



An
Bord
Pleanála

Inspector's Report ABP-310012-21

Development	Quarry
Location	Drumbeagh, Mountcharles, County Donegal
Planning Authority	Donegal County Council
Planning Authority Reg. Ref.	EUQY4 (UD2027)
Applicant(s)	Bridget Murray and Gabriel Murray
Type of Application	Leave to appeal for substitute consent under Section 177C of the Planning and Development Act 2000, as amended
Type of Appeal	First-Party Direct Application
Date of Site Inspection	27 th September 2021
Inspector	Colm McLoughlin

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1.0 Introduction

- 1.1.** This application for leave to apply for substitute consent for a quarry is made under section 177C of the Planning and Development Act 2000, as amended (hereinafter referred to as 'the Act').

2.0 Site Location and Description

- 2.1.** The quarry subject of this application is stated to measure 4.15 hectares and is located in the rural townland of Drumbeagh, which is located approximately 3km to the west of the village of Mountcharles and 9km to the west of Donegal town. The quarry is situated on the steadily rising western slopes of a hillside adjacent to the recently upgraded and realigned N56 national road. The subject quarry sits approximately between the 50m and 80m ordnance datum (OD) levels. Vehicular access to the quarry is available from a slip road that runs parallel with the N56 and connects with a local road leading off the N56 national road, approximately 70m to the east of the quarry. This slip road also serves the applicants' family home located approximately 125m to the west of the quarry. The surrounding area is characterised by agricultural fields interspersed with rural housing, farmsteads, forestry and peatlands.
- 2.2.** The quarry features an access track leading into the central levelled area that features stockpiles, pallets and jumbo bags of various graded materials extracted from the quarry. Machinery and vehicles appear to use this central area for manoeuvring and parking and the quarry features an on-site office or fixed processing equipment. A mature line of hedgerows and trees marks the southern boundary with the N56 slip road. The various working quarry faces are situated on lands rising to the east of the central levelled area, which are accessible via tracks cutting into the hillside. Moveable machinery on site includes excavators / diggers, a small tractor and a loader. There is also a mobile home structure, a fuel tank, a container and a shelter set above and to the east of the central-levelled area of the quarry. Within the application documentation the applicants state that explosives were previously used as part of extraction processes.

- 2.3. An open land drain flows northwest under the vehicular entrance to the quarry before flowing southwest to converge with a stream that discharges to the sea at Inver Bay, approximately 3km to the southwest of the quarry.

3.0 Planning History

3.1. Quarry Site

- 3.1.1. I am not aware of any planning applications under section 34 of the Act relating to the subject quarry site or a license for the subject quarry to discharge trade effluent to waters under the Local Government (Water Pollution) Act 1977 (as amended 1990).

Section 261 & 261A Registrations/Applications

- 3.1.2. The following references provided by the Planning Authority relate to the registration of the subject quarry under sections 261 and 261a of the Act:

- Donegal County Council (DCC) reference (ref.) EU QY4 – in 2006 an area of 9ha with a stone extraction area of 5ha and no processing on site was registered with the Planning Authority and in March 2007 the Planning Authority liaised with Gabriel Murray advising that they were considering imposing conditions;
- DCC ref. EU QY4 – in August 2012 the Planning Authority advised Gabriel Murray of their determination that substitute consent should be applied for the quarry.

Planning Enforcement History

- 3.1.3. Copies of the following enforcement file relating to the subject quarry have been forwarded by the Planning Authority:

- DCC ref. UD 2027 (EUQY 4) – in November 2020 the Planning Authority issued an enforcement notice with respect to the subject quarry and following a response from the owner / occupier of the quarry in December 2020, the Planning Authority issued an instruction in March 2021 for their legal representative to commence prosecution proceedings.

3.2. Other Sites

- 3.2.1. Applications in the immediate vicinity of the subject quarry primarily relate to one-off housing proposals. The Compulsory Purchase Order for the adjacent N56 national road improvement scheme from Mountcharles to Inver was determined by the Board in September 2009 under ABP ref. CH05.CH3114.

4.0 Policy and Context

4.1. Legislation

- 4.1.1. Section 177C(1) of the Act states the following:

A person who has carried out a development referred to in subsection (2), or the owner or occupier of the land as appropriate may apply to the Board for leave to apply for substitute consent in respect of the development.

- 4.1.2. Section 177D of the Act states the following:

(1) Subject to section 261A(21), 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 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 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.

4.2. Natural Heritage Designations

4.2.1. The distance and direction to the nearest European sites, including Special Areas of Conservation (SACs) and Special Protection Areas (SPAs), are listed in table 1 below.

Table 1. Natural Heritage Designations

Site Code	Site Name	Distance	Direction
004151	Donegal Bay SAC	3km	south
000133	Donegal Bay (Murvagh) SAC	3km	southeast

5.0 The Application

5.1. Applicants' Submission

5.1.1. The applicants request that the Board grant leave to apply for substitute consent in respect of the overall quarry development due to the exceptional circumstances arising. The case put forward by the applicants can be summarised as follows:

- prior to the enforcement notice being forwarded to the applicants in November 2020, the applicants were under the impression that they could continue to use the quarry, as they had a letter from the Planning Authority dated the 23rd day of April, 1993, which stated that there was no objection to the continued use of the established quarry. A copy of this letter is included with the application;
- quarrying on site has continuously occurred for many generations, as evidenced by historical ordnance survey mapping for the area, included with the application;
- the Planning Authority themselves will have records of having used materials from the quarry;
- the applicants are aware that previous generations of their family had a home on the subject lands in the 1850s and a chronology of how ownership of the lands were passed through the generations is outlined;
- the quarry would have served the adjoining road works (N56) in 1916 and during the early to mid-1960s the Planning Authority used materials from the quarry;
- the family and two to three locals are dependent on the quarry as a source of employment and income, therefore, ceasing of the operations would not be viable;

- a copy of correspondence from the Planning Authority dating from August 2012 had notified Gabriel Murray that the quarry was not in accordance with the Act;
- as part of an application prepared for substitute consent for the quarry, a report from a conservation specialist was submitted to An Bord Pleanála on the 4th day of October, 2012;
- based on the historical evidence of the quarry existing prior to 1963, the applicants' family were of the opinion that planning permission was not relevant and that the 1993 letter from the Planning Authority confirmed the quarry was in order.

5.2. Planning Authority's Submission

5.2.1. The submission of the Planning Authority was accompanied by copies of a concurrent enforcement file (DCC ref. UD 2027) relating to the quarry and also raised the following:

- there are no planning applications relating to this quarry;
- the quarry was initially registered under section 261 of the Act (under DCC ref. EU QY4);
- following a determination of the Section 261 notice, in August 2012 the Planning Authority advised Gabriel Murray of the need to apply for substitute consent for the quarry;
- the Planning Authority has no record of a substitute consent application relating to the quarry.

6.0 Assessment

6.1. Introduction

6.1.1. Section 177D(1) of the Act specifies that the Board can only grant leave to apply for substitute consent in respect of an application under section 177C, firstly, where it is satisfied that an environmental impact assessment (EIA), a determination as to whether an EIA is required, or an appropriate assessment (AA) was or is required in

respect of the development concerned and, secondly, where the applicant concludes that a permission that has been granted by a Planning Authority or the Board is invalid pursuant to a decision in an Irish Court or the Court of Justice of the European Union, or where 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.

- 6.1.2. A permission has not been granted for the development by the Planning Authority or the Board, and based on the application details submitted it would appear that the applicants are seeking a grant of leave to apply for substitute consent and regularise the development under the 'exceptional circumstances' criteria.

6.2. Requirement for EIA

- 6.2.1. The thresholds concerning the requirement for EIA of a project are set out in the Planning and Development Regulations 2001-2021. With respect to extraction activities, Class 2(b) of Part 2 to Schedule 5 of these Regulations sets out that projects comprising the 'extraction of stone, gravel, sand or clay, where the area of extraction would be greater than 5 hectares' would require EIA.
- 6.2.2. According to the Planning Authority, the original registration form for the quarry (DCC ref. EUQY 4) identified the overall quarry area in 2006 as amounting to 9 hectares with an extraction area of 5 hectares. Map 4 submitted by the applicants illustrates the current size of the quarry to be considerably less than what was registered in 2006, with the overall quarry area stated as measuring 4.15 hectares. Based on the aerial imagery submitted and available for the subject area, the existing workable extraction area for the subject quarry would appear to amount to approximately 2 hectares and, accordingly, EIA is not a mandatory requirement in this instance.
- 6.2.3. The quarry is located on rising lands within an area of High Scenic Amenity based on the landscape amenity categorisation within the Donegal County Development Plan 2018-2024. The quarry is partially visible from the western approach on the adjacent N56 national road, which forms part of the Wild Atlantic Way tourist amenity route. The visual impact of a quarry on elevated ground within a high scenic amenity and adjacent to an important tourist amenity presents some concerns from a visual amenity perspective. The nearest houses are located within 90m to the east, 125m

to the northwest and 225m to the west of the quarry extraction and working area, and the potential impacts from noise, dust and general disturbance arising from the quarry operation may have impacts on these and other neighbouring residential properties. Storm water drains or other drainage features such as attenuation tanks or settlement ponds, serving the quarry were not visible during my site visit and there is potential for surface waters potentially laden with pollutants and / or sediments to flow uncontrolled into the open land drain situated on the western boundary of the site. This drain flows northwest and then southwest to form a stream with a reasonable flow discharging into Inver Bay. It is unclear how the surface water associated with this quarry operates, including run-off to the adjoining open drain. It is also unclear whether or not the quarry is impacting on the flow within the land drain or the wider hydrogeological regime. The Environmental Protection Agency (EPA) mapping system indicates the quarry is situated over a locally-important aquifer, which has an extreme vulnerability. The second Planning Authority enforcement investigation report (DCC ref. UD 2027) referring to a site investigation undertaken on the 12th day of February, 2021, refers to a photograph revealing a large amount of oil or hydraulic fluid that had spilled from machinery onto the quarry floor. I also noted a lack of a bund to fuel containers on my visit. Pollutants to ground may have extreme implications for groundwater in the locally-important aquifer.

- 6.2.4. On the basis of the limited information presented and available, I do not consider that the likelihood of significant effects on the environment resulting from the quarry development can be excluded at this point. The applicants have not submitted adequate information in relation to the existing quarry characteristics, or measures, if any, incorporated or envisaged to avoid, prevent or reduce significant adverse effects of the development on the environment. Accordingly, a determination as to whether EIA is or is not required for the quarry development would be necessary. This requirement, in itself, is sufficient to meet the first part of section 177D(1) of the Act in part qualifying the quarry for consideration for leave to apply for substitute consent.

6.3. Requirement for AA

6.3.1. The second issue to address is whether the quarry development, would have required or requires AA. The site location, including a high-level overview of the drainage serving the site and the quarry facility, is described in section 2 of this report above, and expanded upon below where relevant.

Relevant European Sites

6.3.2. Relevant European sites proximate to the quarry site and in the wider area are listed in table 1 of section 4.2 above.

6.3.3. The following conservation objectives in table 2 are set for Donegal Bay (Murvagh) SAC.

Table 2. Conservation Objectives for Donegal Bay (Murvagh) SAC

To maintain the favourable conservation condition of Mudflats and sandflats not covered by seawater at low tide
To maintain the favourable conservation condition of Harbour Seal
To restore the favourable conservation condition of Fixed coastal dunes with herbaceous vegetation (grey dunes)
To restore the favourable conservation condition of Humid dune slacks

6.3.4. The following conservation objectives in table 3 are set for Donegal Bay SPA.

Table 3. Conservation Objectives for Donegal Bay SPA

To maintain the favourable conservation condition of Great Northern Diver
To maintain the favourable conservation condition of Light-bellied Brent Goose
To maintain the favourable conservation condition of Common Scoter
To maintain the favourable conservation condition of Sanderling
To maintain the favourable conservation condition of the wetland habitat

Is the Project necessary to the Management of European sites?

6.3.5. The project is not necessary to the management of a European site.

Likely Effects

6.3.6. The potential direct, indirect and secondary impacts that could arise as a result of the proposed works and which could have a negative effect on the qualifying interests of European sites, include the following:

- alterations to water quality, for example, through accidental spills or the release of suspended solids to ground and / or surface water;
- alterations to the hydrological regime;
- loss of habitat and species or disturbance or fragmentation;
- spread of invasive species.

Potential Effected Sites

6.3.7. Based on the source-pathway-receptor model, while there is a potential hydrological connection from the quarry site to the European sites listed in Table 1 above, I am satisfied that these European sites downstream of the quarry site can be 'screened out' on the basis that significant effects on these European sites could be ruled out, given the nature and scale of the subject quarry, the substantive separation distances from the quarry to these European sites and the extent of intervening marine waters.

In-combination Impacts

6.3.8. I note that the road improvement works to the N56 national road adjacent to the site have been completed. I am satisfied that likely significant in-combination impacts do not arise when taken in conjunction with other plans or projects.

Stage 1 – Screening Conclusion

6.3.9. The proposed development has been considered in light of the assessment requirements of sections 177U of the Planning and Development Act 2000, as amended. Following an Appropriate Assessment, it has been determined that the quarry development, individually or in combination with other plans or projects would not adversely affect the integrity of Donegal Bay (Murvagh) SAC (Site Code: 000133) and Donegal Bay SPA (Site Code: 004151), or any other European site, in view of the sites' Conservation Objectives.

6.4. Exceptional Circumstances

- 6.4.1. As a determination as to whether an EIA is required for the quarry development, it must be determined whether or not exceptional circumstances exist such that it would be appropriate to permit the opportunity to regularise the quarry development by permitting leave to make an application for substitute consent.

Would regularisation of the development concerned circumvent the purposes and objectives of the EIA Directive or the Habitats Directive?

- 6.4.2. Should leave to apply for substitute consent be granted, any subsequent application would at the least be likely to be accompanied by information to allow for screening for the purposes of EIA. The need for AA has been screened out in section 6.3 above. Thus the regularisation of the development in this instance would not circumvent the purpose and objectives of the EIA Directive or the Habitats Directive.

Whether the applicant has or could reasonably have had a belief that the development was not unauthorised.

- 6.4.3. To address this criteria, below I briefly set out the planning and development history of the quarry. The applicants assert that they were under the impression that they could continue to use the quarry based on historical evidence of the quarry having been in situ prior to 1963 and a letter from the Planning Authority dated the 23rd day of April, 1993, stating that there was no objection to the continued use of the quarry in Drumbigh. I am satisfied that based on a review of the townland area and the addressee that this correspondence was most likely in reference to the subject quarry.

- 6.4.4. To attempt to verify the historical status of the quarry the applicants have referred to the historical ownership of the subject quarry lands, as well as ordnance survey mapping relating to the area. The evidence available from the mapping is reasonably convincing that it can be definitively substantiated that a quarry had existed on the subject lands at various periods prior to 1963.

- 6.4.5. The Planning Authority state that in August 2012 they advised Gabriel Murray of the need to apply for substitute consent for the subject quarry development. The applicants acknowledge that this did occur and they refer to a report having being submitted to An Bord Pleanála in October 2012 with respect to same, but no records

of same were identified by An Bord Pleanála or the Planning Authority. Furthermore, there are no records of a substitute consent application for the quarry. According to the Planning Authority records, a complaint with respect to the quarry was made in January 2020 and this resulted in an enforcement notice being issued to the applicants in November 2020.

6.4.6. Based on aerial photographic imagery held by Ordnance Survey Ireland dating from 1995 and 2011 - 2013, there was not a substantive increase in the worked extraction area of the quarry over this period, but there would appear to have been some alterations to ground within the extraction area. Within their second enforcement investigation inspection report relating to the quarry (DCC ref. UD 2027), the Planning Authority note that a large area of additional excavation to the east of the quarry had commenced at some stage between June 2020 and February 2021.

6.4.7. Following registration of the quarry, the applicants had been notified of the necessity to apply for substitute consent in 2012 and there is no record of such an application being submitted. While there are certain contradictions in the arguments presented by the applicants with respect to their understanding and knowledge regarding the authorisation of the quarry, including their acknowledgement of the Planning Authority's instruction to apply for substitute consent for the quarry, the correspondence from the Planning Authority dating to 1993 stated that the established quarry could continue to operate subject to no significant change in the scale or scope of the operations. It was not until November 2020 that the applicants became aware of enforcement proceedings relating to the quarry, therefore, the applicants could reasonably have had the belief that the quarry was not unauthorised prior to this.

Whether the ability to carry out EIA or AA and to provide for public participation in such an assessment has been substantially impaired.

6.4.8. The process of EIA and AA involves research and the provision of information to the public and consenting authorities in relation to the likely significant effects of a development on the environment. The ability to provide such information has not been substantially impaired as part of the subject quarry development and the provision of such information would facilitate public participation in the assessment/consent process. In conclusion, I am satisfied that the ability to carry

out EIA or an AA for the quarry has not been substantially impaired, nor has the capacity for public participation in the process been substantially impaired.

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.

6.4.9. Having regard to my site visit and the information available, there may be significant effects on groundwater, surface water and the wider hydrological regime in the surrounding area via pollutants and sediment associated with the ongoing or future quarrying activity. The actual or likely significance of the effects on the visual and residential amenities of the area would also appear to need to be addressed as part of the ongoing or continuing quarry development.

6.4.10. Based on my assessment above (section 6.3), there is no indication that the quarrying activities, which would be subject to a substitute consent application, have resulted in any significant direct or indirect effects (or continue to have such effects) that would have significantly affected features of any European Site in view of the conservation objectives for these sites.

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

6.4.11. There are limited details with respect to the historical or ongoing control of water on the quarry site, however, an application for substitute consent could provide information, as well as a means, that could address the actual or likely significant effects on the environment by the inclusion of measures to avoid, prevent or reduce elements of the development that may have significant adverse effects on the environment. This would also present a viable means of remediating any significant effects of the quarry on the visual and residential amenities of the area.

6.4.12. Adverse effects on the integrity of a European site would not appear to require remediation based on my assessment in section 6.3 above.

Whether the applicant has complied with previous permissions granted or has previously carried out unauthorised development.

6.4.13. As referenced above, there are no previous permissions relating to the site and the applicants state that they were under the impression that quarrying could continue

on the site on the basis of the correspondence from the Planning Authority dated from 1993 referring to same and stating that significant change in the scale or scope of current operations should not occur. Based on the information provided by the applicants referring to the resourcing of the site by two to three local persons and the information available showing that the extraction area of the quarry has not altered substantially since 1995, the intensity and methods of extraction of stone from the quarry could reasonably be considered to be similar to that occurring in 1993.

- 6.4.14. The Planning Authority refer to an enforcement notice issued with respect to the quarry in November 2020 and I am not aware of the applicants having undertaken other development that could be considered to be unauthorised. It is reasonable to conclude that the applicants may only have been made aware of the quarry been unauthorised on receipt of this enforcement notice and, by virtue of this application to the Board, they would now appear to be making reasonable efforts to regularise the subject quarry development.

Such other matters as the Board considers relevant.

- 6.4.15. I consider that no further matters need be considered by the Board in this case.

6.5. Conclusion

- 6.5.1. A determination as to whether EIA is required for the quarry development would be necessary and the applicants have demonstrated that exceptional circumstances exist in this case, so as to permit the opportunity for the regularisation of the development in question.

7.0 Recommendation

- 7.1. Having regard to the information furnished by the applicants and the Planning Authority, I recommend that the Board grant leave to apply for substitute consent under section 177D of the Act, based on the reasons and considerations set out below.

8.0 Reasons and Considerations

Having regard to sections 177C and 177D of the Planning and Development Act, 2000, as amended, the Board is satisfied that a determination as to whether an environmental impact assessment is required would be necessary in this case.

Furthermore, the Board examined whether or not exceptional circumstances exist such that it would be appropriate to allow the opportunity for regularisation of the development by granting leave to apply for substitute consent.

In this regard, the Board considered that

- this application for leave to apply for substitute consent has demonstrated that the regularisation of the quarry would not circumvent the purposes and objectives of the Environmental Impact Assessment Directive or of the Habitats Directive, because it would allow for the provision of information and an analysis of the likely significant environmental effects of the development,
- prior to receipt of the Planning Authority's enforcement notice under reference UD 2027 dated the 18th day of November, 2020, the applicants could reasonably have had a belief that the scale and nature of quarrying development that took place was not unauthorised, in particular based on the correspondence from the Planning Authority dated the 23rd day of April, 1993,
- this application for leave to apply for substitute consent has demonstrated that the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment and to carry out an appropriate assessment, and that public participation in such assessments has not been substantially impaired,
- a determination as to whether an environmental impact assessment is required would, if necessary, facilitate the potential for the remediation of any significant effects on the environment,

Having regard to the foregoing it is considered that exceptional circumstances do exist such that it would be appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent in relation to the site outlined in this application.

Colm McLoughlin
Senior Planning Inspector

30th September 2021