



An
Bord
Pleanála

Inspector's Report ABP-308830-20

Question	Whether the past and continuing quarrying at O'Mahoney Quarry is or is not development or is or is not exempted development
Location	Ballintobeenig, Abbeydorney, County Kerry
Planning Authority	Kerry County Council
Planning Authority Ref.	EX871
Referral	
Referred by	Kerry County Council
Owner/Occupier	O'Mahoney Quarries
Date of Inspection	13 th April, 2021
Inspector	Kevin Moore

1.0 Introduction

- 1.1 On 4th December 2020, Kerry County Council made a submission to the Board, under section 5(4) of the Planning and Development Act, seeking a decision on the question whether the past and continuing quarrying at Ballintobeenig, Abbeydorney, County Kerry is or is not development or is or is not exempted development.
- 1.2 The request from Kerry County Council followed a third party section 5 application from Abaigéal Smyth to the planning authority.

2.0 Site Location

- 2.1 The subject quarry is located approximately 5.5 kilometres north-east of Tralee at the western edge of the Stacks Mountains. It is accessed from a minor local road. It is a shale and sandstone quarry. Excavation is by digger/rock breaker and activities comprise primary crushing/sorting/screening. There is no washing of aggregate, no wheelwash and no weighbridge. There is no evident breach of the water table. As well as the extraction area, there is disturbed ground where topsoil has been cleared, extending north, east and west beyond the extraction area. The extraction area has developed extensively further east and north-east beyond the area shown in the map contained in the referral file. The principal land use in the area is agriculture and development in the vicinity includes extensive one-off housing.

3.0 The Question

- 3.1 The question before the Board is:

Whether the past and continuing quarrying at Ballintobeenig, Abbeydorney, County Kerry is or is not development or is or is not exempted development.

4.0 Submission from Abaigéal Smyth to the Planning Authority

4.1 The section 5 referral from Abaigéal Smyth to Kerry County Council may be synthesised as follows:

- The question posed to the planning authority was whether:
 - (i) *The past quarrying operations, including extraction, within this QY045 site, beyond that for which permission or pre-63 authorisation existed, is or is not exempted development under the Planning & Development Act, as amended;*
 - (ii) *The continued operations, including extraction, within this QY045 site, beyond that for which permission or pre-63 authorisation existed is or is not exempted development under the Planning & Development Act, as amended.*
- The quarry is being operated for which no permission appears to exist.
- The ongoing works have led to the unauthorised destruction of an SPA.
- Any development which offends the Habitats Directive or EIA Directive cannot be exempt development and cannot be regularised by application to Kerry County Council.
- O'Mahoney Quarries continue to quarry despite having been refused leave to apply for substitute consent, operating in certain knowledge that there is no consent for such extraction. The site has limited authorisation pre-63 / s261 but section 261A in 2012 found that past works post 1990 and 1997 required rEIS and rNIS with an application for substitute consent which the operator failed to submit to the Board. An application for leave to apply for substitute consent was refused as no exceptional circumstances were found to exist. On that basis, the site should have ceased operations and no later than the section 261A determinations and decision in 2012.

4.2 Appendices attached with the submission to the planning authority included a map showing the site relative to the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA, section 261 documents relating to Ref. QY045 dating from 2007, section 261A documents dating from 2012, the decision of the Board and the Inspector's report to the Board on an application for leave to apply for substitute consent (ABP Ref. 08.LS.0011) dating from 2014, and historical aerial photographs relating to the quarry.

5.0 Submission from Abaigéal Smyth to An Bord Pleanála

5.1 Following an invitation from the Board to make a submission or observation in accordance with section 129 of the Planning and Development Act, Ms. Smyth confirmed that her section 5 application was included in the documentation from the planning authority. She queried why the planning authority referred the matter to the Board when the facts of the case are so straight forward and it was the decision of the Board which set out the planning status. It was submitted that the result of the referral by the Council is to forestall enforcement action.

6.0 The Quarry Operator's Considerations

6.1 Following an invitation from the Board to make a submission or observation in accordance with section 129 of the Planning and Development Act, the quarry owner made a submission which may be summarised as follows:

- The query raised reflects the activity of the quarry over the last few years.
- Historically a portion of the quarry had planning permission and there was a defined area in which quarrying activity could take place. There was also a practice of quarrying pre 1964 for a defined area. The SPA designation encompasses a portion of the quarried-out area. Historically the lands in the control of the quarry owner were used for farming and they also contain areas of forestry along with the quarry footprint. As the quarry

- extended over time the quarry face extended into the SPA and there are areas within the quarry where the stone resource is worked out. No further encroachment into the SPA has occurred. However, there is encroachment into the SPA on one of the eastern sections which is driven by the nature of the rock type, the stratification of the rock and its linear east west profile. The depth of excavation has also influenced the quarry face and its footprint relative to the historical planning approved area.
- The quarry owner recognises there is an issue, wants to regularise the planning status, and there is not a clear mechanism post the completion of the previous 261/261A process.
 - The areas in which the quarry face extends into the footprint of the SPA are comprised of degraded habitat and the areas immediately around the quarry are covered with forestry plantation, with lands to the north-east and north heavily modified habitats with extensive conifer plantation, cutover bog, wind farm development and encroaching agricultural lands.

7.0 Statutory Provisions

7.1 Planning and Development Act 2000 (as amended)

PART I – Preliminary and General

Section 2(1)

In this Act, except where the context otherwise requires—

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

Section 3

3.—(1) In this Act, “development” means, 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.

PART III – Control of Development

Section 32

32.—(1) Subject to the other provisions of this Act, permission shall be required under this Part –

- (a) in respect of any development of land, not being exempted development, and
- (b) in the case of development which is unauthorised, for the retention of that unauthorised development.

(2) A person shall not carry out any development in respect of which permission is required by *subsection (1)*, except under and in accordance with a permission granted under this Part.

PART XA – Substitute Consent

Section 177C

177C. — (1) A person who has carried out a development referred to in *subsection (2)*, or the owner or occupier of the land as appropriate, to whom no notice has been given under *section 177B*, may apply to the Board for leave to apply for substitute consent in respect of the development.

(2) A development in relation to which an applicant may make an application referred to in *subsection (1)* is a development which has been carried out where

an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required, and in respect of which —

(a) the applicant considers that a permission granted for the development by a planning authority or the Board may be in breach of law, invalid or otherwise defective in a material respect, whether pursuant to 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 permission including omission of an F650 [environmental impact assessment report or a Natura impact statement or both that report and that statement, as the case may be, or inadequacy of an environmental impact assessment report or a Natura impact statement or both that report and that statement] , as the case may be, or

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

or

(b) the applicant is of the opinion that exceptional circumstances exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent ...

Section 177D

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) 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.

(2) In considering whether exceptional 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.

(3) In deciding whether it is prepared to grant leave to apply for substitute consent under this section the Board shall have regard to any information furnished by the applicant under section 177C(3) and any information furnished by the planning authority under section 177C(5).

(4) The Board shall decide whether to grant leave to apply for substitute consent or to refuse to grant such leave ...

PART XV111 – Miscellaneous

Section 261

261.—(1) The owner or operator of a quarry to which this section applies shall, not later than one year from the coming into operation of this section, provide to the planning authority, in whose functional area the quarry is situated, information relating to the operation of the quarry at the commencement of this section, and

on receipt of such information the planning authority shall, in accordance with *section 7*, enter it in the register ...

Section 261A

261A. — (1) Each planning authority shall, not later than 4 weeks after the coming into operation of this section, publish a notice in one or more than one newspaper circulating in its administrative area and on the authority's website, stating —

(a) that it intends to examine every quarry in its administrative area to determine, in relation to that quarry, whether having regard to the Environmental Impact Assessment Directive and the Habitats Directive, one or more than one of the following was required but was not carried out —

(i) an environmental impact assessment;

(ii) a determination as to whether an environmental impact assessment is required;

(iii) an appropriate assessment,

(b) that where the planning authority determines in relation to a quarry that an environmental impact assessment, a determination as to whether environmental impact assessment was required, or an appropriate assessment, was required but was not carried out and the planning authority also decides that —

(i) the quarry commenced operation prior to 1 October 1964, or permission was granted in respect of the quarry under *Part III* of the *Planning and Development Act 2000* or *Part IV* of the *Local Government (Planning and Development) Act 1963*,

and

(ii) if applicable, the requirements in relation to registration under section 261 of the Planning and Development Act 2000 were fulfilled,

the planning authority will issue a notice to the owner or operator of the quarry requiring him or her to submit an application to the Board for substitute consent, such application to be accompanied by a remedial environmental impact statement or a remedial Natura impact statement or both of those statements, as appropriate,

(c) that where the planning authority determines in relation to a quarry that an environmental impact assessment, a determination as to whether environmental impact assessment was required, or an appropriate assessment was required, but was not carried out and the planning authority also decides that —

(i) the quarry commenced operation on or after 1 October 1964 and no permission was granted in respect of the quarry under *Part III* of the *Planning and Development Act 2000* or Part IV of the Local Government (Planning and Development) Act 1963 ,

or

(ii) if applicable, the requirements in relation to registration under *section 261* of the *Planning and Development Act 2000* were not fulfilled,

the planning authority will issue a notice to the owner or operator of the quarry informing him or her that it intends to issue an enforcement notice under *section 154* requiring the cessation of the operation of the quarry and the taking of such steps as the planning authority considers appropriate, ...

(2) (a) Each planning authority shall, not later than 9 months after the coming into operation of this section examine every quarry within its administrative area and make a determination as to whether —

(i) development was carried out after 1 February 1990 which development would have required, having regard to the Environmental Impact Assessment Directive, an environmental impact assessment or a determination as to whether an

environmental impact assessment was required, but that such an assessment or determination was not carried out or made, or

(ii) development was carried out after 26 February 1997, which development would have required, having regard to the Habitats Directive, an appropriate assessment, but that such an assessment was not carried out ...

(3) (a) Where a planning authority makes a determination under *subsection (2)(a)* that *subparagraph (i)* or *(ii)* or both, if applicable, of that paragraph apply in relation to a quarry (in this section referred to as a ' determination under *subsection (2)(a)* '), and the authority also decides that —

(i) either the quarry commenced operation before 1 October 1964 or permission was granted in respect of the quarry under *Part III* of this Act or *Part IV* of the Act of 1963, and

(ii) if applicable, the requirements in relation to registration under *section 261* were fulfilled,

the planning authority shall issue a notice, not later than 9 months after the coming into operation of this section, to the owner or operator of the quarry.

(b) In making a decision under *paragraph (a)* , a planning authority shall consider all relevant information available to it including any submissions or observations received by the authority not later than 6 weeks after the date of the publication of the notice under *subsection (1)(a)* .

(c) A notice referred to in *paragraph (a)* shall be in writing and shall inform the person to whom it is issued of the following matters:

(i) the determination under *subsection (2)(a)* and the reasons therefor;

(ii) the decision of the planning authority under *paragraph (a)* and the reasons therefor;

(iii) that the person is directed to apply to the Board for substitute consent in respect of the quarry, under *section 177E* , with a remedial environmental impact

statement or remedial Natura impact statement or both of those statements, as the case may be, in accordance with the determination of the planning authority under *subsection (2)(a)* , not later than 12 weeks after the date of the notice, or such further period as the Board may allow;

(iv) that the person may apply to the Board, not later than 21 days after the date of the notice, for a review of the determination of the planning authority under *subsection (2)(a)* or the decision of the planning authority under *paragraph (a)* , and that no fee in relation to either application for a review shall be payable.

(d) At the same time that the planning authority issues the notice to an owner or operator of a quarry, the authority shall —

(i) give a copy of the notice to any person who not later than 6 weeks after the date of the publication of the notice under *subsection (1)(a)* , made submissions or observations to the authority in relation to the quarry,

(ii) inform that person that he or she may, not later than 21 days after the date of the notice, apply to the Board for a review of the determination under *subsection (2)(a)* or the decision of the authority under *paragraph (a)* and that no fee in relation to either application for a review shall be payable, and

(iii) forward a copy of the notice to the Board.

9.0 **Assessment**

9.1. **The Question of ‘Development’**

Quarrying on this site comprises excavation of rock by digger and rock breaker. Following this there are also activities which include crushing, sorting and screening of the extracted material and its transportation from the site. The principal operation on this site is an act of excavation and clearly forms “works” as defined in section 2(1) of the Planning and Development Act. The works at the

quarry take place on, in, over and under the land and constitute “development” as defined in section 3 of the Planning and Development Act.

8.3 The Question of Exempted Development

The issue of whether the quarry works constitute exempted development can be determined from the planning history associated with the quarry. The following is noted:

Section 261 Quarry Registration

Under P.A. Ref. OY045 relating to the S.261 Registration, Kerry County Council, by decision dated 20th April, 2007, attached 47 no. conditions under section 261(6)(a)(i). These included a requirement for the quarry excavations and related activities to be carried out only within a defined area outlined on an attached map.

Section 261(A)

Under P.A. Ref. EUQY 045, a Notice was issued by Kerry County Council under section 261A(3)(a), dated 3rd August, 2012, which included the following:

Kerry County Council hereby determines – In accordance with Section 261A(2)(a) that:

- (i) Development was carried out after 1st February, 1990 which would have required, having regard to the Environmental Impact Assessment Directive, an environmental impact assessment and such an assessment was not carried out.*

and

- (ii) *Development was carried out after 1st February, 1990 which would have required, having regard to the Environmental Impact Assessment Directive, a determination as to whether an environmental impact assessment was required, and such determination was not made.*
- and*
- (iii) *Development was carried out after 26th February 1997, which would have required, having regard to the Habitats Directive, an appropriate assessment, and such an assessment was not carried out.*

Reasons:

1. *The examination carried out by the Planning Authority concluded that development works carried out after the 1st February, 1990 would be likely to have significant effects on the environment. Therefore it is considered that an Environmental Impact Assessment (EIA) is required in this instance.*
2. *The examination carried out by the Planning Authority concluded that the need for an Environmental Impact Assessment (EIA) could not be ruled out in respect of development works carried out after the 1st February 1990, without the carrying out of a substantial screening assessment. Therefore it is considered that a determination as to whether an EIS is necessary is required in this instance.*
3. *The examination carried out by the Planning Authority was unable to rule out the potential for significant effects to Natura 2000 sites in respect of development works carried out after the 26th February, 1997. Therefore it is considered that an Appropriate Assessment (AA) is required in this instance.*

Kerry County Council, hereby decides – In accordance with Section 261A(3)(a) that:

- (i) *The quarry commenced operation before 1st October, 1964
and*
- (ii) *The requirements in relation to registration under section 261 were fulfilled.*

Reasons:

1. *The Planning Authority is satisfied that the quarry commenced operation before 1st October 1964, and the requirements in relation to registration under section 261 were fulfilled.*

Direction to apply to An Bord Pleanála in respect of the quarry under section 177E with a remedial environmental impact statement and a remedial natura impact statement not later than 12 weeks after the date of this notice, or such further period as the Board may allow.

An Bord Pleanála Correspondence with Planning Authority

By letter dated 7th November, 2012, the Board notified Kerry County Council that no application for substitute consent had been received and advised that the last day for receiving such an application was 26th October, 2012.

ABP Refs. SH08.0101 and SI080019

Requests for an extension of time and a pre-application meeting respectively were received and were deemed invalid as they were received late by the Board on 8th November, 2012.

ABP Ref. LS08.0010

An application for leave to apply for substitute consent was received by the Board on 24th December, 2012. This was deemed invalid as it was not accompanied by the appropriate fee.

By Order dated 3rd April 2014, the Board refused leave to apply for substitute consent under section 177D (4) of the Planning and Development Act, 2000, as inserted by section 57 of the Planning and Development (Amendment) Act 2010 based on the following reasons and considerations:

Having regard to the scale of the overall quarry and its extraction area, the rate and extent to which it expanded, the nature and intensity of the excavation and processing activities on this site, the evidence of significant localised impacts on the environment, the location of the quarry partly within the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle Special Protection Area (Site Code 004161), and the expansion of the quarry partly within that Special Protection Area after the date of the notification of this European Site, the Board is satisfied that an environmental impact assessment and an Appropriate Assessment were and are required.

In coming to its decision that exceptional circumstances do not exist in respect of the subject quarry, and to refuse leave to apply for substitute consent, the Board had regard to the provisions of Section 177D(2) of the Planning and Development Act, 2000, as amended, to the notice issued by the planning authority in accordance with the provisions of Section 261A(3)(a) of the Planning and Development Act 2000, as amended, which directed that an application for Substitute Consent be made to An Bord Pleanála, and to the failure of the applicant to comply with the requirements of that notice. The Board concluded that exceptional circumstances have not been identified such that it would be appropriate to permit the regularisation of the development by permitting an application for substitute consent.

It is apparent from the above planning history associated with this quarry that the quarry was required to be subject to Environmental Impact Assessment and Appropriate Assessment following the issuing of the Notice by Kerry County Council under section 261A. The quarry operator failed to make the relevant application to the Board seeking substitute consent. Following this, the quarry operator failed to acquire leave to apply for substitute consent. The quarry is unauthorised. I further note that quarrying has continued and has substantially extended beyond the boundaries of the site so defined in the section 261A application. These continued works have extended even more substantially into the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle Special Protection Area (Site Code: 004161).

In conclusion, it is noted that:

- The existing quarrying operation has no planning permission under section 32 of the Planning and Development Act,
- The quarry operator has failed to meet the requirements under section 261A of the Planning and Development Act to gain substitute consent, and
- The quarry operator has been refused leave to apply for substitute consent.

It is reasonable to conclude from the above that continued quarrying at Ballintobeenig, Abbeydorney, County Kerry is development and is not exempted development.

9.0 CONCLUSION AND RECOMMENDATION

WHEREAS a question has arisen as to whether the past and continuing quarrying at Ballintobeenig, Abbeydorney, County Kerry is or is not development or is or is not exempted development:

AND WHEREAS the said question was referred to An Bord Pleanála by Kerry County Council on the 4th day of December, 2020:

AND WHEREAS An Bord Pleanála, in considering this referral, had particular regard to:

- (a) Sections 2, 3, 32, 177C, 177D, 261 and 261A of the Planning and Development Act 2000 (as amended), and
- (b) the planning history of the quarry:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) quarrying at this location constitutes 'development' for the purposes of the Planning and Development Act,
- (b) the quarrying constitutes development for which substitute consent is required and it is without substitute consent,
- (c) leave to apply for substitute consent has been refused, and
- (d) the continued quarrying constitutes unauthorised development:

NOW THEREFORE the Board, in exercise of the powers conferred on it by section 5 of the 2000 Act, has decided that continuing quarrying at Ballintobeenig, Abbeydorney, County Kerry constitutes development and development that is not exempted development.

Kevin Moore
Senior Planning Inspector
21st April, 2021