



An
Bord
Pleanála

Inspector's Report ABP-306956-20

Development	Substitute Consent under Section 177C(2)(b)
Location	Quarry at Maplestown, County Carlow
Planning Authority	Carlow County Council.
Planning Authority Reg. Ref.	Click here to enter text.
Applicant	Click here to enter text.
Type of Application	Leave to apply for Substitute Consent
Planning Authority Decision	Refusal.

Date of Site Inspection 16th June 2020.

Inspector Philip Davis.

Contents

1.0 Introduction.....	3
2.0 Site Location and Description	3
3.0 Leave to Appeal.....	4
4.0 Planning Authority.....	4
4.1. Planning Authority Reports	4
4.2. Prescribed Bodies	5
4.3. Third Party Observations	5
5.0 Planning History.....	5
6.0 Policy Context.....	6
6.1. Development Plan.....	6
6.2. Natural Heritage Designations	6
7.0 The Application for Leave to apply for Substitute Consent	7
8.0 Assessment.....	7
9.0 Recommendation.....	13
10.0 Reasons and Considerations	13

1.0 Introduction

This application is for the leave to apply for Substitute Consent under Section 177C(2)(b) of the 2000 Act, as amended. It is for an existing quarry in north-west County Carlow, which was previously granted a planning permission with EIS which has run out of time. The operator has argued that exceptional circumstances exist with regard to a genuine belief that the permission granted was still in operation.

2.0 Site Location and Description

2.1. Maplestown, County Carlow

The townland of Maplestown is located at the north-east of county Carlow, close to the borders with Kildare and Wicklow. The townland is roughly equidistant between the settlements of Baltinglass and Castledermot and is characterised by low hills in an undulating countryside which extends west from the foothills of the Wicklow Mountains. The area is mostly grazing land on what appear to be well drained but low fertility fields on deep deposits of fluvio-glacial gravels. Fields are bounded with ditches and hedgerows and are mostly used for sheep and cattle grazing, with a number of sand and gravel quarries in the area. Settlement is quite sparse, with occasional farmhouses and dwellings scattered around a third class road network. The nearest main road is the N81, some 2-km to the east, linked to the site via a relatively narrow third-class road. There is a national school just west of the townland.

2.2. The site

The quarry subject to this application for leave to apply for Substitute Consent is within an irregularly shaped landholding with an area that appears to be around 25 hectares (differing figures for the overall working area and landholding are given in the previous applications for this site), located on the eastern side of a third class road close to a junction. It extends into a slight hill which rises to the east. There is a wide entrance with cleared areas on either side. A track (with a wheel-washing area) leads to the main quarry, an active sand and gravel extraction and processing centre. The quarry consists of a processing area in the centre, spoil heaps and sand/gravel storage on the western side, with the main excavation area into the

hillside to the east. The excavation is a single bench, perhaps up to 10-12 metres in height. The material is dry, fine grained fluvio-glacial material with some stones. There is a pond in the south-eastern side of the site which appears to be fed from groundwater. There are three linked settlement ponds on higher ground to the west of this pond, these are part of the drainage/gravel processing system. The water system appears to be enclosed, with water possibly extracted from the pond or from an on-site well (most likely the latter). I saw no outfall from the site, but it seems there is some storm water overflow from the settlement ponds to a small watercourse to the south.

The site is bounded by well drained fields, mostly in grazing use. There is a circular enclosure to the east, between the site and a large farmstead – this is part of the overall landholding. This enclosure appears to be of modern origin and is not a recorded ancient monument. The nearest dwellings are to the west, along the access road. There is a small river (River Graney) just over 100 metres north of the site, and a smaller watercourse running through drains bounding the site to the south – the latter appears to be very eutrophic. The Graney forms the boundary between Carlow and Kildare (note that the county boundary as shown on some of the attached aerial photographs obtained online which indicate the boundary runs through the site are inaccurate). The two watercourses flow to the River Lerr to the west, a tributary of the Barrow.

3.0 Leave to Appeal

The owner of the lands is seeking leave to apply for Substitute Consent for quarry works under section 177C(2)(b) of the 2000 Act, as amended.

4.0 Planning Authority

4.1. Planning Authority Reports

4.1.1. Planning Reports

Carlow County Council have stated that they have no objection to the making of the application.

By way of background, it is advised that it is considered that the original permission (**06/842/PL01.221741**) expired on 24/07/2012. It is stated that the decision of ABP did not extend the permission for more than the normal period of five years. Also, a subsequent application to extend the duration of the permission (**19/312**) was returned invalid to the applicant as it was not received by the PA prior to the end of the appropriate period.

4.1.2. Other Technical Reports

None on file.

4.2. **Prescribed Bodies**

None on file.

4.3. **Third Party Observations**

None on file.

5.0 **Planning History**

An enforcement notice was served on the landholder in 2006 regarding unauthorised gravel extraction on the site.

In July 2007 the Board, on appeal, decided to grant permission for a quarry on the site subject to 25 no. conditions (**PL01.221741**). An EIS was submitted with the application. The application was described on the site notice as:

The development will consist/consists of:

Extract and process sand and gravel at Maplestown, Co. Carlow. We are also seeking permission to retain a new entrance and existing sand and gravel pit on site. An EIS is submitted as part of this application.

Subsequently, the planning authority on the 4th December 2019 refused permission for an application for the importation of material for restoration of the site (**19/403**).

The reason for refusal is as follows:

The site of the proposed development comprises an operational quarry development the subject of previous permission reg ref. 06/842 (An Bord Pleanála Ref. PL01.221741), the appropriate period of which expired on 24th July 2012. For these reasons, the underlying quarry development comprising the site on which the proposed development would take place is not authorised. Accordingly, the proposed development would represent works to an unauthorised development, would consolidate and facilitate this unauthorised development, and therefore to permit the proposed development would set an undesirable precedent and would not be appropriate having regard to the proper planning and sustainable development of the area.

In a determination under Section 261A(2)(a)(ii) of the Act, the Board determined that there were no significant impact from the works prior to the granting of planning permission and that the details within the submitted EIS satisfied the requirements of the Habitats Directive (**01.QV.0147**).

In a determination under Section 261A(2)(a)(ii) of the Act, the Board determined that works to a quarry would not have required an appropriate assessment (**01.QV.0150**). This quarry site is located about 500 metres east of the site in question.

6.0 Policy Context

6.1. Development Plan

The appeal site is in open countryside without a specific designation. There are no recorded ancient monuments or protected structures within or particularly close to the site.

6.2. Natural Heritage Designations

The site is in open countryside with no specific designations. The nearest designated EU site is the Rivers Barrow and Nore SAC – the closest part of the complex is the Lerr River tributary, about 4 km to the west, as it flows south from Castledermot. This SAC was advertised as parts of tranche 2 (July 1999) and (June 2003).

7.0 The Application for Leave to apply for Substitute Consent

The application was submitted on behalf of Mr. Mark Phelan of Maplestown, the owner of the site. It provides an overview of the history of the site and states that the current owner purchased the lands on the 10th of April 2019, on the understanding that the lands had a 10 year permission. The planning authority have advised that this is not the case, as no specific condition was attached to the Board decision (it is submitted that the original application was for a 10 year permission). An application was submitted for remediation of the quarry in 2019 (**19/403**) on foot of condition 17 of the Board decision (requiring restoration), but this was refused by the planning authority. The applicant sets out a request following the requirements of S.177C and S.177D. For convenience I will address the specific points made in the main assessment below.

8.0 Assessment

- 8.1. The applicant has requested that the Board grant leave to apply for Substitute Consent. The grounds for the Board to make such a decision are set out in S.177D of the 2000 Act, as amended (I have paraphrased and edited the relevant sections for clarity):

177D.— (1) the Board shall only grant leave to apply for substitute consent in respect of an application under section 177C where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required in respect of the development concerned and where it is further satisfied—

(a) that a permission granted for development by a planning authority or the Board is in breach of law, invalid or otherwise defective in a material respect whether by reason of a final judgment of a court of competent jurisdiction in the State or the Court of Justice of the European Union, or otherwise, by reason of—

(i) any matter contained in or omitted from the application for the permission including omission of an environmental impact statement or a Natura impact statement or both of those statements as the case may be, or inadequacy of an environmental impact statement or a Natura impact statement or both of those statements, as the case may be, or

(ii) any error of fact or law or procedural error,

or

(b)

(2) In considering whether exceptional that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent. circumstances exist the Board shall have regard to the following matters:

(a) whether regularisation of the development concerned would circumvent the purpose and 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 purpose 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 an unauthorised development;

(g) such other matters as the Board considers relevant.

8.2. Overview

The site in question is an active sand and gravel quarry. I observed a number of heavy vehicles accessing the site and leaving loaded with material during my site visit. Such works are not authorised by existing permissions. I did not visit the inner working area, but there are photographs on the previous history files indicating the

extent and nature of the works on site at that time and I am satisfied from my observations that the works have not gone beyond the permitted physical extent. While I will go over all the key questions as set out under 177D (Part XA) of the Act, I consider the most important question to be whether exceptional circumstances exist to permit the opportunity for regularisation of the development.

With regard to S.177D(1), the Board shall only grant leave to apply for substitute consent under section 177C if it is satisfied that an EIA, a determination as to whether EIA is required, or AA was required. In this regard, I note that in two previous files these questions were addressed in the negative. I would note that an EIS was submitted with the original permission, and that the question of whether an AA was required was addressed in 01.QV.0147. I note that the statutory and legal context for addressing both EIA and AA have changed significantly since those dates. Notwithstanding this, I do not consider that there are any fundamental changes relating to the quarry at present. I consider that this requirement has been met.

8.3. In regard to the other criteria under 177D(1):

that a permission granted for development by a planning authority or the Board is in breach of law, invalid or otherwise defective in a material respect

that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

With respect to 177D(1), the original permission was granted on foot of an EIA that was carried out and assessed by the planning authority and ABP on the appeal. It was decided in a subsequent S.261 submission that Appropriate Assessment was not required. There is no active permission for the site, and no decisions by a court that a permission is defective by way of any matter contained in respect of an EIS or NIS, or that there have been any errors of fact in law or procedural errors. The basis of this application is that an error was made by the site owner in allowing the permission to run out of time. I consider it an arguable case that such an error constitutes 'exceptional circumstances'.

I am therefore satisfied that the case generally fulfils the criteria set out in S.177D(1).

8.4. S.177D(2) sets out a number of considerations for the Board in such cases.

S.177D(b)(2)(a): whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;

Although the original permission is not operable, there is no evidence on file or observable from my site visit that there is a breach of the extent of the works or limits set out in the original EIA. The issue of the need for Appropriate Assessment was addressed in a separate application. The quarry is within the catchment of the Barrow River, which has several EU designated habitats, but the Board ruled at the time that due to the separation distance and the nature of the proposed development, no NIS (Stage II AA) was required. There has been no change of circumstances to consider that this should be reassessed. I note that the small stream that runs south of the quarry appears to be very eutrophic, but I am satisfied from my observations that this is likely the result of upstream agricultural pollution and is not connected with the operation of the quarry as there is no functional connection between the works and the quarry and the eutrophication continues upstream from the quarry site.

I would therefore conclude that regularisation of this development would not circumvent the purpose and objectives of either Directive.

8.5. **S.177D(b)(2)(b):** whether the applicant had or could reasonably have had a belief that the development was not unauthorised;

The core of the submission is that the original permission granted for the Board was intended as a 10 year permission. It is not described as such on the site notice, and there is no condition to this end in the Board's decision. However, it is described as such in the Inspectors Report - the first paragraph of section 3 (page 2) of the report clearly states that the application is for 12 years including restoration. The Inspector

did not make further reference to this, and it is not referred to in the Order or Direction. It is argued by the applicant that from the context of the Report, the Direction, and the subsequent decision, that it seems to have been a simple oversight that the final decision did not clearly specify that it was for 10 years, 12 years in total including restoration.

The applicant goes into some detail in his submission, claiming that the quarry was bought in good faith and he was advised at the time that it was a 10 year permission. It is also noted that no enforcement action was taken at the time by the planning authority.

From the evidence on file, I would conclude that the question of whether it was the intention of the Board at the time to grant for 10 years in total is unclear. It is also questionable from the final decision as to whether there is any legal basis to argue that the permission was for 10 years, as this is neither set out on the application notice, nor mentioned in the final decision. But the EIS does set out a general 10 year lifetime for the quarry, so I accept that this could have been a genuine and reasonable error by the site owners, and it does not appear to have resulted in environmental or amenity impacts above and beyond those anticipated in the application and EIA. I would note that an extension and alteration to the permission would be required to allow for the site restoration as anticipated in the permission.

I would therefore consider that there are grounds for giving the benefit of the doubt to the site owner/occupier in order to allow for the site to be completed and restored as anticipated in the original submission.

- 8.6. **S.177D(b)(2)(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.

I am satisfied from my site visit, the history files (including previous inspectors reports and Board decisions) and from the information submitted that the works that have taken place are in accordance with the original EIS and that no NIS is required, and as such that the provision for public participation would not be substantially impaired by granting leave to apply for substitute consent.

- 8.7. **S.177D(b)(2)(e)**: the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;

The quarry is still in operation and is partially visible from public areas. The original application envisaged a full landscaping and restoration scheme. Details of this were not agreed in accordance with the conditions of the permission and the planning authority has refused an application for remediation on the basis that the works are unauthorised. I would consider that there is a justifiable case that granting leave for a substitute consent application would allow for the reduction of the impact on the environment – in particular visual impacts. I do not consider that it would either remediate or impact on the integrity of a European Site.

- 8.8. **S.177D(b)(2)(f)**: whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;

As noted above, the quarry is currently operation without the benefit of planning permission (notwithstanding the ambiguity over the extent of planning permission as I have discussed above). I would note that the overall works appear to have been carried out generally in accordance with the permission granted and the original EIA. I would therefore not consider this an impediment to granting leave to apply for a substitute consent, but I would note that such an application should not facilitate ongoing unauthorised development. An application for substitute consent should only be permitted if it is clearly demonstrated that ongoing works have ceased at the time of the application.

- 8.9. **S.177D(b)(2)(g)**: such other matters as the Board considers relevant.

I do not consider that there are other relevant matters to consider. None have been raised by the planning authority or in other submissions.

9.0 Recommendation

I recommend that the Board gives the applicant leave to apply for substitute consent under S.177C(2)b of the 2000 Act, as amended.

10.0 Reasons and Considerations

Decision:

Grant leave to apply for substitute consent under section 177D of the Planning and Development Act 2000, as amended, 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 section 177C and section 177D of the Planning and Development Act, as amended, the planning history of the site, all the documentation on file, and the report of the Planning Inspector, the Board is satisfied that:

- The development is one where an Environmental Impact Assessment and Appropriate Assessment are required, and were carried out satisfactorily and no additional works have taken place that would require amendment or reconsideration of the EIA or AA.
- The permission granted for permission for a quarry under number PL01.221741, subject to 25 no. conditions was sufficiently ambiguous that the owner had reasonable grounds for considering that the operations could extend beyond 10 years from the grant of permission, and that this constitutes exceptional circumstances to allow leave to apply for substitute consent.

It is furthermore considered that exceptional circumstances exist by reference, in particular,

- to the fact that the regularisation of the development would not circumvent the purpose or objectives of the Environmental Impact Assessment Directive or of the Habitats Directive,
- that the applicant could reasonably have had a belief that the development was not unauthorised,
- that the ability to carry out an Environmental Impact Assessment and Appropriate Assessment, and provide for public participation in such assessments, has not been substantially impaired.

The Board decided that it would be appropriate to consider an application for the regularisation of the development by means of an application for substitute consent.

Philip Davis

Planning Inspector

16th November 2020