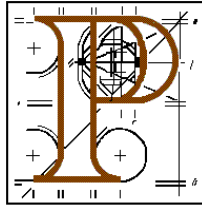


An Bord Pleanála



Inspector's Report

APPLICATION FOR LEAVE TO APPLY FOR SUBSTITUTE CONSENT

Board Reference: ABP-305621-19

Planning Authority: Cork County Council

Applicant: Murray Brothers Tarmacadam Ltd.

Date of Site Inspection: 23rd January, 2020

Inspector: Kevin Moore

1.0 INTRODUCTION

- 1.1 This is an application for leave to apply for substitute consent pursuant to section 177C(2)(b) of the Planning and Development Acts, 2000-2014. The application follows a previous application for leave to apply for substitute consent under ABP Ref. 302158-18 that was refused by the Board.

2.0 THE SITE LOCATION AND QUARRY OPERATION

- 2.1 The existing quarry is located at Ardcahan, approximately 5km north-east of Dunmanway in County Cork. The quarry is accessed from a minor road close to its junction with Regional Road R587 at Inchicahan Cross Roads. The regional road links Dunmanway to the south with Macroom to the north. The quarry within the landholding is worked out for a substantial part of its southern end. There are office/administration buildings, staff/visitor car parking and aggregate storage within this area and at the eastern end of this southern section there is a tarmacadam / asphalt plant and a large storage building. There are a network of internal roads throughout the holding. Lands to the south of the main access road at the southern extremity of the holding remain in mixed woodland while there are extensive areas beyond the worked out sections of the quarry that appear to remain undisturbed. There is extensive lands to the north and north-east of the southern worked out section that are covered in dense scrub. There is an existing watercourse that runs along the eastern and southern boundaries of the landholding that flows to the Bandon River a short distance to the west of the regional road. There is a pond within the north-east section of the holding.

3.0 THE APPLICANT'S SUBMISSION

An overview of the applicant's submission is as follows:

3.1 Background

The applicant submits that 'Note 2' of the Board's Direction under ABP-302158-18 gave some guidance in relation to a further application for leave to apply for substitute consent, wherein it was stated:

“any further application for leave to apply for substitute consent in the circumstances of this case can only be in relation to the quarrying development that took place between 1990 (when the EIA Directive came into force) and 2014 (when quarrying ceased) and can only be made in the context of Section 177C (2)(b), and not Section 177C (2)(a).”

The drawings and details now submitted to the Board are stated to illustrate the area the subject of the application for leave to apply for substitute consent relating to quarrying that took place between 1990 (when the EIA Directive came into force) and 2014 (when quarrying ceased). It is further submitted that the area is based on the definition of 'quarry' from the EU (Environmental Impact Assessment and Habitats) (No. 2) Regulations, 2011 and amended section 2 of the Planning and Development Act, i.e. extraction and ancillary uses (including access roads, plant and stockpile areas). Two large sections of the landholding are excluded from the application, stated to be future development lands, i.e. lands to the north-west and a quarried area stated to have been quarried prior to 1990.

The application before the Board details the planning history associated with the quarry. The applicant submits that they did not comply with the statutory obligation to register the quarry in 2005 pursuant to section 261 of the Planning and Development Act, that enforcement action was taken, a planning application for quarry extraction was subsequently granted, and a judicial review granted *certiorari*. It is submitted that, although relating to a permission for future quarrying, the judgement provided an opinion in relation to the option of substitute consent being available to address the particular issues relating to the quarry. The Board's recent refusal of the application for leave to apply for substitute consent is also set out.

It is submitted that the revised application for leave to apply for substitute consent has been made based on the following:

1. Quarry development that has taken place between February 1990 and October 2014 where the extraction area during this period was 5.67 hectares and where EIA would have been mandatory.
2. Quarry development which has taken place between February 1997 and October 2014 where appropriate assessment would have been required under the Habitats Directive.
3. The inclusion of the former quarry that was considered unauthorised development under Cork County Council Ref. SKBE/13/7 (i.e. Enforcement Notice).
4. The omission of land quarried prior to 1990 (labelled as “Area not included in Application for Leave for Substitute Consent – 2” i.e. ALSC-2) and future development/lands that have not been quarried (labelled as Area not included in Application for Leave for Substitute Consent – 1” i.e. ALSC-1) on Drawings 2546-S1, 2546-S2 and 2546-S3).

3.2 Grounds for Leave to Apply for Substitute Consent

Requirement for Environmental Impact Assessment

Ordnance Survey aerial photography for the years 1995, 2000, 2005 and 2014 is attached with the application and has been used to establish the extent of quarrying/extraction that took place between 1990 and 2014. It is noted that some of the areas which appear as ‘worked’ or quarried were used for stockpiling or other ancillary use but were not extraction areas. It is stated that they are not included in ‘extraction area’ calculations but are included in the ‘quarry development’ area for which leave to apply for substitute consent is sought. It is also submitted that there are also areas that were quarried that later became recolonized with vegetation and appear as ‘green’ or unquarried areas in more recent years. It is further clarified that

no aerial photography was available for the baseline year of 1990 and that the extent of the extraction area at that time has been determined from information made available by previous operators overlain on the 1995 aerial photography.

Table 1 of the application submission illustrates that the difference in area in relation to the quarrying/extraction that took place between 1990 and 2014 is 5.67 hectares. It is submitted that, as this exceeds the threshold set out in Part 2(b) of Schedule 5 Part 2 of the Planning and Development Regulations, the applicant can apply for leave to apply for substitute consent as the development would have required a mandatory EIA as long as there are exceptional circumstances.

It is submitted that the mandatory requirement for EIA is also supported by Council official assessments. It is further submitted that, having regard to the EIA carried out in respect of the quarry development under previous planning application 14/616, the willingness of the applicant to comply with the objectives of the EIA Directive and the ability of the Board to request a remedial EIAR to accompany any application for substitute consent, the regularisation of the quarry will not circumvent the purpose and objectives of the EIA Directive and is fully in accordance with the objectives of the EIA Directive.

Requirement for Appropriate Assessment

It is noted that the quarry is in close proximity to the Bandon River, with a watercourse bounding the site joining this river. The Bandon River at this section forms part of the SAC. It is submitted, given the nature of the quarry activities and the direct hydrological link to the SAC, it is reasonable to conclude that, in the absence of mitigation measures, the quarry had/has the potential to give rise to significant effects on the SAC and that an AA was/is required.

The considerations of the planning authority's Heritage Officer in her section 261A report is seen to support the applicant's submission.

Exceptional Circumstances

(a) Whether regularisation of the development concerned would circumvent the purpose and objectives of the EIA Directive or the Habitats Directive

It is submitted that the regularisation of the quarry would not circumvent either Directive and that it would be consistent with the purposes and objectives of both. The application for substitute consent would be accompanied by a remedial EIA and NIS. The area to which the application relates is 5.67 hectares and should have been subject to EIA. The quarry is in close proximity to and has a direct hydraulic link to the Bandon River SAC and, in the absence of mitigation measures, has the potential to give rise to significant effects on the SAC and, thus, an AA/NIS was also required. The regularization of the quarry accompanied by a remedial EIAR and an AA will therefore not circumvent the purpose and objectives of the Directives.

(b) Whether the applicant had or could reasonably have had a belief that the development was not unauthorised

When the quarry was purchased it was on the basis it was a 'pre-63' quarry and fully authorised. This was confirmed by a Council review of quarries prior to review under 261 and 261A and it was accepted when the application was granted for the tarmacadam/asphalt plant. It was, therefore, authorised from the date of commencement of the Local Government (Planning and Development) Act 1963 to the commencement of section 261 of the Planning and Development Act and the applicant's failure to register the quarry in April 2005. The applicant did not appreciate the seriousness of the failure to register the quarry until July 2011 when permission was refused under P.A. Ref. 11/317 and an enforcement notice was subsequently issued. In October 2014, the Council confirmed the enforcement notice had been complied with. When the applicant became aware of the unauthorised status of the quarry in 2011 and was issued with an enforcement notice the applicant fully complied with the notice.

- (c) Whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired**

In accordance with section 177(D)(7)(b) the Board can request that any application for substitute consent be accompanied by a remedial EIAR and NIS. As such, the ability to carry out an assessment of the environmental impacts of the development for the purposes of EIA or AA and to provide for public participation in the assessment have not been substantially impaired and would be facilitated by the application for substitute consent. As it stands, under the Council's enforcement, there is no requirement to carry out EIA, AA or any mitigation or remedial works. The ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has not been substantially impaired.

- (d) The actual or likely significant effects on the environment or adverse effects on the integrity of a European Site resulting from the carrying out or continuation of the development**

The actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from quarrying at the site would be subject to remedial EIA and an NIS. Any future quarrying would also be subject to EIA and AA. It is noted that the EIA and AA carried out under ABP Ref. PL 88.245174 found that the continuation of quarrying would not adversely affect the integrity of any Natura site and would not be likely to have significant effects on the environment.

(e) The effects on the environment site can be remediated and existing environment improved

An application for substitute consent would allow for the effects on the environment to be remediated and the existing environment improved. The application, accompanied by a remedial EIAR and AA, will afford the opportunity to have the full environmental effects between 1990 and 2014 assessed, remediated and improved. A detailed restoration can also be prepared for the overall quarry.

(f) The applicant has complied with previous planning permissions granted and has not previously carried out an unauthorised development

The quarry was established prior to October 1964 and was considered authorised to the date of commencement of section 261 of the Act. This was accepted by the permission granted for the tarmacadam plant. The only blemish was the failure to register under section 261 and this was based on incorrect advice. The applicant fully complied with the enforcement notice. Notwithstanding permission granted under ABP Ref. PL 88.245174 being quashed, the applicant submitted a comprehensive compliance to the Council in 2016, including the payment of development contributions. The permission for the tarmacadam plant was also fully complied with. This demonstrates the applicant fully respects the planning system.

The Board is asked to permit the applicant to apply for substitute consent.

Details submitted with the application include site maps, aerial photography, copies of the Council's enforcement notice and correspondence, and reports prepared by the Council's Executive and Senior Planners and the Heritage Officer under the section 261A process.

4.0 PLANNING AUTHORITY SUBMISSION

4.1 The planning authority referenced the policy context and planning history relating to the quarry. It was submitted that the site includes all unauthorised land identified by the planning authority in its enforcement notice served on the applicant and excludes any lands which may be subject to an application for future quarrying. The planning authority is satisfied that the applicant could reasonably have held the belief that the quarry was authorised as it was a pre-1963 quarry purchased from the Council. It is also noted that the applicant complied fully with the enforcement notice. It is concluded that the planning authority is of the opinion that exceptional circumstances exist which deem it appropriate to allow the applicant to seek permission by means of an application for substitute consent. The planning authority also notes that the site has been inspected on a number of occasions and no quarrying was evident at these times.

5.0 APPLICANT'S RESPONSE TO PLANNING AUTHORITY'S SUBMISSION

The applicant welcomes the planning authority's submission. This submission also alluded to a range of considerations already submitted with this application for leave to apply for substitute consent.

6.0 PLANNING HISTORY

6.1 It is understood that the quarry was previously a Council quarry established prior to 1964. This quarry was not registered pursuant to section 261 of the Planning and Development Act.

The following planning history also relates to the quarry development:

P.A. Ref. 11/317

An application for planning permission for the extraction of stone to a depth of 77.2m OD on 4.85ha was refused in 2011 by the planning authority because it constituted

an extension to an unauthorised development, it would comprise development to which schedule 7 (sub-threshold development) applies, and because it would impact on a Natura 2000 site – the Bandon River.

Section 261A

The planning authority determined in August 2012 that development had been carried out since 1st February 1990 which was considered would have required EIA and since 26th February 1997 which would have required AA and that neither had been carried out. It was also determined that the quarry had not been registered under section 261 before the deadline of April 2005 and it was concluded that the quarry was unauthorised development.

In November 2013 an enforcement notice was issued by the planning authority seeking the cessation of quarrying. In October 2014 the Council wrote to the quarry operator informing them that the notice had been complied with.

ABP Ref. PL 88.245174 (P.A. 14/.616)

Permission was granted by the Board for the quarrying of stone with an extraction area of 6 hectares. A subsequent Judicial Review (2016 No. 499 JR) quashed this decision.

ABP-302158-18

An application for leave to apply for substitute consent for the quarry was refused by the Board in July 2018. It was determined that the provisions of section 177C of the Act could not apply to the site the subject of ABP Ref. PL 88.245174 because such permission was for future quarrying development, because the area in the application did not include all of the former quarry that is unauthorised and includes areas of lands that have not been developed that the Board is not in a position to assess whether exceptional circumstances apply.

7.0 ASSESSMENT

7.1 The Relevant Quarry Area

7.1.1 I note the definition of “quarry” under section 2 of the Planning and Development Act 2000 (as amended) as follows:

“quarry” means an excavation or system of excavations made for the purpose of, or in connection with, the getting of minerals (whether in their natural state or in solution or suspension) or products of minerals, being neither a mine nor merely a well or bore-hole or a well and bore-hole combined, and shall be deemed to include—

(i) any place on the surface surrounding or adjacent to the quarry occupied together with the quarry for the storage or removal of the minerals or for the purposes of a process ancillary to the getting of minerals, including the breaking, crushing, grinding, screening, washing or dressing of such minerals but, subject thereto, does not include any place at which any manufacturing process is carried on;

(ii) any place occupied by the owner of a quarry and used for depositing refuse from it but any place so used in connection with two or more quarries, and occupied by the owner of one of them, or by the owners of any two or more in common, shall be deemed to form part of such one of those quarries as the Minister may direct;

(iii) any line or siding (not being part of a railway) serving a quarry but, if serving two or more quarries shall be deemed to form part of such one of them as the Minister may direct;

(iv) a conveyor or aerial ropeway provided for the removal from a quarry of minerals or refuse.

7.1.2 I further note Schedule 5 of the Planning and Development Regulations 2001 (as amended) relating to development for the purposes of Environmental Impact Assessment, and in particular 2(a) of Part 2 relating to the ‘Extractive Industry’ as follows:

(b) Extraction of stone, gravel, sand or clay, where the area of extraction would be greater than 5 hectares.

7.1.3 It is evident that the area of extraction is the key consideration when deciding whether mandatory EIA applies.

7.1.4 I note the following from the applicant's mapping and aerial imagery submissions:

- Between 1990 and 2000 the quarry extraction area increased by 2.71 hectares.
- Between 1990 and 2005 the quarry extraction area increased by 4.7 hectares.
- Between 1990 and 2014 the quarry extraction area increased by 5.67 hectares.

7.1.5 I acknowledge the applicant's 2014 aerial photography representation and the Site Location Maps (Drawing Nos. 2546-S1, 2546-S2 and 2546-S3) submitted with the application that clearly indicate the areas the subject of the application for leave to apply for substitute consent and the areas that are not included. From these I note the following:

- The areas to which the application for leave to apply for substitute consent extend well beyond the extraction area purporting to be the extraction area at 2014 when quarrying ceased.
- Very substantial areas at the eastern, north-eastern and northern section of the landholding are included, as are lands to the south of the main access road at the southern end of the site that abut the watercourse bounding this site.

7.1.6 From my site inspection I note the following relating to the area submitted as the application area for the leave to apply for substitute consent:

- The westernmost section to the north of the access road comprises a worked out area that is being used at present for storage and on which there are a number of temporary buildings.
- The areas to the south between the access road running west/east at the southern end of the holding and the existing watercourse comprise scrub and woodland. There is no evidence that any quarry extraction took place along the areas abutting the watercourse over this length.
- The south-easternmost section incorporates the asphalt plant and a large storage building. This is on lands that were previously quarried.
- Following the internal access road north / north-east one rapidly proceeds beyond the quarry extraction area determined to be the quarry in 2014.
- There are two cleared, levelled areas, one each west and east of the access road but there is no indication of any extensive quarry extraction at these locations. These can be discerned to some degree from the aerial photography of 2014 but clearly are not seen to be part of the quarry in 2014 according to the aerial photography.
- A short distance to the north-east / north of the access road is a pond, which again can be discerned from the aerial photography. This pond is clearly not seen to be part of the quarry in 2014 according to the aerial photography.
- Between the pond and the easternmost cleared area in the vicinity and the area included to the north of ALSC-1 in the applicant's drawings the land area presents itself as undisturbed lands that have not been quarried.

7.1.7 It is my submission to the Board that the applicant seeks to include quarrying / extraction areas beyond the extraction areas that formed the quarry at the time of its closure in 2014. Furthermore, the areas seeking to be included in an application for substitute consent include extensive lands areas that were not previously quarried and could not now be considered in any application for substitute consent. The considerations of the Board in its decision in ABP-302158-18 remain pertinent and valid. There is no reason to determine that the applicant's quarry area proposed to be subject to a substitute consent application has now excluded areas of land that

have not been developed. In this context, the Board could not reasonably move on to assessing whether exceptional circumstance exist for such development that could not be considered under section 177C.

7.1.8 In light of the above, considerations on the requirement for EIA and AA and an assessment of exceptional circumstances at this stage would be inappropriate. The Board can only reasonably fully assess such matters where an application that is made to it for leave to apply for substitute consent relates to a development which has been carried out where an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment was or is required (as specified in section 177C(2) of the Planning and Development Act).

8.0 RECOMMENDATION

I recommend as follows:

DECISION

REFUSE leave to apply for substitute consent under section 177C of the Planning and Development Act, 2000, as inserted by section 57 of the Planning and Development (Amendment) Act 2010 based on the reasons and considerations set out below.

MATTERS CONSIDERED

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

REASONS AND CONSIDERATIONS

Having regard to the documentation submitted with the application for leave to apply for substitute consent and due to the area, as outlined in this application, including extensive areas of land that have not been developed, the Board is not in a position to assess whether exceptional circumstances apply, as set out in section 177C(2)(b), as these circumstances can only relate to the quarry development that has taken place since the 1st day of February 1990, where environmental impact assessment would have been required under the Environmental Impact Assessment Directive, and to the quarry development that has taken place since the 26th day of February 1997, where appropriate assessment would have been required under the Habitats Directive, and where neither form of assessment had been carried out.

Kevin Moore

Senior Planning Inspector

17th February, 2020.