



An  
Bord  
Pleanála

## Inspector's Report ABP 313122-22 and 313514 - 22

### Questions

#### ABP 313122

- 1. Whether excavation of land to create a lagoon system, including associated pipe work and mounding to facilitate ground water lowering and discharge of water from the lands at Lismaine, Jenkinstown, County Kilkenny is or is not development and is or is not exempted development within the meaning of the Planning and Development Act 2000(as amended).*
- 2. Whether the operation of the quarry at Lismaine (which is an established use under the P&D Act 2000 as amended) with discharge of water from the quarry to land outside the site ownership boundary at lands at Lismaine, Jenkinstown, County Kilkenny with hydrological connection to the River*

*Barrow/River Nore SAC and Inchbeg pNHA is or is not development and is or is not exempted development within the meaning of the Planning and Development Act 2000 (as amended).*

**ABP 313514**

- 1. Are the historical quarrying works and use of the site development and are they exempt development?*
- 2. Are the intensified quarrying works and use of the site (including water discharge) since 2018 development and are they exempt development?*

**Location**

Llsmaine, Jenkinstown, County Kilkenny.

Planning Authority

Kilkenny County Council

Planning Authority Reg. Ref.

Dec 679(313122) and Dec 685 (313514).

Applicant for Declaration

Aidan Brophy (313514 only).

Planning Authority Decision

None.

**Referral**

**Referred by**

Kilkenny County Council.

<b>Owner/ Occupier</b>	Donal O'Regan (Snr) and Don (Donie) O'Regan.
<b>Observer(s)</b>	Aidan Brophy, Sean Cahill and Eamon Conway.
<b>Date of Site Inspection</b>	24 July 2024.
<b>Inspector</b>	B. Wyse.

## 1.0 Introduction

- 1.1. As indicated this is a single report addressing the two cases ABP Refs. 313122 and 313514. The two cases refer to the same property and raise similar questions and generally involve the same parties.
- 1.2. ABP Ref. 313122 is a referral under Section 5(4) of the Act – the referral was submitted directly by the planning authority (lodged on 22 March 2022) subsequent to enforcement proceedings in relation to the subject property.
- 1.3. ABP Ref. 313514 is also a referral under Section 5(4) of the Act – in this case submitted by the planning authority (lodged on 6 May 2022) following a request for a declaration in relation to the subject property by Mr. Aidan Brophy (lodged on 14 March 2022). No declaration was issued by the planning authority.
- 1.4. The documentation on both files is similar though more extensive on file ABP Ref. 313122.

## 2.0 Site Location and Description

- 2.1. The site is a quarry located in the townland of Lismaine, approximately 10kms north of Kilkenny City and 4.5kms south of the village of Ballyragget. The quarry is accessed off the local primary road L-1818-19 close to its junction with the N77 (Kilkenny to Portlaoise road) and to which it also has extensive frontage. The overall quarry lands, covering an area of approximately 12has, are best identified on the Site Location Map attached as Appendix 2 to the application by Mr. Brophy to the planning authority for a declaration – lands labelled 'Brennans' and

'O'Regan/O'Brien' – under ABP Ref. 313514 and on Folio Map Lismaine, attachment 13 to the planning authority referral submission to the Board under ABP Ref. 313122.

- 2.2. As will become clear the main focus of both referrals is on the current quarry operations of Mr. Donal O'Regan Senior and Mr. Don O'Regan (the O'Regans), Specifically, the focus is on Folio 14635F, an area of 3.003has, roughly identified on the above maps as 'O'Regan/O'Brien ' and 'Quarrying activity in this area' respectively. Extraction is currently taking place within this area with pumping of water to a lagoon system located a short distance to the west and subsequent discharge via pipes/drains to a roadside drain at the entrance to the quarry. The location of these elements is also illustrated on the maps/photographs that accompany this report.
- 2.3. The quarry is generally surrounded by agricultural lands. There are a number of residential properties in close proximity and there is a petrol service station on the opposite side of the N77 near the aforementioned junction.

### **3.0 The Questions**

#### **3.1. ABP Ref. 313122**

3.1.1. The questions referred by the planning authority in this case are as follows:

1. *Whether excavation of land to create a lagoon system, including associated pipe work and mounding to facilitate ground water lowering and discharge of water from the lands at Lismaine, Jenkinstown, County Kilkenny is or is not development and is or is not exempted development within the meaning of the Planning and Development Act 2000(as amended).*
2. *Whether the operation of the quarry at Lismaine (which is an established use under the P&D Act 2000 as amended) with discharge of water from the quarry to land outside the site ownership boundary at lands at Lismaine, Jenkinstown, County Kilkenny with hydrological connection to the River Barrow/River Nore SAC and Inchbeg pNHA is or is not development and is or is not exempted development within the meaning of the Planning and Development Act 2000 (as amended).*

### 3.2. **ABP Ref. 313514**

3.2.1. The questions referred on by the planning authority in this case are as follows:

1. *Are the historical quarrying works and use of the site development and are they exempt development?*
2. *Are the intensified quarrying works and use of the site (including water discharge) since 2018 development and are they exempt development?*

## 4.0 **The Referrals**

### 4.1. **ABP Ref. 313514**

#### 4.1.1. **Request by Mr. Aidan Brophy to Kilkenny County Council for a Declaration**

This submission includes the following:

- The request relates to a site registered as Folio 14635F, measuring about 3.003has, in the ownership of Mr. Donal O'Regan and Mr. John O'Brien. Folio details included as Appendix 1. There is no mention of this being a gravel pit or rock quarry.
- The folio was purchased by the current owners in 1994 from the owners of the adjacent gravel pit and was developed post 1995 as a rock quarry. Further details at larger scale included as appendix 2.
- While the adjacent pit may have been a bona fide pre-63 user in 1994, that pit as of June 1994 was a considerable distance from Folio 14635F and no pit face had reached the boundary of the land sold.
- The development of the sold land as a quarry constituted a new quarry, the pre-63 user rights not having transferred or been shared or diluted.
- *Waterford County Council v John A Wood Ltd [1998] SC 32* precludes the forming of two pits with the purchase of the undeveloped land by generation of a wholly new extraction point unrelated to anything that had gone before. The new pit was not a continuance of the existing pit as of date of purchase.
- An attempt to register the site as an operating quarry under Section 261 of the Act was deemed late as details were submitted after the 27<sup>th</sup> April 2005. However, the Circuit Court recently (2021) ordered the retrospective

registration of the site following the case *Browne v. Kerry County Council (2009) IEHC 552* which clarified and, essentially, extended the time limit for Section 261 registrations.

- Section 261 related to operational details as of the original timeframe (2005). The decision in *Pierson & Others v Keegan Quarries [2010] IEHC 404* determined that the act of registration does not authorise any form of development which was not authorised by bona fide pre-63 user or a planning permission.
- While it may be Section 261 registered on foot of the decision of the Circuit Court decision this does not mean that development on the subject site is authorised nor does it become authorised merely by the imposition of conditions by Kilkenny County in compliance with the order of the Circuit Court.
- A photographic history of development at the subject site is attached as Appendix 3. The small incursion in the north-west corner of the site was made to provide rock for the O'Regan and O'Brien activities within the adjacent site - operation of a business in the large shed and vicinity identifiable in the 2005 photograph and which was not commercial quarrying for the purposes of operating a pre-63 user pit. This appears to have been opportunistic development, carried out in order to seek to register the folio under Section 261.
- Without prejudice to the above analysis, the conditions imposed following the Circuit Court decision must relate to the 2005 state of development in accordance with the Section 261 legislation and that the site was deemed a pre-63 user at that time. At the very least, therefore, subsequent development must be subject to the doctrine of intensification.
- The site appears to have been developed sporadically between 2005 and 2018, with little or no activity between 2015 and 2018. By 2015 extraction had breached the water table. This constituted a material change of use in that the site developed in a manner inconsistent with the 2005 nature of the development – now below the water table and outside any legitimate pre-63 use. It is not clear when the discharge of groundwater started.

- The treatment of the site under Section 261A is unclear and ultimately immaterial to the current state of development as the area then developed by 2012 was less than the minimum EIA screening level of 2.5has and there is likely no proof of a discharge at that time which might have required full Appropriate Assessment.
- The 2018 photograph show less than half the site under development and a sizable pond in the north-west corner. Even at this stage, given the tiny incursion into the field in 2005 the relative increase in scale was sufficient to breach the pre-63 user now claimed.
- The attached 2021 photograph shows the entire 3has under development. The development more than doubled in size in two or three years, thereby confirming intensification post 2005 and separately again post 2018.
- A significant discharge was ongoing in 2021 with a large area extracted to below the water table. The discharge impacted significantly on adjacent dwellings with septic tanks being flooded, with impacts on human health and likely contamination of ground water. This water ultimately runs to the Nore SAC and SPA.
- Thus the development is unauthorised and has incurred both EIA and NIA offences.

#### 4.1.2. **Planning Authority Response and Other Documentation submitted**

As indicated at Section 1.3 above the planning authority referred Mr. Brophy's request to the Board.

The further documentation sent on to the Board on 27<sup>th</sup> May 2022 includes an earlier document prepared by the planning authority on 10 February 2022 addressed to the Board and which predates the similar, but more extensive, document dated 16 March 2022 and submitted by the planning authority to the Board on 22 March 2022 in support of its referral under ABP Ref. 313122. Further, the document dated 10 February, appears to be incomplete and was likely an earlier draft of the document dated 16 March 2022. I consider that it can be regarded as having been superseded by the latter which is considered under Section 4.2.1 below.

**4.1.3. Response of Mr. Aidan Brophy to Planning Authority Referral of his Request to An Bord Pleanala**

No further comment at this time.

**4.1.4. Response of Mr. Donal O'Regan Senior and Mr. Don O'Regan to Planning Authority Referral of Request of Mr. Aidan Brophy to An Bord Pleanala**

The Board will note that this submission, dated 7 June 2022 and submitted on that date, addresses both the referral under ABP Ref. 313514 (referred to in the submission as the 'Brophy Referral') and the referral under ABP Ref. 313122 (referred to in the submission as 'The Referral') in so far as it includes a response to a submission by Mr. Aidan Brophy and Others, dated 13 May 2022 and submitted to the Board on 16 May 2022, in relation to that referral. That submission by Mr. Aidan Brophy and others and the response by Mr. Donal O'Regan Senior and Mr. Don O'Regan is considered under Sections 4.2.2 and 4.2.3 below.

The response in relation to ABP Ref. 313514 includes the following:

- Mr. Brophy's assertion that the lands in question do not have pre-63 rights is surprising as Kilkenny County Council have accepted that this is not the case – quotation included from the planning authority referral document, dated 16 March 2022 and submitted under ABP Ref.313122.
- The lands sold to Messrs. O'Regan and O'Brien were part of the original quarry site and are not a considerable distance from the original pit. Kilkenny County Council have acknowledged that these parcels of land, and those sold to the Brennan brothers and Lismaine Concrete, all formed part of the original quarry site and are all in close proximity to the original quarry pit.
- What has occurred is a proportionate and natural working out across the original quarry site and the continued use of the same quarry seam. There has been no change of use. The quarrying activity continues in the same manner which involves the extraction and removal of rock with no washing and/or use of water. The nature of the activity remains the same.
- The Section 261 registration process has been resolved and this registration was in respect of the pre-1964 use. Includes references from affidavit of Mr. Don O'Regan (copied to the Board under ABP Ref. 313122) in connection



with Section 160 proceedings that illustrate continuous quarrying operations on the lands since 1982 by a number of different companies variously owned/operated by the respondents and family members.

- The aforementioned affidavit and Exhibit DORJ1 to that affidavit (copy attached) illustrate continuous activity at the subject site over the period 2005 to 2018 contrary to the assertion that development was sporadic over that period.
- It is unclear how any of Mr. Brophy's documents support the assertion that quarrying is being carried out below the water table. Groundwater running off the site does not arise from extraction activity. The quarry does not abstract water or use water to wash stone on the site. Water discharging is storm water which would run off the lands regardless of quarrying activity.
- In any event it is not the case that pre-1964 user and/or Section 261 registration are restricted, conditional or contingent on no extraction below the water table. It is also not the case that any extraction below the water table necessarily equates to an intensification of use such as to give rise to a material change of use.
- In relation to Section 261A of the Act Kilkenny County Council considered that the quarry was not one that ought to have been subject to EIA or AA.
- It has always been necessary for the quarry to deal with stormwater/surface water that flows down into the quarry and the issue of discharge into the public drain, either directly or via a lagoon for over 30 years has been fully explained in the response submission to the Board under ABP Ref. 313122.
- There is no question of any surface or storm water discharged from the quarry containing any contaminants or pollutants. Storm water is discharged into the local watercourse and not into neighbouring lands. Mr. Brophy's lands are in an area prone to flooding. Waters from the quarry merge with waters already in the local watercourse. There is no evidence to support the contention that the quarry is causing flooding. KCC is no longer pursuing the matter of pollutants or contaminants emanating from the quarry.

## 4.2. **ABP Ref. 313122**

### 4.2.1. **Planning Authority Referral to An Bord Pleanala**

This submission, dated 16 March 2022 and lodged on 22 March 2022, comprises a cover letter and a significant number of attached documents.

The cover letter outlines the background to the case and presents the planning authority's view on the questions raised in the referral. It includes the following:

- Quarrying in this area started prior to 1964 and aerial photographs from the 1970s show the quarry as extant. The lands in the original ownership of James Treacy in 1964 would have constituted the lands currently in the ownership and use by both Brenstone (William and Liam Brennan), Lismaine Concrete and Asphalt Roofing (Donal O'Regan and Doni O'Regan). This land was sold off in batches in the 1970s and 1980s to the Brennan Bros others (sic). The current landownership breakdown is indicated on the Folio Map Lismaine in exhibit 13 (attached).
- This map shows the area of land currently in the ownership/control of Mr. Don O'Regan, Mr. Doni O'Regan and the Asphalt Roof company where the business of Asphalt Roofing is being carried on and where the current quarrying activity is being carried on.
- In 2012 (sic) the current operators of quarry activities attempted to register under the quarry registration provisions of section 261A (sic) of the Planning and Development Act 2000 (as amended). However, the application was submitted a day late (28 April 2005) and the application was rejected. The quarrying activities were considered unauthorised development.
- On a number of occasions in the past, 2009, 2010, 2012 and 2014 Kilkenny County Council has issued Enforcement Notices and the developer has ceased activities in response to these.
- In 2020 the Council received a further complaint in relation to unauthorised quarrying activity at the subject site. Ultimately the Council was of the view that this constituted unauthorised development and it made an application for an injunction under Section 160 of the Act. [The case was still active before the Circuit Court at the time of this submission (16 March 2022)].

- The Council subsequently received a further complaint in October 2021 regarding excavations to create a lagoon system and associated works to facilitate water discharge at the subject site. An Enforcement Notice in relation to this was issued on 10 December 2021. This most recent complaint is the subject of question 1 of the planning authority's referral. The site owner is contending that the lagoons and associated discharge of water is exempted development (see attached submission by Malcolm Lane, Planning Consultant, exhibit 5).

### **Planning Authority View on Question 1**

- The planning authority accepts that the quarry existed at Lismaine, Jenkinstown, County Kilkenny prior to 1964. However, excavations to create a lagoon system and associated works to facilitate water discharge to an area outside the site ownership boundary have now been carried out. There is a potential significant impact on the surrounding environment, particularly the River Barrow River Nore SAC (Site Code 002162) and the Inchbeg pNHA (Site Code 000836). The quarry entrance from local primary road L-1818-19 is located approx. 448m from the SAC/pNHA. The road drain at the entrance is hydrologically connected to these sites (see exhibit 15 attached).
- Site inspections carried out by the planning authority (exhibits 6,7 and 8 attached) show that water from the quarry through the lagoon system is being discharged at the entrance to this drain with water flowing towards the SAC/pNHA (see also exhibit 4). Ground water within the active quarry area is being pumped to the lagoon system and from there is discharged off site to the road drain.
- The impact of these works cannot be screened out from a requirement for stage 2 appropriate assessment. There is a lack of detail regarding the construction of the lagoons, the land drainage regime within the quarry site and the management of water disposal from the quarry site.
- Under Section 4(4) of the Act any development that cannot be so screened out cannot be exempted development. Article 9(1)(a)(viiB) of the Regulations also provides a restriction on exemption where appropriate assessment is

required. The planning authority, therefore, considers that the subject works are not exempted development.

- The planning authority rejects the assertion of Malcolm Lane that the lagoon system is exempted development by reference to Article 6, Schedule 2, Part 3 Exempted Development – Rural, Class 3 (minor works and structures).
- *Rural* is not defined in the Act or Regulations. The dictionary definition refers to *relating to, or characteristic of the country or country life*. These exemptions are clearly for rural works associated with agriculture or other rural activity and are not applicable to commercial uses such as quarrying, which has the potential to seriously impact the environment and are not minor.
- Further, the planning authority considers that the works relating to the lagoon and disposal of water off site have resulted in a significant change to the character and operation of the use of the quarry site affecting the proper planning and sustainable development of the area to such an extent as can be considered material in planning terms.

#### **Planning View on Question 2**

- The planning authority accepts that a quarry use on the lands at Lismaine was established prior to 1 October 1964.
- It is clear from the section 261 registration form (see exhibit 14 attached) submitted in 2005 that there was no discharge from the premises at that time. The answers to questions 10, 14, and 16 are referenced in this regard. The answer to question 16 indicates that the winter water table had not been identified. These answers are put forward as credible evidence of the scale and extent of the quarry operation in 2005.
- A site inspection carried out in May 2012, for the purposes of Section 261A of the Act, indicated recent quarrying to below the water table as the extracted area was filled with water. No discharge to any adjoining surface water drainage was found at that time. On this basis an appropriate assessment screening concluded that, as there was no pathway, an impact on the SAC would be unlikely (see exhibit 16 attached).

- Affidavits from Mr. Sean Cahill, Mr. Aidan Brophy and Mr. Eamonn Conway in connection with the Section 160 proceedings, lodged subsequent to the complaints received in 2020, are attached as exhibit 17.
- Subsequent site inspections have established that the operation of the quarry now provides for the pumping of water from the active quarry area to a set of constructed lagoons and water now discharges from the site to the public road drainage system and onwards to the SAC and pNHA.
- The contention of the planning authority is that this has resulted in a material change to the nature and scale of the operation of the quarry and has rendered the entire operation (established quarrying activity and water discharge system) development which requires stage 2 appropriate assessment and, therefore, that it is development and is not exempted development.

The submission includes the following attachments/exhibits:

1. Copy of complaints and supporting documentation from KCC Environment Section made under Ref ENF20103.
2. Copy of Planners report dated 15 October 2021 relation to ENF20103, recommending Enforcement Notice issued on 10 December 2021.
3. Copy of land map outlining the location of the active quarry and the lagoons.
4. Copy of map prepared by the Environment Section KCC ref ENV-W-21-03 showing the hydrological connection between the discharge point of the site and the SAC and pNHA.
5. Copy of affidavit from Mr. Malcom Lane claiming exemption for the lagoons under Article 6 schedule 2 Part 3 Exempted Development – Rural, Class 3.
6. KCC follow-up site inspection photos dated 17 December 2021.
7. KCC follow-up site inspection photos dated 21 December 2021.
8. KCC follow-up site inspection report and photos dated 20 January 2022.
9. Copy of Enforcement Notices issued in relation to ENF20103.
10. Appears to be as per 17 below.

11. Copy of Planning ref 790/82.
12. Copy of Planning ref 08/1233.
13. Folio Map Lismaime.
14. Copy of application under Section 261 of the P&D Act.
15. Copy of Map 1 NPWS Designated Areas.
16. Copy of Planners report and AA screening report under 261A.
17. Copies of affidavits from Mr. Sean Cahill, Mr. Eamon Conway and Mr. Aidan Brophy (relating to injunction proceedings under ENF20103 – see 10 above).

**4.2.2. Submission of Mr. Aidan Brophy and Others (Mr. Sean Cahill; Mr. Eamon Conway; Mr. Martin Fitzpatrick; Mr. David Sherman)**

Includes:

- There has been a very large build up of water within the quarry and this is being pumped onto neighbouring farmland owned by Mr. Sean Cahill, Lismaime, causing untold damage.
- A large pump in the artificial lake (in the quarry) is running a minimum of 12 hours plus a day and it is estimated that upwards of 750k litres of water are pumped nightly. The lake is beneath the water table and large volumes of water can be seen gushing from the rock face.
- The water is affecting domestic wells on the other side of the N77 and there is examples of wells running dry.
- Some of the water is finding its way into drains that run along the L1818 and ending up flooding land owned by Aidan Brophy, Knockroe and causing his septic tank to malfunction.
- The claim that the water from the quarry is surface water is refuted.
- The quality of life of local residents is being impacted six days a week, sometimes 7am-6pm, due to; excessive noise, dust; flooding; vibration; and excessive traffic.

The submission includes a series of photographs.

#### 4.2.3. **Response of Mr. Donal O'Regan Senior and Mr. Don O'Regan to the Submission of Mr. Aidan Brophy and Others**

This is the relevant part of the submission referred to at Section 4.1.4, first paragraph, above (the document is on file ABP Ref. 313514).

The response includes:

- It is not clear on what statutory basis the Board is considering Mr. Brophy's submission under this referral ABP Ref. 313122. By reference to Section 130 of the Act the submission is out of time and, therefore, cannot be considered by the Board. The following points are made strictly without prejudice to this position.
- The only water being discharged from the quarry flows from higher lands and underground and is storm/ground water. If there was no quarry the very same water would flow across the lands and into the roadside drain and/or directly on to adjacent lands. Any flooding identified is natural flooding. Reference report of Mr. Conor McGrath Awn Consulting.
- The submission in relation to continuous pumping of water is incorrect. The single floating pump is located in the quarry pit and does not operate all year round. As per the Awn Consulting report (parag. 2.2) the pumping frequency is influenced by seasonal factors and ranges from 20 minutes per day in summer time to 2 times hourly per day in winter time. The water then flows by gravity from the lagoon system to the roadside drain, discharging in a controlled manner that does not cause flooding. If, as appears to be the case, and notwithstanding the flood relief works carried out by KCC in 2010, the local watercourse is not capable of containing stormwater emanating from local lands and flooding results downstream, the quarry operators cannot be blamed.
- The quarry pit is not beneath the water table and the water cited as gushing from the rock face is water that cascades from higher lands down on to the quarry site and into the quarry pit. By reference to the Awn Consulting report the quarry activity is having no impact on domestic wells as no abstraction of water is taking place.

- In relation to the alleged impacts on the quality of life of residents no particulars of same are provided.

#### **4.2.4. Response of Mr. Donal O'Regan Senior and Mr. Don O'Regan to the Planning Authority Referral**

This includes a submissions document, including an executive summary, and a significant number of attached documents/exhibits.

The executive summary includes the following:

##### **Planning Authority Question 1**

- The works to create the ponds/lagoon system constitute development either;
  - (a) Falling within the authorisation enjoyed by the quarry by reason of its pre-1964 planning status, or
  - (b) Is exempted development pursuant to Planning and Development Regulations 2001- 2021, Part 3, Article 6, and does not require an appropriate assessment.
- Over several decades of the operation of the quarry a large silt pond system was in place, primarily on adjacent land, but also on land which forms part of the quarry site. More recently a new lagoon system has replaced the original pond system.
- This type of drainage management system is a regular feature of most quarry operations, primarily to manage the drainage of stormwater. As excavation progresses the location and nature of the system may need to be altered or new system created. This is ancillary to the quarry process.
- The continuous use of ponds form part of the authorisation enjoyed by the quarry by reason of its pre-1964 user and planning status.
- In the alternative, and strictly without prejudice to the foregoing, the works to create the ponds involve the replacement of the original silt pond system with the new lagoon system, in a rural area, and as part of a rural based activity (ie. quarrying).



- These works constitute exempted development by reference to Class 3 of the above regulations.
- The contention that the new lagoon system is for groundwater lowering is incorrect. An integral part of the quarry operation for decades has been the management of water in the quarry.
- The new lagoon system replaces the previously existing silt pond to continue the management of groundwater at the site. There has been no change of use or intensification of use.
- The excavation process at the quarry takes place above the water table. It is the seasonal rainfall that determines the level of the water table and not the water management system.
- The works to create the new ponds/lagoon system have not caused more water to be discharged from the site. Pipe works have always existed at the quarry to direct groundwater from the quarry to the local watercourse. The quantity of water discharged is determined by the level of seasonal rainfall. The lagoon system can be used to regulate the flow of water in times of heavy rainfall so as to prevent flooding.
- No appropriate assessment is required.

### **Planning Authority Question 2**

- This question is misconceived and the Board should decline to consider it. The planning authority acknowledges that the quarry is an established use (ie. has pre-1964 user). Such quarries have an authorised planning status and do not require planning permission. The question of whether they are exempted development simply does not arise.
- Without prejudice to the foregoing, there has been no change in the discharge of water from the quarry to the local watercourse.
- The Awn Consulting report (Exhibit 5 attached to the submission) findings include; the quarry is not using water as part of its operations; water discharged contains no pollutants and is not trade effluent; a single floating pump operates seasonally (intermittently) to discharge accumulated groundwater; and water test results show full compliance with appropriate

specifications and the total suspended solids concentrations were below detection on each occasion.

- All water management takes place on site and does not alter the discharge of waters to the local watercourse in either quality or volume.
- From time immemorial gravity fed drains and/or pipe-work have discharged groundwater/stormwater from the site to the local watercourse.
- The pumping of water has occurred for years and is wholly contained within the quarry for the purpose of managing groundwater levels and to prevent overflow (across the quarry yard and/or onto the public road into adjoining grasslands).
- The capability to store water allows for the management of release rather than flooding adjoining lands or the adjacent public road.
- The assessment carried out by the planning authority in 2012 (Section 261A) identified the existence of a pump and concluded that no appropriate assessment was required.
- There has been no material change of use or intensification since 2012. The planning authority have not adduced any evidence to indicate that the position on the ground has altered since 2012 or presented any credible scientific evidence to support the assertion that there is now a potential for significant effects on the SAC. The expert scientific evidence of the AWN Consulting report establishes that the water that continues to be discharged is non-polluted groundwater and there is, therefore, no risk of significant effect on the SAC.

The substantive submissions document elaborates on the arguments set out above. In this it references the legal cases *Waterford County Council v. John A Wood Ltd. [1999] 1 IR556* and *Harrington v. An Bord Pleanala [2014] IEHC 232*. It also contains a detailed section on the background to the case.

The document includes the following information:

- The first enforcement notice issued was in 2010 and not in 2009. That notice was withdrawn in December 2010. There was no cessation of quarrying activities.

- There was no enforcement notice issued in 2012. Following the issue of the enforcement notice in October 2014 there was a short cessation of activities pending legal advice after which quarrying activities recommenced and there was no further communication from KCC.
- The Section 160 proceedings were based on the quarry being unauthorised as it had not been registered under Section 261 on time and that there had been cessations of quarrying following the issuing of enforcement notices.
- Over 30 years ago Mr. O'Regan installed a drain pipe system to carry the spring water to a lagoon situated on the adjoining land owned by Brennan Brothers and also directly to the roadside drain to avoid pooling on the site and to avoid any build-up of spring water when the springs ran high in Spring time. The natural accumulation of waters has at all material times been managed by a piping system. The piping or pumping of water was an historic means of managing naturally occurring rain water or spring water or otherwise referred to as stormwater.
- Following the blocking of the lagoon on the Brennan site (in 2020) the O'Regans were required to identify other means of draining the storm waters in times of heavy rainfall. Consequently, the stormwaters were diverted directly to the land drain adjacent to the quarry entrance which then flows downstream joining with waters draining from other lands. This was essentially done through the pipes which had been constructed over 30 years ago.
- Following on from complaints from Mr. Brophy, Mr. O'Regan arranged for three tailing lagoons to be formed to stymie the flood of any stormwater as they serve to abate any sudden accumulation of storm water and to allow it to drain away slowly.
- As per the Awn Consulting report ground water flooding is common in the locality and occurs when the natural underground system is incapable of sufficiently draining itself, resulting in the emergence of groundwater at the surface. This can occur following prolonged rainfall that causes a water table rise.
- The pre-1964 user of the quarry is not in dispute.

- In relation to the answers to questions on the Section 261 Registration form referenced by the planning authority these do not substantiate the planning authority's position in relation to the scale or nature of the quarry at that time. No discharge licence had been obtained as it was not required but water was being discharged. The answer (to Q.16) that the water table had not been identified was correct. As explained above the water emanating and being discharged from the quarry is surface water and is not ground water caused by the excavation.
- The findings of the KCC Section 261A report (May 2012) are incorrectly referenced. The report did not state that quarrying had taken place below the water table. And the reasons for the conclusion in relation to appropriate assessment screening do not rely on there being no pathway to the SAC but rather refer to the nature and size of the quarry not posing a threat to the SAC.
- At the time of that Section 261A report there was a discharge of water from the quarry to the public drain and that remains the case. There is no substance to the suggestion that there has been a material change to the nature and scale of the quarry.

The attachments/exhibits are as follows:

1. Replying affidavit of Don O'Regan dated 6 May 2021.
2. Replying affidavit of Donal O'Regan dated 6 May 2021
3. Supplemental affidavit of Denis Malone dated 6 July 2021.
4. Replying affidavit of Don O'Regan dated 18 November 2021.
5. Exhibit 2 to that affidavit: AWN report dated 5 October 2021.
6. Affidavit of Malcolm Lane of PD Lane dated 24 November 2021.
7. S261 registration dated 27 April 2005.
8. S261A Report of KCC dated May 2012.
9. Enforcement Notice dated 5 November 2021.
10. Letter of withdrawal of Enforcement Notice (of 5 November 2021) dated 25 November 2021.

11. Letter from PKHL to KCC date 7 December 2021.
12. Enforcement Notice dated 10 December 2021.
13. Letter from PKHL to KCC dated 17 December 2021.
14. Report of AWN Consulting dated 18 May 2022.

**4.2.5. Planning Authority Response to submission of Mr. Donal O'Regan Senior and Mr. Don O'Regan**

Includes:

- What was established as a quarry use prior to 1964 is not disputed. However, the contention that the discharge of water from the site does not constitute development outside the pre-1964 permission and is authorised by that pre-1964 user is not accepted. Excavations to create a lagoon system to facilitate ground water lowering and discharge of water to an area outside the site ownership boundary give rise to an impact on the surrounding environment, particularly the SAC.
- The subject works have resulted in an intensification of use which is affecting the proper planning and sustainable development of the area to such an extent that is material in planning terms.
- It is not accepted that no material alterations have taken place at the quarry since 2012 and the Section 261A assessments.

**4.2.6. Response of Mr. Sean Cahill to submission of Mr. Donal O'Regan Senior and Mr. Don O'Regan**

Includes:

- The previously existing silt pond referred to was in fact in the adjoining property owned by William and Liam Brennan. The pond was a self-contained water system and was not used for the management of ground water.
- It is contested that the site of the present lagoon is within the operator's property.
- The operators cannot provide any evidence that they have stayed above the water table. It is visually evident that water pours from the rock face. No test boring has been proven as is required by the planning process. Anecdotally

the continual pumping of water has led to domestic wells running dry on the L5859.

- The operator's claim that no excess water leaves the site is contested. Photo and video footage has been supplied showing excess flooding on neighbouring farmland and watercourses.
- Members of KCC have seen first-hand the pumping of large volumes of water from the site.
- In living memory the fields adjoining have never flooded to the extent shown on the photographs supplied. Flooding coincides with pumping activity in the quarry.
- It is conceded that the operators may have been selling sand and gravel at all material times. However, it is believed that this material was drawn from another site.
- The provision of receipts by the operator does not prove material was in fact removed from the site. The enclosed photographs illustrate that quarrying could not have taken place at this site on a continual basis as it was a green field and untouched up to recently.

The submission includes a number of photographs.

#### **4.2.7. Response of Mr. Donal O'Regan Senior and Mr. Don O'Regan to the submission of Mr. Aidan Brophy and Others**

The Board will note that this submission is the same as that submitted to the Board under ABP Ref. 313514 on 7 June 2022 – see Section 4.1.4 (first paragraph) above and Section 4.2.3 above.

#### **4.2.8. Response of Mr. Aidan Brophy to the submission of Mr. Donal O'Regan Senior and Mr. Don O'Regan**

The submission includes a series of photographs stated to show the extent of flooding of the observers lands in summertime.

## 5.0 Planning History

### **PA Ref. 790/82**

Permission granted in 1982 to Mr. D. O'Regan and Mr. J. O'Brien for an asphalt plant.

### **Section 261 Registration 2005**

As per Section 4.1.1. (6<sup>th</sup> bullet point) and 4.1.4 (4<sup>th</sup> bullet point) above the quarry was registered as required – positioned clarified following subsequent Court challenge. Attachment 14 to the planning authority referral under ABP Ref. 313122 contains details of the registration application (See Section 4.2.1 above). These include a map attached to the application form indicating the extent of lands included for registration.

### **PA Ref. 08/1233**

Permission granted in 2009 to Asphalt Roofing Ltd for extension of yard by 1.5has to be used for storage of asphalt, roofing insulation and other roofing materials and other ancillary site works.

### **PA Ref. 10/19**

Permission granted in 2010 for retention of concrete batching plant. Access via an internal roadway through an adjoining facility and an existing access from the public road which is to be upgraded.

### **Section 261A Assessment**

As per Section 4.2.1 (16<sup>th</sup> bullet point) above the planning authority, while noting quarrying below the water table, concluded that appropriate assessment was not required on the basis that there was no water discharge from the quarry to any surface water drainage and, hence, no pathway to the SAC.

Attachment 16 to the planning authority submission includes the Planning Report that provides the basis for this assessment. This indicates that, on inspection, it was clear that significant quarrying had taken place to well below the allowed yard level (referring to the above permission PA Ref. 08/1233 for extension to a yard). It indicates that the yard was then a water filled quarry with solid limestone walls. The

accompanying assessment sheet indicates a *yes* answer to the question relating to the development of quarries, particularly where abstraction is below the water table. A note to the side indicates *no discharge to river evident, only to tailings pond*. Maps and photographs are also attached.

**PA Enforcement Refs. 09176; 09177; 10046; 12110; 12111; and 14024** – cases closed.

**Section 160 Proceedings** – commenced in 2020 and since resolved in the Circuit judgement that the quarry had been registered under Section 261.

**PA Enforcement Ref. 20103** – under investigation.

## 6.0 Policy Context

### 6.1. Development Plan

The relevant plan is the Kilkenny City and County Development Plan 2021-2027.

### 6.2. Natural Heritage Designations

The nearest European site is the River Barrow and River Nore SAC (Site Code 002162) at a distance (straight line) of about 500m to the west of the quarry lands at its nearest point.

The Inchbeg pNHA (Site Code 000836) coincides in part with the SAC.

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000 (as amended)

#### 7.1.1. Section 2(1) includes:

“unauthorised development” means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use;



“unauthorised structure” means a structure other than—

(a) a structure which was in existence on 1 October 1964, or

(b) a structure, the construction, erection or making of which was the subject of a permission for development granted under Part IV of the Act of 1963 or deemed to be such under section 92 of that Act or under *section 34, 37G or 37N or 293* of this Act, being a permission which has not been revoked, or which exists as a result of the carrying out of exempted development (within the meaning of section 4 of the Act of 1963 or [section 4](#) of this Act);

“unauthorised use” means, in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than—

(a) exempted development (within the meaning of section 4 of the Act of 1963 or [section 4](#) of this Act), or

(b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under *section 34, 37G, 37N or 293* of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;

“unauthorised works” means any works on, in, over or under land commenced on or after 1 October 1964, being development other than—

(a) exempted development (within the meaning of section 4 of the Act of 1963 or [section 4](#) of this Act), or

(b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under *section 34, 37G, 37N or 293* of this Act, being a permission which

has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;

“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.

#### 7.1.2. Section 3(1)(a)

“development” means the carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land.

### 7.2. **Planning and Development Regulations, 2001 (as amended)**

7.2.1. Article 6(3) provides for exemptions for certain developments in rural areas as specified in Part 3, Schedule 2 of the regulations.

7.2.2. Class 3, Part 3 (Rural), Schedule 2 states:

*Minor works and structures*

#### CLASS 3

Works relating to the construction or maintenance of any gully, drain, pond, trough, pit or culvert, the widening or deepening of watercourses, the removal of obstructions from watercourses and the making or repairing of embankments in connection with any of the foregoing works.

7.2.3. Article 9(1)(a)(viiB) provides that development to which Article 6 relates shall not be exempted development if the carrying out of such development would require appropriate assessment.

### 7.3. **Other**

#### 7.3.1. **Relevant Legal Cases**

**Krikke and Others v. Barranafaddock Sustainable Electricity Ltd [2022] SC 2021/133**

This judgement provides a recent clarification that the only issue that the Board can decide on in a Section 5 referral is the question as to what, in any particular case, is or is not development or is or is not exempted development.

### **Waterford County Council v. John A Wood Ltd [1999] 1 IR556**

This judgement clarified that while development (quarrying in this instance) commenced before the appointed day (1 October 1964) conferred rights to continue without a requirement for planning permission under the new Act (1963) such rights were not unrestricted. In that case the judge decided that the extent of such rights would depend on an examination of all the established facts to ascertain what was or might reasonably have been anticipated at the relevant date (1 October 1964) as having been involved in the works then taking place. The facts to which importance was attached in that case included:

- The extent of the ore body.
- The boundaries to the property in question – in that case defined by roads.
- Any sub-division of the property under the control of the quarry owner/operator at the relevant date.

The judgement attached the greatest significance to the last fact – the extent of the ownership as at 1 October 1964 – and determined that only those lands enjoyed the pre-1964 user rights.

### **Dublin County Council v. Tallaght Block Company Ltd [1983] SC 282/1981**

While probably most referenced for dealing with the concept of abandonment the judgement also endorsed the view of the High Court judge that an intensification of use can be a material change of use. Factors taken into account in that case as evidence of intensification included; the changed nature of the process; and a material alteration to the external appearance of the premises.

### **Monaghan County Council v. Brogan [1987] IR333**

The Court addressed the matter of deciding whether or not a change of use is material. Issues of relevance were stated as:

- The matters which the planning authority would take into account in the event of a planning application being made for its use. If these matters are materially

different (from the original use) then the nature of the use must equally have been materially different.

### **Roadstone Provinces Ltd v An Bord Pleanala [2008] IEHC 210**

This judgement deals at some length with the issue of intensification of use. It stressed the requirement to identify, firstly, that a change of use has occurred as a result of intensification by reference to observed facts. Secondly, then, the question is whether that change is material for planning purposes.

The judgement endorsed the approach laid out in *Monaghan County Council v Brogan* and in the case *Galway County Council v Lackagh Rock Ltd [1985] IR 120*.

### **McGrath Limestone Works Ltd v An Bord Pleanala [2014] IEHC 382**

This judgement also refers at some length with the issue of intensification of use and generally endorsed the approaches established in the cases cited above.

## **7.3.2. Referrals Database**

### **Case Refs. RL3356, 3149 and 3148**

These are examples of previous cases, dating from 2015, dealing with developments at quarries that also touch on the issue of intensification. While not directly applicable to the subject case they illustrate how the Board has previously addressed the issue in the context of quarrying developments.

### **Case Refs. 3521, 3451 and 3446**

These are examples of previous cases, dating from 2016 and 2018, that also touch on the issue of intensification but in relation to other types of development. Again, while not directly applicable to the subject case, they illustrate how the Board has previously addressed the issue in these contexts.

## 8.0 Assessment

### 8.1. Introduction

- 8.1.1. The Board will be aware that the only issue that it can decide on under a Section 5 Referral is the question as to what, in any particular case, is or is not development or is or is not exempted development (see, for example, *Krikke and Others v. Barranafadock* referenced at Section 7.3.1 above).
- 8.1.2. However, as indicated in the submissions in this case, the question of the pre-1964 status of the subject quarry is central to considering the questions raised, particularly in relation to the issues of intensification and material change of use.

### 8.2. The Pre-1964 Issue

- 8.2.1. It is not in dispute that the bulk of the lands at Lismaine have historically had the benefit of a pre-1964 status. The extent of the overall lands is best illustrated on Folio Map Lismaine attachment 13 to the planning authority submission to the Board, dated 16 March 2022 (see Section 4.2.1 above – first bullet point), and on the Site Location Map attached as Appendix 2 to the application to the planning authority of Mr. Brophy for a Declaration, dated 14 March 2022 (see Section 4.1.1 above – second bullet point- the area in question being that labelled Brennan and O'Regan/O'Brien).
- 8.2.2. While the O'Regans and the planning authority are in agreement that the pre-1964 status extends to the entire lands Mr. Brophy contests that this should be deemed to apply to the 3.003has, Folio 14635F, identified as O'Regan/O'Brien on the Site Location Map referred to above.
- 8.2.3. On the basis of the information provided by the planning authority (see Section 4.2.1 above – first bullet point) all of the lands were originally, in 1964, in the ownership of Mr. James Treacy. The lands were subsequently sold off in batches to various parties during the 1970's and 1980's. It appears that the 3.003has, referred to by Mr. Brophy (Folio 14635F), was purchased by the current owners (O'Regan/O'Brien) in 1994 (see Section 4.1.1 above – second bullet point).
- 8.2.4. Mr. Brophy contends that the then existing quarry pit, in 1994, was a considerable distance from Folio 14635F and the pit face had not reached the boundary of the land sold. The sold land constituted a new quarry, the pre 1964 user rights not

having transferred or been shared or diluted. It is contended that the legal judgement in *Wicklow v John A Wood Ltd* precludes the forming of two pits with the purchase of undeveloped land and the formation of a wholly new extraction point unrelated to anything that had gone before.

- 8.2.5. In support of his position Mr. Brophy included photographs, attached as Appendix 3 to his application for a Declaration, purporting to present a photographic history of the subject lands. The aerial photographs date from 2005, 2015, 2018 and 2021. It is contended that the small incursion in the north west corner of Folio 14635F was made to provide rock for O'Regan/O'Brien activities within the adjacent site and was not commercial quarrying for the purposes of a pre-1964 user pit. It is further contended that this was an opportunistic development for the purposes of the Section 261 Registration.
- 8.2.6. The submission of Mr. Cahill also includes aerial photographs, including one (Photo A), from 2012, purporting to show Folio 14635F as a green field and untouched (see Section 4.2.6 above).
- 8.2.7. The O'Regans contend, on the other hand, that Folio 14635F was part of the original quarry site and not a considerable distance from the original pit. They maintain that there has been a proportionate and natural working out across the original quarry site and the same quarry seam (see Section 4.1.4 above).
- 8.2.8. The O'Regans submission in response to the planning authority referral ( Section 4.2.4 above) also refers to the pre-1964 status of the quarry. In this they also reference *Wicklow County Council v John A Wood*. This submission also includes copies of a number of affidavits (attachments 1 and 2), lodged in the Section 160 proceedings, from the O'Regans which attest to the existence of the quarry pre-1964, estimated to have been operational since about the 1950's, and to Folio 14635F being an integral part of the quarry lands.
- 8.2.9. I would also draw the Board's attention to the Section 261 application details on file – see attachment 14 to the planning authority referral submission to the Board (Section 4.2.1 above). The total site area that the application refers to is stated as 7.57ha and the map attached indicates that this includes Folio 14635F.
- 8.2.10. In coming to a view on this matter, and while the information before the Board is not as comprehensive as one would like, I would place the greatest weight on the fact

that all of the lands in question, including Folio 14635F, were, as of 1964, in the single ownership of Mr. James Treacy and quarrying was being carried on, perhaps from as early as the 1950's. I would also place some importance on the coherence of the overall holding, including it being clearly delineated by roads to the north and east and by field boundaries and other ownerships to the south and west. It also appears that the underlying resource comprises a single limestone seam. In considering such matters I have had regard, in particular, to the judgement in *Wicklow County Council v John A Wood Ltd* and the 'tests' it suggests for determining the extent of pre-1964 user rights. I am satisfied, therefore, that all of the lands in question at Lismaine, including Folio 14634F, have historically had the benefit of a pre-1964 status.

### 8.3. Intensification

- 8.3.1. Mr. Brophy suggests that, even if the pre-1964 status is accepted, the issue of intensification has arisen. He contends that operations at the quarry were sporadic between 2005 and 2018, with little or no activity between 2015 and 2018. By 2021 the entirety of Folio 14635F was under development so that the development had more than doubled in size in 2/3 years. Intensification had occurred post 2005 and separately again post 2018, (see Section 4.1.1 above), thus taking quarry operations over these periods outside the scope of the pre-1964 user rights.
- 8.3.2. The copy affidavits of Mr. Cahill, Mr. Conway and Mr. Brophy submitted as attachment 17 to the planning authority referral submission to the Board (Section 4.2.1 above) generally support the above contention in relation to sporadic operations over many years at the quarry.
- 8.3.3. The O'Regans contest that activity at the quarry has been sporadic and submit that the quarry operations have been continuous at least since 1982 (see Section 4.1.4 above). Supporting documentation includes Exhibit DORJ1 attached to that submission and copy affidavits lodged with the response to the planning authority referral (see Section 4.2.4 above, attachments 1 and 2).
- 8.3.4. I am satisfied, on the basis of the available evidence, that operations at the quarry have been ongoing over a protracted period of time and on a reasonably consistent basis. It is not unusual for activity at quarries to vary in intensity to a considerable degree from time to time, most often in response to downturns and upturns in the

economy and, especially, in the construction sector. Such variations do not, in my view, give rise to intensification as understood in planning terms. I do not consider that there is sufficient evidence in this case to suggest variations in quarrying activity levels markedly over and above what might be normally expected. There is also no suggestion that the quarry was abandoned at any stage. I am satisfied, therefore, that intensification in terms of general activity levels at the quarry does not arise.

- 8.3.5. The primary concern of the planning authority in relation to the issue of intensification is their contention that quarrying is now taking place below the water table, that a lagoon water management system has been constructed and that there is discharge of water off site. Mr. Brophy, and others, also raise these concerns.
- 8.3.6. The basis for the planning authority position on this is summarised at Section 4.2.1 above. As indicated the submission includes several attachments, comprising documentation, reports and details of site inspections, including photographs, over the period 2021 and 2022 as evidence that there has been excavation below the water table, that a new lagoon system has been constructed and that water from this system is pumped to the roadside drain at the entrance to the quarry. It is contended that there is a direct hydrological link via this drain to the River Barrow River Nore SAC (Site Code 002162) located approximately 450m to the west (see, in particular, attachments 1,2,4,6,7 and 8).
- 8.3.7. The planning authority references the Section 261 registration form submitted in 2005 (attachment 14) as evidence that there was no discharge from the quarry at that time. It submits that the answers to questions 10 (re. pumping), 14 (re. emissions, including water) – answered ‘N/A’ – and 16 (re. level of winter water table) – answered ‘water table not identified’ indicate the scale and extent of the quarry operation in 2005.
- 8.3.8. The planning authority also refers to its site inspection and report prepared in May 2012 for the purposes of Section 261A (attachment 16). While this report is cited as confirming recent quarrying below the water table the report itself only refers to significant quarrying below the allowed yard level (referring to a yard extension permitted under permission PA Ref 08/1233). It also states that the yard was then a water filled quarry with solid limestone walls. The accompanying assessment sheet indicates a yes answer to the question relating to the development of quarries,



particularly where abstraction is below the water table. A note to the side indicates *no discharge to river evident, only to tailings pond*. I note that the photographs attached to the assessment are difficult to interpret. In particular, the aerial photographs are both dated 11 May 2012 but indicate very different levels/extents of excavation, especially in relation to Folio 14635F.

- 8.3.9. The attached affidavits from Mr. Brophy and Mr. Cahill also refer to pumping of water from the quarry (see attachment 17).
- 8.3.10. On this basis the planning authority contends that there has been a material change to the nature and scale of the quarry such that it is now outside the scope of its pre-1964 user rights. This conclusion is supported by Mr. Brophy and others – see Sections 4.1.1 and 4.2.2 above.
- 8.3.11. The O’ Regans response to these arguments is summarised at Sections 4.1.4, 4.2.3 and 4.2.4 above. In short, their position is that there is no quarrying below the water table, that the water build-up identified is storm/ground water, that there has always been gravity fed drains/pipework on site discharging ground/storm water to the local watercourse, that pumping has been ongoing for years and is wholly contained within the quarry for the purposes of managing ground water levels, and that the new lagoon system replaced a previously existing silt pond/lagoon on the adjacent quarry site (Brennans) in order to continue the management of ground water at the site. On this basis it is submitted that there has been no change of use or intensification of use and that the operation of the quarry still falls within the authorisation afforded by the pre-1964 user rights. It is also suggested that, in any event, the pre-1964 user rights are not contingent on no extraction below the water table or that such necessarily equates to an intensification of use giving rise to a material change of use.
- 8.3.12. The submission also rebuts the suggestion that the answers on the Section 261 registration form substantiate the scale and nature of the quarry at that time. It reiterates that surface water was being discharged at that time. It also cites the incorrect reference to the Section 261A report in relation to quarrying below the water table.
- 8.3.13. Noting the somewhat confusing references above to both storm and ground water the Board should also note that the O’Regans submissions place a particular

emphasis on the AWN Consulting Report, dated 5 October 2021 (see attachment 5). This report, which appears to have been prepared prior to the construction of the new lagoon system, includes the following:

- Surface water accumulates in the quarry floor sump in the centre of the site.
- There is no ground water abstracted on site. The quarry is not using water as part of its operations. There are no washing ponds and no process water is generated.
- Bedrock geology is thick bedded limestone.
- The aquifer is likely to be karstified.
- Flow in the aquifer is likely to be through a diffuse network of conduits.
- Large fluctuations in water table levels in the area are expected.
- Very high annual fluctuations are indicative of relatively low ground water storage potential.
- A significant portion of the ground water discharge from this karstic area, particularly in winter, will likely be through conduit flow. Surface water sinks underground where the aquifer is at the surface.
- Ground water flooding is common in the locality. Ground water flooding occurs when a natural underground drainage system is incapable of sufficiently draining itself, resulting in the emergence of ground water at the surface. Ground water flooding can occur in this area following prolonged rainfall causing water table rise.
- The prevalence of ground water flooding in the area is fundamentally linked to the bedrock geology.
- Surface water drainage systems are frequently absent within well developed karst landscapes. Instead, the ground water flow system acts as the main drainage mechanism.
- There is very little room within the ground water system to store excess recharge.

- This combination of low storativity and shallow depth to ground water renders this area susceptible to ground water flooding.
- During prolonged rainfall the ground water system is unable to drain recharge quickly causing surface flooding in topographic depressions.
- The water discharging from the O'Regan quarry is in effect storm water.
- It is understood that ground water has been flowing from the quarry lands for many years and will continue to do so regardless of whether any quarrying activity is undertaken or not.

8.3.14. In my view, based on the evidence as set out above, which clearly describes the fundamental characteristics of the underlying bedrock geology at the quarry lands, comprising karstified limestone with a highly fluctuating water table, and while the management of surface water may well have been necessary over the years and may still be necessary, there is a very high likelihood that significant extraction is now taking place below the water table. I note that there are no details provided in the report, or otherwise in the O'Regan submissions, of any investigations carried out to identify and demonstrate the actual levels of the local water table. In this regard the Board will note the photographs that accompany this report and which illustrate the current extensive area of extraction across Folio 14635F and the clear marker in the quarry void of the level that water rises to in the absence of pumping – denoted by the top of the whitened band across the rock face. Photographs, stated to date from February/March 2021, included in the submission of Mr. Brophy and Others are also particularly relevant here (see Section 4.2.2 above).

8.3.15. While it appears that there was a previous silt pond/lagoon system on adjacent lands I find it surprising that there is no mention of that system in the AWN Consulting report. No specific details of the earlier system have otherwise been presented. I conclude, therefore, that while the recently constructed lagoon water management system seems to have replaced a previous system, it is also evidence, at least in part, of the need to significantly increase the management of water at the site as a result of the most recent extraction below the water table.

8.3.16. It appears from photographic evidence on file, in particular attachment 2 to the planning authority referral submission (see Section 4.2.1 above), that this significant

extraction below the water table, within the area of Folio 14635F, has occurred since about 2018 and that the lagoon system was constructed sometime in late 2021.

- 8.3.17. Taking note of the legal cases cited at Section 7.3.1 above I am satisfied that this recent significant extraction below the water table and the associated construction of the lagoon water management system has given rise to a change of use at the quarry site through intensification. It represents a marked departure from the nature of the operations previously conducted on the site which may or may not have impacted directly on the water table and included an ill-defined water management system.
- 8.3.18. I am further satisfied that this change of use is material in planning terms. Quarrying of this nature, below the water table, gives rise to significant planning and environmental considerations and potential impacts that would not arise to the same extent in relation to the previous operations. Working below the water table gives rise to direct impacts on ground water with a potential for significant negative effects. For example, there is the potential for effects through ground water pathways to sensitive receptors in the vicinity, not least the SAC located a relatively short distance to the west, but also including private wells and other water resources in the area. The need to pump water from the works area to lower the water table can have significant consequences for the water table levels over a wide area potentially affecting such receptors as well. The potential for all of these impacts is all the greater in the complex geology of karst limestone where pathways, via conduits, can extend over considerable distances and where water table levels are subject to such large fluctuations. Predicting effects in such an environment requires detailed analysis and assessment. Having to deal with much larger volumes of water also creates additional challenges in terms of water management and in relation to the ultimate discharge of water from the site and the capacity of the receiving water bodies. While it may be that water has always been discharged from the quarry lands the new regime is of a different order of magnitude.
- 8.3.19. I conclude, therefore, that the recent significant extraction below the water table, and the associated construction of the lagoon water management system and discharge off site, constitutes a material change of use at the quarry.

#### 8.4. Is or is not development

8.4.1. For ease of reference I repeat the questions raised here:

##### **ABP Ref. 313122**

1. *Whether excavation of land to create a lagoon system, including associated pipe work and mounding to facilitate ground water lowering and discharge of water from the lands at Lismaine, Jenkinstown, County Kilkenny is or is not development and is or is not exempted development within the meaning of the Planning and Development Act 2000(as amended).*
2. *Whether the operation of the quarry at Lismaine (which is an established use under the P&D Act 2000 as amended) with discharge of water from the quarry to land outside the site ownership boundary at lands at Lismaine, Jenkinstown, County Kilkenny with hydrological connection to the River Barrow/River Nore SAC and Inchbeg pNHA is or is not development and is or is not exempted development within the meaning of the Planning and Development Act 2000 (as amended).*

##### **ABP Ref. 313514**

1. *Are the historical quarrying works and use of the site development and are they exempt development?*
2. *Are the intensified quarrying works and use of the site (including water discharge) since 2018 development and are they exempt development?*

8.4.2. Having regard to the central arguments made in both cases and to my conclusions, as set above, I consider that the questions can be more properly reworded to a single question as follows:

*Whether the current operation of a quarry, including the construction of a lagoon water management system and discharge of water off sit at Lismaine, Jenkinstown, County Kilkenny is or is not development or is or is not exempted development.*

8.4.3. Following on my conclusion above that the recent significant extraction below the water table, and the associated construction of a lagoon water management system and the discharge of water off site, has given rise to an intensification of use

amounting to a material change of use at the quarry, it is clear that the current operation of the quarry does constitute development.

- 8.4.4. Under the other limb of the definition of development these actions also clearly involve works and, therefore, also constitute development on this basis.

## 8.5. **Is or is not exempted development**

- 8.5.1. There is no relevant exemption for the material change of use in this case.
- 8.5.2. The Board will note that there is dispute between the planning authority and the O'Regans as to whether or not the works to create the lagoon system are exempted development by reference to Class 3, Part 3, Schedule 2 of the regulations (see Sections 4.2.1 and 4.2.4 above). As the lagoon system, as an integral part of the current quarrying operations below the water table, is already deemed development by reason of constituting a material change of use, and for which there is no exemption, this argument is moot. For completeness, however, I would comment as follows.
- 8.5.3. I do not agree with the planning authority's somewhat narrow interpretation of the word 'rural' in this context. I note that Part 3 of the schedule also includes works relating to minerals and petroleum prospecting, land reclamation and peat extraction. While a debate could be had as to what constitutes 'minor' works I am inclined to concur with the O'Regans position that the lagoon system, considering it in terms of works only, does fall within the scope of Class 3 and, therefore, on the face of it is exempted development.
- 8.5.4. However, the Board will be aware that Article 9 of the Regulations places several restrictions on Article 6 exemptions. In this case Article 9(1)(a)(viiB) is relevant in that it restricts such where a development would require appropriate assessment. Given that the lagoons in this case were constructed in order to manage water arising from a significant increase in extraction below the water table at the quarry, and where the discharge from same is to a roadside drain with a direct hydrological connection over a relatively short distance to the River Barrow and River Nore SAC, and where details of the design and construction of the lagoons is unknown, and any mitigation measures applied or not are also unknown, it would not be possible, in my view, to rule out the possibility of likely significant effects on the European site. The

development, therefore, would require an appropriate assessment. It follows that the lagoon system, even in terms of works, is not exempted development

## 8.6. Procedural Matter

- 8.6.1. This relates to the challenge by the O'Regans to the Board accepting the submission of Mr. Brophy and Others – see Section 4.2.3 above. Contrary to the assertion that the submission was late by reference to Section 130 of the Act the Board will note that the submission was received on foot of a notice issued under Section 129 of the Act and which provides for a 4 week period from the date of the notice. The relevant notice was issued on 22 April 2022 and the submission was received on 16 May 2022, within 4 weeks. The submission, therefore, can be considered by the Board.

## 9.0 Recommendation

- 9.1. I recommend that the Board should decide these referrals in accordance with the following draft orders.

### 9.2. ABP Ref. 313122

**WHEREAS** questions have arisen as to:

- 1. Whether excavation of land to create a lagoon system, including associated pipe work and mounding to facilitate ground water lowering and discharge of water from the lands at Lismaine, Jenkinstown, County Kilkenny is or is not development and is or is not exempted development within the meaning of the Planning and Development Act 2000(as amended).*
- 2. Whether the operation of the quarry at Lismaine (which is an established use under the P&D Act 2000 as amended) with discharge of water from the quarry to land outside the site ownership boundary at lands at Lismaine, Jenkinstown, County Kilkenny with hydrological connection to the River Barrow/River Nore SAC and Inchbeg pNHA is or is not development and is or is not exempted*

*development within the meaning of the Planning and Development Act 2000 (as amended).*

**AND WHEREAS** Kilkenny County Council referred the questions to An Bord Pleanála on the 23<sup>rd</sup> day of March 2022.

**AND WHEREAS** An Bord Pleanála has amended the questions to read as a single question as follows:

*Whether the current operation of a quarry, including the construction of a lagoon water management system and discharge of water off site at Lismaine, Jenkinstown, County Kilkenny is or is not development or is or is not exempted development.*

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

- (a) Sections 2(1) and 3(1)(a) of the Planning and Development Act, 2000, as amended,
- (b) Article 6(3) and Class 3, Part 3, Schedule 2 of the Planning and Development Regulations 2001, as amended,
- (c) Article 9(1)(a)(viiB) of the Planning and Development Regulations 2001, as amended,
- (d) the planning history of the site,
- (e)

Legal judgements in: Krikke and Others v. Barranafaddock Sustainable Electricity Ltd [2022] SC 2021/133; Waterford County Council v. John A Wood Ltd [1999] 1 IR556; Dublin County Council v. Tallaght Block Company Ltd [1983] SC 282/1981; Monaghan County Council v. Brogan



[1987] IR333; Roadstone Provinces Ltd v An Bord Pleanála [2008] IEHC 210; McGrath Limestone Works Ltd v An Bord Pleanála [2014] IEHC 382

- (f) The documentation on file and the report of the Inspector.

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

- (a) Based on the evidence before it of significant additional excavation at the quarry since 2018 into a bedrock geology of karstified limestone with highly fluctuating water table levels, there has been significant extraction of material below the water table.
- (b) This significant extraction below the water table, in conjunction with the construction of an associated lagoon water management system and the discharge of water off site has given rise to a change of use through intensification that constitutes a material change of use. Quarrying of this nature gives rise to significant planning and environmental considerations and impacts that would not have arisen in relation to the previous operations at the quarry. These include; direct impacts on ground water and water table levels over a potentially wide area; potential impacts on sensitive receptors, including the River Barrow River Nore SAC and local wells and other water resources; and potential impacts in relation to the capacity of receiving water bodies.
- (c) There is no exemption for a material change of use of this type, and
- (d) While the construction of the lagoon system, in terms of works, may be deemed to fall within the scope of Class 3, Part 3, Schedule 2 of the Regulations, it is also subject to Article 9(10(a)(viiB) as, on the basis of the information available, it is not possible to rule out likely significant effects on a European Site (River Barrow River Nore SAC) and a consequent requirement for appropriate assessment. The lagoon system, therefore, is not exempted development.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5(4) of the 2000 Act, as amended, hereby decides that *the current operation of a quarry, including the construction of a lagoon water management system and discharge of water off site to a road side drain at Lismaine, Jenkinstown, County Kilkenny is development and is not exempted development.*

9.9.1. **ABP 313514**

**WHEREAS** questions have arisen as to:

1. *Are the historical quarrying works and use of the site development and are they exempt development?*
2. *Are the intensified quarrying works and use of the site (including water discharge) since 2018 development and are they exempt development?*

**AND WHEREAS** Mr. Aidan Brophy, Knockroe, Jenkinstown, County Kilkenny requested a declaration on the said questions from Kilkenny County Council on the 16<sup>th</sup> day of March 2022.

**AND WHEREAS** Kilkenny County Council did not issue a declaration and referred the questions to An Bord Pleanala on the 9<sup>th</sup> day of May 2022.

**AND WHEREAS** An Bord Pleanala has amended the questions to read as a single question as follows:

*Whether the current operation of a quarry, including the construction of a lagoon water management system and discharge of water off site at Lismaine, Jenkinstown, County Kilkenny is or is not development or is or is not exempted development.*

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

- (a) Sections 2(1) and 3(1)(a) of the Planning and Development Act, 2000, as amended,
- (b) Article 6(3) and Class 3, Part 3, Schedule 2 of the Planning and Development Regulations 2001, as amended,
- (c) Article 9(1)(a)(viiB) of the Planning and Development Regulations 2001, as amended,
- (d) the planning history of the site,
- (e) Sections 2(1) and 3(1)(a) of the Planning and Development Act, 2000, as amended,
- (f) the planning history of the site,
- (g)

Legal judgements in: Krikke and Others v. Barranafaddock Sustainable Electricity Ltd [2022] SC 2021/133; Waterford County Council v. John A Wood Ltd [1999] 1 IR556; Dublin County Council v. Tallaght Block Company Ltd [1983] SC 282/1981; Monaghan County Council v. Brogan [1987] IR333; Roadstone Provinces Ltd v An Bord Pleanala [2008] IEHC 210; McGrath Limestone Works Ltd v An Bord Pleanala [2014] IEHC 382

- (h) The documentation on file and the report of the Inspector.

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

- (a) Based on the evidence before it of significant additional excavation at the quarry since 2018 into a bedrock geology of karstified limestone with highly fluctuating water table levels, there has been significant extraction of material below the water table.
- (b) This significant extraction below the water table, in conjunction with the construction of an associated lagoon water management system

and the discharge of water off site has given rise to a change of use through intensification that constitutes a material change of use. Quarrying of this nature gives rise to significant planning and environmental considerations and impacts that would not have arisen in relation to the previous operations at the quarry. These include; direct impacts on ground water and water table levels over a potentially wide area; potential impacts on sensitive receptors, including the River Barrow River Nore SAC and local wells and other water resources; and potential impacts in relation to the capacity of receiving water bodies.

- (c) There is no exemption for a material change of use of this type, and
- (d) While the construction of the lagoon system, in terms of works, may be deemed to fall within the scope of Class 3, Part 3, Schedule 2 of the Regulations, it is also subject to Article 9(1)(a)(viiB) as, on the basis of the information available, it is not possible to rule out likely significant effects on a European Site (River Barrow River Nore SAC) and a consequent requirement for appropriate assessment. The lagoon system, therefore, is not exempted development.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5(4) of the 2000 Act, as amended, hereby decides that *the current operation of a quarry, including the construction of a lagoon water management system and discharge of water off site at Lismaine, Jenkinstown, County Kilkenny is development and is not exempted development.*

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

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B. Wyse  
Planning Inspector

26 July 2024