



An
Bord
Pleanála

Inspector's Report ABP 302158-18

Development	Application for Leave to apply for Substitute Consent for a Quarry
Location	Ardcahan, Dunmanway, County Cork
Planning Authority	Cork County Council
Planning Authority Reg. Ref.	11/317 & 14/616
Applicant(s)	Murray Brothers Tarmacadam
Type of Application	Application for Leave
Planning Authority Decision	N/A
Appellant(s)	Murray Brothers Tarmacadam
Date of Site Inspection	17 th December 2018
Inspector	Hugh Mannion

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1.0 Site Location and Description

- 1.1. The site is an existing quarry at Ardcahan, Dunmanway, County Cork. The quarry is accessed from a minor road which has a junction with the R587 which links Dunmanway to the south with Macroom to the north. The quarry within the blue line (within the ownership of the applicant on the submitted site layout) in its southern part is worked out and this area accommodates an office/administration building, staff/visitor car parking and aggregate processing/tarmacadam manufacturing buildings and machinery. The north-eastern part of the area within the blue line appears generally undisturbed. It is fairly densely covered in scrub and is accessed over a track which winds uphill behind the aggregate storage building. I observed one waterbody in this area. There is a stream running along the southern boundary, it flows under the R587 and into the Bandon river to the southwest of the site.
- 1.2. The area the subject of this application is in the north-western corner of the site and has been partly excavated with quarry walls deepest at its eastern end and falling as the area moves west.

2.0 Proposed Development

- 2.1. The quarrying of stone at Ardcahan, Dunmanway, County Cork.

3.0 Planning History

- 3.1. There was quarrying in this area between 1964 and when the provisions of Section 261 of the Planning and Development Act, 2000, as amended, became operational. Section 261 required that operating quarries which had not been granted planning permission within the previous 5 years be registered with the relevant planning authority before 27th April 2006. The two objectives of the process were (a) to provide the planning authority with certain basic information in relation to the quarry (section 261(2) sets out the information to be submitted) and (b) to facilitate additional control on the quarry (the section was amended to section 261A by the P&D Amendment Act 2010) to allow planning authorities to carry out a screening for Environmental Impact Assessment (EIA), Environmental Impact Assessment or Appropriate Assessment (AA). This quarry was not registered under the section.

- 3.2. An application for planning permission (reference 11/317) for the extraction of stone to a depth of 77.2m OD on 4.85ha in 2011 which was refused because (a) it constituted an extension to an unauthorised development, (b) it would comprise development to which schedule 7 (sub-threshold development) applies, and (c) it would impact on a Natura 2000 site – the Bandon River.
- 3.3. In the period before November 2013 the planning authority determined that the quarry comprised unauthorised development and should have been subject to EIA and AA. Quarrying operations ceased and in October 2014 the applicant (Murray Brothers) made an application for permission (register reference 14/0616) for quarrying about 6ha and that application was accompanied by an EIS and NIS. The planning authority decided to grant permission on the 26th June 2015 and that decision was appealed to the Board under reference PL88.245174.
- 3.4. The Board carried out a planning assessment, an EIA and an AA and granted permission 17th May 2016. That decision was judicially reviewed (see Alice Hayes, Patrick Hayes and Peter Sweetman v ABP, copy in pouch) and the High Court quashed the Board's grant of permission in June 2018.
- 3.5. The Court decided that the application under section 34 of the P&D Acts was not a valid and should not have been determined by the planning authority or the Board since it did not properly address the requirements of the EIA and Habitats directives and European Court of Justice case law in relation to the assessment of significant environmental impacts.
- 3.6. The present application is for leave to make an application for substitute consent under section 177K. The application for leave is made in accordance with the provisions of section 177C and the Board's decision is made in accordance with section 177D. The present application is stated to be made in accordance with the Court decision in relation to PL88.245174 and the drawing submitted with the application indicates the area covered by the application in PL88.245174.

4.0 Policy Context

4.1. Development Plan

4.2. The area is unzoned in the Cork County Development Plan 2014 – 2020.

4.3. County Development Plan objective EE12-1 is to;

“Protect and safeguard the county’s natural mineral resources from inappropriate development, by seeking to prevent incompatible land uses that could be located elsewhere, from being located in the vicinity of the resource, since the extraction of minerals and aggregates is resource based”.

4.4. County Development Plan objective EE12-2 states that;

Consideration will be given to the desirability of preparing a Minerals Strategy to support a sustainable extractive industry during the life time of the plan.

4.5. County Development Plan objective EE12-3 states that it is an objective to;

- Minimise environmental and other impacts of mineral extraction through rigorous application of licensing, development management and enforcement requirements for the extractive industry and ancillary developments.
- All extractive industry developments to have regard to the “Quarries and Ancillary Activities Guidelines for Planning Authorities (2004)” published by the DoEHLG or as may be amended from time to time.
- With new quarries and mines and extensions to existing quarries and mines regard should be had to visual impacts, methods of extraction, noise levels, dust prevention, protection of rivers, lakes, European sites and other water sources, impacts on residential and other amenities, impacts on the road network (particularly with regard to making good any damage to roads), road safety, phasing, reinstatement and landscaping of worked sites.

4.6. Natural Heritage Designations

Not relevant.

5.0 The Appeal

5.1. Grounds of Appeal

- The quarry had not been registered under Section 261 of the Planning and Development Act and the planning authority determined that it was unauthorised. The applicant made an application under section 34 of the P&D Act to regularise the activity. Permission was granted by Cork County Council and that decision was subsequently appealed to the Board under PL88.245174 and the Board granted planning permission.
- The High Court struck down the Board's decision to grant planning permission on appeal. The applicant now seeks leave to make an application for leave to apply for substitute consent.
- Section 177D (1) requires that quarries which require EIA, screening for EIA or AA must apply for substitute consent. The subject quarry requires EIA because it exceeds the 5-ha limit in the relevant Class for triggering EIA. The planning authority under application reference 14/616 has determined that the quarrying activity requires an AA.
- The quarry fulfils the requirement for granting leave to make an application for substitute under section 177D(1)(a) because the previous decision of the Board under PL88.245174 has been struck down by the courts and the exceptional circumstances provisions of 177D(2).
- These exceptional are; would the regularisation of the quarry undermine the objectives of the EIA or Habitats Directives, could the applicant have reasonably held the view that the quarry was not unauthorised, has the ability to carry out and EIA or AA or allow for public participation been substantially impaired, are there actual or likely significant effects on the environment or adverse effects on the integrity of a European site, can any effects on the environment or European sites be remediated, has the applicant complied with previous planning permissions or carried out unauthorised development. The Board may also consider other matters it considers relevant.

- The Board may request a remedial EIS and NIS and the proposed development will not undermine the objectives of the EIA Directive or Habitats Directive. The rEIA process does not preclude public participation.
- The quarry operated as an authorised activity between 1963 and the commencement of section 261. The applicant held a reasonable belief on foot of legal advice that an application under section 34 of the P&D Acts was the appropriate avenue to regularise the quarry.
- The Board has previously assessed the environmental impacts and effects on European sites of the proposed development and found them to be acceptable under PL88.245174.
- The rEIS will allow for any remediation requirements to be identified and carried out.
- The applicant has complied with previous enforcement notice in relation to the quarry.

5.2. Planning Authority Response

- The planning authority determined that the quarry was unauthorised.
- Since the area was more than 6ha an EIA was required and an EIS and NIS were submitted.
- While recognising the decision in the High Court the planning authority in good faith considered that the application subject to conditions would not undermine EU environmental law.
- The planning authority accepted that the applicant was unaware of the development was unauthorised since works ceased on foot of an enforcement notice.
- The planning authority is satisfied that the right to public participation would not be undermined in the rEIA/AA process.
- The planning authority is satisfied that there would not be adverse impacts on any European site.
- Remedial solutions may be submitted with a remedial EIS.

- The planning authority is generally satisfied that the applicant complies with planning law.

6.0 Assessment

- 6.1. Section 177C of the P&D Acts provides that an application for leave to apply for substitutive consent may be made where development required an EIA, screening for EIA and/or submission of an NIS and where the applicant concludes that a permission that has been granted by a planning authority or the Board is invalid pursuant to a decision in an Irish Court or the Court of Justice of the European Union or that there are exceptional circumstances where it would be appropriate to regularise a development by way of an application for substitute consent.
- 6.2. This application is unclear as to what it seeks to achieve. It is accompanied by a site layout drawing which shows the applicant's landholding marked in blue, the area of the quashed planning permission marked in red and an "extraction area" from that permission. This seems to arise from a confusion of the area which was subject to the application/appeal under PL88.245174 and the area previously quarried that is unauthorised. Furthermore, an application for substitute consent must refer to development which has been carried out – the submitted site layout plan refers to proposed excavation.
- 6.3. The Board, to grant leave under section 177D to make an application for substitute consent, must be satisfied that the application refers to development has been carried out and that EIA screening, EIA or AA is required. The area of land included in the application refers to the area the subject of the quashed planning permission. Without clarity on the area to be assessed and if development has already been carried out on it in whole or in part it is not possible to determine if the conditions set out in 177D have been met. Furthermore, without clarity on the area being considered and if it has been subject to development it is not possible to carry out a screening assessment to determine if rEIA or NIS is required.
- 6.4. It may be noted that a further criterion for granting leave to make an application for substitute consent set out in section 177D(1)(a) is that a grant of permission has been found to be defective or invalid by a domestic court of competition jurisdiction or the European Court of Justice. Having regard to the High Court decision in Alice

Hayes, Patrick Hayes and Peter Sweetman v ABP in relation to PL88.245174 which determined that the previous permission granted under section 34 was invalid and the Board has not appealed that decision I conclude that this criterion is not relevant as that permission was only for future extraction.

6.5. Section 177D(1)(b) provides that the Board may grant leave to apply for substitute consent where exceptional circumstances apply. These exceptional circumstances are set out in Section 177D (2) and I consider the provisions of Section 177D(2) as follows (the criteria set out in the section is in bold while my assessment is bullet pointed);

6.6. **“Whether the regularisation of the development would circumvent the purposes and objectives of the EIA Directive or the Habitats Directive”**

- This application for leave applies to an area outlined in red on the submitted site layout drawing. This application has not demonstrated that the area has benefitted from a grant of planning permission. A grant of leave to apply for substitute consent on the confined area outlined in red in this application would restrict the area to be assessed for likely significant impacts in a manner which circumvents the purpose and objectives of the EIA and Habitats Directive.

6.7. **“Whether the applicant had or could reasonably have had a belief that the development was not unauthorised”**

- The applicant states that he was unaware of the unauthorised nature of the quarry prior to an application for permission in 2011. The planning authority states that it is satisfied that the applicant responded to the enforcement notice to cease quarrying activities and that it is not unreasonable to conclude that the applicant was unaware of the unauthorised nature of the quarry.
- Having regard to the history of the quarry and the material submitted in relation to this application I conclude that the applicant could reasonably have had the belief that the quarry was authorised.

6.8. **“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.”**

- The restriction of the area to be included in the application for substitute consent to the area outlined in the site layout drawing submitted with this application would substantially impair the ability to carry out an rEIS and rNIS to assess the environmental impacts of the development that has been carried out on the remainder of the existing quarry, the effects on European sites and public participation.

6.9. **“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 proposed substitute consent area is part of a larger development which this application has not demonstrated is authorised. There are potential likely significant effects arising in particular for ground and surface water. There is a hydrological connection between the site and the Bandon SAC via a stream which runs along the southern boundary, under the R587 and into the Bandon River. I recommend that the restriction of the application for substitute consent to the area outlined in this application would not allow for adequate consideration of the likely significant impacts on the environment or adverse effects on European sites.

6.10. **“The extent to which significant effects on the environment or adverse effects on the European site can be remedied”**

- Having regard to restricted part of the overall quarry to which the application for leave applies and that the application has not demonstrated that the remainder of the quarry is authorised I consider that an application for substitute consent could not demonstrate the extent to which significant effects on the environment or adverse effects on the European site could be remedied.

6.11. **“Whether the applicant has complied with previous planning permissions or previously carried out an unauthorised development”**

- The applicant has ceased quarrying activity in compliance with an enforcement notice and sought a permission for further development in a manner which satisfied the planning authority and the Board on appeal even if it was not the correct course of action. At least part of the area now within the applicant's ownership was subject to unauthorised development.

6.12. **“Such other matters as the Board consider relevant”**

I consider that no further matters need be considered by the Board in this case.

6.13. **Recommendation**

I recommend that leave to apply for substitute consent should be refused.

7.0 **Reasons and Considerations**

7.1. Having regard to Section 177D, Planning and Development Act, 2000, as inserted by Section 57, Planning and Development (Amendment) Act, 2010, the Board is satisfied that an environmental impact assessment and an appropriate assessment is required, in the light of the scale and nature of the quarrying that has been carried out.

7.2. The Board had regard to the judgement of the High Court in the case 2016 Number 499JR which found that the application under planning register reference number 14/0616 appeal reference PL88.245174 should not have been accepted and considered and that permission should not have been granted by the planning authority and by An Bord Pleanála on appeal.

Furthermore, the Board examined whether or not exceptional circumstances exist such that it would be appropriate to allow the opportunity for regularisation of the development by permitting leave to make an application for substitute consent.

In this regard the Board;

- considered that this application for leave to apply for substitute consent has not demonstrated that additional areas within the quarry have the benefit of a grant of planning permission and that regularisation of the development within the boundary comprised in this application would restrict the proper consideration of the likely significant impacts on the environment and adverse effects on the Bandon River SAC (002171) or any other European site in a manner which would be likely to circumvent the purpose and objectives of the Environmental Impact Assessment Directive or of the Habitats Directive,
- considered that the applicant could reasonably have had a belief that the quarrying development that took place prior to 2011 was authorised.
- considered that this application for leave to apply for substitute consent has not demonstrated that additional areas within the quarry have the benefit of a grant of planning permission and that regularisation of the development within the boundary comprised in this application would substantially impair the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment and to carry out an appropriate assessment, and for the public to participate in such assessments.
- considered the nature of the likely significant effects on the environment to include, but may not be limited to, impacts on surface and ground water or adverse effects on the integrity of the Bandon River SAC (002171) or any other European site having regard to a hydrological link between the quarry and Bandon River SAC (002171) or any other European site, resulting from the carrying out of the development.
- considered that the applicant had not carried out unauthorised development subsequent to the service of an enforcement notice by the planning authority.

7.3. Having regard to the foregoing it is considered that exceptional circumstances do not exist such that it would be appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent in relation to the site outlined in this application.

Hugh Mannion
Senior Planning Inspector

18th January 2019