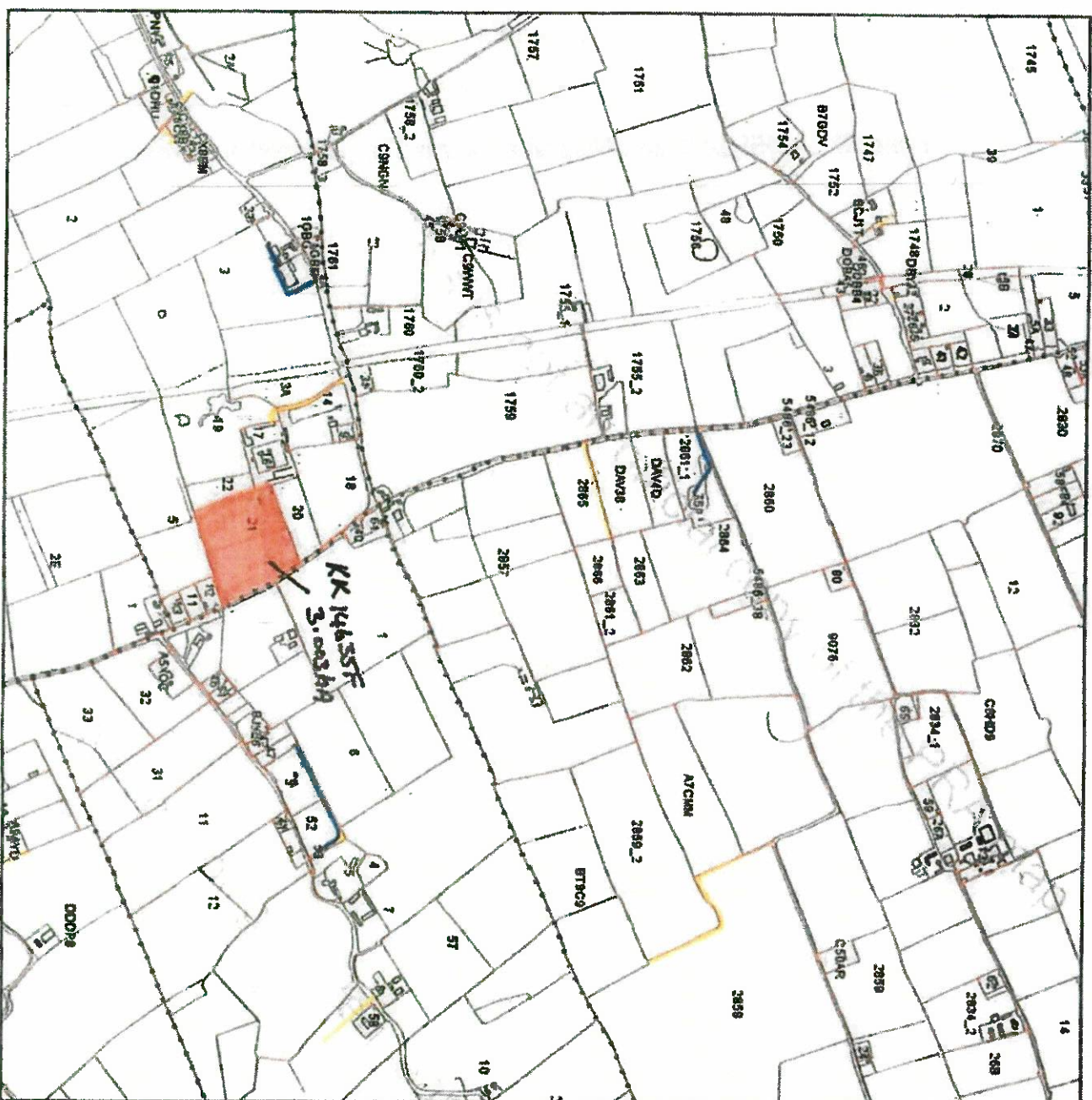
Burdens (may not all be represented on map)

- Right of Way / Wayleave
- Turbary
- Pipeline
- Wall
- Pump
- Septic Tank
- Sock Pit

A full list of burdens and their symbology can be found at: [www.landregistry.ie](http://www.landregistry.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 82 of the Registration of Deed and Title Act 2008.





# Land Registry

County Kilkenny

Folio 14635F

## Register of Ownership of Freehold Land

### Part 1(A) - The Property

Note: Unless a note to the contrary appears, neither the description of land in the register nor its identification by reference to the Registry Map is conclusive as to boundaries or extent

No.	For parts transferred see Part 1(B) Description	Official Notes
1	<p>A plot of ground being part of the Townland of LISMAINE and Barony of FASSADININ containing 3.0030 Hectares shown as Plan(s) 21 edged RED on the Registry Map (OS MAP Ref(s) 4525/5).</p> <p>The Registration does not extend to the mines and minerals</p>	<p>From Folio KK11231</p>

Land Cert Issued: Yes

Page 1 of 4

Collection No.:



# Land Registry

County Kilkenny

Folio 14635F

## Part 1(B) - Property

### Parts Transferred

No.	Prop No:	Instrument:	Date:	Area (Hectares):	Plan:	Folio No:



# Land Registry

County Kilkenny

Folio 14635F

## Part 2 - Ownership

Title ABSOLUTE

No.	The devolution of the property is subject to the provisions of Part II of the Succession Act, 1965	
1	24-JUN-1994 J4021/94	JOHN O'BRIEN of LORETO PARK, KILKENNY is full owner as tenant-in-common of 1 undivided 1/2 share(s). Land Cert Application No.: D2006TJ007601D Date: 23-MAR-2006 Issued To: POE KIELY HOGAN SOLICITORS Address: 21 PATRICK ST KILKENNY
2	24-JUN-1994 J4021/94	DONAL O'REGAN of BALLYRAGGETT, COUNTY KILKENNY is full owner as tenant-in-common of 1 undivided 1/2 share(s). Land Cert Application No.: D2006TJ007601D Date: 23-MAR-2006 Issued To: POE KIELY HOGAN SOLICITORS Address: 21 PATRICK ST KILKENNY



# Land Registry

County Kilkenny

Folio 14635F

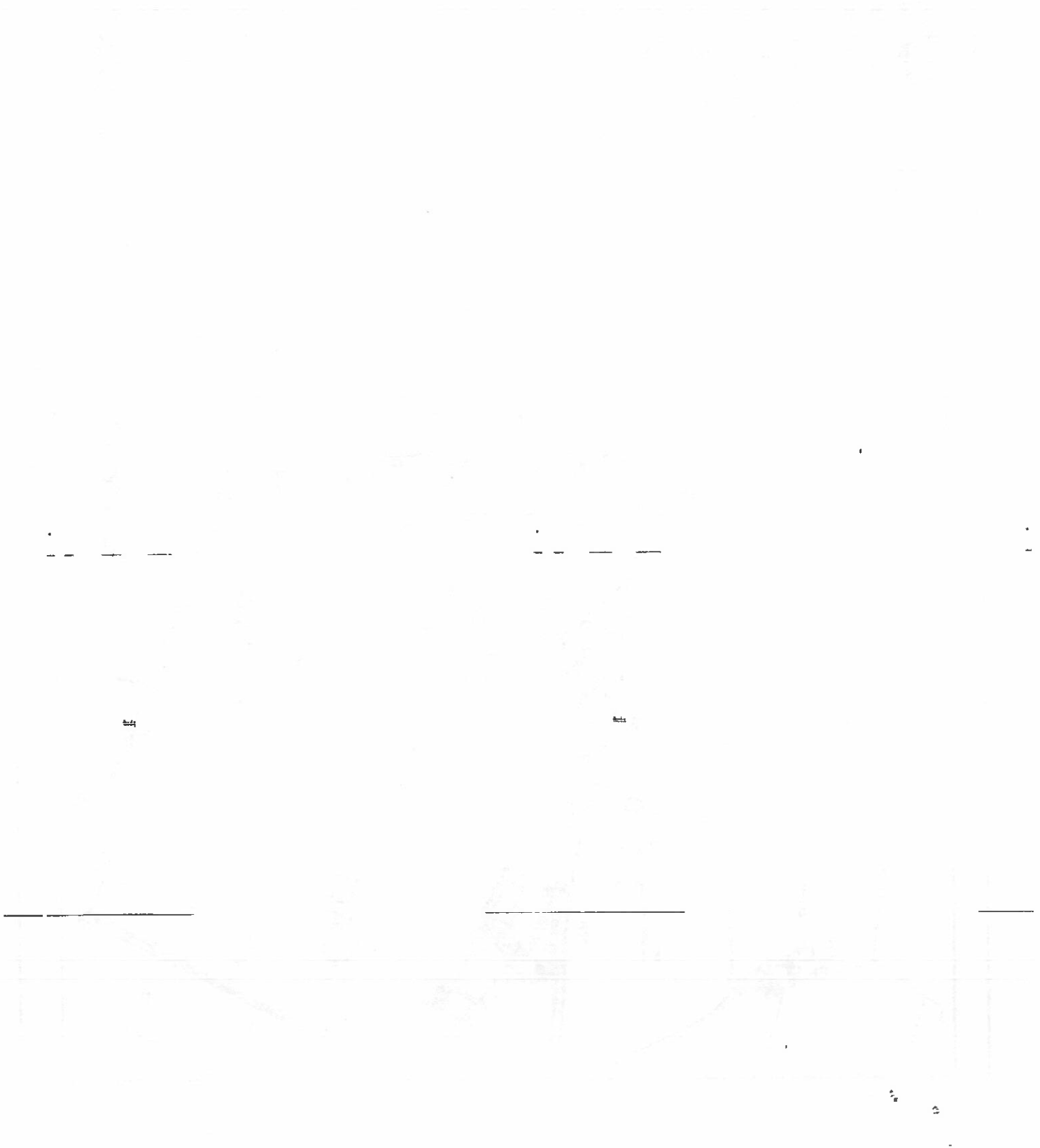
## Part 3 - Burdens and Notices of Burdens

No.	Particulars
1	<p>14-MAR-2006 D2006TJ007601D</p> <p>Charge for present and future advances repayable with interest. ALLIED IRISH BANKS plc is owner of this charge. Certificate of Charge issued. Rule 156</p> <p>Note: The ownership of this charge has been transferred. See Entry No.3</p>
2	<p>08-JAN-2013 D2013LR001282Y</p> <p>A judgment mortgage in respect of a a judgment obtained by THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND against John O'Brien, Donal O'Regan on 12th day of September 2012 in the High Court Record Number 2012/2228 S in a cause/matter/action of THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND v John O'Brien, Donal O'Regan against the interest of John O'Brien, Donal O'Regan in the property.</p> <p>Note: This judgment is registered also on folios KK21768F, KK24045F, KK21414F, KK7344F, KK6317F, LS14774F, LS30142F and LS107433F.</p>
3	<p>05-DEC-2018 D2018LR177601E</p> <p>EVERYDAY FINANCE DESIGNATED ACTIVITY COMPANY is the owner of the charge registered at Entry No.1</p>



## Appendix 2

### Site Location Map (Larger Scale)





# The Property Registration Authority An tÚdarás Clárúcháin Maoine



## Official Property Registration Map

This map should be read in conjunction with the folio.

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(colour-line of parcel(s) edged)

Freehold

Leasehold

Subleasehold

'S' Register

(see Section 8(3)(i) of Registration of Title Act 1964 and Rules 224 & 225 Land Registration Rules 1972 - 2010).

Burdens (may not all be represented on map)

Right of Way / Wayleave

Turbine

Pipeline

Well

Pump

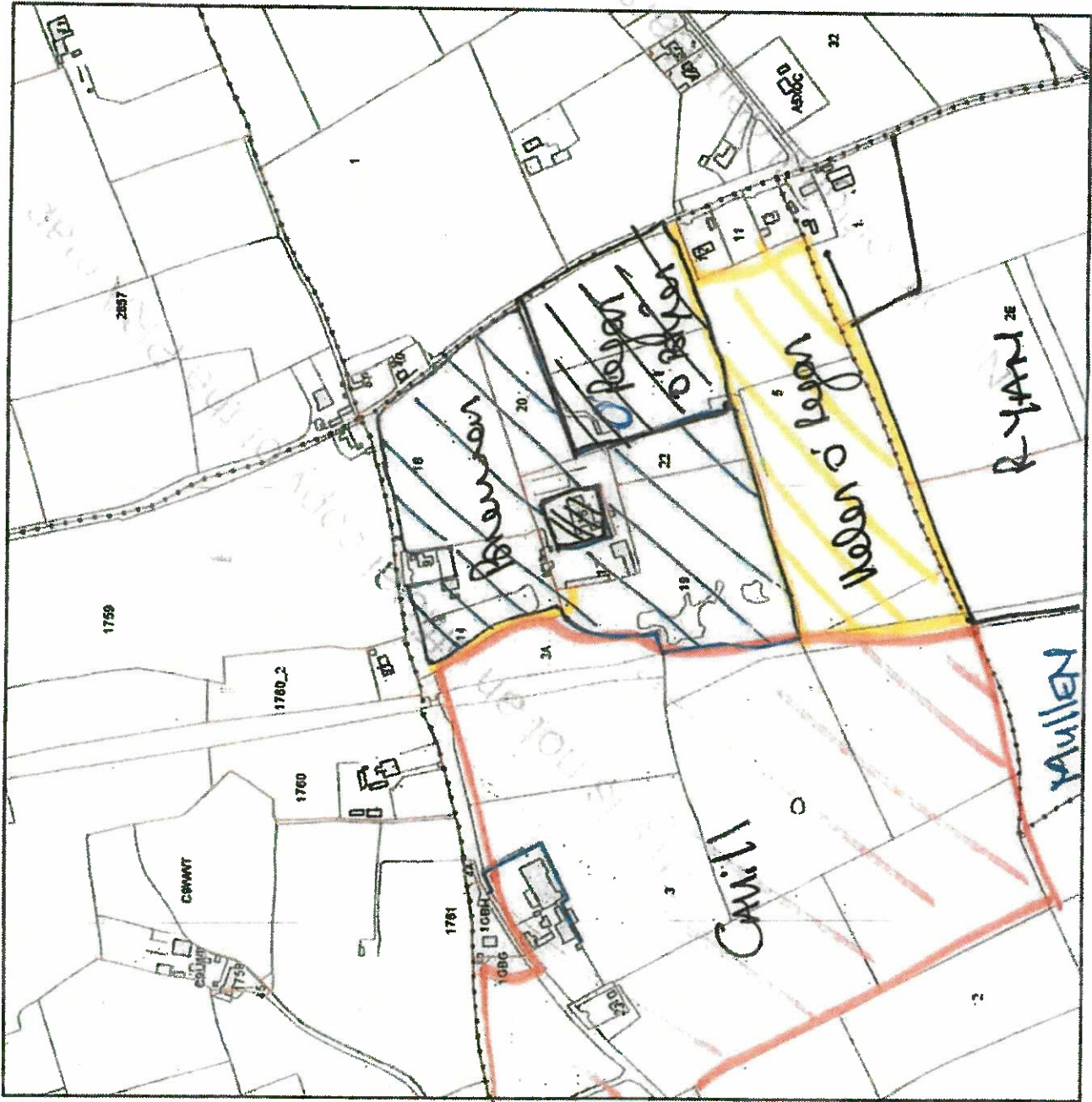
Septic Tank

Soak Pit

A full list of burdens and their symbology can be found at [www.pra.ie](http://www.pra.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 2008.





## **Appendix 3**

### **Photographic History of Site Development 2005-2021**



 Regan, Conahy 2005

Legend



Google Earth

Image © 2021 Maxar Technologies

200 m



LISMAVE  
Regan, Gonahy 2018

Write a description for your map.

Legend

 Inver N77 Dooley's Garage

Google Earth

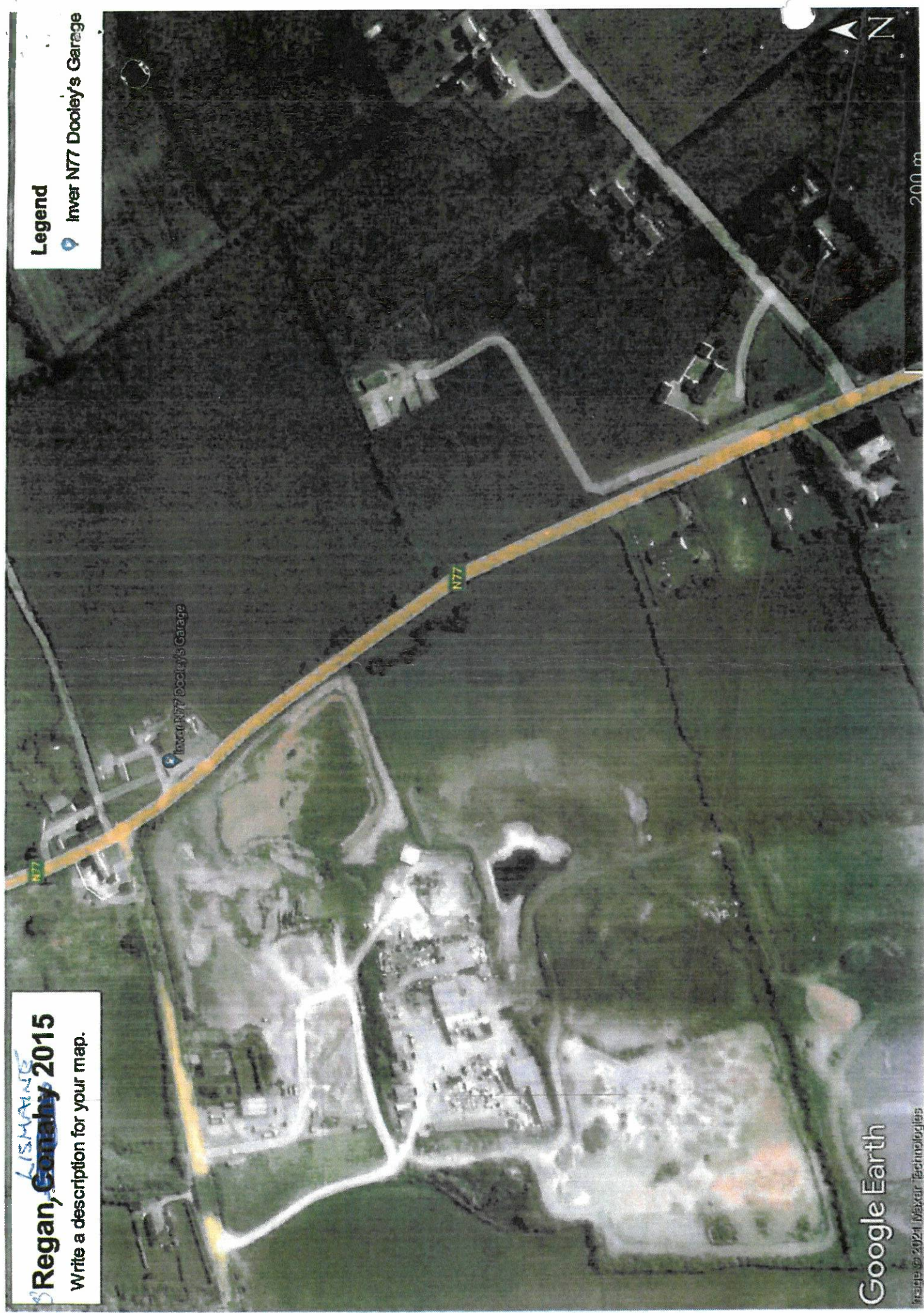
Image © 2021 Maxar Technologies





**Regan, Conahy 2015**  
Write a description for your map.

**Legend**  
Inver N77 Dooley's Garage



Google Earth

Image © 2024 Maxar Technologies



O'Regan, LISA ANNE  
~~CONTRACT~~

2021





Our Ref.: DEC 685

06.03.2022

Aidan Brophy,  
Knockroe,  
Jeninstown,  
Co. Kilkenny.  
R95 AF30

**Re: Application for Declaration under Section 5 of the Planning and Development Act 2000-2021**  
**Development Address: Lismaine Townland.**

A Chara,

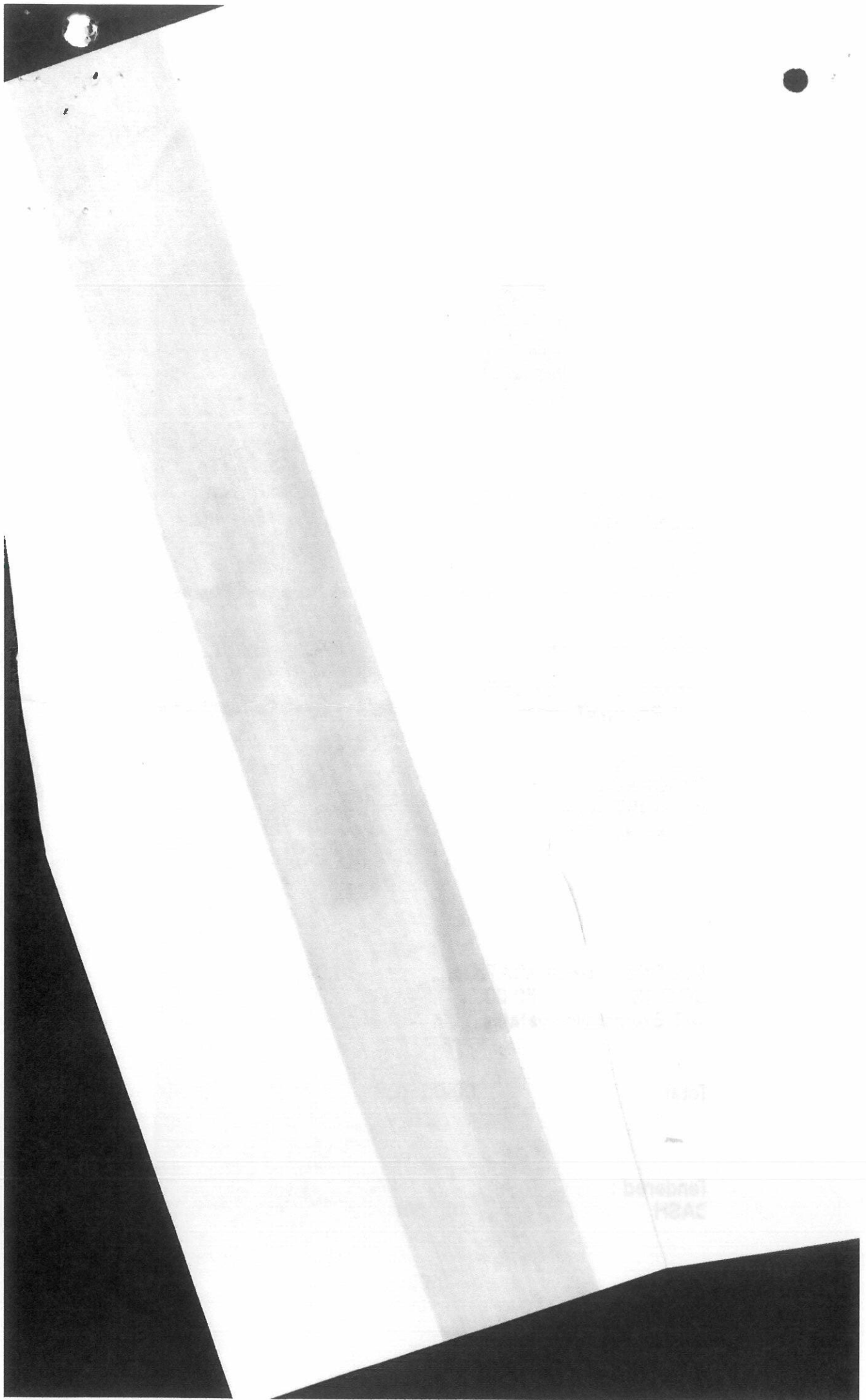
I wish to acknowledge receipt of your application in connection with the above on the 16/03/2022 and inform you that the matter is receiving attention. You will be informed of the Councils' decision in due course.

Please find enclosed receipt for €80.00 confirming payment of the application fee.

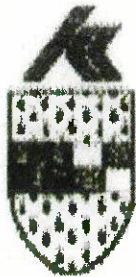
Is mise le meas,

**Planning Section**









KILKENNY COUNTY COUNCIL  
COUNTY HALL  
JOHN STREET  
KILKENNY

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18/03/2022 10:02:16

Receipt No : CASHOFF/0/358656  
\*\*\*\*\* REPRINT \*\*\*\*\*

AIDAN BROPHY  
KNOCKROE  
JENKINSTOWN  
CO. KILKENNY

SECTION 5 DECLARATION	80.00
GOODS	80.00
VAT Exempt/Non-vatable	

Total : 80.00 EUR

Tendered :  
CASH 80.00

Change : 0.00

Issued By : ANNETTE SINNOTT  
From : CASH OFFICE  
Vat reg No.0252728L