



An
Bord
Pleanála

Inspector's Report ABP.307488-20

Question	Whether the alleged unauthorised quarrying activity constitutes development or is or is not exempted development
Location	Reenagappul, Kenmare, County Kerry
Declaration	
Planning Authority	Kerry County Council
Planning Authority Reg. Ref.	EX 833
Applicant for Declaration	Martin Arthur
Planning Authority Decision	Quarrying activity constitutes works which is development and is not exempted development
Referral	
Referred by	Martin Arthur, Lime Kiln Lodge, Kenmare
Owner/ Occupier	Brian Gallivan & KPK Properties
Observer(s)	None
Date of Site Inspection	1 st October 2020

1.0 Site Location and Description

- 1.1.** The site is located at the south-western edge of the built-up area of Kenmare Town. It is situated to the west of Henry Street, to the north of Pier Road and to the south and east of the Finnihy River, which forms part of the Kenmare River SAC. The site is accessed by means of a right-of-way which leads south-westwards from the end of Market Street/Pound Lane. The Kenmare Wastewater Treatment Plant is located adjacent to the site. There is a tourist attraction, a stone circle (which is a National Monument) located to the northwest of the right-of way, which is one of several Recorded Monuments in the vicinity of the site. Kenmare Pier on the Kenmare River coast, is located to the south. The right-of-way also provides access to the Kenmare Sewage Treatment Plant. At the time of inspection, there was a large industrial type gate (closed) at the entrance from Market Street, adjacent to the entrance to the stone circle tourist facility.
- 1.2.** The site has a stated area of approx. 1.7ha. It comprises an area of unfenced lands to the west of the access road. There are two main parts, the first comprises a large stockpile of aggregate to the south-west of the WWTP with a smaller stockpile of stone to the south-east of the WWTP. The larger area comprises lands that are roughly triangular in shape, and comprises a cliff face and a number of stockpiles of stone and aggregate, which is surrounded by trees. It is noted from the aerial photographs of the area that there is a further much larger rectangular site to the southwest of the area in question, which appears to comprise lands which have recently been cleared of vegetation and recontoured and possibly undergoing quarrying activity, which is also accessed from the same accessway.
- 1.3.** A set of two plans were submitted by the referring party, Mr. Martin Arthur, to the planning authority on 29th May 2020, together with a set of undated photographs of stockpiles.

2.0 The Question

- 2.1.** The question has arisen as to whether the use of the lands as a quarry is or is not development and is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

The P.A. made the following declaration on 22nd June 2020

[that] “the alleged unauthorised quarrying activity is development and [that] it does not constitute exempted development having regard to the considerations hereunder

1. Quarrying activity constitutes works that would come within the scope of Section 2(1) of the Planning and Development Act 2000-2020.
2. The said works would constitute development that comes within the scope of Section 3(1) of the Planning and Development Act 2000-2020,
3. Quarrying activity constitutes development for which there is no exemption provided for under the Planning and Development Act 2000-2020.

Therefore, the quarrying activity at Reennagappul, Kenmare constitutes development which is not exempted development.”

The decision was based on plans and particulars submitted to the planning authority on the 26th May 2020, the 29th May 2020 and the 18th June 2020.

3.2. Planning Authority Reports

The site was inspected by the Senior Executive Engineer on 18th June 2020. It was noted that the site the subject of the referral was approx. 1.7ha in area and comprised an unfenced area of lands adjacent to Kenmare Sewage Treatment Plant and that access to the treatment plant runs through the site. Photographs of the site inspection were included with the report and showed various views of stockpiles of crushed and unprocessed stone within the area in question. The SEE stated :-

“From inspection, it is clear that limestone from the site subject of this referral has been crushed and graded and that stockpiles of processed rock are being stored on the land in question. Thus, it is considered that the use of the site falls under the description of a quarry as defined at Section 2 of the Planning and Development Act, 2000 (as amended).”

It was noted that the agent acting for the owner had stated that there is no evidence of quarrying activity on site, that the lands had not been registered as a quarry, and that if quarrying was to recommence that planning permission would be required. Notwithstanding this, it was considered by the planning authority that quarrying works come within the scope of Section 2(1) of the PDA, that the said works would constitute development as defined in Section 3(1) of the PDA, and that quarrying activity constitutes development for which there is no exemption under the Act. It was concluded that as such, the quarrying activity at the site constitutes development which is not exempted development.

A decision was made by the planning authority on 22nd June 2020 on this basis.

4.0 Planning History

I am not aware of any planning history on the site. However, the following case on an adjacent site to the north-east is of relevance: -

302796 (17/1050) – Permission refused by Board in February 2019 for planning permission (by the referring party, Mr. Arthur), for a proposed motorhome park, following a third party appeal. The reasons for refusal were based on premature development due to the deficiencies in the Kenmare WWTP (at capacity) which would result in a public health hazard and in the absence of a NIS, the board could not be satisfied that the proposal would not have a significant effect on Kenmare River SAC.

3111192-21 – A further Referral has been received by the Board in relation to the large rectangular area to the southwest of the site. The question posed relates to whether this site is being used for quarrying activity, and was submitted by the same Referring party. The lands are also stated to be in the same ownership as the referral case the subject of this report.

5.0 Policy Context

5.1. Development Plan

The lands are just outside the development boundary for the town in the Kenmare Functional Area LAP. The lands therefore fall within the Rural General Zone in Kerry County Development Plan. However, the lands in the vicinity within the town boundary are zoned either 'Residential Existing' (Market Street, Pound Lane, the lands to the south-east of the access route) or 'Mixed Use' (southern part of eastern side of access route but excluding barn). In addition a large circular annotation which indicates the presence of Recorded Monuments is shown over the site of the WWTP and adjoining lands. The majority of the right-of way/access route indicates an objective to provide a proposed walkway.

5.2. National and Recorded Monuments

Stone Circle and Boulder Burial - Ke093 032001-002 -These National Monuments, which comprise a stone circle and a boulder burial site, are located approx. 70m to the north-east of the site of the referral. These National Monuments are subject to a Preservation Order for which Ministerial Consent is required in certain circumstances.

Children's Burial Ground – KE093-031 – this Recorded Monument is located approx. 100m to the northwest of the site of referral.

Souterrain – KE93-101 – this Recorded Monument is located on the opposite bank of the Finnihy River, c.200m from the site of referral.

5.3. Natural Heritage Designations

Kenmare River SAC (002158) – c.45m to Northeast, c.250m to south
Mucksna Wood SAC (001371) – c.700m to south
Killarney National Park, MacGillicuddy Reeks and Caragh River Catchment SAC (000365) – C. 5km to north
Old Domestic Building Dromore Wood (000353) – c.7km to west
Maulagowna Bog SAC (001881) – c.6km to south
Blackwater River SAC (002173) – c.6km to northwest
Clonee & Inchiquin Loughs, Uragh Wood (001342) – C.10km to southwest

6.0 The Referral

6.1. Referrer's Case

Background – The applicant for referral, Martin Aurthur, had sought a request from the P.A. for a Declaration under Section 5 on 26th May 2020. The request was accompanied by a site location /aerial photograph of the site with annotations in red print. These pointed to the large area of stockpiles and cliff face to the southwest of the WWTP as “alleged unauthorised quarrying activity” and “KCC waste water treatment plant”. The question posed (on the same page as the annotated photograph) was “Does this quarrying activity constitute development or is it exempted development?”

During the course of the determination of the matter, the planning authority sought further information in terms of a site location plan, and the referring party responded with two maps with the site outlined in red. The planning authority also wrote to the landowner and sought observations on the matter.

The response from the landowner submitted on 15th June 2020 raised similar comments to those contained in the response to the reference to the Board, which are summarised in 6.3 below. Essentially, it is stated that there are no quarrying works being carried out at the site at present, that the quarry was established prior to 1963 and as such the quarry feature is not unauthorised. However, it is acknowledged that as the quarry was never registered under Section 261A, that any recommencement of quarrying works would require planning permission.

Mr. Arthur disputed the statements that no quarrying activity was being carried out at the site and provided evidence to support his claims that quarrying activity had recommenced within the last few years in the form of photographs and a photocopy of an enforcement notice.

6.2. Grounds of reference

The Referring party is in agreement with the P.A. decision but is seeking a review of the P.A. determination on the basis that the decision did not go far enough.

His original question to the P.A. in his Section 5 Referral was

‘Whether the alleged unauthorised quarrying activity constitutes development or exempted development’

The landowner’s response was that there is no evidence of any quarrying activity taking place, and as such, the P.A. cannot make a determination on the Section 5 application. Notwithstanding this, the P.A. did determine that quarrying activity was taking place on the site and that this quarrying activity did constitute ‘development’ and was not ‘exempted development’.

The Referring Party is now seeking the Board’s agreement that because quarrying activity has taken place on the subject site abutting a Kerry County Council Right-of-Way, this has created a public safety hazard. As such, it is requested that the Board direct that the lands be reinstated and made safe.

6.3. Planning Authority Response

The P.A. has not made any observations in response to the referral.

6.4. Response from landowner

A response was received from an agent acting on behalf of the current landowners. The main points may be summarised as follows:

1. **Question posed** – it is claimed that the question posed has been changed throughout the determination period. The question currently before the Board is ‘whether the alleged unauthorised quarrying activity constitutes development or is exempt’. It is claimed that this question differs from that put to the local authority as ‘Does this quarrying activity constitute development or is it exempted development?’ with reference to a photograph of stockpiles of limestone. It is submitted that the question put to the P.A. is the one that should form the basis of the determination.
2. **Inadequate information** – it is stated that the information submitted to the P.A. was insufficient to allow the P.A. to make its decision, which is contrary to the provisions of Section 5 of the Planning and Development Act 2000 as amended. It is submitted that there is currently no quarrying activity on site and therefore, no development arises.

3. **Background to land ownership** – it is claimed that the lands in question were previously owned by the referring party's family, and that they were acquired by NAMA. Prior to this, the Council blasted rock from the quarry in 1995 to facilitate the construction of the Kenmare WWTP, and as more rock was blasted at this time than was needed, the surplus rock has been stored on the site ever since. Thus the 'development' comprising quarrying excavation took place over 25 years ago, and the site was not purchased by the current owners until 2018.
4. **Background to recent works** – Early in 2020, the current owner started site clearance in an attempt to ready the site for future development. In order to facilitate the removal of the stockpiles, the landowner crushed the existing granite on site but was unaware that planning permission was required for such works. Following the issue of a Warning Notice to cease in February 2020, all stone crushing works ceased on site immediately. Although an Enforcement Notice was issued in May 2020, it is claimed that this was without foundation. It is further stated that around this time, the landowner used some of the crushed stone to repair the existing private roadways within the landholding. It is submitted that this is exempted development under Class 13 of the Planning and Development Regulations 2001 as amended.
5. **Unauthorised use or works is disputed** – It is claimed that the property was purchased in 2018 with an established pre-1963 quarry, which has not been actively worked since 1995. It is acknowledged that it was not registered under section 261A of the Planning and Development Act because all quarrying activity had ceased at that time. Thus the quarry was lawfully commenced prior to 1964 and the historical quarrying and associated stockpiles are not unauthorised. It is further acknowledged that should quarrying works recommence on site, that planning permission would be required. However, it is re-iterated that there are no quarrying works on site presently.
6. **Remedy sought by referring party** – it is stated that the remedy being sought in terms of reinstatement of the lands is unreasonable. The Board is reminded that it has no powers of enforcement or ability to require reinstatement of the lands.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000 (as amended)

Section 2 (1)

“Works” are defined in this section as including any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

“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 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.

Section 3 (1) of the Act defines “*Development*” as, ‘except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land’.

Section 3(2)(b)(iii) provides that where land becomes used for the following purpose, the use of the land shall be taken as having materially changed:

The deposit of vehicles whether or not usable for the purpose for which they were constructed or last used, old metal, mining or industrial waste, builders' waste, rubbish or debris.

Section 4 of the Act refers to '*Exempted Development*' and Subsection (1) sets out categories of development that shall be exempted development for the purposes of this Act. Subsection (1) (l) states the following:

'development consisting of the carrying out of the works referred to in the Land Reclamation Act, 1949, not being works comprised in the fencing or enclosure of land which has been open to or used by the public within the ten years preceeding the date on which the works are commenced or works consisting of land reclamation or reclamation of estuarine marsh land and of callows, referred to in section 2 of that Act.'

In addition to specified exemptions in the Act, Subsection (2) of the Act provides that the Minister may by regulations provide for any class of development being exempted development. The principal regulations made under this section are the Planning and Development Regulations 2001.

Section 4 was amended by the Environmental (Miscellaneous Provisions) Act 2011 such that section 4(4) provides that:

Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

Section 177U(9) – in deciding upon a declaration or referral under section 5 of this Act, a planning authority or the Board, as the case may be, shall, where appropriate, conduct a screening for Appropriate Assessment in accordance with the provisions of this section.

Section 32 has a general obligation in respect of

Any development of land not being exempted development and in the case of development not authorised for the retention of unauthorised development.

Section 34 (12)

A planning authority shall refuse to consider an application to retain unauthorised development of land where the authority decided that if an application for permission had been made in respect of the development concerned before it was commenced the application would have required that one or more than one of the following was carried out –

- (a) An environmental impact assessment
- (b) A determination as to whether an environmental impact assessment is required or
- (c) An appropriate assessment

7.2. Planning and Development Regulations, 2001

Article 6 of Part 2 of the Regulations provides that subject to Article 9 (1) (a), development specified in Column 1 of Part 1 of the Second Schedule shall be exempted development for the purposes of the Act subject to the conditions and limitations specified in Column 2. There are no Classes of development relevant to the use in question. However, the landowner's submission to the board indicated that crushed stone was used to repair existing roads within the landholding and made reference to Class 13 of Part 1, Schedule 2.

Class 13 -The repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, and the construction of any private footpath or paving.

The limitation on this class is the width of any such private footpath or paving shall not exceed 3 metres.

Article 9 (1) (a) lists the exceptions where development would not be exempted development (by virtue of Article 6). These included

- (iii) endanger public safety by reason of traffic hazard or obstruction of road users,

- (vii) consist of or comprise the excavation, alteration or demolition (other than peat extraction) of places, caves, sites, features or other objects of archaeological, geological, historical, scientific or ecological interest, the preservation, conservation or protection of which is an objective of a development plan or local area plan for the area in which the development is proposed or, pending the variation of a development plan or local area plan, or the making of a new development plan or local area plan, in the draft variation of the development plan of local area plan or the draft development plan or draft local area plan,
- (viiA) consist of or comprise the excavation, alteration or demolition of any archaeological monument included in the Record of Monuments and Places, pursuant to Section 12(1) of the National Monuments Act 1994, save that this provision will not apply to any excavation or any works pursuant to and in accordance with a consent granted under section 14 or a licence granted under section 26 of the National Monuments Act (No.2 of 1930) as amended,
- (viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site,
- (x) consist of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a means of access to any seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility.
- (xi) Obstructe any public right of way.

Article 11 provides that development which commenced prior to the coming into operation of this Part and which was exempted development for the purposes of the Act of 1963 or the 1994 Regulations, shall notwithstanding the repeal of that Act

and the revocation of those Regulations, continue to be exempted development for the purposes of the Act.

8.0 Relevant Board Decisions The following Board decisions in relation to Section 5 Reference/Referral cases are considered to be of relevance.

8.1 RL3434 – Whether the prospective restoration works on previously authorised and unauthorised quarrying lands at Boolinarrig Big, Birr, Co. Offaly, is or is not development and is or is not exempted development.

The referral related to an existing non-operational quarry, which had been excavated to a depth of c.10m in some places. There were planning and enforcement histories pertaining to the site. A substitute consent had been determined necessary in respect of the quarry, but no application to the Board had been made. The referrer wished to carry out restoration works on both the permitted quarried area and on that area that had been subsequently excavated without permission. The referral was made by the owner/operator, consequent to the Planning Authority's refusal to issue a Section 5 declaration.

The Board decided (2016) that the proposed restoration works were development that was not exempted development as follows:

- The activity/operation constituted works that were development as per Section 2 and 3 of the Act
- The overall quarry was the subject of an assessment under section 261A of the PDA as amended, wherein it was determined that substitute consent would be required, but no subsequent application in this regard had been made to the board
- Therefore, under S177O(3) the entire quarry, which would have required EIA constituted unauthorised development
- Works involving restoration would not be authorised by the extant permission given the conditions attached to same.

8.2 RL3149 – whether the quarrying of lands carried out within a specified registered landholding in Co. Carlow is or is not development or is or is not exempted development.

The site in question was one of two in the ownership of a single landowner and both the subject of concurrent referrals. The site incorporated an operational quarry; lands that were formerly quarried; and lands that had never been quarried.

Questions arose as to whether commencement occurred prior to the appointed day or whether quarrying had extended into the subject site thereafter, abandonment, material intensification of use and blasting. The referral was made by a local residents group consequent to the planning authority's declaration that it was exempted development.

The Board concluded (2015) that the development was not exempted development for the following reasons –

- There was insufficient information to make a determination as to whether quarrying activity on the adjoining site had commenced after the appointed day.
- There was not a reasonable anticipation of continuing to quarry sand and gravel only within the subject site.
- There had been material intensification of quarrying within the subject site.
- The pre 1964 establishment of quarrying activity in the adjacent holding did not permit the extension of quarrying into the subject site.

8.3 RL2081 – Whether a quarry at Cartron, Newport, Co. Mayo is or is not development or is or is not exempted development.

This referral related to a quarry that had been in existence prior to and had been in continuous use without abandonment since 1st October 1964. There had been some changes to operations over the years, such as the use of a rock breaker and screening plant. The PA considered that the current nature, scale and extent of the quarrying constituted a material change of use without the benefit of planning permission. The referral was made by the owner/operator.

The Board concluded (2003) that the quarry was exempted development as follows:

- The use of part of the land for quarrying commenced prior to the appointed day and was not abandoned since that date.
- There had not been a significant intensification of quarrying.
- The use of land as an extension to the existing quarry did not constitute a material change of use of the land within the scope of S.3 of the 1963 Act because the use had not been abandoned.

8.4 RL2446 – Whether land recovery by filling with imported soil and topsoil material at Drakestown, Castletown, county Meath is or is not development or is or is not exempted development.

The referral was submitted to the board by a third party and related to the infilling of a disused sand and gravel quarry with soil and topsoil material complying with EWC code 170504 (56,000 tonnes over 3 years). The main issues were whether the development fell within the scope of class 11 of Part 3 of Schedule 2 of the Regulations and whether EIA was required, a traffic hazard would result and/or whether objects of archaeological interest would be altered.

The Board (2008) concluded that the land recovery fell within the scope of Class 11, that it would endanger public safety by reason of traffic hazard or obstruction of road users and would interfere with sites of archaeological interest, and by implication fell within the limitations on the exemptions under article 9(1)(a)(i) and (vii).

Thus, the Board decided that the land recovery was development and was not exempted development.

8.5 Whether land reclamation for agricultural purposes using soil as infill material is or is not development and is or is not exempted development

The referral related to the infilling of a rural site (4.57ha) with imported soil. Questions arose firstly regarding the use of part of the site for the storage of builder's material which did not conform with the definition of "agriculture" within the Act. Secondly, that the works could adversely affect European site Trawmore Bay SAC and Trawmore Bay SPA by reason of a hydrological connection to these

sites by drains with the development site. The referral was made by the owner operator.

The board concluded (2013) that the works were development and not exempted development as follows:

- Importation of soil might have an impact on European sites – Section 17(1)(b) of Environmental (Miscellaneous Provisions) Act 2011 which amends Section 4(4) of the PDA 2000.
- Second schedule Part 3 class 8C of PDR, 2001, does not provide an exemption for the importation of soil to a farm holding – rather refers to moving soil within a farm holding.
- Second Schedule Part 3 Class 11 of PDR,2001, does not cover the proposed development.

9.0 Assessment

9.1. Introduction

The referral was submitted by a third party and arose out of a declaration made by the planning authority on foot of a Section 5 application by that same third party, but where the outcome of that application was a determination which was favourable to the third party. The stated reason for the referral is that “the planning authority did not go far enough” and that the referring party wants the lands to be reinstated. The landowner has pointed out that this goes beyond the remit of the Board who has no powers of enforcement. I would agree with this but consider that the referring party essentially wants confirmation of the status of the development in terms of whether the quarrying activity is development and if so, whether it is exempted development.

The landowner’s position also states that the question posed is unclear and has changed during the process and that insufficient information was provided for the planning authority to come to a decision on the matter. Where the question is unclear or ambiguous, the Board can rephrase it. In terms of the information provided, I would agree that the information provided by the various parties to the referral is very scant indeed, but it is noted that the planning authority had

considered that it had enough information before it to enable it to come to a decision. In any case, the burden of proof, in terms of what is exempted development, lies with the party seeking to prove the exemption, and not with the decision-maker to disprove it.

Having regard to the foregoing, it is considered that the referring party is seeking a determination as to whether the 'quarrying activity' on the subject lands is or is not development and is or is not exempted development. It is not specified whether this relates to past, present or future activity. Although the landowner is seeking to confine the question of quarrying activity to the current use of the lands, and is relying on claims that the quarry (including any historical activity) is exempt by virtue of a pre-1964 established use, there is nothing to prevent the board from examining the question retrospectively, as the matters in question can relate to past, present or future development or activity.

It is considered, therefore that the **question should be restated** as follows:

- Is the 'quarrying activity' that has or is taking place on these lands 'development'?
- If 'development', is the use or activity authorised by virtue of being a pre-1964 established use?
- If an 'established use or development', has there been any intensification or abandonment of the use or any other material change of the use?
- If 'development', is the use or activity exempted development under section 4 of the P & D Act 2000 (as amended) or Article 6 of the P & D Regulations 2001 (as amended)?
- If exempted, is the exemption restricted under Section 4 of the P & D Act (as amended) or Article 9 of the P & D Regulations 2001 (as amended)?

9.2. Is the Quarrying Activity that has or is taking place on these lands development?

'Development' is defined in Section 3 of the P & D Act as the carrying out of any works on, in, over or under any land or the making of any material change of use of any structure or land. 'Works' are defined in section 2 of the PDA as any act or

operation of construction, excavation, demolition, extension, alteration, repair or renewal. 'Quarry' means an excavation/system of excavations for the purpose of/in connection with the getting of minerals or products of minerals..... and shall be deemed to include inter alia –

Any place on the surface surrounding or adjacent to the quarry occupied together with the quarry for 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.

The evidence before the Board regarding the current use of the site is that from inspection and reports on the file, it comprises lands that have obviously been quarried with a cliff face remaining at the western end and a series of stockpiles of material including unprocessed stone, crushed and graded stone and aggregate, which are uncovered. The planning authority and the referring party, by means of photographs, maps and statements of observation have confirmed the storage of stockpiles of stone on the lands and the transport of the material off the site in the recent past (last 2 years). It is further noted that the planning authority had issued a Warning Notice (February 2020) and this was followed by an Enforcement Notice (May 2020) to cease quarrying activity at the site.

The landowner has also acknowledged the following additional points -

- That the lands have been used for quarrying activity since before the appointed day (1st October 1964) and, as such, is authorised.
- That extraction of rock took place in 1995, including blasting, to facilitate the construction of the nearby town waste water treatment plant, which resulted in an excess of stone being extracted, and the surplus stone now sits in stockpiles around the site.
- That no works or quarrying activity took place after 1995.
- Thereafter, the lands were taken over by NAMA and were subsequently sold to the current landowner in 2018.

- In the recent past (2019/2020), the current landowner, in an attempt to clear the site to make it ready for development, began to clear some of the stockpiles. In order to do so, the stone was crushed to facilitate movement.
- Some of the crushed stone was used to repair internal roads within the landholding.

On the basis of the evidence before the Board, I am satisfied that the site has been used for the excavation of minerals/rock, the storing of stone materials on the site, the breaking, crushing and screening of rock/stone and the transport of material off the site to unknown destinations. These activities come within the definition of quarry. The quarrying activity that has been taking place, and continues to take place on the lands, therefore constitutes 'works' which come within the scope of Section 2(1) of the PDA 2000 (as amended), and the said 'works' constitute 'development' which comes within the scope of Section 3(1) of the PDA, 2000, (as amended). Thus the 'Quarrying Activity' is 'development'.

9.3. If 'development' is the use/activity authorised by virtue of being a Pre-1964 established use/development?

The only reference to a Pre-1964 established use is made by the landowner's agent. The statement was made in response to notification in respect of both the Section 5 application and the Referral to the Board.

"The property when purchased had an established pre-1964 quarry which has not been actively worked since 1995, with the last excavation from the quarry made by Kerry County Council some 25 years ago. We would submit that the quarry has a pre-1964 authorisation, that the works undertaken in 1995 had pre-1964 authorisation such that the quarry which commenced prior to 1 October 1964 was lawfully completing the quarry which would have reasonably been envisaged when the quarry commenced."

This statement (HRA submission, 29/07/21) implies that the quarrying activity was authorised by the fact that it had commenced before the appointed day, that there was a reasonable anticipation that the quarry could continue to operate to completion, that it had continued to operate within this authorisation until 1995, and that no 'quarrying activity' has occurred since.

It should be noted however, that no evidence has been submitted to substantiate this statement. Furthermore no evidence has been provided regarding matters such as the physical/geographical extent of the original quarry; the nature of the deposit(s) being worked; the rate of extraction that had applied to this quarry use and whether this had changed over time; the nature, scale, extent or frequency of the activities involved in the quarrying activities. The agent for the landowner also stated that the quarry was never registered under the Section 261 process on the basis that all quarrying activity had ceased at that time.

The Referring Party has strongly disputed the statements that no quarrying activity has been carried out in recent times and has provided evidence to support his claims that quarrying activity had recommenced within the last few years in the form of photographs and a photocopy of letter from P.A. advising of the service of an enforcement notice. The photographs show lorries with crushed stone and plant/equipment being transported off the site on various dates including the 18th March 2020, the 21st April 2020 and the 23rd April 2020. The letter regarding the service of the Enforcement Notice is dated the 19th May 2020. I would also draw the Board's attention to the OSI Geohive aerial photo (dated 2017) which is available on the OSI website and the current Google Maps Aerial photo (imagery date 2021). A comparison of these two aerial photos clearly indicates that the scale and extent of the quarry has changed significantly in the last four years, which casts serious doubt on the landowner's position.

In conclusion, on the basis of the information before the Board, therefore, it is considered that the information is insufficient to allow for a determination regarding whether or not the quarry is authorised.

9.4. If the established use of the quarry is accepted, has there been a material change in the use with regard to intensification or abandonment?

The Board may, however, accept that the quarry has the benefit of a pre-1964 established use. If this is the case, it would be necessary to ascertain whether the original quarry is comparable to the existing use of the site and that no significant intensification of use has occurred in the meantime, such that a material change of use has occurred. However, as stated above, there is insufficient information regarding the original quarry or the nature/scale of the use in the intervening years

to come to a definitive view on this matter. Furthermore, there is little information regarding the extent, scale and nature of the rock blasting that occurred in 1995 or the nature of the more recent works involving the crushing and grading of stone and the movement of stone material off the site to unknown destinations.

The question of abandonment also arises, although it has not been raised by any of the parties. The landowner's agent has stated that the last 'quarrying activity' at the site took place in 1995 and that no quarrying works have taken place for 25 years. This is a considerable length of time. I would accept however that as there is no specific evidence before the board as to any intention not to resume the use, and as the matter has not been raised by any of the parties, it is not proposed to pursue the matter of abandonment at his point in time. Nevertheless, the length of time that the quarry is stated to have been inactive raises further questions regarding the authorised status of the quarry, and does not seem to fit with the comparison of aerial photos between 2017 and 2021.

It is, therefore, in my opinion, open to the Board to conclude on the basis of the information before it that some form of quarry operation was in place before the 1st October 1964. However, it is considered that there is insufficient information to either be definitive about this or to determine that a material change of use, by reason of intensification or abandonment, has not occurred in the meantime.

9.5. If 'development', is the use or activity exempted development under the provisions of either the Planning and Development Act 2000 (as amended) or the Planning and Development Regulations 2001 (as amended)?

Section 4 of the Act sets out various provisions in relation to Exempted Development. There are no provisions specifically relating to use as a quarry. However, Section 4(1)(f) relates to development carried out on behalf of, or jointly or in partnership with, a local authority, pursuant to a contract entered into by the local authority concerned, whether in its capacity as a planning authority or in any other capacity. Section 4(1)(g) relates to development consisting of the carrying out by any local authority or statutory undertaker of any works for the purpose of inspecting, repairing, renewing, altering or removing any sewers, mains, pipes, cables, overhead wires, or other apparatus.....

The documentation on file indicates that the local authority had extracted rock (or used rock which had been extracted on its behalf) in 1995 for the purposes of constructing the new waste water treatment plant on the adjacent lands to the north-east of the site. As stated previously, no evidence to this effect has been provided, but neither has the statement been disputed by either the planning authority or the third party. However, there is no evidence in the submitted documents of any contract to this effect. Furthermore, there is no indication that the quarrying activity which preceded this event in 1995 was carried out by or on behalf of the local authority, or for what purpose any such quarrying activity had been carried out.

Section 4(1)(l) of the PDA relates to reclamation of land under the Land Reclamation Act 1949. However, there is no evidence to suggest that the quarrying activity or works in recent times comes within the scope of land reclamation works.

Thus there is insufficient evidence to support any exemption for the works comprising quarrying activity under Section 4 (1) (f) or (g) or (l) of the Planning and Development Act 2000 (as amended). As such, it is considered that these works constitute 'development' under Section 3, but do not come within the scope of Section 4(1) of the P & D Act 2000, as amended. As such, the said works are development and are not exempted development.

Exemptions are also provided for by Article 6 of the P&D Regulations 2001 (as amended). This provides that development of a class specified in Schedule 2 of the Regulations shall be exempted development provided that the conditions and limitations attached to those various classes are met. The only class that is of any relevance to the case currently before the Board is Class 13 of Part 1, Schedule 2. This provides for an exemption in respect of

The repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, or the construction of any private footpath or paving.

Condition/limitation – The width of any such private footpath or paving shall not exceed 3 metres.

The landowner has advised that the activity carried out during the last two years included the use of some of the crushed stone on site to repair the private roads within the landholding. However, no information or evidence has been provided to

indicate which roads, in what locations, such repair works were carried out, or whether the roads in question complied with the limitation of 3m width. The evidence that has been provided indicates that the main activity related to the movement of material from the stockpiles and the crushing of stone to facilitate this process. Thus, there is little to suggest that the main purpose of the activities was to repair the internal roads.

9.6. If exempted development, are there any restrictions on such exemption?

Notwithstanding the conclusions reached above, the Board may consider that the works are exempted development. Should the exemption be provided for by Section 4 of the Act, there is a restriction on any such exemption under Section 4(4) of the Act (inserted by the Environment Miscellaneous Provisions Act 2011) which states that notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required. This matter will be addressed further below.

Any exemptions conferred by Article 6 of the Regulations would be restricted by Article 9 in certain circumstances. These are summarised in 7.2 above and include

- Endangering public safety by reason of a traffic hazard or obstruction of road users (9(1)(a)(iii)).
- Interference with designated places, sites of archaeological, geological interest the preservation of which is an objective of a local development plan (9(1)(a)(vii)).
- Interference with a national or recorded monument (9(1)(a)(viiA)).
- Development that would require Appropriate Assessment because it is likely to have a significant effect on the integrity of a European site (9(1)(a)(viiB)).
- Fencing or enclosure of lands habitually open to the public for the preceding 10 years for recreational purposes providing a means of access to a riverbank...for recreational utility (9(1)(a)(x)).
- Obstruction of any public right of way (9(1)(a)(xi)).

- Development to which Part 10 applies, i.e. Environmental Impact assessment) is required (9(1)(c)).

(1) Roads and Traffic and Access Arrangements

The site is accessed via Market Street and the Square in the centre of town. The Square functions as a market place and car park with shops, cafes and restaurants opening onto it together with a Heritage Centre. Market Street (also known as Pound Lane) is a mainly residential street which leads off the Square towards the Stone Circle tourist facility. It is a very narrow street with on-street parking and no footpaths. From the end of this street, the site is accessed by means of a private road which serves a number of properties/facilities including the quarry site and a further larger site to the south west (which has been stripped of topsoil), as well as the public wastewater treatment plant. It is considered that the access route serving the site is likely to be problematic for the transport of material and machinery to/from the quarry in terms of road safety and traffic congestion, and would be likely to result in conflict with pedestrians.

The Board's attention is drawn to the fact that the larger site to the southwest is the subject of a more recent Section 5 Referral, Reference ABP.311192-21, (lodged with Board on 4th August 2021, with same third party referring party and same landowner), regarding whether the stripping back and removal of all topsoil and trees on lands to create an extension of 2.75ha to an existing quarry and the importation of broken stone from quarry extension for storage in the existing quarry is or is not development or is or is not exempted development. Should this site be found to be in use as a quarry, which appears to be accessed via the same route, this would raise the question of cumulative impacts in terms of traffic and transport, which are likely to be significant.

There has been no indication that any consideration has been given to the likely impact of the movement of stone material from the stockpiles, or plant/equipment, to/from the site. However, it is considered that the environmental impacts of the use of the private road and the public street in terms of traffic hazard and obstruction of road users is likely to be significant and that the development could be considered to endanger public safety by reason of a traffic hazard or obstruction of road users, which would restrict any exemption provided under Article 6. However, there is

insufficient information available to the Board regarding the nature/volume/frequency of traffic arising from the use to to be definitive about whether any exemption provided by Article 6 would be restricted by Article 9(1)(a) (iii).

The private road is also used by pedestrians, including tourists, to access both the Stone Circle feature and the riverbank. It is not clear what rights-of-way or easements are in place over this route, but as it serves several properties and facilities, it is likely that some rights-of-way exist up to and beyond the entrance to the stone circle. No information has been provided in respect of any rights-of-way. The Kenmare LAP includes a specific objective to provide for a public walkway along this route. However, there was a large industrial type gate which was closed with signs stating 'no thoroughfare' at the time of inspection. Thus, it is possible that the development may involve the fencing of lands habitually open to the public and/or the obstruction of a right-of way, but there is insufficient information available for the Board to be definitive about whether any exemption provided by Article 6 would be restricted by Article 9(1)(a) (x) and/or (xi).

(2) Archaeology

The site is located in close proximity to two National Monuments, a Stone Circle and a Boulder Burial site, (KE093-032001/002) which are located approx. 60 metres to the northwest of the closest stockpile. These National Monuments are subject to Preservation Orders made under the National Monuments Act and as such, any development which would affect or be in proximity to these monuments would require Ministerial Consent in accordance with Section 14 of the National Monuments (Amendment) Act 2004. There are several other Recorded Monuments in the vicinity including a Children's Burial Ground (KE093-031, approx. 100m to the north-east) and a souterrain (KE093-101, approx. 200m to the north on the opposite bank of the River Finnihy).

The development in question, by reason of its nature and scale and type of activity with associated environmental effects could potentially interfere with one or more of these features of archaeological interest, which are either National Monuments (subject to a Preservation Order) or Recorded Monuments. It is considered, therefore, that any exemption that might apply to the use of the site for 'quarrying

activity' under Article 6 is likely to be restricted by Article 9 (1)(a)(vii) and (viiA). However. There is insufficient information regarding the nature, extent and scale of the use to be definitive about this matter.

(3) Need for EIA

The use of the lands for 'quarrying activity' comes within the scope of Class 2(b) of Part 2, Schedule 5 of the Planning and Development Regulations 2001 (as amended). Class 2(b) relates to the extraction of stone, gravel, sand or clay, where the area of extraction would be greater than 5 hectares. The landowner has not provided any details of the size of the quarry, but the planning authority has estimated the area of extraction to be 1.7ha, which would be well below the threshold for EIA. Notwithstanding this, however, the full extent of the quarry is far from clear, as no maps of the area of extraction have been provided, nor has any information been provided regarding the extent of land ownership (by the current landowner) in the area. There is also evidence of a considerably larger site area to the south west of the site, which has been cleared of topsoil and seems to have been subject to some recontouring. This does not appear to have been the subject of any recent planning permissions but was not evident in the 2017 OSI mapping of the area. As stated previously, this site is the subject of a further referral that is currently before the Board (311192-21) and was the subject of a further Section 5 application to the P.A. in the intervening period, whereby the planning authority considered that the works at this site constituted reclamation of lands in agricultural use. However, the more recent referral has raised further information and issues which will be addressed by the Board in due course. In the meantime, thus, there is much uncertainty regarding the scale and extent of the quarry that is the subject of the referral and any other quarrying activity that might be ongoing in the immediate surrounds, which cumulatively could have serious impacts on the environment.

The site is located in an environmentally sensitive area and is in close proximity to both designated national/recorded monuments and ecologically sensitive sites. No information has been provided regarding the true scale, nature and extent of the quarrying activity, but the information available to the Board would indicate that there is potential for significant environmental effects. Thus it is not possible to be definitive about whether an EIA is required, and should this be the case, no

exemption is possible by virtue of Section 4(4) of the PDA 2000 (as amended) and Article 9(1)(c) of the PDR 2001 (as amended).

(4) Appropriate Assessment

Article 6(3) of the Habitats Directive requires that any plan or project not directly connected with or necessary to the management of a European site, but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to Appropriate Assessment of its implications for the sites in view of the sites' Conservation Objectives. The Board is the competent authority in this regard and must be satisfied that the development in question would not adversely affect the integrity of the European sites having regard to their conservation objectives.

The subject referral is a project which is not directly connected with or necessary to the management of a European site. The site is not located within a designated European site but is located in close proximity to several European sites. A Screening Report for Appropriate Assessment has not been provided by any of the parties and the planning authority has not indicated that it has carried out an AA screening of the development before issuing its declaration.

The site of the subject referral is located in proximity to European sites as follows;

Kenmare River SAC (002158) – c.45m to Northeast, c.250m to south

Mucksna Wood SAC (001371) – c.700m to south

Killarney National Park, MacGillicuddy Reeks and Caragh River Catchment SAC (000365) – C. 5km to north

Old Domestic Building Dromore Wood (000353) – c.7km to west

Maulagowna Bog SAC (001881) – c.6km to south

Blackwater River SAC (002173) – c.6km to northwest

Clonee & Inchiquin Loughs, Uragh Wood (001342) – C.10km to southwest

It is considered that having regard to the distance and lack of hydrological connections to the following European sites

Killarney National Park, McGillicuddy Reeks and Caragh River Catchment SAC

Blackwater River SAC

Maulagowna Bog SAC

Clonee & Inchiquin Loughs, Uragh Wood

it is likely that these sites could be screened out from further consideration. However, in the absence of any data about the nature, scale and extent of the development and ecology/hydrology of the site and surrounding lands, it is not possible to be definitive about this matter.

Old Domestic Building Dromore Wood is designated for Lesser Horseshoe Bat. However, the NPWS maps contained in the Conservation Objectives for this site indicate that the site of the subject reference is outside the foraging range and potential foraging grounds for this European site.

Mucksna Wood SAC is located on the southern bank of the Kenmare River and is designated for its old sessile oak woodlands, which are an Annex 1 habitat. It includes an area of saltmarsh fringe and an important heronry. Further consideration of this site may be warranted.

Kenmare River SAC includes the Finnihy River which flows to the north and west of the subject site to join the Kenmare River. Thus the site of the subject referral is located in close proximity (ranging from 45-250m) to this European site. The lands to the northwest of the site and in the general vicinity include established mature woodlands, some of which appear to have been affected by recent development, as evidenced by a comparison of aerial photographs. It is considered that further consideration of this European site would be warranted.

The Qualifying Interests for Kenmare River SAC include Lesser Horseshoe Bats, Otter, Harbour Seal, Marsh Snail, several coastal habitats, salt meadow habitats, grassland and dunes habitats. The NPWS Maps in the Conservation Objectives for this site indicate that the habitats that are closest to the subject site are Reefs, Atlantic Salt Meadows and Mediterranean Salt Meadows and the species that occur closest to it are Lesser Horseshoe Bat, Otter and Harbour Seal.

As stated previously no AA Screening Report has been submitted and the P.A. does not appear to have carried out a Screening for Appropriate Assessment, and there is little information regarding the precise nature and characteristics of the

use/development, or the characteristics of the receiving environment. However, on the basis of the information available to the Board, it is considered that potential impacts that are likely to occur would include noise and vibration, dust emissions, pollution/contamination of water quality. No consideration appears to have been given to the likely impacts in terms of habitat loss, fragmentation or disruption or to water quality impacts. Thus, the likelihood of impacts from 'quarrying activities' on the subject site on the habitats and species for which the Kenmare River SAC is designated cannot be ruled out. Similarly, in the absence of any detailed information regarding the nature of the receiving environment and/or the nature and scale of the use in question, it is not possible to rule out significant impacts on the other European site in the vicinity of the site.

Given that there is considerable uncertainty regarding whether the project is likely to have significant effects, either individually or in combination with other plans or projects, on the European sites in view of the Conservation Objectives for these sites, the quarrying activity cannot be considered to be exempted development by reference to Section 4(4) of the Planning and Development Act 2000 (as amended) and/or to Article 9(1)(a) (viiB) of the Planning and Development Regulations 2001 (as amended).

I also note with regard to this issue and the matter of a pre-1964 quarry use, that J. Ni Raifeartaigh in the JJ Flood case [2013] JR 647 (ABP QV0015), ruled that a quarry which had commenced operations prior to 1964, even one which stays within its pre-1964 user, is not automatically rendered immune from the requirements of either the Habitats Directive or the Environmental Impact Directive. In this respect, the trigger dates for the EIA Directive is February 1990 and for the Habitats Directive is February 1997.

9.7. Conclusion

It is accepted that the lands the subject of the referral are and/or have been used for 'quarrying activity', which comes with the definition of 'works' which constitutes 'development' within the meaning ascribed by the P & D Act 2000 (as amended). Notwithstanding the landowner's claims that the quarry was established before 1964, there is insufficient information or evidence before the Board to allow for a determination regarding the planning status of the quarry or whether there has been

any significant intensification and/or abandonment of the use in the intervening years, which might involve a material change of use.

There is insufficient evidence that any exemptions would apply under section 4(1) (f), (g) or (l) of the Planning and Development Act 2000 (as amended) or Article 6 of the Planning and Development Regulations 2001 (as amended). In any case, any such exemption would be restricted by section 4(4) of the PDA by reason of the need for EIA Screening and Screening for Appropriate Assessment due to the nature of the development and the proximity of the site to the Kenmare River SAC. Furthermore, it is considered that any such exemptions that might apply under Article 6 of the PDR would be likely to be restricted by Article 9 by reason of traffic hazard, proximity to National Monuments and Recorded Monuments and on the basis that the need for EIA and AA cannot be ruled out.

Thus, the said 'quarrying activity' is 'development' and is not exempted development.

10.0 Recommendation

I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether

- (a) The 'quarrying activity' on the lands is development;
- (b) The 'quarrying activity' comes within the scope of a pre-1964 established use of the site;
- (c) The 'quarrying activity' is exempted development under S4(1) of the Planning & Development Act 2000 (as amended); and
- (d) The repair of internal private roads within the lanholding comes within the scope of Class 13 of Part 1, Schedule 2 of the Planning and Development Regulations 2001, as amended.

AND WHEREAS Martin Arthur requested a declaration on this question from Kerry County Council and the Council issued a declaration on the 22nd

day of June, 2020 stating that the matter was development and was not exempted development:

AND WHEREAS Martin Arthur referred this declaration for review to An Bord Pleanála on the 1st day of July, 2020:

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Sections 2 and 3 of the Planning and Development Act, 2000, as amended,
- (b) Section 4(1)(f) (g) and (l) of the Planning and Development Act, 2000, as amended,
- (c) Section 4(4) of the Planning and Development Act 2000, as amended,
- (d) Article 6(1) and Article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Class 13 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the planning history of the site,
- (g) the pattern of development in the area.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The use of the lands for ‘Quarrying Activity’ comprising excavation, storage and transport of stone material comes within the scope of ‘works’ and ‘quarry’ as set out in Section 2 of the Planning and Development Act 2000 (as amended), and therefore constitutes development as defined in Section 3 of the Act.
- (b) The information before the Board is not sufficient to enable a determination to be made in relation to the planning status of the

quarry in terms of whether it was established before the 1st day of October 1964 or whether there has been any intensification and/or abandonment of the use of the lands since the 1st day of October 1964, which would have given rise to a requirement for planning permission.

- (c) The information before the Board is not sufficient to enable a determination as to whether the development would require an Environmental Impact Assessment and/or an Appropriate Assessment which would exclude it from any exemption by reference to Section 4(4) of the Planning and Development Act 2000 (as amended).
- (d) The development does not come within the scope of any exemption under Section 4 of the Planning and Development Act 2000 (as amended).
- (e) The development does not come within the scope of any exemption provided for under Article 6 and Schedule 2 of the Planning and Development Regulations 2001 (as amended).

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the said works involving 'quarrying activity' at Reenagappul, Kenmare Co. Kerry is development and is not exempted development.

Mary Kennelly
Planning Inspector

20th September 2021