



An
Bord
Pleanála

Inspector's Report ABP-311824-21

Question

Whether: (i) the continuation of existing quarry operation including extraction, processing and sale of raw and processed quarried material, is operating in accordance with its pre-64 authorisation and is or is not development and is or is not exempted development and (ii) the continuation of quarrying to the extremity of the landholding (18.99ha), is in accordance with its pre-64 authorisation and is or is not development and is or is not exempted development.

Location

Tober, Carrigans, Inishowen, Co. Donegal.

Referred by

Donegal County Council

Occupier

DPH Groundworks Ltd.

Planning Authority Reference

UD1819

Planning Inspector

Barry O'Donnell.

Date of Site Inspection

3rd February 2022

1.0 Introduction

- 1.1. This report relates to a referral by Donegal County Council as to whether (i) whether the continuation of existing quarry operation including extraction, processing and sale of raw and processed quarry material, is operating in accordance with its pre-64 authorisation and is or is not development and is or is not exempted development and (ii) whether the continuation of quarrying to the extremity of the landholding (18.99ha), is in accordance with its pre-64 authorisation and is or is not development and is or is not exempted development. Donegal County Council argues that if intensification or expansion occurred post-1st February 1990, which requires mandatory EIA or determination for sub-threshold EIA, a quarry can no longer rely solely on pre-64 authorisation.

2.0 Site Location and Description

- 2.1. The subject site is located at Tober, Newtowncunningham, approximately 13km east of Letterkenny in north-east County Donegal. The site contains an operational quarry that is on the eastern slope of Dooish Mountain.
- 2.2. The site is accessed on the west side of the L8171-2, via a recessed entrance and haul route that climbs up to the main quarry site. The route initially climbs up to the site office, parking and machinery storage area, which are themselves located below the main area of quarrying activity. There are 4 No. concrete bays in the vicinity of the site office, which were used for plant storage at the time of my site visit.
- 2.3. The main quarrying area is to the west of the site office and is accessed by a track that wraps around the concrete bays and leads up to an elevated plateau. There is an additional steep track access to the elevated plateau, to the north of the site office. The plateau contains a mix of spoil and stored aggregate and quarry machinery and in turn leads down into the quarry floor, which is at the west end of the site.

3.0 The Question

- 3.1. The questions which are the subject of the referral before the Board are: -

- (i) Whether the continuation of existing quarry operation including extraction, processing and sale of raw and processed quarry material, is operating in accordance with its pre-64 authorisation and is or is not development and is or is not exempted development' and
- (ii) Whether the continuation of quarrying to the extremity of the landholding (18.99ha), is in accordance with its pre-64 authorisation and is or is not development and is or is not exempted development

4.0 Planning History

4.1. The Planning Authority's referral submission states that the quarry has no extant planning history but refers to registration of the quarry under Section 261(A) of the Planning and Development Act 2000, as amended (referred to hereafter as the Act), which was determined by the Board on 11th December 2013 (Ref. 05E.QV.0230 refers).

4.2. The decision: -

- (i) confirmed the determination of the Planning Authority under Section 261(A)(2)(a)(i) of the Act, which determined that development was carried out after 1st February 1990 which would have required mandatory Environmental Impact Assessment (EIA) or determination regarding sub-threshold EIA, but such assessment of determination was not carried out.
- (ii) set aside the decision of the Planning Authority in respect of the development made under Section 261(A)(4)(a) of the Act, which determined that the quarry commenced operation on or after 1st October 1964 and no planning permission was granted in respect of it under Part 3 of the Act or Part 4 of the Local Government Planning and Development Act 1963.

4.2.1. In setting aside the decision made under Section 261(A)(4)(a), the Board had regard to the following:

- a) The provisions of the Planning and Development Acts, 2000 to 2011, and in particular Part XA and section 261A,
- b) The Regulations pertaining to Environmental Impact Assessment 1989 to 1999 and the Planning and Development Regulations, 2001, as amended, which

restates the prescribed classes of development which require an Environmental Impact Assessment (Schedule 5) and which makes provision for a planning authority to require the submission of an Environmental Impact Statement in such cases and the criteria for determining whether the development would or would not be likely to have significant effects on the environment (Schedule 7 thereof),

- c) The Department of the Environment, Community and Local Government – Section 261A of the Planning and Development Act, 2000 and related provisions, Supplementary Guidelines for Planning Authorities, July 2012,
- d) The scale of unauthorised quarrying development, and
- e) The documentation on the review file (planning authority register reference number EUQY 55), including the site’s planning history, aerial photography.

4.2.2. In confirming the determination under Section 261(A)(2)(a)(i), the Board concluded that:

- a) The quarry commenced pre the 1st day of October, 1964, and
- b) By reference to the terms of section 261(1) and (2) of the Act and to section 3.4 of, document titled, Section 261A of the Planning and Development Act, 2000 and related provisions, Supplementary Guidelines for Planning Authorities, issued by the Department of the Environment, Community and Local Government, July 2012, it is considered that the requirements in relation to section 261 were fulfilled.

5.0 The Referral

5.1. The referral comprises a written submission from Donegal County Council. It contains a number of historic aerial photo records for the site and photographs of site conditions, taken on a site inspection on 18th October 2020. It discusses the history of registration of the site under S261 and S261(A) of the Act, outlining in particular that:-

- The site was registered in 2006, under S261 of the Act. The application form identified a quarry area of 33.12ha.

- It is accepted that quarrying commenced before 1st October 1964.
- The Council issued notices under S261(A)(2)(a)(i) and S261(A)(4)(a) of the Act.
- The S261(A)(4)(a) notice was set aside by the Board but, following this, no notice under S261(A)(3)(a) was issued, so the quarry operator was not made aware of the implications of the S261(A) determination.

5.2. The referral states that an Enforcement Notice was issued on 14th April 2021, regarding continuation of quarrying activity, and that following this, on 6th May 2021 a submission from the quarry operator's agent claimed that the operator is entitled to continue to operate the quarry as a pre-64 authorised quarry, subject to certain limitations. The referral states that the submission referred to a similar quarry-related referral taken by the Planning Authority in a separate case.

5.3. The Planning Authority is of the opinion that if intensification or expansion occurred post 1st February 1990, which requires mandatory EIA or determination regarding sub-threshold EIA, then a quarry can no longer rely solely on pre-64 authorisation.

5.4. Reference is made to referral Ref. ABP-309662-21, which relates to a quarry with an extraction area of less than 1ha and an overall landholding of 3.71ha at Glenmakee, Carndonagh, Co. Donegal. The Board's determination in that case is acknowledged, but the subject referral is contended to be materially different, by reason of the scale of the operation which gives rise to the requirement for EIA or sub-threshold EIA determination (extraction area of c.2ha, surfaced stripped lands of c.4.5ha and potential future quarry of c.19ha) and proximity to European sites which gives rise to the requirement for consideration of appropriate assessment or screening for appropriate assessment.

5.5. There are no other applicable exemptions and it is contended that continuation of quarrying without the benefit of planning permission is development and is not exempted development.

6.0 Referral Responses

6.1. A submission was received on behalf of the landowner, DPH Groundworks Ltd, prepared by Michael Friel Architects & Surveyors Ltd, on 26th November 2021. The contents of the submission can be summarised as follows: -

- The Planning Authority accepts that the quarrying activity commenced before the appointed day, 1st October 1964, prior to the introduction of the EIA Directive (1st February 1990) and Habitats Directive (26th February 1997). The PA also accepts that the quarry registered under S261 of the Planning and Development Act, 2000, as amended, and that it was also registered under S261A of the Act.
- The area of the site is 18.99ha. It is accepted that there was an error at the time of the S261 registration, at which time the quarry was stated to occupy an area of 33.12ha.
- The quarry's main product is slate and building stone. By-products are also produced, such as chippings and mulch. Extracted material is not processed and no additives are applied.
- Rock is extracted using rock breakers, no blasting takes place at the quarry.
- The quarry has had a large footprint since 1963, due to extraction of the easiest to access material. Modern methods mean that extracted/spent areas can now be revisited and further extraction can take place, while remaining within the original footprint.
- The continuation of quarrying is development and is the same the development in size, scale and operation as was in existence pre-'63.
- Regarding the question as to whether the quarry has been altered in a significant way, which would give rise to a material change of use, the following is stated: -
 - The footprint or area of development has not changed. The Board has previously confirmed that the quarry should be accepted as a pre-'63 quarry and allowed for it to be registered under S261A.
 - The site operator is extracting from areas that were previously worked.
 - Works have not intensified, creating a material change of use. The process undertaken on the site is as was pre-'63, but modern machines have made the work easier to undertake. The volume of material sold has remained steady, save for the recession period 2008-2015.
 - Operation of the quarry is carried out by 2 people: the operator and his son.

- The quarry has not been abandoned at any time. It has been operational since the early 1900s. OSI maps have been provided for the periods 1829-1841 and 1897-1913, which show the presence of a quarry at this location at this point. The footprint of the quarry has grown over time, to the point where it stands currently.
- The entire 18.99ha site was in operation as a quarry pre-'63. It predates the EIA Directive. Should the Board require submission of an application for Substitute Consent and an associated EIAR, the applicant will facilitate this. Notwithstanding this, given the longevity of quarrying activity, the necessity for this is questioned.
- No buildings have been erected at the site
- A copy of a statutory declaration in respect of the quarry is provided, which is dated 17th November 2011.

7.0 Further Responses

- 7.1.1. The Planning Authority made a further submission on 23rd December 2021, following the first party submission on the referral, advising that it had no further comments.

8.0 Statutory Provisions

8.1. Planning and Development Act, 2000

8.1.1. Section 2: Definitions

“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.

“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 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 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.

8.1.2. Section 3(1): Development

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.

8.1.3. Section 157(4)(aa)

Notwithstanding paragraph (a) a warning letter or enforcement notice may issue at any time or proceedings for an offence under this Part may commence at any time in respect of unauthorised quarry development or unauthorised peat extraction development in the following circumstances:

- (i) where no permission for the development has been granted under Part III and the development commenced not more than 7 years prior to the date on which this paragraph comes into operation.

8.1.4. Section 157(4)(ab)

Notwithstanding paragraph (a) or (aa) a warning letter or enforcement notice may issue at any time to require any unauthorised quarry development or unauthorised

peat extraction development to cease and proceedings for an offence under section 154 may issue at any time in relation to an enforcement notice so issued.

8.2. **Planning and Development Regulations, 2001**

8.2.1. No relevant provisions

9.0 **Section 261A of the Planning and Development Act, 2000 and Related Provisions Supplementary Guidelines for Planning Authorities (July 2012)**

9.1. Section 2.2 'Amendment in relation to enforcement notices' sets out that the intention of the legislative provision in relation to the issuing of enforcement notices was that *'the owner/operator of the quarry would be required to cease the unauthorised quarrying, that is to say, the quarrying the subject of the subsection (2)(a) determination (the quarrying which should have had environmental impact assessment/appropriate assessment, etc. but did not). It was subsequently pointed out that there may be cases where in addition to an unauthorised part of a quarry, there is also an authorised part (e.g. covered by a permission) where there are still resources/deposits: in such a case the intention was that the quarry owner/operator should cease the unauthorised quarrying but he or she should not be prevented from continuing to work on any authorised portion of the quarry.'*

10.0 **Assessment**

10.1.1. The questions raised are as follows:

- (i) Whether the continuation of existing quarry operation including extraction, processing and sale of raw and processed quarry material, is operating in accordance with its pre-64 authorisation and is or is not development and is or is not exempted development' and
- (ii) Whether the continuation of quarrying to the extremity of the landholding (18.99ha), is in accordance with its pre-64 authorisation and is or is not development and is or is not exempted development

- 10.1.2. In essence, what the Planning Authority is asking is whether the existing quarry operation is a pre-'63 use, in view of the fact that the site has no planning history, and whether this existing use can be extended to encompass the operator's landholding, which has a stated area of 18.99ha.
- 10.1.3. I am satisfied that the operation of a quarry constitutes 'development', which is defined under Section 3(1) of the Planning and Development Act, 2000 as amended (the Act), as "*the carrying out of works on, in, over or under land...*" Works are defined, under Section 2(1) of the Act as including "*any act or operation of construction, excavation, demolition, extension...*"
- 10.1.4. Regarding the question of whether the operation/expansion of the quarry constitutes exempted development or otherwise, I note from the Planning Authority's submission that the site was registered in 2006, under S261 of the Act and it is accepted that quarrying commenced on the site before 1st October 1964. The Planning Authority submits that if intensification or expansion occurred post 1st February 1990, which requires mandatory EIA or determination regarding sub-threshold EIA, then a quarry can no longer rely solely on pre-64 authorisation.
- 10.1.5. The applicant states that the entire 18.99ha site was in operation as a quarry before 1st October 1964.
- 10.1.6. I have given consideration to available planning records pertaining to the site and consider the site's registration history under Section 261 and Section 261(A) of the Act are important in the context of this referral. The following details of the site's registration history are important in the context of this referral: -
- It is accepted by all parties that the quarry was registered under Section 261 of the Act.
 - Following registration under Section 261, the Planning Authority issued notices under Sections 261A(2)(a)(i) and 261A(4)(a) of the Act, in 2012.
 - The notice under S.261A(2)(a)(i) determined that development was carried out after 1st February 1990 which was not authorised by a permission granted under Part IV of the Act of 1963, prior to 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, and that such a determination was not carried out or made.

- The notice under S.261A(4)(a) determined that the quarry commenced operation on or after 1st October 1964 and no permission was granted in respect of the quarry under Part III of this Act or Part IV of the Act of 1963 and that the Planning Authority intended to issue an enforcement notice in relation to the quarry, requiring the cessation of operations and the taking of such steps as the Authority considered appropriate.
- The quarry operator referred the Planning Authority's determination to the Board for review (ABP Ref. QV05E.0230 refers). The Board's Order confirmed the determination under S.261A(2)(a)(i) but set aside the decision under S.261A(4)(a).

10.1.7. From the information available to me, I am satisfied that the Board has previously determined that whilst quarrying activity took place on the site prior to 1st October 1964, unauthorised development that would have required EIA/Screening for EIA/AA took place at some point after 2005, which following assessment, gave rise to a requirement to submit an application for substitute consent.

10.1.8. No new evidence has been provided as part of the referral, by either party, to question the Board's determination in this respect.

10.1.9. With reference to the Board's decision to set aside the decision of the planning authority under S.261A(4)(a), Section 261(A)(10) of the Act requires that in such circumstances the Planning Authority should have issued a notice to the quarry owner or operator on foot of this decision, directing them to apply to the Board for substitute consent. The Planning Authority's submission states that no such notice was ever issued so the quarry operator was evidently not made aware of the implications of the review of the S.261A determination and thus never applied for substitute consent.

10.1.10. I note that the quarry operator does not dispute that an application for substitute consent for the quarry was not submitted.

10.1.11. The Inspector's reports on ABP Ref. QV05E.0230 are also important to this referral as they include a detailed analysis of available aerial photograph records for

the site, in the context of the expansion of quarrying activity, and I note that the Inspector concluded that it was clear from the available aerial imagery that a significant intensification of operations/unauthorised development occurred on the site during the period after 2005. The Inspector estimated that an area in excess of 3ha was under extraction at the time of her report.

10.1.12. I visited the site on 3rd February 2022 and following this I have compared my on-site observations to the available historical aerial photograph images and to the previous Inspector's report.

10.1.13. The Inspector on ABP Ref. QV05E.0230 estimated that the area of excavation stood at c.1.5ha at the time of the 1995 aerial photograph and c.1.7ha at the time of the 2005 aerial photograph, but that the 2010 Google Earth aerial image (dated 15th August 2010) identified expansion of quarried lands to the north, east and west, creation of a settlement pond and newly quarried areas in the south-east corner and construction of a processing area close to the east boundary. The Inspector noted that there was a difference in the estimated area of excavation between her calculations and the Planning Authority's estimation, but she expressed satisfaction that in excess of 3ha was under extraction at the time of the report.

10.1.14. On my site visit I observed that the quarry remains largely as per the 2010 Google Earth aerial image dated 15th August 2010 and is certainly larger than that depicted by earlier aerial photograph images.

10.1.15. Quarrying activity is concentrated toward the west, most-elevated part of the site and there is material stored adjacent to the north, east and south-east boundaries of this elevated area. An additional haul route appears to have been provided, which runs adjacent to the east site boundary and wraps around the west side of the concrete bays, before leading up to the elevated plateau where quarrying activity takes place. A site office has also been installed in the area of the 4 No. concrete bays and there is an amount of vehicle parking and machinery and plant storage in the area also.

10.1.16. Returning to the subject matter of the referral, I am satisfied from my assessment and review of available planning records that the existing quarry is not authorised by reason of any pre-64 status, for the reasons outlined, and expansion

of the quarry to the extremity of the 18.99ha landholding would also not be authorised by reason of any pre-64 status.

10.1.17. I have previously outlined that quarrying activity constitute development and, in this context, I am satisfied that there is no exempted development provision within the legislation that would allow quarrying activity to continue in this instance, without the requirement to apply for and secure substitute consent.

11.0 Recommendation

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

WHEREAS a question has arisen as to: -

- (i) Whether the continuation of existing quarry operation including extraction, processing and sale of raw and processed quarry material, is operating in accordance with its pre-64 authorisation and is or is not development and is or is not exempted development and
- (ii) Whether the continuation of quarrying to the extremity of the landholding (18.99ha), is in accordance with its pre-64 authorisation and is or is not development and is or is not exempted development.

AND WHEREAS Donegal County Council requested a declaration on this question under the provisions of Section 5 of the Planning and Development Act, 2000, as amended on the 29th day of October, 2021.

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

- (a) Sections 2(1) and 3(1) of the Planning and Development Act, 2000, as amended,
- (b) The Board's previous decision in relation to the site under ABP Ref. QV05E.0230 in December 2013.

AND WHEREAS An Bord Pleanála has concluded that: -

- (a) It had previously been determined under ABP Ref. QV05E.0230 that unauthorised development that would have required Environmental Impact Assessment, screening for Environmental Impact Assessment or Appropriate Assessment took place on the site at some point after 2005, which following assessment, gave rise to a requirement to apply for substitute consent.
- (b) No application for substitute consent was submitted, following the Board's decision on ABP Ref. QV05E.0230

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that: -

- (i) The continuation of existing quarry operation including extraction, processing and sale of raw and processed quarry material, is not operating in accordance with its pre-64 authorisation and is development and is not exempted development.

and
- (ii) The continuation of quarrying to the extremity of the landholding (18.99ha), is not in accordance with its pre-64 authorisation and is development and is not exempted development.

Barry O'Donnell
Planning Inspector

24th March 2022.