



An  
Bord  
Pleanála

## Inspector's Report ABP-313030-22

### Question

Whether ongoing quarrying and ancillary activities is or is not development or is or is not exempted development.

### Location

P. McCaffrey & Sons Limited Quarry,  
Ballymagroarty, Ballintra, Co.  
Donegal.

### Declaration

Planning Authority

Donegal County Council

Planning Authority Reg. Ref.

S5 22/07

Applicant for Declaration

Pearse O'Gorman.

Planning Authority Decision

No declaration issued

### Referral

Referred by

Donegal County Council.

Owner/ Occupier

P McCaffrey & Sons Limited.

Observer(s)

None.

Date of Site Inspection

25<sup>th</sup> July 2022.

**Inspector**

Barry O'Donnell

## 1.0 Introduction

- 1.1. This report relates to a referral by Donegal County Council as to whether ongoing quarrying and ancillary activities at P McCaffrey & Sons Ltd Quarry, Ballymagroarty, Ballintra, Co. Donegal is or is not development and is or is not exempted development. The Planning Authority's cover letter with the referral states that two previous declarations were made in relation to quarrying activity and on both occasions the decision was subject to a Judicial Review.

## 2.0 Site Location and Description

- 2.1. The subject site is situated in the townlands of Ballymagroarty Irish and Glasbolie, in south County Donegal, approximately 150m to the west of the N15 National Primary Road. The village of Ballintra is located 2.7km to the north of the site.
- 2.2. The site comprises two distinct areas that have been subject of quarrying and are bisected by a local road, the L7265. The part of the quarry north of the L7265 does not currently appear to be subject to quarrying and contains a deep flooded void. The part of the quarry to the south of the L7265 can be accessed from the north and south sides and contains an operational quarry area a number of stockpile areas and processing/storage structures.
- 2.3. The surrounding rural area is characterised by a patchwork of agricultural land. The immediate area features numerous residential properties and farmsteads, several of which are situated adjacent to the quarry site.

## 3.0 The Question

- 3.1. The question the subject of the referral before the Board is: -

*Whether the ongoing quarrying and ancillary activities at P McCaffrey & Sons Ltd Quarry, Ballymagroarty, Ballintra, Co. Donegal is or is not development requiring planning permission from Donegal County Council and is or is not exempted development.*

- 3.2. Section 5 of the Planning and Development Act, 2000, as amended has a clear and narrow focus, allowing for a question to be asked as to whether a given development

is or is not development and is or is not exempted development. In including the additional text within the referral question '*requiring planning permission from Donegal County Council*' the referral, in my view, strays into other areas of the planning system that cannot reasonably be encompassed under a Section 5 determination. I therefore propose to reword the question slightly, as follows: -

*Whether ongoing quarrying and ancillary activities at P McCaffrey & Sons Ltd Quarry, Ballymagroarty, Ballintra, Co. Donegal is or is not development and is or is not exempted development.*

## 4.0 Planning History

4.1. The subject site has a lengthy and complex planning and S261/S261A quarry registration history. Relevant historical records include the following: -

**PL 05E.SU0128** – On 23<sup>rd</sup> May 2017 the Board dismissed an application for substitute consent as the application should have related to the entirety of the quarry, as per the Board's order issued under ABP ref. QV 05E.0128. The application submitted did not relate to the entirety of the quarry and related only to the northern part of the site.

**QD05E.QD0018** - On 23<sup>rd</sup> May 2017 the Board refused permission to further develop the quarry (application made under S37L of the Act) on the basis that the Environmental Impact Statement submitted with the application failed to adequately quantify the volume of material to be extracted and the consequential impact on the processing and manufacturing and manufacturing of materials within the main quarrying area.

**05E.QV.0128** – (PA Reg. Ref. EUQY01) The Board issued a determination on 16<sup>th</sup> October 2013 as follows: -

- Confirming the determination of the Planning Authority under Section 261A(2)(a)(i) of the Act (development was carried out after 1<sup>st</sup> February 1990 that required Environmental Impact Assessment);
- Confirming the determination of the Planning Authority under Section 261A(2)(a)(ii) of the Act (development was carried out after 26<sup>th</sup> February 1997 that required Appropriate Assessment); and

- Setting aside the determination of the Planning Authority under Section 261A(4)(a) of the Act (the quarry commenced operated prior to 1<sup>st</sup> October 1964 and the requirements in relation to registration under section 261 of the Act were fulfilled.)

**EUQY01** - The quarry was registered with the Planning Authority under section 261 of the Act.

**01/106** - (ABP Ref. PL 05.131103): Permission refused on 22<sup>nd</sup> October 2003 for retention, extension and completion of works to existing quarry. Permission was refused for 2 reasons as follows: -

1. The Board is not satisfied, on the basis of the information contained in the planning application, the Environmental Impact Statement and the additional information submitted in support of the planning application and the appeal, that an appropriate assessment of the effects of the development on the environment has been carried out. It is considered that there is insufficient information in relation to the nature and extent of the development, the characteristics of the proposed development and the receiving environment. The planning application, the Environmental Impact Statement and the further information submitted fails to address the likely and significant effects of the development on the environment. Significant uncertainty exists therefore in relation to the extent of impacts arising from the proposed development and how such impacts should be contained or mitigated. It is considered that the proposed development would seriously injure the amenities and depreciate the value of property in the vicinity, would be unacceptable in terms of the risk of environmental pollution and would be prejudicial to public health and safety. The proposed development would, therefore, be contrary to the proper planning and development of the area.
2. It is considered that the public notices and drawings which form part of the planning application fail to adequately describe the nature and extent of the development and, in particular, to distinguish between those elements of development to be retained, completed and future extensions. Furthermore, the drawings submitted fail to adequately describe the extent of future quarrying and proposals for final reinstatement of the site. The Board is, therefore, precluded from considering a grant of planning permission in this case.

## **5.0 Policy Context**

### **5.1. Donegal County Development Plan 2018-2024**

- 5.1.1. The site is in a rural part of County Donegal.
- 5.1.2. Chapter 8 of the Development Plan outlines the aims for natural resource development in the County, with section 8.1 addressing the extractive industry and geology. A host of objectives and policies aimed at controlling the locations and the impacts of quarry developments are also listed within sections 8.1.2 and 8.1.3 respectively of the Development Plan.

### **5.2. Natural Heritage Designations**

- 5.2.1. The site is not located within or adjacent to any designated European site, the closest such site being Ballintra SAC (Site Code 000115) which is c.1.9km north-east. The area is also designated as a proposed Natural Heritage Area (Site Code 000115).
- 5.2.2. Carricknahorna Lough And Lough Gorman pNHA (Site Code 002068) is situated c.650 south-east of the site.

## **6.0 Statutory Provisions**

### **6.1. Planning and Development Act, 2000**

#### **6.1.1. 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.

#### 6.1.2. 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.

#### 6.1.3. Section 4(1) of the Act (Exempted Development) sets out various forms of development that are exempted development. Section 4(2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. Section 4(4) provides that:

- notwithstanding paragraphs (a), (i), (ia) and (l) of subsection 4(1) and any regulations under subsection 4(2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

#### 6.1.4. Section 177O: Enforcement

(3) Where a person is required by a planning authority, under section 177B or section 261A, to make an application for substitute consent for a development and he or she —

(a) fails to make such an application in accordance with relevant provisions of this Part and regulations made under section 177N, or

(b) fails, having made an application, to furnish additional information as required under relevant provisions in this Part or in regulations made under section 177N,

the Board shall inform the planning authority for the area in which the development is situated of that fact and the development shall, notwithstanding any other provision in this Act, be unauthorised development.

## **6.2. Planning and Development Regulations, 2001**

### **6.2.1. No relevant provisions**

## **7.0 The Referral**

### **7.1. Referrer's Case**

7.1.1. The Planning Authority referred the application to the Board on 14<sup>th</sup> March 2022 and provided a cover letter with the referral, the contents of which can be summarised as follows: -

- Two previous declarations were made in relation to quarrying activity and on both occasions the decision was subject to a Judicial Review.
- The quarry operator has consistently relied on pre-1963 consent for quarrying activity.
  - An application for retention, completion and extension of the quarry (Reg. Ref. 01/106) was approved by the Planning Authority but was refused by the Board (Ref. PL05.131103).
- Pursuant to S261A of the Act, in 2012 the Planning Authority issued an Enforcement Notice requiring cessation of quarrying activity. Following referral to the Board by the quarry operator, the Board determined that the quarry had commenced prior to 1<sup>st</sup> October 1964 and that the Enforcement Notice should not have been issued, thus allowing the applicant to apply for substitute consent.



- A subsequent application for substitute consent (PL 05E.SU0128) was dismissed by the Board in 2017 on the grounds that the application did not relate to the entire quarry area. A Section 37L application (QD05E.QD0018) for continuation and extension of quarrying activity was also refused by the Board at that time. Both of these decisions are the subject of judicial review proceedings.
- Given the above context, the application is referred to the Board for determination.

## **7.2. Observations**

7.2.1. A submission on the referral was made on behalf of Pearse O’Gorman (the original applicant) by MKO Planning Consultants on 12<sup>th</sup> April 2022. Its contents can be summarised as follows: -

- Previous planning applications relating to the subject site are summarised and the following is noted: -
  - The quarry was registered under S261 in 2006, with a stated total site area of 33.9ha and extraction area of 10.6ha.
  - The Board determined in 2013 on a S261A referral that the quarry had commenced operation between 1<sup>st</sup> October 1964, thus opening the way for the operator to apply for substitute consent.
  - The operator applied for substitute consent for the northern quarry area only, in 2014. This application was dismissed by the Board in 2017 as the application did not relate to the entire quarry.
- Quarrying activity is ongoing at the site, in the absence of any planning permission. It is submitted that the entire quarry operation is unauthorised.

## **7.3. Owner’s response**

7.3.1. The site owner made a submission on the referral on 16<sup>th</sup> March 2023, prepared on their behalf by Earth Science Partnership Ltd. Its contents can be summarised as follows: -

- The Section 5 application has been referred to the Board without the knowledge of the quarry owner.
- The quarry was registered under S261 as a pre-1963 development, which was accepted by the Planning Authority.
- In subsequent S261A registration, following an appeal to the Board, it was determined that part of the quarry is a pre-1963 development and engagement with the Planning Authority established the exact area.
- The question asked by the third-party referrer cannot be determined under Section 5 as the section has a limited focus, as to whether or not a given activity is or is not development and is or is not exempted development. It is unconcerned with whether or not an activity requires planning permission.
  - To uphold the application conflicts with the protocols applied under S261 and S261A and would be sub-judice, as the basis of this application is the subject of ongoing court proceedings.
- Both the quarry owner and Donegal County Council are bound by the sub-judice rule.

#### **7.4. Further Responses**

- 7.4.1. Both the Planning Authority and MKO Planning Consultants (on behalf of Pearse O’Gorman) made further submissions, following receipt of the site operator’s response to the referral. Each submission is summarised below: -

##### Planning Authority submission dated 13<sup>th</sup> April 2023

- As both the decision to dismiss the substitute consent application and the decision to refuse permission for the Section 37L application, which are key to the subject referral, are the subject of judicial review, it would be sub-judice to comment further.

##### Submission by MKO on behalf of Pearse O’Gorman dated 14<sup>th</sup> April 2023

- The quarry operator has been involved in largescale and intensive quarrying at the site for the past 25+ years and it is understood that, currently, material is sourced locally and is transported to the site for processing.

- The quarry operator's claim that the southern quarry area does not require substitute consent is flawed as it is an integral part of the overarching quarry and meets the definition of a quarry as set out in the legislation.
  - This has been dealt with previously by the Board, in its correspondence with the operator as part of the substitute consent planning application.
- The operator's claims that environmental legislation was considered and complied with has bearing on the referral before the Board.
- The entire quarry has been determined to require substitute consent under the S261A registration process and no such substitute consent has been granted, with the result that ongoing quarrying is unauthorised.

## 8.0 **Assessment**

8.1. The question raised in the Referral is as follows:

*Whether the ongoing quarrying and ancillary activities at P McCaffrey & Sons Ltd Quarry, Ballymagroarty, Ballintra, Co. Donegal is or is not development and is or is not exempted development.*

8.2. The question concerns an area outlined in red on drawing Nos. 141215a-01 and 141215a-02 provided by the original applicant, Pearse O'Gorman.

### 8.3. **Is or is Not Development**

8.3.1. There are two separate areas of the subject quarry, north and south, which are intersected by the L-7265 local road. The northern part of the quarry does not appear to be quarried any longer and available aerial photography indicates that the excavated area has been allowed to flood. The southern part of the quarry remains active and contains a number of stockpile areas, processing/storage structures and other buildings. In relation to the exact nature of the quarrying activity being undertaken, I note the Inspector's report on application Ref. QD05.QD0018 states that the following activities take place on the southern part of the quarry:

*'It occupies an area of approximately 6 hectares and accommodates active excavation of limestone through drilling and blasting. The material is processed on site using fixed crushing and screening plant to reduce the rock to aggregate which*

*is sold. Processed aggregate is also used to produce readymix concrete on site. The concrete batching plant is located in the northern area of the main quarry. The applicant also manufactures a range of asphalt products within the main quarry. As a result, raw aggregate and finished product are both transported off site in accordance with market demands.'*

- 8.3.2. I am satisfied that the operation of the 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...*"
- 8.3.3. The quarry was registered under S261 of the Act, pursuant to Planning Authority Reg. Ref. EUQY01. In its review of the Planning Authority's subsequent determination under S261A of the Act (ABP Ref. 05E.QV.0128 refers), the Board determined that in view of the nature and extent of operations, landownership, and the extent of lands indicated during the S261 registration process, the entirety of the quarry site should be considered as a single entity.
- 8.3.4. The Board also determined under Ref. 05E.QV.0128 that development took place at the quarry after 1<sup>st</sup> February 1990, which would have required an environmental impact assessment, but such an assessment was not carried out and that development took place after the 1<sup>st</sup> March 1997, which would have required an appropriate assessment, but such an assessment was not carried out. In accordance with S261A(7) of the Act, the effect of this determination was that an application for substitute consent was required to be made to the Board, in respect of the operation of the quarry.
- 8.3.5. An application for substitute consent was made in 2014 (Ref. PL 05E.SU0128 refers) but, in May 2017, following opportunities afforded by the Board to the applicant to address deficiencies in the application, specifically to ensure that the application and the supporting documentation extended to the entire site, the Board decided to dismiss the application for substitute consent.
- 8.3.6. I am not aware of another application for Substitute Consent relating to the subject site having been made in the intervening period.

8.3.7. In making a submission on the referral, the site operator submits that to uphold this Section 5 application conflicts with the protocols applied under S261 and S261A and would be sub-judice, as the basis of this application is the subject of ongoing court proceedings. Whilst I note the submission, for the Board's clarity it is the decisions on the substitute consent application (Ref. PL 05E.SU0128) and Section 37L planning application for further quarrying (Ref. QD05E.QD0018) that are the subject of Judicial Review, not the Board's S261A determination (Ref. QV 05E.0128), which determined that unauthorised development had taken place.

#### 8.4. **Is or is Not Exempted Development**

8.4.1. The development does not come within the scope of exemptions provided for in Sections 4(1) and 4(2) of the Act.

8.4.2. Further, in the event the development was considered to come within the scope of an exemption under the aforementioned Sections of the Act, the Board has previously determined under ABP ref. QV 05E.0128 that development took place after the appointed dates in 1990 and 1997 that would have required EIA and AA but which were not carried out for the entire quarry. In this regard, the provisions of Section 4(4) of the Act are engaged, which states that development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

8.4.3. I am not aware of any other exempted provision under which the ongoing operation of the subject quarry could be considered to constitute exempted development.

### 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 ongoing quarrying and ancillary activities at P McCaffrey & Sons Ltd Quarry, Ballymagroarty, Ballintra, Co. Donegal is or is not development and is or is not exempted development.

**AND WHEREAS** Pearse O’Gorman care of MKO Planning & Environmental Consultants requested a declaration on this question from Donegal County Council on 15<sup>th</sup> February 2022 and the Council did not issue a declaration on the application:

**AND WHEREAS** Donegal County Council referred this application to An Bord Pleanála for determination on the 14<sup>th</sup> day of March, 2022:

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

- (a) Sections 2, 3, 4, 261 and 261A of the Planning and Development Act, 2000, as amended;
- (b) the nature and scale of the operations and activities on these lands;
- (c) The planning history and quarry registration history of the site including the decision of An Bord Pleanála on Ref. QV 05E.0128 pursuant to section 261A of the Planning and Development Act 2000, as amended, and the decision of An Bord Pleanála to dismiss a substitute consent application under ABP Ref. PL05E.SU0128 (Planning Authority reference number EUQY01) pursuant to section 177E of the Planning and Development Act 2000, as amended; and
- (d) the submissions on the file.

**AND WHEREAS** An Bord Pleanála has concluded that:

- (a) the nature and scale of the quarry activities and ancillary activities within the quarry area constitutes works within the scope of the definition in section 2(1) of the Planning and Development Act 2000, as amended, and therefore constitutes development;
- (b) in accordance with the determination of the Board under ABP Ref. QV 05E.0128, development took place at the quarry after 1<sup>st</sup> February 1990, which would have required an environmental impact

assessment but such an assessment was not carried out, and development too place at the quarry after 1<sup>st</sup> March 1997, which would have required an appropriate assessment, but such an assessment was not carried out,

- (c) under section 261A(7) of the Planning and Development Act 2000, as amended, the effect of the determination and decision of the Board under reference QV 05E.0128 was to require an application to be made to the Board for substitute consent in respect of this quarry,
- (d) the only substitute consent application made in relation to this quarry was dismissed by An Bord Pleanála under reference PL05E.SU0128,
- (e) there are no provisions in the Planning and Development Act 2000, as amended or in the Planning and Development Regulations 2001-2020, made thereunder, whereby the said development is exempt development:

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the Planning and Development Act 2000, as amended, hereby decides that the ongoing quarrying and ancillary activities at P McCaffrey & Sons Ltd Quarry, Ballymagroarty Irish and Glasbolie townlands, Ballintra, County Donegal, is development and is not exempted development.

---

Barry O'Donnell  
Planning Inspector

12<sup>th</sup> May 2023.