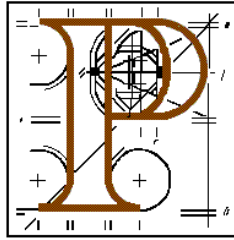


# An Bord Pleanála



## Inspector's Report

Ref. No 306155-19.

**DEVELOPMENT:** Existing limestone quarry at Cartron, Belclare, Tuam, Co. Galway.

### PLANNING APPLICATION

**Planning Authority:** Galway County Council

**Planning Authority Ref.:** -

**Applicant:** McTigue Quarry's Ltd.

**Application Type:** Application for leave to apply for Substitute Consent

**OBSERVERS** None

**DATE OF SITE INSPECTION** 12<sup>th</sup> March 2020.

**Inspector:** Paul Caprani

## 1.0 INTRODUCTION AND BACKGROUND

- 1.1 This application is for leave to apply for substitute consent for a limestone quarry near Tuam in Co Galway. It was received on behalf of Mc Tigues Quarries on December 13<sup>th</sup> 2019.
- 1.2 The Board had already granted substitute consent for the quarry in January 2015 under reference no. SU 0036. Post decision, the applicant was of the opinion that the grant of substitute consent had regularised all activities on site and continued to extract and process material at the quarry in accordance with the rEIS submitted. This was challenged by An Taisce on the basis that the substitute consent related to the completion of restoration works and the substitute consent did not authorized the continued extraction works. On this basis, An Taisce served notice to the High Court seeking a S.160 injunction for unauthorised development. The applicant on the other hand argued that the substitute consent provided for authorised extraction up to a point in which it delivered and enabled the restoration to take place as envisaged under the rEIS. The High Court concluded that the continued operation and extraction of material was unauthorised, but it refused to grant the S.160 injunction, instead referring it back to Galway Co Council for enforcement proceedings.
- 1.3 Both An Taisce appealed the High Court's refusal to make the S160 Injunction Order, and the applicant appealed the findings of the High Court that the continued extraction of the quarry on foot on the granting of substitute consent permission was unauthorised. The Supreme Court Judgement (see copy on on file) concluded inter alia, that a substitute consent *'has effect for those procedures as if it were a permission granted under S34 of the PDA 2000, but only where there was a flawed or erroneous planning permission'*, only in those circumstances can such a development be deemed to be authorised development. These circumstances did not pertain to the substitute consent application before the Courts. The Supreme Court therefore upheld the decision of the High Court and deemed that quarrying activities to be unauthorised.

- 1.4 It is therefore on this basis that the current application seeking leave for another substitute consent application is made.

## **2.0 SITE LOCATION AND DESCRIPTION.**

- 2.1 The site is located in the townland of Cartron in a rural area approximately 7 kilometres southwest of Tuam and the 1.5 kilometres southwest of the small village of Belclare in County Galway. The appeal site has no direct frontage onto a public road but is connected via a narrow private road to the public road. The public road c 1 km to the south east of the site is a 3<sup>rd</sup> class road, and links into the R333 Tuam to Headford Regional Road approximately 1.5 kilometres to the north. The N17 Galway - Sligo National Primary Route is approximately 3 kilometres to the east. The private road also serves another quarry (Mortimer' Quarry) which is contiguous to the south and east of the appeal site.
- 2.2 Many of the roads are relatively narrow and the alignment of the R333 Tuam to Headford Regional Road in proximity to the N17 is of a relatively poor vertical and horizontal alignment with a large section of the carriageway having a solid white line.
- 2.3 The quarry on the site is an active working stone quarry characterized by benching and cliffs with stockpiling of materials, surface water sump areas and processing areas for the screening, crushing and grading of material with associated plant. There is large area of hardstanding accommodating workshops and sheds at the northeastern corner of the quarry site. There was no active extraction or processing of materials at the time of my site inspection.
- 2.4 The general wider area is characterized by agricultural use but with a relatively high level of dwellings, many of recent construction located along the road network largely arising from the relative close proximity to Tuam and the N17. The landscape is relatively flat and low-lying, with relatively few surface water features or streams. The appeal site is located on the eastern lower slopes of Knockmaa Hill, which is the dominant feature in the landscape, and which is highly visible from a considerable distance in all directions.

- 2.5 The site is irregular in configuration but the main of quarrying operation is roughly L-shaped in layout. There is also an area to the west of the active quarry which was part of the registration process which has not been excavated.
- 2.6 There are no details on file with regard to the actual size of the quarry however a previous application for substitute consent under PL SU.07.0036 indicated That the overall site has a stated area of 12.11 hectares with 8.64 hectares the subject of substitute consent and 3.47 hectares to the west which is undeveloped.

### **3.0 PLANNING HISTORY.**

- 3.1 The planning history relating to the site is detailed below:

**P.A Ref. 06/3299**

Permission granted on the 21<sup>st</sup> of May 2007 for the retention of (a) garage/workshop, (b) wheelbase washing unit and c) a weighbridge subject to 3 conditions.

**P.A Ref. 10/629.**

An application for retention of oil storage tanks, office, retention of garage/workshop granted under 06/3299 and retention of and additional garage/workshop was withdrawn.

**P.A Ref. 09/1518.**

An application for retention of oil storage tanks, office, retention of garage/workshop granted under 06/3299 and retention of and additional garage/workshop was withdrawn.

- 3.2 **Planning Registration P.A. Ref QY 71.**

The site was registered under Section 261 with 14 conditions, which are standard in nature on the 27<sup>th</sup> of April 2007.

- 3.3 **P.A. Ref. No. EN09/098**

An enforcement notice was served by the planning authority in relation to unauthorised oil storage tanks, unauthorised office, unauthorised extension to existing garage/workshop approved under planning Ref. No. 06/3299 and unauthorised additional workshop/storage unit.

#### **3.4 DETAILS OF DETERMINATION UNDER SECTION 261A**

The planning authority determined under file ref **QSP71** that

- (i) Development was carried out after 1st February 1990 which development would have required having regard to the Environmental Impact Assessment Directive an environmental impact assessment but that such an assessment was not carried out.
- (ii) Development was carried out after 26<sup>th</sup> February 1997 which was not authorised by a permission prior to 26<sup>th</sup> February 1997, which development would have required having regard to the Habitats Directive an appropriate assessment and that such an assessment was not carried out.

3.5 The reasons referred to the quarry being less than 0.5 km from Knockmaa Hill a proposed NHA Code 001288 and the quarry exceeds the threshold of 5 hectares. Accordingly, a notice was served on the applicant directing to apply for substitute consent and to submit a Remedial EIS and a Remedial Natura Impact Statement.

3.6 The Planning Officer's assessment report noted the size of the quarry as 11.29 hectares; the proximity to Knockmaa Hill pNHA; the planning history including a grant with conditions under P.A Ref. 06/3299 a garage/workshop, wheelbase washing unit and a weighbridge; the site has pre 1964 commencement and both EIA and AA is required.

#### **4.0 THE APPLICANT'S CASE FOR LEAVE FOR SUBSTITUTE CONSENT**

- 4.1 The applicant's case for seeking leave for substitute consent is set out in a submission by *Quarry Plan - Chartered Quarry Consultants*. Leave for substitute consent is sought under the provisions of Section 177C(1) and specifically 177C(2)(b) of the Act. The submission sets out the legal background pertaining to the site and substitute consent application granted under Ref. Ref 07.SU.0036 (briefly outlined in my introduction). It is stated that this new substitute consent application will cover the operational areas at Cartron quarry and all ancillary structures (canteen pumphouse, lime crushing enclosure etc.) on site. These structures were omitted in the public notices in the original application. The substitute consent application will exclude the access road and some infrastructure when already have the benefit of planning consent.
- 4.2 With regard to whether or not the regularisation of the development would circumvent the purpose and objectives of the EIA Directive or the Habitats Directive, it is noted that in the previous application for substitute consent, the Board stated that the rEIS identified and adequately described the direct and indirect effects on the environment and concluded that the development would be unlikely to have or have had a significant effect on the environment. Likewise, in terms of the circumventing the Habitats Directive, the Board concluded in respect of the rNIS submitted that the subject development has not adversely affected and is not adversely affecting the integrity of any European Site. It is on the basis of the documentation submitted with the previous application for substitute consent, that, it is argued, the Directives referred to above would not be circumvented.
- 4.3 In respect of whether or not the applicant could reasonably had the belief that the development was not unauthorised, reference is made to the planning and legal history relating to the site and the application. It is contended that the fact that the applicant sought a decision in its favour from both the High Court and the Supreme Court is testament and proof that the applicant had the inherent belief that the substitute consent issued by the Board provided for authorised extraction up to a point at which it delivered the restoration concept. However, it is accepted that the applicant's belief was held to be incorrect by the Courts.

- 4.4 In respect of the potential to carry out an assessment of the environmental impacts of the development for the purposes of EIA and AA and to provide for public participation, reference is again made to the Boards positive conclusions in respect of the rEIS and rNIS submitted with the previous substitute consent application. It is stated that there have been no further activities post June 2019 on the site. Activities that had taken place during the court proceedings was anticipated and assessed in the rEIS as phase 1 of the restoration strategy.
- 4.5 In relation to the likely or actual significant effects on the environment or integrity of a European Site resulting from the carrying out or continuation of the development, reference is again made to the Board summation in respect of the previous application for substitute consent and the rEIS and rNIS documents submitted with the application. It is noted that the Board expressed general satisfaction with content of these documents in identifying and assessing the environmental effects.
- 4.6 It is further stated that there is no requirement to consider remediation of significant effects as the Board has concluded in respect to the previous substitute consent application that the development was not likely to have significant effects on the environment.
- 4.7 With regard to compliance with previous applications, details of the planning history associated with the site are provided and it is stated that several attempts were made to regularise all outstanding planning matters. However due to the ongoing legal battles in respect of the substitute consent application, Galway Co Council were reluctant to deal with the application and a number of applications were withdrawn. The only non-compliance issue relates to a financial contribution, which it is stated will be complied with in any new consent issued.
- 4.8 In relation to other such matters that the Board may consider relevant, the applicant highlights the importance of the quarrying activities in terms of providing local aggregate supply. The employment benefits to the local area are also

highlighted. It is stated that Mc Tigues Quarry is crucial to the economic development of the local area and support and sponsors many local organisations in the area. The submission also provides information on population growth, employment, commuting times and housing. The need to provide aggregates and jobs within the local area are stressed and the applicant's role in providing these services are regarded as being very important.

## **5.0 PLANNING AUTHORITY SUBMISSION**

5.1 Galway County Council have not submitted a response to the application for leave for substitute consent.

## **6.0 LEGISLATIVE PROVISIONS**

6.1 The European Court of Justice (ECJ) decision in the case of C-215/06 resulted in the removal of the facility to apply for retention of planning permission for development which required EIA. Thus, under the amended Section 34(12) of the 2000 Act, a retention application cannot be accepted by the Planning Authority for a development which would have required EIA (screening for EIA) or Appropriate Assessment under the Habitats Directive.

6.2 The provisions of 177C of the Act permits an application for leave to apply for substitute consent where a Court has found that there was procedural error in the original consent or where the Board grants leave to a developer to apply for substitute consent in other exceptional circumstances. The current application seeks approval to apply under the latter provision (177C(2)(b)).

Under Section 177D(2) in considering whether exceptional circumstances exist the Board shall regard to the following matters:



- (a) Whether the regularisation of the development concerned would circumvent the purpose of objectives of the Environmental Impact Assessment Directive or the Habitats Directive.
- (b) Whether the applicant had or could reasonably have had a belief that the development was not unauthorised.
- (c) Whether the ability to carry out an assessment of the environmental impacts of the development for the purposes of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has 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.
- (e) The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated.
- (f) Whether the applicant has complied with previous planning permissions granted or has previously carried out unauthorised development.
- (g) Such other matters as the Board considers relevant.

## **7.0 ASSESSMENT**

7.1 For the purposes of determining the current application before the Board, it is not necessary nor indeed appropriate to evaluate the contents of the rEIS or the rNIS and other documentation submitted as part of the original application which sought substitute consent. The Board have already determined that substitute consent should be granted in the case of the previous application. It is not altogether apparent what will constitute the specifics of any future substitute consent application and whether or not any future rEIAR or rNIS will relate to exactly to the activities for which substitute consent was already granted<sup>1</sup> only to be legally quashed by a decision in the Supreme Court.

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<sup>1</sup> The submission on behalf of the applicant indicates that some ancillary development (extension for garage workshop etc.) were not included in the public notices in the case of the previous application but would be included in any subsequent application for substitute consent to the Board.

7.2 The Board in this instance is merely required to determine whether or not sufficient exceptional circumstances exist in order to permit an application to apply for substitute consent in accordance with the provisions of the Act. If the Board accept that exceptional circumstances do exist, it can evaluate the planning merits of the case in any subsequent application for substitute consent.

7.3 The merits of the case seeking leave to apply are evaluated in the context of the criteria set out in Section 177D(2). I would comment as follows:

**(a) *Whether the regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or Habitats Directive.***

7.4 I do not consider that the regularisation of the development concerned would circumvent the purpose and objectives of either the EIA Directive or the Habitats Directive in that the applicant had previously prepared a Remedial Environmental Impact Statement and a Remedial Natura Impact Statement in accordance with both the EIA Directive and Habitats Directive. These remedial impact statements were accepted by the Board where it was concluded in relation to appropriate assessment that:

*'The Board concluded that, on the basis of the information available, the subject development, either individually or in combination with other plans or projects, has not adversely affected and is not adversely affecting the integrity of any European site, having regard to the conservation objectives of those sites.'*

7.5 And in relation to the rEIA, the Board similarly came to the conclusion that:

*'that the remedial Environmental Impact Statement submitted identified and described adequately the direct and indirect effects on the environment of the development.'*

*The Board considered that the Inspector's report was satisfactory in addressing the environmental effects of the subject development and also agreed with its conclusions in*

*relation to the acceptability of mitigation measures proposed and residual effects. The Board adopted the report of the Inspector and decided that the subject development would not be likely to have had/or have a significant effect on the environment’.*

7.6 It cannot be reasonably argued that the applicant in attempting to regularise the development did circumvent the purpose and objectives of the Environmental Impact Assessment Directive or Habitats Directive.

**(b) *Whether the applicant had or could have reasonably had the belief that the development was not authorised.***

7.7 Having regard to the planning history associated with the site, and the fact that the applicant obtained a positive substitute consent from the Board, and furthermore that the applicant sought decisions affirming that the works to be undertaken were authorised from both the High Court and Supreme Court, I consider that it is reasonable to conclude that the applicant could have reasonably held the belief that the substitute consent provided for the continued extraction and as such was not unauthorised.

7.8 The High Court and the Supreme Court ruled against the applicant’s view that all the works and activities were governed and permitted by the substitute consent application. I consider that the bona fides of the applicant were genuine. If the applicant did not have an honest conviction that the grant of substitute consent enabled him to carry out the

works and activities on site up to which it delivered and enabled the restoration works to be implemented, it is unlikely that he would have appealed the decision of the Supreme Court and the considerable expense that went with it.

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

7.9 The applicant has already demonstrated the ability to carry out an assessment of environmental impacts of development for the purposes of an rEIA and appropriate assessment in the previous application for substitute consent. And the Board's conclusion in relation to the same has been referred to under criteria (a) above.

7.10 Again, having regard to the planning history of the site and the fact that the applicant has applied for substitute consent for the quarry, under which third party observations were been submitted<sup>2</sup>, I do not consider that the provision for public participation in such an assessment has been in any way impaired. If the Board are minded to permit leave for the applicant to apply for substitute consent on foot of the current application before it, opportunities for public participation will be provided for under the provisions of S177H of the Act.

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

7.11 Again, I would refer the Board to the conclusions it reached in respect of the previous application for substitute consent, where it was concluded that (a) *The Board adopted the report of the Inspector and decided that the subject development would not be likely to have had/or have [My Emphasis] a significant effect on the environment' and (b) the subject development, either individually or in combination with other plans or projects, has not adversely affected and is not adversely affecting [My Emphasis] the integrity of any European site, having regard to the conservation objectives of those sites.'*

(e) ***The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated.***

7.12 The Board in its determination of the previous application for substitute consent, as referenced above, concluded that the proposal did not have a significant effect on the

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<sup>2</sup> A total of 7 observations (including the submission from Galway Co Council) were submitted in respect of PL07.0036

environment or on the integrity of any European site. On the basis of this conclusion, no remedial measures are required on the subject site.

**(f) *Whether the applicant has complied with previous planning permissions granted or has previously carried out unauthorised development.***

7.13 It appears from the planning history set out above that the application has undertaken unauthorised works on site whereby subsequent planning applications for retention of planning permission has been sought. The nature of the applications for which retention of planning permission was sought, some of which were on foot of enforcement notices, were relatively minor in nature, relating to unauthorised oil storage tanks, unauthorised office, unauthorised extension to existing garage/workshop.

7.14 The applicant has sought to regularise this unauthorised development through retention applications, and perhaps more importantly, the site was registered under Section 261 (P.A. Ref QY 71) with 14 conditions, 27<sup>th</sup> of April 2007. And on foot of this, an application was lodged with the Board for substitute consent. The applicant therefore in my view has taken reasonable steps to regularise all quarrying activity on site and has sought to ensure that development and quarrying activities on site are authorized in accordance with the requirements of the Planning Acts.

7.15 It is also apparent that a number of applications for new development on site were lodged with Galway Co Council and then subsequently withdrawn, this however according to the applicant, is due to the fact that Galway Co Council have demonstrated a reluctance to deal with the application pending the on-going legal battles at the time of making the applications. I note that notwithstanding the fact that the planning authority were invited on two occasions to comment on the current application before the Board, no comments were received. The withdrawal of the applications, therefore, it would appear were due to circumstances beyond the remit of the applicant.

**(g) *Such other matters as the Board considers relevant.***

7.15 The main relevant matter in the case of the current application relates to the lengthy legal proceedings that emanated from the High Court and Supreme Court decisions in respect of the original grant of substitute consent. It appears that a legal question arose whether or not the substitute consent granted provided for the continuing extraction up to such a point before the restoration works were to be commenced. It appears that a genuine legal dispute arose and the applicant's bona fides in the belief that the works undertaken were authorised works is accepted. Likewise, the applicant has accepted that the Supreme Court's Judgement that the development undertaken was unauthorised. Therefore, on this basis that I conclude that exceptional circumstances do exist to permit the applicant to apply for substitute consent.

## **8.0 CONCLUSIONS AND RECOMMENDATIONS**

The Board conclude that exceptional circumstances do exist such that it would be appropriate to permit the regularisation of the development by permitting leave for substitute consent based on the reasons and considerations set out below.

### **REASONS AND CONSIDERATIONS**

Having regard to section 177D of the Planning and Development Act, 2000, as amended, and to the conclusions reached by the Board in its determination of the SU0036 and the subsequent legal judgement the Supreme Court in the case of An Taisce – The National Trust for Ireland -v- Mc Tigue Quarries [2018 IESC 54], with respect to the development on the site, the Board is satisfied that exceptional circumstances exist such that it would be appropriate to consider the regularisation of the development by permitting leave to make an application for substitute consent.

In this regard the Board -

- considered that the regularisation of the development would not 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 development was not unauthorised,
- considered that the ability to carry out an Environmental Impact Assessment and an Appropriate Assessment and for the public to participate in such assessments has not been substantially impaired, and
- considered that the actual or likely significant effects on the environment or adverse effects on the integrity of a European site, if any, can be remediated.

Taking all of the above into consideration, it is considered that exceptional circumstances do exist such that it would be appropriate to permit the opportunity for the regularisation of the development by permitting an application for substitute consent.

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Paul Caprani,  
Senior Planning Inspector.