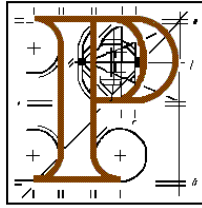


An Bord Pleanála



Inspector's Report

APPLICATION FOR LEAVE TO APPLY FOR SUBSTITUTE CONSENT

Board Reference: LS01.0030

Planning Authority: Carlow County Council

Applicant: Noel Aughney

Date of Site Inspection: 9th May, 2017

Inspector: Kevin Moore

1.0 INTRODUCTION

- 1.1 This is an application for leave to apply for substitute consent pursuant to section 177C(2)(b) of the Planning and Development Acts, 2000-2014.

2.0 THE SITE LOCATION AND QUARRY OPERATION

- 2.1 The site of the proposed development is located to the north of Regional Road No. R724, approximately 2km west of Bagnalstown in County Carlow. The site associated with the section 261 registration comprises approximately 17.5 hectares, most of which is agricultural land. The quarry area is located at the south-eastern edge of the holding, adjoining the public road, separated by a dense woodland strip. The quarried area includes stockpiles of excavated materials, plant associated with the works, and two settlement ponds. Direct access onto the R724 is provided at the site's southernmost end.

3.0 THE APPLICATION

- 3.1 The applicant submits that Carlow County Council have alleged that section 261A notices were hand-delivered to Noel Aughneys house in Kilcarrig, Bagnelstown and that the documents were posted through the letter box. The applicant denies receiving any notification of the determinations by the planning authority. As a result, the applicant could not avail of the opportunity for a section 261A(6) application for review to An Bord Pleanála and was, therefore, denied fair procedures provided for under the legislation.
- 3.2 The applicant further submits that the planning authority's determination under section 261A(2)(a)(i) in relation to sub-threshold EIA requirement, based on archaeological impact concerns, was factually incorrect and unfounded. It is submitted that an archaeological assessment was undertaken previously for the quarry, including the area developed outside of Planning Application 97/209. It is submitted that this established that works carried out did not have

the potential to have significant environmental effects on the historical landscape and that there was no archaeological material present in the area in which works were carried out. It is requested that, in the event the Board does not accept this submission, section 177(C) should be considered. In support of this, it is submitted that the applicant should have been able to rely on the outputs of the site excavation works done on the totality of the developed ground and could not have reasonably known that an EIA offence was potentially being committed with regard to archaeology. It is argued that exceptional circumstances thereby exist to excuse the alleged offence and, if an offence is deemed to exist, the applicant should be afforded the opportunity for regularisation through substitute consent. An Archaeologist's report is submitted in support of this submission.

3.3 In relation to the need for Appropriate Assessment, it is submitted that section 261A(5) should not have been applied to the site. An Ecologist's report submitted in support of this submission determined that there is no direct or indirect surface water hydrological link between the existing sand and gravel pit and the River Barrow and River Nore SAC (Site Code: 002162). The report concludes that it is considered that no adverse effects are expected to arise to any Natura 2000 sites from the continued operation of the sand and gravel pit. It is requested that, in the event the Board finds that a Stage 2 NIA is warranted, this should not be attached to the unauthorised extension to the previously authorised pit as was done under the section 261A process, that section 177(C) applies to the site, and the entire site can be viewed as open to substitute consent.

3.4 It is submitted that the Board might arrive at one of two conclusions:

- (i) That no EIA or NIA offences exist on the site and that section 177(C) does not apply to the site, thereby allowing the applicant to seek section 34 regularisation without EIA or Stage 2 NIA; or

- (ii) That an offence may have occurred and that section 177(C) does apply to the site, but that exceptional circumstances exist as to allow the applicant apply for substitute consent on all of the developed area.

4.0 PLANNING AUTHORITY SUBMISSION

- 4.1 The planning authority submitted that the correspondence (QY12/33) to Mr. Noel Aughney was posted at the door of the premises at 9.01 pm on the 23rd August 2012. It is further stated that there was no subsequent correspondence from Mr. Aughney on file regarding the matter. The planning authority noted the correspondence to the Board and has no objection to the Board processing the application for Substitute Consent.

5.0 PLANNING HISTORY

- 5.1 The following planning history relates to the quarry development:

ABP Ref. PL 01.130045 (P.A. Ref. 97/209)

Permission was granted for a period of six years by the Board in 2003 for the commencement of limited commercial development of an existing sand pit with associated site works and new entrance.

P.A. Ref. 08/721

Extension of duration of the above referenced permission was granted by the planning authority in 2009 until 31st December 2013.

P.A. Ref. QY/33

An application was made to the planning authority to register the quarry under section 261 of the Planning and Development Act. This application was for a site area of 17.5 hectares, with the extraction area shown to comprise 0.5 hectares, located at the south-eastern end of the overall holding.

The planning authority, by letter dated 17th February 2006, informed the applicant that a section of the quarry included in the registration application had been granted permission under Plg. Ref. 97/209, that this area does not require registration as the permission was not yet five years old (granted in 2003), and that only the area shown outside of that area granted permission requires registration. The letter further stated that only operational quarries require registration and, as the areas outside of Plg. Ref. 97/209 were not currently being extracted, no registration of these lands was required. It was stated that, should there be any proposal to commence quarrying on lands outside of that granted under Plg. Ref. 97/209, a new planning application would be required.

6.0 QUARRY REVIEW UNDER SECTION 261A

- 6.1 Noel Aughney was informed by the planning authority, by letter dated 29th February 2012, of the Control of Quarries provisions under section 261A of the Planning and Development Act. A Planning Report and an Appropriate Assessment Screening Report and Conclusion Statement were prepared.
- 6.2 The Planning Report noted that no submission or observation was received in relation to the quarry. It was noted from site inspection that the extraction area comprised an area of 1.14 hectares. It was stated that the extraction works had extended across the area where registered monuments had been identified and outside the area which was the subject of Planning Application PL 97/209. It was submitted that no Appropriate Assessment was prepared nor sought for during the assessment of Planning Application PL 97/209, although an Appropriate Assessment Screening would have been required. It was noted that the owner/operator had submitted documentation confirming that development had commenced post 3rd July 2008 and it was considered that an Appropriate Assessment Screening and an EIA determination (screening) would have been required. Determinations under section

261A(2)(a) were recommended and considerations were given in relation to section 261A(5)(a).

6.3 The Appropriate Assessment Screening Report and Conclusion Statement concluded that it was unknown whether any pollutants or silt had caused any negative impacts to the River Barrow and River Nore regardless of whether the quarry was in operation or disused.

6.4 Under Planning Authority Ref. QY12/33, the planning authority, on 23rd August 2012:

- in accordance with section 261A(3)(a), directed that Noel Aughney apply to An Bord Pleanála for substitute consent for the quarry with a remedial Environmental Impact Statement and remedial Natura Impact Statement; and
- in accordance with section 261A(5)(a), determined that development took place after 3rd July 2008 and that EIA screening was required and was not carried out, with particular regard to development occurring in a location where there are several recorded monuments. Furthermore, it was determined that an Appropriate Assessment was required but was not carried out. Therefore, the planning authority intends to issue an Enforcement Notice under section 154 of the Planning and Development Act.

The Notice informed Noel Aughney of his right to apply to the Board, not later than 21 days after the date of the Notice, for a review of the determination.

6.5 The Board did not receive an application to review these determinations.

7.0 SUBSTITUTE CONSENT AREA

7.1 From the planning authority's determinations under section 261A, it appears that the quarry area comprising 1.14 hectares in 2012 was viewed as a

development, while significantly below the threshold requiring EIA, that was a development that may have significant effects on the environment (see Section 5.2 of Planner's report). The archaeological sensitivity of the site was particularly referenced, when it was also noted that extraction works had extended across an area where registered monuments had been identified and outside of the area which was the subject of the previous planning application relating to the site. It appears that the previous quarry activity the subject of the section 261A(3)(a) relating to Appropriate Assessment applied to the total quarried area.

7.2 I note for the Board that there is a drawing attached with the planning authority's determinations entitled 'Combined Map on Modern Map' (Drg. No. 11). This appears to show the site area associated with Planning Application 97/209, the area of quarrying and archaeological sites on and in the immediate vicinity of the site. It is noted that the quarried area extends beyond and north of the land area associated with Planning Application 97/209.

8.0 ASSESSMENT

8.1 Introduction

8.1.1 The Board is asked by the applicant to arrive at one of two conclusions:

- (i) That no EIA or NIA offences exist on the site and that section 177(C) does not apply to the site, thereby allowing the applicant to seek section 34 regularisation without EIA or Stage 2 NIA; or
- (ii) That an offence may have occurred and that section 177(C) does apply to the site, but that exceptional circumstances exist as to allow the applicant apply for substitute consent on all of the developed area.

Each of these will be examined below.

8.2 Requirement for EIA and/or NIA

8.2.1 I note that when the Board is making a decision on whether to grant leave to apply for substitute consent, in accordance with section 177D(1), it can only do so, in respect of an application under section 177C, where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required in respect of the development concerned.

The following observations are made in respect of this quarry:

8.2.2 *Environmental Impact Assessment*

- Planning permission was previously acquired for a period of six years for a quarry under ABP Ref. PL 01.130045. This related to a land area of 1.6 hectares approximately. This permission was extended until December 2013 under P.A. Ref. 08/721.
- The planning authority and the Board did not determine that Environmental Impact Assessment was required for the proposed quarry, with the Board taking its decision in January, 2003. Under Planning Permission 08/721, the planning authority did not determine that EIA and/or AA was required for the development.
- The applicant submits that 1.11 hectares was developed and that this was exceeded by 0.38 hectares, with the developed area now totalling 1.49 hectares. The planning authority does not refute the submission made.
- The applicant submits that the owner/operator commenced operations on the site in October 2008. The planning authority does not refute this submission.
- The planning authority, notwithstanding the live planning permission for quarrying at this site, determined there was a need for EIA and AA under section 261A. The permission under PL 01.130045 was a valid permission

and the need for EIA and AA was not a requirement for development carried out in accordance with that permission.

- The quarried area that has extended beyond the area associated with the area permitted under PL 01.130045 comprises a small linear section to the north of the permitted quarry (0.38 hectares). This was the area to which consideration would be given to the need for EIA.
- With regard to mandatory requirements for Environmental Impact Assessment, it is apparent that the small land area in question would not have triggered an automatic requirement for EIA.
- The environmental sensitivity of the site determined by the planning authority relates to archaeological impact. An archaeological survey was carried out in accordance with the requirements of PL 01.130045 and included an impact assessment. The area assessed included the area developed beyond that permitted under Planning Permission PL 01.130045. The applicant's report on potential archaeological impact submitted to the Board, comprising a review of archaeological work undertaken for the site, concludes that the works carried out after 3rd July, 2008 did not have the potential to have a significant environmental effect on the historical landscape, including recorded monuments. The planning authority did not refute the conclusions drawn. There is no evidence to conclude that the quarried area beyond the permitted area permitted under PL 01.130045 had any significant environmental impact on any archaeologically sensitive material that would warrant EIA.
- With regard to sub-threshold development requirements, it is considered that the quarry does not pose a significant environmental risk, due to the limited extent, scale and type of works, the contained nature of operations, the low level of activity that has occurred to date, and the remote location of the quarry relative to residential and other sensitive receptors. This development falls very far below the 5 hectare threshold

such that the likelihood of a sub-threshold development would trigger the requirement for EIA.

8.2.3 *Appropriate Assessment*

- The planning authority referred to Appropriate Assessment Screening not being prepared or sought during the assessment of the planning application relating to this site. In noting quarry operations commenced in Autumn 2008, it deemed that an Appropriate Assessment Screening would have been required because development commenced post 3rd July 2008 and because the site was 34m from a stream that flowed into the River Barrow and River Nore cSAC some 1.5 kilometres west of the site.
- The planning permission and extension of permission granted for this quarry are again noted. A requirement for Appropriate Assessment did not arise for the previously permitted application. That permission was a valid permission for the quarrying activity within the area of the site relating to that application. Any consideration of AA would relate to the small section of quarry that falls outside of the previously permitted development.
- The quarry is approximately 34 metres from a stream to the south-west of the site. This stream flows into the River Barrow and River Nore cSAC some 1.5 kilometres west of the site in Bagnalstown. The SAC is selected for the following habitats / species:
 - Estuaries
 - Mudflats and sandflats not covered by seawater at low tide
 - Reefs
 - Salicornia and other annuals colonising mud and sand
 - Atlantic salt meadows (*Glauco-Puccinellietalia maritima*)
 - Mediterranean salt meadows (*Juncetalia maritimi*)

- Water courses of plain to montane levels with the *Ranunculus fluitans* and *Callitriche-Batrachium* vegetation
 - European dry heaths
 - Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels
 - Petrifying springs with tufa formation (*Cratoneurion*)
 - Old sessile oak woods with *Ilex* and *Blechnum* in the British Isles
 - Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*)
 - *Vertigo moulinsiana* (Desmoulin's Whorl Snail)
 - *Margaritifera margaritifera* (Freshwater Pearl Mussel)
 - *Austropotamobius pallipes* (White-clawed Crayfish)
 - *Petromyzon marinus* (Sea Lamprey)
 - *Lampetra planeri* (Brook Lamprey)
 - *Lampetra fluviatilis* (River Lamprey)
 - *Alosa fallax fallax* (Twait Shad)
 - *Salmo salar* (Salmon)
 - *Lutra lutra* (Otter)
 - *Trichomanes speciosum* (Killarney Fern)
 - *Margaritifera durrovensis* (Nore Pearl Mussel)
- I consider the only potential pathway to the SAC would be via discharge from the quarry to the stream. I note the wholly contained nature of the development of the quarry operation, whereby there is a closed water system and no discharge from the site to the stream. There is, and has been, no extraction within or below the water table. I further note the extensive woodland buffer along the site's frontage. I also note the small extent and scale of the quarry activity outside of the area granted planning

permission, which is located to the north of the permitted area, at the furthest remove from the stream. I consider there has been, and is, no potential for the quarry operation to date to impact on the stream and, as a consequence, to then have significant effects on the features of interest of the SAC some 1.5 kilometres away.

- I note the findings of the applicant's Stage 1 Screening Report and concur with the findings that there is no direct or indirect surface water hydrological link between the quarry and the SAC.

8.2.4 *Conclusion*

Having regard to the provisions of section 177D(1), I am satisfied to conclude it would be unreasonable to determine that quarrying at this location was/is development of a scale that would have required a determination to be made as to whether an environmental impact assessment was necessary or a determination to be made that Appropriate Assessment was required. For this reason, I am of the opinion that the application for leave to apply for Substitute Consent should be refused. The small area of quarry development comprising 0.38 hectares beyond the area granted under Planning Permission PL 01.1300445 should be subject to an application for retention under section 34 of the Planning and Development Act 2000, as amended.

8.3 Exceptional Circumstances

8.3.1 In the event that the Board does not concur with my conclusions, my considerations on the issue of 'exceptional circumstances' are now set out.

8.3.2 Section 177D(2) of the Planning and Development Act provides that, in considering whether exceptional circumstances exist, the Board must have regard to the following:

- (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.

My consideration on each of these are as follows:

8.3.3 ***“Whether the regularisation of the development would circumvent the purposes and objectives of the EIA Directive or the Habitats Directive”***

I note the nature and extent of development that would be subject to an application for substitute consent in this instance. I note the limited extent of the land area outside of the area for which planning permission was previously granted for quarrying activities. I further note the site area lies beyond any designated Natura 2000 site, the limited extent of quarrying, and the nature of controlled operations within the site that would be subject to Appropriate Assessment. I consider that an application for substitute consent

in this instance, which would include a remedial Environmental Impact Statement (rEIS) and a remedial Natura Impact Statement (rNIS), would not circumvent the purpose and objectives of the Environmental Impact Assessment or Habitats Directive.

8.3.4 ***“Whether the applicant had or could reasonably have had a belief that the development was not unauthorised”***

The applicant was in receipt of planning permission for quarrying activities under ABP Ref. PL 01.130045. The land area associated with that development was clearly identifiable in the application submission. Quarrying activities have extended beyond the permissible quarry area. The applicant could not reasonably have been of the belief that quarrying in the area beyond that which was permitted was authorised development.

8.3.5 ***“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.”***

If leave to apply for substitute consent is permitted in this instance a rEIS and rNIS would be submitted with the application that would follow. This application would allow for public participation within the process. The assessment would not be substantially impaired in such an event.

8.3.6 ***“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”***

I acknowledge once again that the quarried area that would be subject to a substitute consent application is not located within any designated European site. From the details available to date, there is no indication that these previous quarrying activities, that would be subject to the substitute consent application, have resulted in any significant direct or indirect effects (or continue to have such effects) that would have affected the Conservation Objectives of the features for which any European Site in the vicinity had been designated. The rNIS that would be submitted with an application for substitute consent would seek to confirm the likely effects and could then be assessed accordingly.

8.3.7 “The extent to which significant effects on the environment or adverse effects on the European site can be remedied”

There is no understanding of previous quarrying on this site having had any significant effects on the environment or adverse effects on a European Site. There have been no remedial measures deemed necessary beyond the operational measures employed heretofore. The application for substitute consent and the Board’s determination on such an application, which would include a rEIS and rNIS, would allow for definitive conclusions to be drawn.

8.3.8 “Whether the applicant has complied with previous planning permissions or previously carried out an unauthorised development”

The applicant has been in receipt of planning permission for quarrying at this location and the life of this permission was extended to 2013. Quarrying has extended beyond the area permissible under the planning permissions issued for this site. The applicant has carried out unauthorised development by exceeding the area permissible for quarrying activity.

8.3.9 ***“Such other matters as the Board consider relevant”***

The applicant denies receiving any notification of the determinations by the planning authority under section 261A. The planning authority has not refuted the claim that the applicant was not in receipt of the notices issued by them. In my opinion, this is a particularly relevant matter for the Board’s consideration. If it is accepted that the applicant was not in receipt of the planning authority’s notices under section 261A, then the applicant could not have availed of the opportunity to seek a review of the planning authority’s decision. Leave to apply for substitute consent should be allowed in the interest of fairness.

9.0 **RECOMMENDATION**

Having regard to section 177 D(1)(a), which provides that the Board shall only grant leave to apply for substitute consent where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required in respect of the development concerned, I am satisfied to conclude that EIA, a determination as to whether EIA is required, and AA is not required in this instance. In the event the Board does not concur with this conclusion, I consider that exceptional circumstances exist that would permit the making of an application for substitute consent.

DECISION

REFUSE leave to apply for substitute consent under section 177D (4) of the Planning and Development Act, 2000, as inserted by section 57 of the Planning and Development (Amendment) Act 2010 based on the reasons and considerations set out below.

MATTERS CONSIDERED

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

REASONS AND CONSIDERATIONS

Having regard to the size and scale of the extraction area outside of the quarry area permitted under Appeal Ref. PL 01.130045 which was carried out subsequent to 1st February 1990 and which is significantly below the mandatory threshold for Environmental Impact Assessment, together with the nature of the receiving environment, it is considered that an environmental impact assessment would not have been necessary or warranted in this instance. Furthermore, having regard to the separation distance between the quarry operation and the River Barrow and River Nore candidate Special Area of Conservation, the lack of direct effects thereon resulting from the quarry operations, and the lack of any known pathways linking potential pollutants arising from the quarry operations that could indirectly effect the cSAC, it is considered that an appropriate assessment arising from development that was carried out on this quarry site subsequent to 26th February 1997 would not have been necessary or warranted in this instance.

Kevin Moore

Senior Planning Inspector

May, 2017.