



An
Bord
Pleanála

Inspector's Report 06S. LT0003

Development	Quarry
Location	Aghfarrell, Brittas, Co. Dublin
Planning Authority	South Dublin County Council
Planning Authority Reg. Ref.	SDQU05A/1
Applicant	Shillelagh Quarries Ltd.
Type of Application	Application under section 177C of the planning act for leave to apply for substitute consent
Observers	Dublin Mountain Conservation and Environmental Group Michael McCoy
Inspector	Stephen J. O'Sullivan

1.0 Site Location and Description

1.1. The application refers to a quarry at Aghfarell, Co. Dublin 3km south-east of the village of Brittas on the southern fringe of the Dublin Mountains. A map was submitted with the application which shows an area of 20.5ha that has been subject to quarrying operations and for which substitute consent would be sought. It lies within a landholding of 48ha.

2.0 The Application for Leave to Apply

2.1. The covering letters submitted with the application states that leave is sought to apply for substitute consent under section 177C of the planning act following provisions in subsections 261A(21) to (24) of the act. The applicant argues that the following circumstances bring the quarry within the scope of the latter provisions:

- Extraction commenced at the quarry before 1st October 1964. This is demonstrated by the decision of the High Court in Patterson vs. Murphy in 1978. However that judgment underestimated that extent and nature of activity that was established at the quarry. This is apparent from evidence contained in council records that were not available at that trial, as was acknowledged by the High Court in the McCoy vs. Shillelagh Quarries Ltd.
- The applicant registered the quarry in 2005 in accordance with section 261 of the act. It was directed to apply for permission with an EIS. It did so. After a third party appeal the board refused that application. The applicant sought a judicial review of that decision. This application was dismissed by the court on 27th June 2012. The applicant sought leave to appeal that decision, which itself was refused on 5th March 2013. Section 261A was commenced on 15th November 2011 and the planning authority was obliged to make a determination within 9 months, i.e. by 14th August 2012. So legal proceedings against a determination of the board under section 37 had not been concluded by the expiry of period set out in section 261A(2)(a).
- The planning authority did not issue a notice in respect of the quarry under section 261A.

- Quarry development after 1990 on the site exceeded 5 hectares. A composite of aerial photographs prepared by the council is submitted to attest to this fact. Therefore development took place after 1st February 1990 that required EIA but such an assessment was not carried out.
- The quarry on the site therefore meets the criteria set out at sections 261A(21)(a)(i)(II), 216A(21)(a)(ii), 261A(21)(iii), 261A(21)(c)(i), 261A(24)(a)(i)(I) and 261A(24)(a)(ii) of the act. Therefore the board is required by section 261A(24)(a) to grant leave to apply for substitute consent in respect of the quarry on the site.
- An barrister's opinion was submitted to support this position. It stated that the 2015 judgement in McCoy vs. Shillelagh Quarries Ltd. recognized that a significant body of relevant evidence was not available to the court when the decision in Patterson vs. Murphy was given. So the latter judgement does not properly describe the extent of quarrying operations on the site before the late 70s and the precedential weight of its findings of fact has been greatly attenuated.

2.2. The board accepted that the application complied with the criteria at section 261A(21)(a). It published a notice of the application stating that it would make a determination on the quarry under section 261A(c) of the act which might lead to a decision under section 261A(24), and inviting submissions.

3.0 Planning History

High Court Judgement - Frank Patterson and Emily Patterson v. Martha Murphy and Trading Services Ltd. [1978] ILRM 85:

In his judgement of 4th May 1978, Costello J. concluded that the operations which were being conducted on site differed materially from those carried out prior to 1 October, 1964 in that the object of the 'new' operation was to produce a different product i.e. the manufacture of 4 inch stone, which was used for a different purpose in the building industry and which fetched a different price. Furthermore, he considered the method of production as being different to that in before 1964 in that the raw material (rock) was being obtained by means of regular blasting with large crushing and screening plant used to produce stones of the correct dimension. It was

also noted that considerable ancillary equipment was being used and that a considerable labour force was employed. Finally, he concluded that the scale of the operation was a substantial one which bore no relationship to the scale of operations carried on prior to the appointed day. Accordingly, Costello J. stated that:

“ . . . if it appears that the scale of operations has so intensified as to render contemporary operations materially different from those carried on before the appointed day, this fact can be taken into account in considering whether what is presently being done commenced prior to 1 October, 1964 . . . The development, I am now considering was, in fact, not commenced until the summer of last year. Thus, it was and is development which requires permission under Part IV of the 1963 Act and in my opinion I should prohibit its use under s.27. I should add that if the case fell to be considered as one of ‘development’ arising from the making of a material change in the use of land I would have reached the same conclusion.”

Reg. Ref. No. S99A/0016 – The planning authority refused permission on 22 November, 1999 to retain an earth embankment for the reasons that stated *inter alia* that the quarrying operations on site were unauthorised development in that planning permission has not been granted nor were the present operations operating prior to October, 1964; and that the proposed development in an area zoned to protect and enhance the outstanding natural character of the Dublin Mountain Area would be contrary to the SDCC Development Plan 1998 because it would not protect nor enhance the natural character of the area and would be seriously injurious to the amenities of the area and of property in the vicinity.

Quarry Registration No. SDQU05A/1. On 19 April, 2006 the Planning Authority issued an order pursuant to Section 261(7) of the Planning and Development Act, 2000, as amended, in respect of the registration of the existing quarry, requiring the applicant to apply for planning permission and to submit an Environmental Impact Statement to the Planning Authority not later than 18 October, 2006 or such other period as may be agreed in writing with the Planning Authority in respect of the continued operation of the subject quarry.

06S. RL2473. On 23rd December 2010 the board made a declaration under section 5 that the intensification of use of a quarry at Aghfarell Upper, Brittas, Co. Dublin, including the use of explosives, is development and not exempted development. The board also stated that insufficient evidence had been provided with regard to the laying of material for a new road and a new entrance to make a declaration upon them.

PL06S. 231371, Reg. Ref. SD07A/0276 – On the 23rd December 2010 the board refused the application submitted on foot of the above order made by the planning authority for two reasons which both stated that the board was precluded from granting permission for the proposed development, having regard to *inter alia* the planning history of the site; the High Court judgement in the *Patterson* case; the nature, scale and extent of the activities carried out on the site; and the judgment of the ECJ in the case C215/06. The proposed development referred to the existing quarry area of 11.3ha and an extension of 4.2ha. The applicant sought leave to seek judicial review of this decision, as described below.

Shillelagh Quarries vs. An Bord Pleanála [2012] IEHC 257 – In his judgement of 27th June 2012 in the High Court, Hedigan J. refused leave to seek judicial review, finding that was evidence to support the board's conclusion that the quarry operations had intensified since 1964 amounting to a material change of use, and that the permission sought included a significant element of retention and so C-215/06 was applicable. The registration of the quarry by the planning authority under section 261 does not establish a pre-1964 use or determine the status of the quarry. On 5th March 2013 the High Court refused to certify that the case raised a point of law of exceptional public importance that would allow an appeal to the Supreme Court, with Hedigan J. observing that "*It is difficult if not impossible, to see how the public interest could be served by questioning the status of a quarry that 35 years ago was deemed to be unauthorised and which has continued to be unauthorised notwithstanding its continued use*".

06S. QV0155, Reg. Ref. QU05A/1 – The planning authority examined the quarry on the site under section 261A of the act and concluded that the operation of the quarry was unauthorised; that the operations carried out after 1st February 1990 required EIA; that the development carried out after 26th February 1997 would have required a determination as to whether an appropriate assessment was necessary; that any extension of the existing quarry after 3rd July 2008 would not have required EIA or a determination as to whether an EIA or an appropriate assessment were necessary; and that the requirements of section 261 of the planning act were complied with in respect of the quarry. The planning authority made no determination under section 261A. It wrote to the operator of the quarry stating that the quarry was not covered by section 261A and was not eligible for retention as because it had been refused permission on an application made in accordance with a notice served under Section 261(7)(a) of the act. As there was no such determination the board decided that a request for a review from a third party was not valid.

06S. LS0009 – On 17th February 2014 the board refused the applicant leave to appeal for substitute consent under section 177D of the act. Its reasons stated that it had regard to the planning history of the site and the judgements in Patterson vs. Murphy and Shillelagh Quarries vs. An Bord Pleanála. It stated that the development is having significant adverse impacts on the environment, in particular on the landscape, and that it was not considered that the applicant could reasonably have had a belief that the development was unauthorised.

McCoy and South Dublin County Council vs. Shillelagh Quarries et al [2015] IEHC 838

On the 16th October 2015 the High Court decided to grant an order under section 160 of the planning act to cease unauthorised development on the site. Ms Justice Baker noted that the board had declared under 06S. RL2473 that a material change in the use of the site had occurred since 1964 that constituted development requiring a grant of permission, and that the board had refused permission under PL06S. 231371, Reg. Ref. SD07A/0276 on the basis that is sought retrospective permission for a development that required EIA. Evidence from council records may indicate

that quarrying activity on the site in 1972 was of greater intensity than that described as the established use in the judgement of Costello J. in *Murphy vs. Patterson*. However the board has exclusive jurisdiction to determine whether development has occurred in any particular case. The board has exercised this jurisdiction in the cited declaration and decision. The question is not now open to challenge in the court. The unavoidable conclusion is that there is unauthorised development on the site.

4.0 Submissions

4.1. Planning Authority

- The current quarry is unauthorised. It is not exempted development. It is not a pre-64 development and it has never obtained planning permission.
- The history of the quarry on the site is primarily one of complaints about unauthorised development and water pollution, with enforcement and legal proceedings. The council does not have records of complaints against the quarry before 1972. Aerial photography from that date is more consistent with the land being intermittently used to obtain shale by primitive means. It does not indicate extraction at that date.
- The council's enforcement files include a note that states that output from the quarry was significantly reduced following the judgment in the *Patterson vs. Murphy* in 1978. The injunction against blasting issued in that case was vacated on 7th May 1999. The council has no evidence that the current quarrying activities on the site commenced prior to 1st October 1964.
- From 1994 complaints were made on behalf of a fish farm regarding pollution in the Brittas stream associated with the quarry. Copies of the documents associated with those complaints are submitted.
- Legal proceedings against the quarry on foot of planning complaints were put on hold when section 261 of the 2000 planning act came into force in 2004.
- Under the review of the quarries in its area required by section 261A in 2012, the council focused on the excavation area of the quarry and now it developed over time. Aerial photography shows –

In 1972: 1.4ha of disturbed ground

1978: A stone quarry excavation area of 2.9ha

1986: A stone quarry excavation area of 3.3ha

1995: A stone quarry excavation area of 6.9ha

2000: A stone quarry excavation area of 13.7ha

2005: A stone quarry excavation area of 17.1ha

2009: A stone quarry excavation area of 18.5ha

2013: A stone quarry excavation area of 18.5ha

- A composite of the photographs is submitted. It appears to the planning authority that the current scale of stone quarry commenced as a material change of use after 1972. The subsequent rate of extraction and stone production correlates to level of construction activity in the economy, reaching a peak between 2000 and 2007. The council has never received information regarding environmental monitoring at the quarry. The rural road network serving the site is not adequate to handle truck movements to and from the quarry, which conflicts with the use of the roads for tourism and recreation. The quarry does not have a trade effluent licence, although an application for a water pollution licence was made in 2007. The discharge from the quarry flows towards the Poulaphouca Reservoir, which designated as an SPA designated for the Greylag Goose and the Lesser Black-backed Gull. The foraging area for those species might include the quarry. It is unclear how the activity there might affect them.
- The operation of the quarry has a significant effect on the landscape and is not compatible with the provision of the county development plan in this regard. It is the only quarry in the county operating above the 350m contour. It undermines the environmental quality and amenity value of the area. The existing quarry has a negative visual impact on the character of the landscape at a sub-regional level.

4.2. Other submissions

The submissions from the Dublin Mountain Conservation and Environment Group and Michael McCoy are similar and can be summarised as follows-

The quarry is an unauthorised development. This has been established in law. The matters raised by the applicant were considered by Judge Baker in 2015 in McCoy vs. Shillelagh Quarries who ruled that the quarry was unauthorised development and made an order under section 160 of the planning act to cease activity there. The applicant is misrepresenting the findings in that judgement. The board's conclusions under 06S. RL2473 and PL06S.231371 that the quarry was unauthorised stand. The current application is vexatious and should be dismissed. The submitted barrister's opinion should be treated with caution as it is simply an opinion until tested in court.

5.0 Assessment

- 5.1. The status of the quarry on the site as a post-1964 development that is neither exempted nor permitted, and hence is unauthorised, has been settled by the board's section 5 declaration under 06S. RL2473 and section 37 decision under PL06S. 231371, SD07A/0276. This was confirmed twice by the High Court in the decision of Hedigan J. in Shillelagh Quarries Ltd. vs An Bord Pleanála 2012 IEHC 257 and in that of Baker J. in McCoy and South Dublin Co. Co. vs. Shillelagh Quarries Ltd. 2015 IEHC 838. The latter judgment did refer to records held by the local authority that would indicate that the description in the judgment of Costello J. in Patterson vs. Murphy of quarrying activity occurring over "25 square yards" in the early 1970s was an understatement. However even if those records could be construed as a grounds to argue that the quarry on the site was a continuation of a pre1964 development, (the judge did not imply that they could be while the planning authority has specifically denied that they could be), Baker J. was clear that this would not be relevant now because the board's determination of the planning status of the quarry is now beyond review at this stage.

- 5.2. The applicant has not made statements of historical fact from its own knowledge in this application. It submitted a copy of a composite aerial photograph prepared by the planning authority during its review of operations under section 261A showing the extent of the extraction area of the quarry at various dates. The same photograph was submitted by the planning authority with the addition of information from 2013 that was not available at the time of that review. The accuracy of this information was not questioned in either of the third party submissions of the application. Its depiction is consistent with observations on the quarry contained in the various cases that comprise the planning history of the site, including the inspectors' reports on 06S. RL2473 and PL06S. 231371. The board is therefore advised that the information contained in this composite photograph is a reasonable basis on which to make the findings of fact about the quarry on the site that are needed to consider this application.
- 5.3. The information shows that the extraction area of the quarry on the site was 6.93ha in 1995, 13.75ha in 2000 and 18.5ha in 2009 and 2013. The current application states the worked area of the quarry to be 20.5ha. Quarry operations therefore commenced after the 1st February 1990 on an extraction area that was significantly greater than 5ha. The area involved is therefore in excess of the threshold established in Class 2.d of Part II of the First Schedule to the EC(Environmental Impact Regulations) SI 349/1989 and the subsequent regulations that replaced them, including schedule 5 of the Planning and Development Regulations SI600/2001. The class and threshold were specified in accordance with article 4(2) and annex II of the EIA directive. The quarry operations have had a significant effect on the landscape, as was stated by the board in its decision to refuse leave to apply for substitute consent under 06S. LS0009. Annex III of the EIA directive provides an alternative approach to the use of thresholds by member states, allowing the application of criteria on a case by case basis, although Irish law uses the former for quarries. The criteria refer to the characteristics of the project, its location and the characteristics of its potential impacts. Having regard to the characteristics of the quarry, particularly its size and the nature of the operations there, it would have been likely to have had significant effects on water, air and human beings due to emissions to water and of dust, as well as those from noise and vibration. The physical extent of the extraction area would have had a significant effect on soil. The

consequent loss of habitat and emissions may have effected flora and fauna. The generation of heavy traffic would be likely to have had significant effect on the material asset consisting of the local road network. Their location of these impacts would have been in a mountain area, and the would have occurred over a period of long duration. Therefore, having regard either manner to determine the likelihood of significant effects on the environment set out in the Environmental Impact Assessment Directive, and to the information which has been submitted by the applicant and the planning authority, it is evident that the development was carried out at the quarry which is the subject of this application after 1st February 1990 which would have been likely to have had significant effects on the environment and required an environmental impact assessment. The various likely significant effects on the environment arising from a development of this type and size, apart from that on the landscape, may have been avoided or mitigated in the course of the development, or they may not have been so adverse in character as to render the it contrary to the proper planning and sustainable development of the area. However these are matters which would be considered in the course of an environmental impact assessment rather than in a prior screening for one.

- 5.4. An EIS that described quarrying of at least part of the site was submitted with the application for planning permission which the board refused under PL06S. 231731, Reg.Ref. SD07A/0276. The board's reasons for refusing that application referred to a legal constraint on granting permission for the retention of development that required EIA rather than to substantive environmental issues. I would therefore advise the board that an environmental impact assessment of the quarry on the site was not completed in the course of that application and appeal. This is the same advice that I gave in the course of the previous application for leave to apply for substitute consent that was made under section 177D of the act in 2013. There was no other occasion when the quarry could have been subject to environmental impact assessment.
- 5.5. So development was carried out at the quarry after 1st February 1990 that required environmental impact assessment but such assessment was not carried out. The board should therefore make a determination that the circumstances set out in section 261A(21)(c)(i) of the act apply.

- 5.6. The quarry is not within or immediately adjacent to a Natura 2000 site. However it is upstream of the Special Protection Area at Poulaphouca Reservoir sitecode 004063 which lies c6.5km to the south-east. The conservation objectives of the site refer to the Greylag Goose and the Lesser Black-backed Gull. The separation distance from the outer boundaries of the SPA mean that it is not likely that the physical expansion of the quarry would have reduced the foraging area available to those species that would have affected them in a significant way. However information is not present on the file with regard to the operation of the quarry and the discharges from it to waters. There is the possibility that it might have some indirect effect on the quality of waters in the SPA, and thus upon the relevant bird species, that did constitute a significant effect on that Natura 2000 site. This cannot be excluded on the basis of the information before the board. However leave to apply is not in itself a consent for development, and if the board concludes that section 261A(21)(c)(i) of the act applies then its decision on this application does not require a conclusion under section 261A(21)(c)(ii) that development has occurred that would have required appropriate assessment under the Habitats Directive. In these circumstances it would be prudent to refrain from making a declaration on the issue at this time. If an application for substitute consent is made to the board, then a screening determination would have to be made and adequate information to support one would have to be submitted at that time. This advice differs from that given in my report under 06S. LS0009 by placing more weight of the possibility that downstream effects on a Natura 2000 site might have occurred even where there is a substantial hydrological distance to the site.
- 5.7. The requirements in relation to registration under section 261 of the act were met with regard to the quarry on the site. This is evident from the information submitted in the course of the appeal PL06S. 231371 which arose from an application made on foot of a direction issued by the planning authority after that registration. So the board may decide that the criterion at section 261A(24)(a)(ii) applies in this case.
- 5.8. The remaining issue for the board to determine before the requirement to grant leave to apply for substitute consent becomes operative is that set out in section 261A(24)(a)(i), which is whether the quarry commenced operation before 1st October 1964. It is clear from the judgement in Patterson vs .Murphy in 1977 that some works were being carried out on the site to remove shale before 1964. So it is clear

that there was some quarry operation on the site before the relevant date. On this basis the board could decide that the quarry which is the subject to the current application for leave to apply for substitute consent commenced operation before 1st October 1964 and that the criterion at 261A(24)(a)(i) had been met, and proceed to grant the leave sought.

5.9. However the board could also decide on the basis of its prior declarations under 06S. RL 2473 and decision under PL06S. 231271, as confirmed by the judgements of the High Court in Shillelagh Quarries vs. An Bord Pleanála and Mc Coy vs. Shillelagh Quarries, that the nature of the operations which occurred on the site after 1964 were of a different nature and intensity than the operations carried out before 1964 so that they were materially different in planning terms. This would imply that the quarry that is the subject of the current application is not the same as the one that commenced operation before 1st October 1964 and so section 261A(24)(a)(i) of the act would not apply in this case to allow leave to be granted. The text of the act would support either interpretation in the circumstances that are established by the planning and legal history of the site. The argument at paragraph 17 of the barrister's opinion submitted with the application that there is some significant evidence from council records that would undermine the conclusions in the Patterson judgement regarding the pre1964 status of the quarry is not accepted. As stated in section 5.1 above, the applicant has neither submitted nor described in detail what the council's records might be. The reference to it in the judgement of Baker J. in McCoy vs. Shillelagh Quarries Ltd. would not raise serious issues with the description of the pre1964 quarry operations on the site. It would merely indicate that the topsoil removal over '25 square yards' to which Mr Patterson personally attested was not the only prior operation on this land. The judgment of Costello J. in Patterson vs. Murphy cannot be reasonably interpreted as being based on any such assumption. It explicitly describes evidence of other pre1964 works. This submitted barrister's opinion quotes this very description at paragraph 14. The precedential weight of the judgment in Patterson vs. Murphy and the applicability of the board's previous declaration and decision regarding the quarry on the site have not been impaired.

5.10. Nevertheless I would prefer the looser interpretation of section 261A(24)(a)(i). A grant of leave to apply would not constitute a development consent in itself and

would not imply that one would be granted if adverse effects were identified on the environment, on any Natura 2000 site or otherwise in relation on the proper planning and sustainable development of the area. The amendment of section 261A by the EU(EIA and Habitats) Regulations S/320/2015 had the clear effect of widening the scope to apply for substitute consent even when leave to do so had been refused under the previously enacted provisions. It would therefore seem unduly restrictive to interpret the new provisions with excessive rigour so as to prevent applications for substitute consent when they might be enabled by the new laws. In these circumstances I would advise the board that the quarry on the site was in operation before 1st October 1964 for the purposes of section 261A(24)(a)(i) of the act.

6.0 Recommendation

6.1. I recommend that the board -

make a determination that development occurred at the quarry to which this application refers after the 1st February 1990 which would have required an environmental impact assessment but no such assessment was carried out, and decide that the quarry commenced operation before 1st October 1964 and that the requirements in relation to registration under section 261 of the Planning and Development Act,2000 were fulfilled, and grant leave to apply for substitute consent for the quarry.

7.0 Reasons and Considerations

Having regard to -

- The size of the quarry on the site and the effects on the environment that it is likely to have had, in particular the effect on the landscape,
- The information on the extent of the extraction area of the quarry at various dates submitted by the applicant, the planning authority and third parties in the course of the current application
- The planning history of the site, in particular its registration by the planning authority under section 261 of the Planning and Development Act 2000 (as

amended), the section 5 declaration made by the board under 06S. RL2473 and its decision to refuse permission under PL06S. 231371, Reg. Ref. SD07A/0276, and

- The court judgments issued in relation to the quarry including that of Costello J. at 1978 ILRM 78, those of Hedigan J. 2012 IEHC 257 and 2013 IEHC 92, and that of Baker J. 2015 IEHC 838,

The board determines under section 261A(21)(c)(i) of the act that development occurred at the quarry to which this application refers after 1st February 1990 which would have required an environmental impact assessment and that no such assessment was carried out. The board also decides under section 261A(24)(a) of the act that the quarry commenced operation before 1st October 1964 and that the requirements in relation to regulation under section 261 were fulfilled, and so leave to apply for substitute consent should be granted in accordance with section 261A(24)(a) of the act.

Stephen J. O'Sullivan
Planning Inspector

7th February 2017