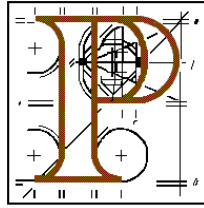


# An Bord Pleanála



## Inspector's Report

|                                      |  |
|--------------------------------------|--|
| <b>Board Reference:</b>              | <b>RL3434</b>  |
| <b>Question:</b>                     | Whether the prospective restoration works on previously authorised and unauthorised quarrying lands is or is not development or is or is not exempted development. |
| <b>Location:</b>                     | Boolinarrig Big, Birr, Co. Offaly  |
| <b>Referrer:</b>                     | Dermot Nally Stone Ltd.  |
| <b>Observers</b>                     | None on file   |
| <b>Planning Authority:</b>           | Offaly County Council  |
| <b>Planning Authority Reference:</b> | DEC 15/8   |
| <b>Date of Site Inspection:</b>      | 24 <sup>th</sup> May 2016  |
| <b>Inspector:</b>                    | Sarah Moran  |

## 1.0 INTRODUCTION

- 1.1 A referral case has been received by An Bord Pleanála pursuant to Section 5 of the Planning and Development Act, 2000. The Planning Authority issued a declaration on 27<sup>th</sup> October 2015 to the effect that the following is development and is not exempted development:

*Prospective restoration works on previously authorised and unauthorised quarrying lands at Boolinarrig Big, Birr, Co. Offaly.*

The planning authority refused to issue a section 5 declaration having regard to:

- *Permission PL19.202155 has expired and therefore no planning permission exists on this site;*
- *No exemptions exist for such prospective restoration works and;*
- *An Bord Pleanála decision Ref. PL 19.244944, which accepted that the quarry had expanded without the benefit of planning permission, under S261A it was determined that a remedial EIS was required and therefore S4(4) of the Planning and Development Act 2000, as amended, prospective restoration works cannot be considered exempted development.*

- 1.2 The site owner / occupier has referred the issue to the Board. This report considers the matters raised in the declaration and the referral and advises the Board as to whether or not the restoration constitutes development and is or is not exempted development.

## 2.0 SITE LOCATION AND DESCRIPTION

- 2.1 The site is situated off the N62 Birr to Athlone road, c. 3.5km north of Birr, Co. Offaly. There is an existing quarry at the site, which is set back from the N62. As can be seen in the enclosed aerial photograph, there are several other quarries in close proximity, including a substantial area of excavation nearby to the south, also off the N62. Birr Golf Course abuts a local road along the western site boundary. There is also a local road along the northern site boundary, which serves several dwellings and farm complexes. The other surrounding lands are in agricultural use. There is a river nearby to the north of the site that eventually drains to the Shannon. The area is generally undulating and marshy in nature.

- 2.2 The quarry is closed at present and it appears that no ongoing excavation or processing is taking place. The overall site is triangular in shape. The application states that the lands comprise c. 14.74 ha of extracted area. No cross sections are provided, however I would estimate that excavation has taken place to a depth of c. 10m in some parts of the quarry. The site

has sand and gravel deposits associated with its situation at Ross Glens Esker. Having regard to available current and historical aerial photographs, it appears that excavation works were undertaken at the western end of the quarry, however this area has now become overgrown. There are several areas of standing water, thus it is apparent that excavation has reached the water table. There are stockpiles of excavated material throughout the site.

### **3.0 PLANNING / ENFORCEMENT HISTORY**

#### **3.1 Reg. Ref. 02/400 PL19.202155**

3.1.1 Patrick Quigley sought permission for sand and gravel extraction and dry screening (no washing process proposed) on a site area of c. 3.6 ha, within an overall site of c. 4.45 ha. The development did not involve extraction below the water table. The application indicated that further phases of sand and gravel extraction were proposed. The development included upgrading an existing agricultural entrance and access lane. The application was accompanied by an EIS. The PA refused permission for 3 no. reasons, relating to landscape impacts associated with the location 'within the Ross and Glens Esker', residential amenities and proximity to Birr Golf Course. The Board granted permission on 16<sup>th</sup> October 2003. Condition no. 2 states that the permission refers to Phase I of the development only, the extent of the extraction area is to be confined to that identified on the Site Layout Map submitted to the PA on 14<sup>th</sup> May 2002. Condition no. 3 states that the permission shall cease to have effect 8 years from the date of the Order. The permission therefore expired on 15<sup>th</sup> October 2011. Condition no. 5 specifies that extraction within 2m of the level of the winter water table shall not be permitted.

#### **3.2 Section 261A EU QY 79**

3.2.1 The PA assessed the quarry under section 261A of the Planning and Development Act 2000 (as amended) and determined under section 261A(2)(a) that development was carried out which would have required EIA but that such an assessment was not carried out or made, for the following stated reason:

*Having regard to the thresholds cited in S.I. No. 93/1999 European Communities (Environmental Impact Assessment)(Amendment) Regulations, 1999, an extension of development (10.31ha) occurred at this quarry after 1<sup>st</sup> May 1999 which brought the total area quarried to exceed the 5 hectares threshold and also exceeds the greater of an extension in size of 25%, or 50% of the relevant threshold for EIA, which is 2.5 hectares in this instance.*

3.2.2 The PA decided in accordance with section 261A(3)(a) that the subject quarry commenced operation on or after 1<sup>st</sup> October 1964 and was granted planning permission in respect of quarry development, reg. ref. 02/400, PL 19.202155 on 16<sup>th</sup> October 2003 for “sand & gravel extraction & dry screening with restoration to agriculture” on these lands. The above named applicant was therefore directed to apply to the Board for substitute consent to be accompanied by a remedial Environmental Impact Statement (rEIS) within 12 weeks of the section 261 Notice, which was issued on 14<sup>th</sup> August 2012.

### **3.3 Enforcement Action UD 04/55**

3.3.1 According to the documentation on file, the PA issued a Warning Letter to Dermot Nally in relation to non-compliance with conditions of PL19.202155. The PA subsequently issued a section 154 Enforcement Notice to Dermot Nally to “Cease the unauthorised quarry prior to the close of business on 2<sup>nd</sup> August 2013.” The applicant requested an extension of 6 months to cease works and complete necessary works. However, according to the planning report on file reg. ref. 15/54, the applicant continued reinstatement works at the site during 2014. The PA carried out a site visit in February 2015, when it was noted that there was a large volume of stockpiles still in place and machinery on site. According to the planning report on file, the enforcement case was before the courts as of November 2015.

### **3.4 Reg. Ref. 15/54 PL19.244944**

3.4.1 The above named applicant Dermot Nally Stone Ltd. sought permission to retain and complete remediation measures to the gravel pit, including the removal of stockpiles and associated civil works under reg. ref. 15/54, which was lodged with the PA on 11<sup>th</sup> March 2015. The application related to a total stated site area of 13.076 ha. The PA refused permission on 8<sup>th</sup> June 2015, on the basis that the site had already been the subject of a section 261A determination that development requiring EIA had taken place at the site but that EIA had not been carried out and the applicant had been directed to apply to the Board for substitute consent. However, the applicant had not applied for substitute consent when afforded the opportunity. The Board also refused permission on 10<sup>th</sup> July 2015, for the following stated reason:

*The site of this development was the subject of an assessment under Section 261A of the Planning and Development Act, 2000, as amended, wherein it was determined that quarrying was carried out after the 1<sup>st</sup> day of February 1990, which development would have required, having regard to the Environmental Impact Assessment Directive, an environmental impact assessment, but that such an assessment was not carried out or*

*made. The applicant was directed to apply to An Bord Pleanála for Substitute Consent with a remedial Environmental Impact Statement. Given that this direction was not complied with, it is considered that the existing unauthorised use/development would, therefore, be contrary to the proper planning and sustainable development of the area.*

The Board Direction included the following note:

*Note: In deliberating on the case, the Board noted the provisions of section 34(12) of the Planning and Development Act 2000 (as amended), and also took into consideration the precedent value that might arise for similar cases in terms of implementation of section 261A of the Act.*

## **4.0 GROUNDS OF REFERRAL**

4.1 The main points made by the applicant may be summarised as follows:

- The overall site at Boolinarrig Big comprises c. 14.74 ha of extracted gravel lands. Under reg. ref. 02/400 PL19.202155, c.4.45 ha was authorised and underwent EIA. The EIS submitted covered the site and described the eventual masterplan, the permitted area being described as 'Phase 1'. The development exceeded the authorised area and extended to the current area without planning permission.
- The applicant was unable to comply with the PA requirement to seek substitute consent for the unauthorised development due to financial difficulty.
- The applicant wishes to remediate what he can. Offaly County Council continues to require a bond for the restoration of the originally authorised area of c. 4.45 ha.
- The originally authorised area was subject to EIA. Therefore, the PA erred in including this area within the section 261A determination and decision. The section 261A process could not have corrected this error, as the only options available to the Board under the legislation was to confirm or quash the determination and / or decision as substitute consent was required on the majority of the site. The legislation did not provide for the removal of a clear factual error and so did not allow for an effective right of response, a fair procedures necessity. On that basis, the Board is not constrained by the error.
- If the late restoration of the originally permitted area was allowable or otherwise exempt development, i.e. a right existed, it cannot be impacted by another planning process (*Fingal County Council v William P. Keeling* (Supreme Court 2005)).
- Gareth Simons S.C. in his work *Planning and Development Law* (2<sup>nd</sup> ed.) points out that section 34(4) conditions may include requirements for the "carrying out of works required for the reinstatement of land at the expiration of the period". Thus, works may continue to be exempt even after an implied or express term within a permission. Simons also

notes that exempted development is available as long as the proposed development does not contravene a condition attached to a planning permission, or be inconsistent with any use specified in a planning permission. It is submitted that the proposed works are entirely consistent with the exhausted permission and are open to exempted status. The ongoing requirement for bonding means that the restoration was mandated beyond the term of the permission.

- It is submitted that the restoration of the previously authorised area, by covering with soil no greater than 200mm deep, i.e. well within the normal reclamation exemption, should be exempt development or otherwise covered by a continuing requirement of the permission. Only material on the site itself would be used, with no importation required.
- The unauthorised area of the site retains the agricultural zoning and the proposed development is to restore, or reclaim, the land to agricultural use, by covering with soil no greater than 200mm deep, i.e. well within the normal reclamation exemption. Only material on the site itself would be used, with no importation.
- The referral is accompanied by a site layout indicating the authorised and unauthorised areas of the site.

## **5.0 RESPONSE OF PLANNING AUTHORITY**

5.1 The PA has no further comment to make and respectfully requests the Board to support its decision in this instance.

## **6.0 LEGISLATIVE CONTEXT**

### **6.1 Planning and Development Act, 2000 (as amended)**

#### **6.1.1 Section 2(1)**

*In this Act, except where the context otherwise requires:*

*“exempted development” has the meaning specified in section 4;*

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

*“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 or 37G 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.*

*"quarry" means an excavation or system of excavations made for the purpose of, or in connection with, the getting of minerals (whether in their natural state or in solution or suspension) or products of minerals, being neither a mine nor merely a well or bore-hole or a well and bore-hole combined, and shall be deemed to include—*

- (i) any place on the surface surrounding or adjacent to the quarry occupied together with the quarry for the storage or removal of the minerals or for the purposes of a process ancillary to the getting of minerals, including the breaking, crushing, grinding, screening, washing or dressing of such minerals but, subject thereto, does not include any place at which any manufacturing process is carried on;*
- (ii) any place occupied by the owner of a quarry and used for depositing refuse from it but any place so used in connection with two or more quarries, and occupied by the owner of one of them, or by the owners of any two or more in common, shall be deemed to form part of such one of those quarries as the Minister may direct;*
- (iii) any line or siding (not being part of a railway) serving a quarry but, if serving two or more quarries shall be deemed to form part of such one of them as the Minister may direct;*
- (iv) a conveyor or aerial ropeway provided for the removal from a quarry of minerals or refuse.*

### 6.1.2 Section 3

Section 3(1) defines "development" as follows:

*In this Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.*

Section 3(2)(b)(iii) provides that where land becomes used for the following purpose, the use of the land shall be taken as having materially changed:

*the deposit of vehicles whether or not usable for the purpose for which they were constructed or last used, old metal, mining or industrial waste, builders' waste, rubbish or debris*

### 6.1.3 Section 4

Section 4(1)(l) states that the following shall be exempted developments:

*development consisting of the carrying out of any of the works referred to in the Land Reclamation Act, 1949, not being works comprised in the fencing or enclosure of land which has been open to or used by the public within the ten years preceding the date on which the works are commenced or works consisting of land reclamation or reclamation of estuarine marsh land and of callows, referred to in section 2 of that Act.*

Section 4(2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. The principal regulations made under this section are the Planning and Development Regulations, 2001.

Section 4 was amended by the Environmental (Miscellaneous Provisions) Act 2011 such that section 4(4) provides that:

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

### 6.1.4 Section 32

This section has a general obligation to obtain permission in respect of any development of land not being exempted development and in the case of development not authorised for the retention of unauthorised development.

### 6.1.5 Section 34

Section 34(12):

*A planning authority shall refuse to consider an application to retain unauthorised development of land where the authority decides that if an application for permission had been made in respect of the development concerned before it was commenced the application would have required that one or more than one of the following was carried out—*

*(a) an environmental impact assessment*



- (b) a determination as to whether an environmental impact assessment is required,  
or  
(c) an appropriate assessment.

## **6.2 Planning and Development Regulations 2001 (as amended)**

6.2.1 Part 2 and Schedule 2 of the Regulations relate to Exempted Development.

6.2.2 Article (6)(1) provides circumstances for exemption where it states:

*Subject to Article 9, development of a class specified in column 1 Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.*

6.2.3 Article 8 provides for works specified in a drainage scheme, which shall be exempted development. Article 8C refers to:

*Land reclamation works (other than reclamation of wetlands) consisting of re-contouring of land, including infilling of soil (but not waste material) within a farm holding, shall be exempted development.*

6.2.4 Article 9 provides restrictions on exemptions. Article 9(1)(a) specifies development which would:

*Contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act*

Article 9(1)(a)(viii) specifies development which would:

*Consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use.*

6.2.5 Under Part 3, Class 11 of the Second Schedule, the following is viewed as exempted development:

*Development consisting of the carrying out of drainage and / or reclamation of wetlands.*

Subject to the following limitations in Column 2:

1. *The area to be affected shall not exceed 0.1 hectares.*

2. *Where development has been carried out within a farm holding under this class, the total area of any such development taken together with the area of any previous such development within the farm holding shall not exceed the limits set out in 1. above.*

## **7.0 OFFALY COUNTY DEVELOPMENT PLAN 2014-2020**

7.1 The site is not located in an area where any specific zoning designations apply.

7.2 Section 2.8.6 notes the economic the importance of sand and gravel extractions in Co. Offaly. However, it is also recognised that exploitation of deposits can have a seriously damaging environmental impact on the scientific, recreational and amenity value of the County's natural landscape, in particular its esker network. Policy RDP-14 states:

*It is Council policy to ensure those extractions (quarries / sand and gravel pits) which would result in a reduction of the visual amenity of areas of high amenity or damage to designated sites, habitat types or species shall not be permitted. It is Council policy that all such workings should be subjected to landscaping requirements and that worked out quarries should be rehabilitated to a use agreed with the Planning Authority which could include recreational, biodiversity, amenity or other end-of-life uses. The use of these rehabilitated sites shall be limited to wastes such as soil, stone and subsoils and sites shall be authorised under the appropriate waste regulations. Where the Council considers and accepts that in cases where inert material (i.e. soil, stones and subsoil etc.) cannot be recycled or otherwise sold, such materials may be considered for the phased restoration and landscaping of the site in line with standard planning conditions imposed.*

7.3 Development Plan map 7.8 indicates that there are several eskers in the vicinity. Section 7.2.15 of the plan notes that Co. Offaly's landscape contains a number of eskers, the most prominent being the Eiscir Riada. A restrictive approach to sand and gravel extraction from 'green field' sites will be encouraged by the council. Area of High Amenity Policy AHAP-01 states a policy to protect and preserve the county's primary areas of high amenity including Eiscir Riada and other eskers.

7.4 Development plan section 7.2.22 notes that Offaly has a number of exhausted or worked out quarries and sand and gravel pits, where activity has ceased. It is now recognised that worked out quarries have potential as rich habitat and nesting sites. The council will examine the potential for these worked out quarries from a biodiversity and habitats view point. Policy NHP-17 states:

*NHP-17 It is the policy to the Council to recognise the natural heritage value of disused quarries as rich habitat, and to provide appropriate protection to these renewing habitats.*

- 7.5 The site is located within an area north of Birr that is generally designated as 'High Sensitivity' in the landscape classification of Co. Offaly, ref. Map 7.15. Table 7.11.1 of the plan states that these area with identified features or areas of natural beauty or interest which have extremely low capacity to absorb new development. Table 7.11 provides guidance on sensitive landscapes in the county, stating:

*Eskers are also of economic importance and there is a need to balance the conservation of the important landscape features associated with eskers providing educational / tourism and recreational potential with the requirements of aggregate extraction and economic development. Hence, the esker landscape is highly sensitive to any future development and the opening up of new pits for sand and gravel extraction will be strongly resisted.*

## **8.0 RELEVANT REFERRALS**

### **8.1 Referrals Relating to Infill Works at Quarry Sites**

- 8.1.1 The Board has determined a series of referrals relating to infill works at existing quarry sites. The following cases all relate to infill works at quarries using material imported from outside the quarry site. They are therefore of limited relevance to the subject case.

8.1.2 RL2369 Gurteen, Mulinahone, Co. Tipperary

This referral related to the backfilling of a worked out quarry with imported fill. Permission was granted in 1979 for the re-opening of the gravel pit and associated works, a condition of which required that the land be restored to agricultural use upon completion of gravel workings. The quarry was registered under section 261, ref. QY/2, which amended the original permission. The referrer claimed that backfilling was required to restore the land to agricultural use, and that such backfilling was provided for by the condition of the extant permission. Part of the site was within a cSAC. The Board decided that the operation was development and was not exempted development as follows:

- The importation of fill material / filling of the existing gravel quarry comprised development per Section 3 of at Act.
- It had not been established that the importation of fill material and the filling of existing gravel quarry came within the scope of Part 3 Class 11 particularly given that this would not constitute land reclamation on land used only for the purposes of agriculture or forestry.

- The works constituted a material change of use of the land by reference to Section 3(2)(b)(iii) of the Act and the importation of fill material into the said existing gravel quarry was contrary to the requirements of a Condition of QY/2.

#### 8.1.3 RL2446 Drakestown, Castletown, Co. Meath

The referral related to the infilling of a disused sand and gravel quarry with soil and topsoil material complying with EWC Code 170504 (56,000 tonnes over 3 years). The Board decided the land recovery works were development and not exempted development with regard to the following:

- The recovery fell within the scope of Class 11 of Part 3 of Schedule 2 of the Regulations,
- The recovery would endanger public safety by reason of traffic hazard or obstruction of road users and would interfere with sites of archaeological interest and, by implication, fell within the limitations on the exemptions under article 9(1)(a)(i) and (vii).

#### 8.1.4 RL3209 Ballindall, Roscommon, Co. Roscommon

The referral related to the filling of a disused quarry with clear inert material. The quarry had previously been used for the disposal of domestic refuse. The applicant stated that the remaining area would be infilled with imported soil, sub-soil and aggregate, to bring the area to normal field contour which could then be used for agricultural purposes. The PA had carried out the section 261A process, ref. SCQY107, and concluded that there was no record of any works taking place at the quarry since February 1990, therefore there was no requirement for remedial EIA or AA or any further action under section 261A. The Board concluded that:

- The proposed raising of the existing ground level comprises works of both construction and alteration. The materials proposed to be imported to the subject lands constitute waste, and having regard to the provisions of section 3(2)(b)(iii) of the Act, it is considered that the deposit of builders' waste on the subject lands constitutes a material change of use of the land and the said proposal therefore constitutes development,
- The development does not come within the scope of section 4(1)(l) of the Act, not being works referred to in the Land Reclamation Act 1949,
- The proposal to import waste materials from outside the landholding to the subject site does not come within the scope of article 8C of the Regulations and
- The development does not comprise the reclamation of wetlands, and Class 11 of Part 3 of Schedule 2 of the Regulations therefore does not apply.

## **8.2 Referral Relating to Infill Works and the Definition of ‘Agriculture’**

### **8.2.1 RL3034 Bunnahowen, Belmullet, Co. Mayo**

The referral related to a rural site of 4.57 ha which would be subject to infilling by imported soil. The question arose as to whether land reclamation for agricultural purposes using soil as infill material is or is not development and is or is not exempted development. A portion of the site was in use for the storage of builder's materials and therefore did not conform to the definition of "agriculture" as per the Act. In addition, drains on site were connected to Trawmore Bay which was part of a designated SPA and SAC, i.e. there was an issue of potential impacts on European Sites. The Board decided that the works were development and not exempted development as follows:

- Importation of soil might have impact on European sites, ref. section 4(4) of the Act 2000,
- Schedule 2 Part 3 Class 8C of the Regulations does not provide an exemption for the importation of soil to a farm holding, rather refers to moving soil within a farm holding,
- Schedule 2 Part 3 Class 11 of the Regulations does not cover the proposed development.

## **8.3 Referral Relating to a Quarry and Section 261A**

### **8.3.1 RL3356 Smithstown, Belmont, Ferbane, Co Offaly**

The referral site comprised the northern portion of an established quarry. The quarry owner made the case that the overall quarry site should be viewed as two distinct pits and that a ruling of Offaly County Council with regard to the extent of the section 261A(3) decision should not remove existing pre 1963 rights. The Board concluded that:

- The expansion of the quarry after 1963, and after 2005 in particular, both within the registered area and beyond it, constitutes works within the scope of the definition in section 2(1) of the Act, having regard to the rate of that expansion, and therefore constitutes development,
- The quarrying undertaken after 1963, and after 2005 in particular, both within the registered area and beyond it, also comprised a significant intensification of a previous use, which intensification of use is considered to be material, having regard to the potential for impacts to have arisen or increased in planning terms (including the generation of noise, dust, heavy vehicular traffic on narrow roads, impacts on multiple sensitive receptors in close proximity, and landscape impacts in a prominent location including the removal of established woodland), and, therefore, constitutes development,
- The area of the quarry registered under section 261 of the Act, being the lands the subject of the referral, forms part of the overall quarry that was the subject of the planning authority's notice under section 261A(3)(a),

- In accordance with the determination of the Board under An Bord Pleanála ref. 19.QV0181, the development undertaken at this quarry after the 1<sup>st</sup> day of February, 1990 would have required EIA, but such an assessment was not carried out,
- Under section 261A(7) of the Act, the effect of the determination and decision of the Board under 19.QV.0181 was to require an application to be made to the Board for substitute consent in respect of this quarry. No such application was made, and therefore, under section 177O(3) of the Act, and notwithstanding any other provision in the Act, the quarry constitutes unauthorised development, and
- for the avoidance of doubt, there are no provisions in legislation under which the development that has taken place could avail of an exemption from the general obligation to obtain planning permission.

## 9.0 ASSESSMENT

9.1 From my review of the file, relevant documents and inspection of the site and its environs, I consider the main consideration in this referral to be:

- Whether the restoration works constitute development
- Whether the development is exempted development
- Whether any of the restrictions on exemption under article 9 would apply

These issues may be addressed separately as follows.

### 9.2 Whether the Restoration Works Constitute Development

9.2.1 The applicant wishes to carry out restoration works on both the area originally permitted under Reg. Ref. 02/400 PL19.202155 and the area subsequently excavated without permission. He submits that the infill material will come from within the site, i.e. no material will be imported. The excavated area would be covered with soil to a depth of 200mm. The definition of development as set out in Section 3(1) of the Planning and Development Act 2000 (as amended) is except where the context otherwise requires:

*the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.*

The permitted development was carried out and the use of the site changed to that of a sand and gravel quarry. The current use of the lands is therefore not agriculture or forestry. With reference to case law, Keane J in his Supreme Court judgement clearly determined that the extraction of sand and gravel (as per (1999) 2 I.R. 495) on lands formerly in use for agriculture, was a form of industrial or quasi-industrial use. Given that the

proposed restoration would, as stated by the applicant, restore the land to agricultural use, it would constitute a material change of use and is, therefore, development. In addition, I am satisfied that the restoration process would involve earth moving and levelling, resulting in a new land form and would come within the scope of the definition of “works” provided in section 2(1) of the Act, i.e.:

*any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.*

I conclude on this basis that the said restoration works are development.

### **9.3 Whether the Restoration is Exempted Development**

9.3.1 Section 4 of the Planning and Development Act 2000 (as amended) relates to exempted development. Section 4(1)(l) states that the following shall be exempted developments for the purposes of the Act:

*development consisting of the carrying out of any of the works referred to in the Land Reclamation Act, 1949, not being works comprised in the fencing or enclosure of land which has been open to or used by the public within the ten years preceding the date on which the works are commenced or works consisting of land reclamation or reclamation of estuarine marsh land and of callows, referred to in section 2 of that Act.*

However, section 4(4) provides that:

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

The PA determined in the course of the section 261A process that works were carried out at the site that would have required Environmental Impact Assessment but that same was not carried out or made. This determination was on the basis that the overall scale of the operation exceeded the threshold for EIA. I see no reason to revisit that determination, which is not disputed by the applicant. Given that restoration works are an integral part of the overall quarry operation, I conclude that they would also require EIA and therefore would not be exempt with regard to section 4(4) of the Act.

9.3.2 Part 2 of the Planning and Development Regulations 2001, as amended, sets out further provisions relating to exempted development including Article 8C, which refers to land reclamation within a farm holding:

*Land reclamation works (other than reclamation of wetlands) consisting of re-contouring of land, including infilling of soil (but not waste material) within a farm holding, shall be exempted development.*

The applicant submits that the unauthorised area outside the scope of Reg. Ref. 02/400 PL19.202155 retains its agricultural zoning and that the proposed works would be covered within the normal exemption for reclamation works on agricultural lands. However, as discussed above, the extraction of sand and gravel on lands formerly in use for agriculture is a form of industrial or quasi-industrial use, i.e. a material change of use has taken place. The site is therefore not 'within a farm holding' and the above exemption does not apply.

9.3.3 To conclude, therefore, it is considered that the quarry restoration works in question do not constitute exempted development.

#### **9.4 Whether any Restrictions on Exemption Apply**

9.4.1 I now propose to consider whether any restrictions to exemption apply, notwithstanding the above conclusion that the development is not exempt, in order to provide as full an assessment as possible. Article 9 of the Planning and Development Regulations 2001, as amended, provides restrictions on exemptions.

9.4.2 I note the Board's conclusion in referral RL3356, as discussed above, which is considered relevant to the subject case. In RL3356, the overall quarry had been the subject of a section 261 determination by the Board that development had been carried out at the site that would have required EIA, but such an assessment was not carried out, ref. 19.QV.0181. The applicant had therefore been required to make application to the Board for substitute consent. The question arose as to whether a material intensification of quarrying use of the lands registered under section 261 of the Act and quarrying works and use of these registered lands was exempted development. The following parts of the Board order of RL3356 are considered particularly relevant to the subject case:

*(c) the area of the quarry registered under Section 261 of the Planning and Development Act, 2000, as amended, being the lands the subject of this referral, forms part of the overall quarry that was the subject of the planning authority's notice under Section 261A(3)(a) of the Planning and Development Act, 2000, as amended,*

*(d) in accordance with the determination of the Board under An Bord Pleanála reference number 19.QV0181, the development undertaken at this quarry after the 1st day of February, 1990 would have required an*



*environmental impact assessment, but such an assessment was not carried out,*

*(e) under Section 261A(7) of the Planning and Development Act, 2000, as amended, the effect of the determination and decision of the Board under 19.QV.0181 was to require an application to be made to the Board for substitute consent in respect of this quarry,*

*(f) no such application was made, and therefore, under Section 177O(3) of the Planning and Development Act, 2000, as amended, and notwithstanding any other provision in the Act, the quarry constitutes unauthorised development, and*

*(g) for the avoidance of doubt, there are no provisions in legislation under which the development that has taken place could avail of an exemption from the general obligation to obtain planning permission.*

9.4.3 In the case of RL3356, therefore, the overall quarry was deemed to be unauthorised development on the basis of non-completion of the section 261A substitute consent process. The applicant submits that the permission granted on the authorised area of the subject site includes restoration works and that he therefore has a right to carry out the proposed works in this part of the site. However, I consider that the above conclusion would also apply at the subject site. Under Section 261A(7) of the Act, the effect of the determination and decision of the PA under EUQY79 was to require an application to be made to the Board for substitute consent in respect of this quarry. No such application was made, and therefore, under Section 177O(3) of the Planning and Development Act, 2000, as amended, and notwithstanding any other provision in the Act, the existing quarry constitutes unauthorised development. Any restoration works at the overall quarry site would therefore be works to an unauthorised land use. I note the restriction on exemption specified in Article (9)(1)(a)(viii) of the Regulations, i.e. development that would:

*Consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use.*

I conclude that this restriction would de-exempt any works at the subject site.

## **10.0 CONCLUSION AND RECOMMENDATION**

10.1 Having considered the contents of the file, and following inspection of the site and surrounding area, I conclude the works as described constitute

development. Accordingly, I recommend a decision order in the following terms: -

### **DRAFT ORDER**

**WHEREAS** a question has arisen as to

**WHETHER** the prospective restoration works on previously authorised and unauthorised quarrying lands is or is not development or is not exempted development.

**AND WHEREAS** the said question was referred to An Bord Pleanála by Dermot Nally Stone Ltd. under Section 5 of the Planning and Development Act 2000 (as amended) on the 17<sup>th</sup> November 2016.

**AND WHEREAS** An Bord Pleanála, in considering this reference, had regard particularly to:

- (a) Sections 2, 3 and 4 of the Planning and Development Act 2000, as amended;
- (b) Sections 261A and 177O(3) of the Planning and Development Act, 2000, as amended;
- (c) Articles 6, 8 and 9 and Schedule 2 of the Planning and Development Regulations 2001, as amended;
- (d) The planning history on the lands including the planning authority decision EU QY 79 pursuant to Section 261 of the Planning and Development Act 2000, as amended;
- (e) The nature, scale and location of the site and quarrying on these lands assessed over a period of time.

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

- (a) Having regard to the existing quarry use of the subject site and to the nature of the proposed activity/operation, the said activity/operation constitutes works within the scope of the definition in section 2(1) of the Planning and Development Act, 2000, as amended, and therefore constitutes development as defined in Section 3 of the Act,
- (b) The overall quarry was the subject of an assessment under section 261A of the Planning and Development Act 2000, as amended, wherein it was determined that quarrying was carried out after the 1<sup>st</sup> day of February 1990, which development would have required, having regard to the Environmental Impact Assessment Directive, an environmental impact assessment, but that such an assessment was not carried out or made. The applicant was directed to apply to An Bord Pleanála for Substitute Consent with a remedial Environmental Impact Statement. No such application was made, and therefore, under Section 177O(3) of the Planning and Development Act, 2000, as amended, and notwithstanding any other provision in the Act, the quarry constitutes unauthorised development, which would have required environmental impact assessment. As per article 9(1)(a)(viii) of the Planning and Development Regulations, 2001, as amended, development which will consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use, shall not be exempted development. In addition, under section 4(4) of the Planning and Development Act, 2000, as amended, development shall not be exempted development if an environmental impact assessment of the development is required.
- (c) The development does not come within the scope of the exemptions provided in Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (d) The development does come within the scope of the restrictions on exemption provided in Article 9 of the Planning and Development Regulations 2001, as amended.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by Section 5 of the Planning and Development Act 2000, as amended, hereby decides that the prospective restoration works on previously authorised and unauthorised quarrying lands is development and is not exempted development.

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**Sarah Moran,  
Senior Planning Inspector  
25<sup>th</sup> May 2016**