



An
Bord
Pleanála

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Inspector's Report ABP-308711-20

Question

1. Whether continued quarry operations, including extraction beyond that for which Substitute Consent was sought and received under SU23.SU009 is or is not exempted development..

Location

Lands at Ballydine and Butlerstown, Kilsheelan, Co. Tipperary.

Declaration

Planning Authority

Tipperary County Council

Planning Authority Reg. Ref.

S5/20/78

Applicant for Declaration

Kilsheelan Blue Limestone

Planning Authority Decision

No declaration

Referral

Referred by

1. Tipperary Co. Co.
2. Abigeal Smyth.

Owner/ Occupier

Kilsheelan Blue Limestone

Observer(s)

None

Inspector

Caryn Coogan

1.0 Site Location and Description

- 1.1. The site is an established working quarry located in South Tipperary between Carrick On Suir and Kilsheelan village, with a local road access just off the N24.
- 1.2. The site is approximately 11.2Ha with the extraction area to the north of the site. There is staff accommodation, portacabins, weighbridge etc to the south of the site.
- 1.3. The main working quarry face to the rear, north of the site. The quarry floor meets the water table at this point. The quarrying activity includes blasting and crushing. There is a mobile crusher that reduces the size of the rocks to 4inches. There are several overburden mounds throughout the site.
- 1.4. There is a farm immediately east of the quarry.
- 1.5. There is a weighbridge and wheel wash facility to the south of the site beside the site office. I noted the efficiency of the wheel wash facility whereby the quarry road was clean and carried no dirt or dust onto the public road.

2.0 The Question

- 2.1. The question before the Board as referred by Tipperary Co. Co. is whether:
The continued quarry operations are authorised under Condition 1 of SU 23.SU009.

3.0 Planning Authority Declaration

3.1. Declaration

The planning authority referred the matter to the Board for determination.

3.2. Planning Authority Reports

3.2.1. *Planning Reports*

When the Planning Authority issued a Warning Letter to the applicant on 19th of October 2016, the owner sought a legal opinion on compliance with Condition No. 1 of SU0009 was submitted. The legal opinion was prepared by Dr. Yvonne Scannell, Authur Cox Solicitors. The points stated the submission are that continued quarrying

within the limits indicated in Fig. 2.1 provided with the Substitute Consent application. This consideration was acceptable by the Planning Authority. However, there is some ambiguity because Condition No. 1 of An Bord Pleanala SU0009 requires further extraction limits of drawings provided to An Board Pleanala namely Fig. 2.1 and 2.3.

It was recommended to refer the matter to the Board for determination.

3.2.2. **Other Technical Reports**

None

4.0 **Planning History**

- 4.1 **P7954:** Planning permission granted to excavate stone and level site (11th of February 1982)
- 4.2 **L.A. 95/731** Planning permission granted on 27th of May 1996 to extract rock from quarry, including blasting operation, provision of crushing plant and erection of office block. Permission limited to a life span of 15 years.
- 4.3 **L.A. 99/460** Permission granted for the construction of a concrete batching and concrete block plant including storage area. An Bord Pleanala refused the permission.
- 4.4 **L.A. Reference 01/811 (Appeal Ref. 128959)** Planning permission granted for concrete batching plant, block storage, workshop/ canteen. Conveyors/ hoppers and biological effluent treatment system.
- 4.5 **SU 23 SU0009** : Permission granted for a Substitute Consent by An Bord Pleanala on 24th of September 2013 included for extraction of rock from existing quarry including blasting operations, provision of crushing plant and erection of block and stores.
- 4.6 **TUD-16-127** : Warning Letter issued regarding non-compliance with conditions attached to An Bord Pleanala SU0009.

5.0 Policy Context

5.1. Development Plan

Tipperary South County Development Plan 2009

5.2. Natural Heritage Designations

Site Code 002137 Lower River Suir SAC is located less than 1km south of the site.

6.0 The Referral

6.1. Referrer's Case

6.1.1 When Tipperary Co. Co. issued a Warning Letter to the applicant on 19th of October 2016, the owner sought a legal opinion on compliance with Condition No. 1 of SU0009 was submitted. The legal opinion was prepared by Dr. Yvonne Scannell, Authur Cox Solicitors. The points stated the submission are that continued quarrying within the limits indicated in Fig. 2.1 provided with the Substitute Consent application. This consideration was acceptable by the Planning Authority. However, there is some ambiguity because Condition No. 1 of An Bord Pleanala SU0009 requires further extraction limits of drawings provided to An Board Pleanala namely Fig. 2.1 and 2.3.

It was recommended to refer the matter to the Board for determination.

6.1.2 A submission from Abaigeal Smyth from Ballyhaunis, Co. Mayo made a submission to the Board.

- Tipperary Co. Co. had no business granting a section 34 for weighbridge and other quarry related facilities prior to the prospective permission being in place for quarrying, which in turn was supplying the concrete plant. At that point, the operation of both was unauthorised by virtue of the planning status of the underlying site as set out in Section 261A Outturn and by virtue of the operator's acceptance of same as confirmed by the application to An Bord Pleanala which covered the entire site, thereby accepting that no area of the site remained authorised for extraction.

- The grant of Substitute Consent is clearly limited to past development, noting development (Or at least extraction) should have stopped when the Section 261A notice was issued by the Planning Authority and in any event no later than the date of the Substitute Consent application. All quarrying and discharges since that time have constituted new offences under European and national legislation.
- The limits of the Substitute Consent are clear from the text of the grant itself. While clear from the legislation and details of the grant in each case of granted Substituted Consent nationwide, the An Taisce vs McTigue Quarries & Ors judgements, made it crystal clear that no prospective quarrying was permitted under Substitute Consent. The applicant may have provided for further extraction in the maps submitted with the Substitute Consent application but that does not and cannot change the limits of legislation.
- The limitation of the Warning Letter of 2019 is such that Tipperary County Council has not had regard to legislation and case law in that it did not expressly include unauthorised quarrying, and just sought implementation of ongoing mitigation measures for what should have been a dormant site. Only site closure landscaping and restoration are permitted by the Substitute Consent.

The absence of prospective permission for quarrying means that ongoing quarrying and all other site development based on that extracted rock is unauthorised

6.2. Owner/ Occupier's response

In response to

Ms Abaigeal Smyth's submission to the Board, the owner/ occupier states the following:-

1. The planning for the weighbridge was granted for environmental reasons. The wheel wash was moved to improve the effectiveness of the wheelwash as the previous location was on higher ground and would not control the run off on the remainder of the entrance. The current location is at the lowest point of the exist road from the quarry and catches all run off from the entire

road. In the four years that it has been in operation the owner/ occupier the road has remained clean.

There is reference made to the concrete plant, which was granted planning permission but it was never installed or operated.

2. In late 2015, Cemex, the previous owners put Ballydine quarry up for sale consisting of 22 acres of agricultural land and a fixed crushing plant. The land was actually owned by Brian Kehoe and leased to Cemex. Paschal O'Shea, Deirdre Kent reached an agreement with Brian Kehoe and Cemex.

The granting of the substitute consent in 2012 notes that no further extraction be permitted beyond the area marked red on the map, it was considered

3. The

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

In Section 2 of the Act, as amended, "quarry" means '*an excavation or system of excavations made for the purpose of, or in connection with, the getting of minerals ... or products of minerals and shall be deemed to include*

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

(ii) any place occupied by the owner of a quarry and used for depositing refuse from it ..'

- 7.2 Works are defined as '*any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.*'

7.3 Section 3 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*'.

7.4 **Planning and Development Regulations, 2001**

Exempted development provisions are set out in the *Planning and Development Regulations, 2001 (as amended)*. No exemptions are provided in respect of quarrying operations.

8.0 **Assessment**

8.1. **Is or is not development**

- 8.1.1. The excavation of lands for the benefit of quarrying, constitutes development under the definition provided by the Planning and Development Act, 2000 (as amended). Use of lands surrounding or adjacent to a quarry occupied for the storage or removal of materials or for depositing refuse from the quarry, are included in the definition of quarrying.
- 8.1.2. The subject quarry has been registered under the Planning Act and deemed satisfactory as a quarry by the Board under Substitute Consent Reference SU 23 SU0009. In 1982 planning permission was granted on the subject site for the extraction of stone, and subsequently permission was granted in 1997 for the extraction of rock from the existing quarry including blasting operations, a crushing plant, the erection of an office and stores, which expired on 27th of June 2011. In December 2012 the Cemex (ROI) Ltd applied to An Bord Pleanála for a Substitute Consent which was accompanied by a remedial Environmental Impact Statement and remedial Natura Impact Statement. The Substitute Consent was granted on 24th of September 2013. Condition No. 1 stated the '*grant of the statute consent relates only to the development undertaken as described in the application and does not authorise any future development of the site*'. '
- 8.1.3. Since the substitute consent was granted by the Board, Cemex, the previous operator, put the interests of Ballydine Quarry up for sale, and the current operators are Kilsheeland Limestone Quarries Limited. According to SU23.SU0009 mapping, the application area was 11.2Ha as per Figure 1-3 of the submitted documentation.

- 8.1.4. The third party (Abaigeal Smith) claims the Substitute Consent is limited to past development only. All quarrying (area and Depth extensions) and discharges since that time of the Substitute Consent was granted constitute new offences under European and national legislation. It has been made clear in case law, *An Taisce Vs McTigue Quarries* that no prospective quarrying is permitted under Substitute Consent.
- 8.1.5. At the time of inspection and reflected in photography it is clear the quarry face at the rear of the site has been pushed northwards towards the northern site boundary. The quarry face has been extended westwards and northwards. The extension can be seen by comparing the Maps and Photographs on ABP file SU23.SU009, and the current Bing and Google aerial photographs of the site, in addition to my own on site photographs. The area currently being extracted is located within the Substitute Consent boundary.
- 8.1.6. The extraction is occurring below the water table level, the water is pumped to a siltation lake located at the quarry floor. Clean water is pumped back to the south of the site where it is discharged to a natural watercourse, (a stream along the southwestern site boundary). This is a Natura 2000 site, *Site Code 002137 Lower River Suir SAC*, located less than 1km south of the site. The discharge is the subject of an EPA Water Discharge Licence.
- 8.1.7. The area affected is modest, but the extraction is ongoing. The quarry face is blasted with crushing and screening occurring on the quarry floor. Having regard to the definition of quarrying in the Planning Act 2000 (as amended) and the nature and extent of the works which have taken place and are ongoing, I consider that these works constitute a material change of use (quarrying) and can be considered to be 'development' in the context of the relevant legislation.

8.2. **Is or is not exempted development**

- 8.2.1. Condition No. 1 of the Substitute Consent states the consent '*relates only to development undertaken as described in the application and does not authorise any future development of the site*'. According to the operators legal opinion, which is included on the file, the works consisting of remediation works for the quarry and works aligning the quarry as per Drawing Figure 2.1 involves further development of

the quarry because it is not possible to carry out the development in accordance with the plans and particulars lodged. The current extraction area is within the boundaries of the Substitute Consent boundaries, I refer to Figure ABP-RFI-1 Dated April 2013. The ongoing quarrying activities are within the shaded yellow area of the technical drawings associated with SU23.SU0009. It should be interpreted that the terms of Condition No. 1 of SU23.SU009 relate to lands outside of the yellow area i.e. S216A Substitute Consent Application Area (11.2Ha) which also highlighted the Extraction Area 5.15Ha. The current quarrying activities on site are within these specified areas and boundaries.

8.2.2. It is my opinion, the existing and continued quarrying is within the limits indicated in Figure 2.1 and ABP-RFI-1 of the substitute consent planning application, and therefore comply with Condition No. 1 of the Board's decision.

8.2.3. In this instance, I do not consider a material change has occurred, and the continued quarry operations are authorised under Condition No. 1 of 23.SU009.

9.0 Recommendation

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

WHEREAS a question has arisen as to whether the continued quarry operations authorised under Condition No. 1 of the Substitute Consent SU23.SU009 is or is not development or is or is not exempted development:

AND WHEREAS Tipperary County Council and Abaigeal Smyth requested a declaration on this question under the provisions of section 5(4) of the Planning and Development Act, 2000 (as amended) on the 13th of November 2020.

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

- (a) Section 2 and 3 of the Planning and Development Act, 2000, as amended,
- (b) The Board's previous decision under SU23.SU0009 signed on the 24th of September 2013
- (c) The nature and scale of activities undertaken at the quarry site subsequent to the Board's decision on the 24th of September 2013
- (d) the planning history of the site,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The continuation of existing quarrying operation within the substitute consent area of 11.2 ha including extraction, processing of stone and siltation and pumping of water from the quarry floor, is within a boundaries of the designated quarrying area authorised by the substitute consent

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the Planning Act 2000, hereby decides that the continuation of the existing quarry operation is within the site area of the 11.2ha authorised by the substitute consent and is development and is exempted development.

Caryn Coogan

Planning Inspector

28/06/2022