



An
Bord
Pleanála

Inspector's Report PL.09.LS0023

Development	Quarry.
Location	Ballysax Great, The Curragh, Kildare.
Planning Authority	Kildare County Council.
Planning Authority Reg. Ref.	QRA-28-004.
Party Seeking Leave:	Patrick Higgins Snr. And Elizabeth Higgins.
Type of Application	Section 177C.
Date of Site Inspection	1 st April 2019.
Inspector	Philip Davis.

Contents

1.0 Introduction.....	3
2.0 Site Location and Description	3
3.0 Grounds of leave to appeal.....	4
4.0 Planning Authority.....	5
4.1. Response	5
4.2. Prescribed Bodies	5
5.0 Planning History.....	5
6.0 Policy Context.....	6
6.1. Development Plan.....	6
6.2. Natural Heritage Designations	6
7.0 Assessment.....	6
8.0 Overview.....	6
9.0 Recommendation.....	12
10.0 Determination Under Section 177C – Reasons and Considerations.....	13

1.0 Introduction

This is stated to be an application for leave to apply for leave to apply for substitute consent under Section 261(A) of the 2000 Act, as amended. From the context, I interpret this to mean that it is intended to see for leave to apply for Substitute Consent under Section 177C(2)(b) of the Planning and Development Acts 2000-2014, where notice has not been served by a planning authority. It relates to a substantial operating sand and gravel quarry just south of the Curragh in County Kildare. The operators of the quarry claim that there are 'exceptional circumstances' (as set out under S.177C(2)(b)) to justify the Board granting leave to apply for substitute consent.

I previously reported on this case in July 2016, but due to a Judicial Review consideration by the Board was delayed. Because of this delay, the Board requested (18th February 2019), a further site inspection and report. This report is an updated and amended version of the previous report (also on file) dated 4th July 2016.

2.0 Site Location and Description

Ballysax Great, the Curragh

The townland of Ballysax Great is located just south of the Curragh Camp military area, about 3km west of Kilcullen, and some 5 km south of Newbridge in County Kildare. It has a typical landscape of the Curragh, with wide open well drained if infertile sheep grazing lands, divided by hedges into large fields, with a landscape gently undulating with prominent fluvio-glacial features such as eskers and kames. There are a number of gravel pits in the wider area.

The townland is served by a small number of third class country 'L' roads, which connect about 3 km to the west with the R418/R448 and Junction 2 of the M9, just south of its junction with the M7. Settlement in the area is intermittent, mostly single houses ribboned along the road network, with a few clusters, the closest of which is at the crossroads at Brownstown/Cut Bush, about 1.5 km to the west.

Quarry at Ballysax Great, Kildare

The quarry in question is an irregularly shaped landholding on the west side of a third class road running south from the Curragh Camp. The site area is not given, but I estimate it to be significantly in excess of 20 hectares. I assume that the application applies to the entire 'red line' area indicated in the submitted site plan.

From older OS plans, it seems the area was once part of a ridge, possibly an esker that extends to the west. Approximately 75% of this site has been excavated as a sand and gravel quarry. Within the quarry there are a number of extraction faces, areas that appear to have been 'restored' with gravel washings, in addition to a number of settlement ponds and an active processing area. The site is accessed via a wide entrance on the L road at a gentle twist, with a nearby entrance to the south of this entrance to some farm buildings.

Since my original site visit (2016), there has been some visible additional works but no major additional excavations. I note that the settlement ponds are now dry and seemingly inoperable. While there is still processing plant on site I saw no evidence of recent large scale quarrying activities, although there are fresh heavy plant vehicle tracks across the site. There is dust and other visible indicators of quarry vehicles using the local road, but as there are other quarries in the vicinity it is possible this is not associated with the quarry in question.

3.0 Grounds of leave to appeal

The owners set out a number of 'exceptional circumstances' in their application.

- It is claimed that there is a quarry on site prior to 1877 marked on the OS sheet.
- Planning permission was granted on the site for a period of 3 years from 1980 (**80/412**).
- A notification under S.261 of the 2000 Act as amended was granted for a period of 20 years (Ref: **QR34**), from 2007.
- The operator at the time (Mr. Edward Nolan Jnr trading as Ballysax Concrete Limited) intended to apply for substitute consent at the time, but had ceased trading due to economic difficulties.

- The County Council did not take action following an August 2012 S.261A 4(a) notice.
- In 2014 Sharon Browne (trading as Roadfill), entered into a Licence agreement with the Higgins Family, the quarry owners.
- The applicant wishes to proceed with development, including full restoration.
- It is noted that the issue has arisen due to the collapse of the building and construction industry in 2008, but there is now a strong demand for building material in the mid Kildare area, and this will generate income to allow for the quarry to be operated according with good practice and will allow restoration to agriculture.

4.0 Planning Authority

4.1. Response

No response on file.

4.2. Prescribed Bodies

None

5.0 Planning History

I note that the decision on this file has been delayed because of on-going High Court appeals.

Planning permissions In 2015 the planning authority received, with an EIS and NIA, an application to continue the use of the quarry (site area 23.07 hectares), with its restoration and remediation (**15/790**). In the planners report it is noted that it seems to be similar to the situation in Board decision **PL19.244944** wherein it was decided that the Board would not grant permission for an unauthorised quarry whereby it was determined that quarrying would have required an EIA and AA, so a recommendation was made for permission to be refused. I note that the NIS produced for this application stated that the only designated habitat considered to fall within the zone of influence of the project is the Barrow and Nore SAC (site code

2062) at 6.5 metres distance. There is no mention of the Pollardstown Fen SAC site code 000396, which is closer, at 6km to the north. There is also no apparent reference to Pollardstown Fen in the EIS.

In 2015 Kildare County Council decided, pursuant to Section to S.154 of the 2000 Act, as amended, that the post 1990 development would have required an EIA, the post 1997 development would have required an AA, the quarry did not have the benefit of planning permission, the quarry was in breach of conditions 1, 2, 4, 7, 9 and 17 of permission 80/412, it is outside the boundaries of the quarry registered under S.261, and the conditions under QR34 were not complied with. On various dates in May and June 2015 the operator was ordered to cease all unauthorised quarrying activity and processing and to secure the site. Reference **UD6603**.

In 2006 the planning authority imposed conditions on the quarry (a smaller area than the current quarry) under S.261 of the 2000 Act, as amended (**QR34**).

In August 1980 the planning authority decided to grant permission for the extraction of sand and gravel from part of the site subject to 17 no. conditions (**80/412**).

6.0 Policy Context

6.1. Development Plan

The site is in open countryside without a specific zoning or landscape designation.

6.2. Natural Heritage Designations

The closest Natura 2000 site is Pollardstown Fen SAC, some 5km to the north.

7.0 Assessment

8.0 Overview

This extensive quarry, with works seemingly in excess of 20 hectares of sand and gravel extraction, appears to have been active since the 1970's. There is a very small gravel pit indicated on what seems to have been part of an esker in one of the older OS plans, but most of the historical OS record does not indicate any works. It would seem that some quarrying commenced before the 1980 planning permission,

which was for a limited time period. The works carried on beyond the timeframe of the 1980 permission, and were, as is apparent from aerial photographs from 1995 and 2000, quite extensive in this period. The works did not have the benefit of EIA or AA – the planning authority ruled in 2015 that it would have required EIA and AA during this period. Substitute consent was not sought by the owner or occupier during the relevant period. A registration under S.261 of the Act was allowed, with conditions imposed – some of these do not appear to have been followed.

The quarry, at the time of my first site visit, was active and appears to have been constantly active for a few years, although it is claimed that it was shut in the immediate aftermath of the 2008 economic crash. There is significant noise and activity from the quarry, and the main haul road (north from the entrance, with vehicles apparently mostly then going east to the main road network) appears busy with heavy vehicles from the quarry running past dwellings. On my second site visit, on the 1st April 2019, the quarry was not active and there are indications that it has been shut or only operating at a low level for some time – the settlement ponds are dry and the on-site plant was inoperative. However, some quarrying faces are unvegetated and relatively ‘fresh’ and there are clear vehicle tracks across some parts of the quarry, so it seems likely there has been some additional quarrying since my first site visit in 2016.

I estimate that the nearest Natura 2000 site is Pollardstown Fen, SAC 000396, is 6-km to the north. Both the EIS and NIS submitted with the 2015 application to the planning authority state that the only Natura 2000 site within the zone of influence is the Nore/Barrow SAC. I note that page 97 of the EIS submitted states that the site is located within the Curragh (East) groundwater body, which, it suggests (but does not state clearly), also supports the Pollardstown Fen (a fen is a wetland which usually arises directly from mineral rich PH neutral or alkaline underground springs). The qualifying status for the Fen relates to the maintenance and restoration of calcareous and alkaline fens and petrifying springs. There would therefore seem to be a strong possibility of hydraulic continuity between the underlying aquifer and the designated SAC.

The owner/operator has requested leave to apply for substitute consent under S.261A, under the provisions of S.177C of the 2000 Act, as amended. I would note that there is some ambiguity about the specifics of the request – the applicant states

that it is under S.261(A), but refers to provisions under S.177C, so my assessment follows the requirements under S.177C(2)(b).

Determination under Section 177C(2)(b)

S.177C(2)(b) of the 2000 Act, as amended allows the applicant to request permission from the Board to apply for substitute consent on the basis of 'exceptional circumstances'.

In deciding whether to permit this, S.177D(2) states that in deciding whether exceptional circumstances exist the Board shall have regard to the following matters:

- (a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;*
- (b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;*
- (c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;*
- (d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;*
- (e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;*
- (f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;*
- (g) such other matters as the Board considers relevant.*

The applicants have argued that the development had ceased to operate for economic reasons during the period for which substitute consent could be applied for – this being the primary reason for the failure to apply for substitute consent within the original timeframe. They also argue that there is an economic need at present for the products of the quarry.

I will address the seven matters set out in the Act as follows:

(a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;

The works are of a significant scale and intensity and the quarry far exceeds the 5 hectare size (Schedule 5, part 2, paragraph 2(b) of the 2001 Regulations, as amended) which is the usual threshold for considering if EIA is required. I note that there are substantial numbers of dwellings within 500 metres of the quarry, and a very significant number on the sole haul road. The local impacts on residents are therefore likely to be quite significant. Although the nearest SAC is Pollardstown Fen, some 6 km to the north, I would note that it would appear that there may be hydraulic continuity between the Fen and the quarry, so the possibility of effects cannot be ruled out. For these reasons, I concur with the decision of the planning authority that the works, during the relevant periods would have required an EIS and would have required an NIS. I note that the quarry appears to have been in breach of its 1980 planning permission and the conditions imposed under the S.261 Registration. I would therefore conclude that any attempt to regularise this development could be interpreted as an attempt to circumvent the purpose and objectives of the EIA and Habitats Directives.

(b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;

There are records from the planning history attached to the file indicating that the site at various times was operating either without the benefit of planning permission

or in breach of conditions attached to planning permissions and S.261 registration requirements. While there seems to have been changes in the operators (the same owners), there is no evidence on file to indicate that there was any reasonable basis for the applicant to have had a belief that it was not unauthorised.

(c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;

It is quite clear from the aerial photographic record and the planning history on site that substantive works, including the extraction of groundwater, has taken place over a period during which an EIA and AA should have applied. It is reasonable in my opinion to assume that had an EIA or AA been applied, measures could have been taken to minimise impacts and effects, and that it is difficult to see whether an assessment at this stage could fully address the past impacts of unauthorised works, in particular those which have taken place between the period for which substitute consent should have been applied for and the present date.

(d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;

Although there is insufficient information on file to make a full assessment of the impacts on the works, I am satisfied from the information on file and from my site visit that the quarry has very substantial impacts on the local environment and that it cannot be ruled out that adverse effects on the integrity of a European site has taken place, and is likely to take place in the future, if the development is allowed to continue.

(e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;

Although there may be scope to reduce some impacts if the site is regularised, many of the impacts and adverse effects appear to be integral to the operation of an unauthorised quarry on this site. The one benefit of regularising the quarry would be that it would enable the restoration of the site – although in reality this would only likely occur after a substantive period of further extraction. It is not clear to me that the benefits of a restoration of the quarry would substantively mitigate the past, present, and likely future environmental impacts and effects of allowing the works to continue.

(f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;

It does seem from the record that there is a past history of a failure to comply with conditions attached to the site, although not necessarily by the present operator of the site. I do not consider that anything on the available records indicates that this would justify allowing a substitute consent application.

(g) such other matters as the Board considers relevant.

The applicant has noted the apparent substantive demand in the mid-Kildare area for the products from the quarry. Notwithstanding that this may be the case, there are a significant number of other similar sand and gravel quarries in the area and no evidence has been submitted to indicate that there would be any economic harm or impact on the local economy if the quarry were not to be permitted to continue.

I do not consider that there are any other relevant matters.

Section 177L

Although it was not raised in this application, the Board has the powers under S.177L of the 2000 Act as amended as follows:

Where the Board refuses an application for leave to apply for substitute consent under section 177D, or refuses to grant substitute consent under section 177K, it may give a draft direction in writing to the applicant concerned requiring him or her—

(a) to cease within the period specified in the draft direction, all or part of his or her activity or operations on or at the site of the development the subject of the application, where the Board forms the opinion that the continuation of all or part of the activity or operations is likely to cause significant adverse effects on the environment or adverse effects on the integrity of a European site, or

(b) to take such remedial measures, within the period specified in the draft direction, as the Board considers are necessary for either or both of the following:

(i) to restore the site on or at which the development referred to in the application is situated, to a safe and environmentally sustainable condition;

(ii) to avoid, in a European site the deterioration of natural habitats and the habitats of species or the disturbance of the species for which the site has been designated, insofar as such disturbance could be significant in relation to the objectives of the Habitats Directive.

While there is undoubtedly some on-going environmental impacts from the quarry operations, and there is the possibility of some adverse effects on the conservation objectives of European sites within hydraulic continuity, I would conclude, on the basis of the file information, that it would be most appropriate to leave any decision on enforcement to the planning authority. I therefore do not recommend that an order under S.177L is necessary.

9.0 Recommendation

I conclude that there is no basis under the criteria set out under S.177D of the Act to consider that the 'exceptional circumstances' required to grant leave for an application for Substitute Consent under S.177C(2)(b) of the Planning and Development Acts, 2000-2014 apply in this case. I therefore recommend that the

Board refuse the application for leave to apply for the reasons and considerations set out below.

10.0 **Determination Under Section 177C – Reasons and Considerations.**

Having regard to section 177D of the Planning and Development Act, 2000, as inserted by section 57 of the Planning and Development (Amendment) Act, 2010, the Board considered that a Stage II Appropriate Assessment is required in respect of the development concerned, and also that a determination is required as to whether an Environmental Impact Assessment would also be required. Furthermore, the Board examined whether or not exceptional circumstances exist such that it would be appropriate to permit the regularisation of the development by permitting leave to make an application for substitute consent.

In this regard, the Board:

- considered that the regularisation of the development would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or of the Habitats Directive,
- considered that the applicant could not reasonably have had a belief that the development was not unauthorised, particularly in the light of the planning history of the subject site,
- considered that the ability to carry out an Appropriate Assessment and an Environmental Impact Assessment and for the public to participate in such assessments has been substantially impaired,
- considered that the development has had significant effects on the environment, in particular by way of impacts on nearby residents and the landscape, and may have adversely affected the integrity of a nearby European site,
- considered that many of the significant effects on the environment and adverse effects on the integrity of a European site could not be remediated,
- did not consider that the demand for sand and gravel in the mid Kildare area is sufficient reason to overcome the environmental issues.

The Board concluded that exceptional circumstances do not exist such that it would be appropriate to permit the regularisation of the development by permitting leave to apply for substitute consent, and decided to refuse leave to make an application for substitute consent.

In relation to section 177L of the Act, the Board did not consider it necessary to invoke the powers available to it under section 177L of the Act.

Philip Davis
Planning Inspector

3rd April 2019