

# An Bord Pleanála



## Inspector's Report

**RL15.RL3465**

**Question:** Whether activities in question constitute quarrying for the purposes of European Union Regulations.

**Address:** Rathory, Reaghstown, Ardee, County Louth.

**Planning Authority:** Louth County Council

**Referrer:** Louth County Council

**Owner/Occupier:** Brendan Doyle

**Date of Site Inspection:** 19<sup>th</sup> May, 2016.

**INSPECTOR:** Paul Caprani

## **1.0 INTRODUCTION**

A question has arisen pursuant to Section 5(4) of the Planning and Development Act 2000 (as amended) as to whether or not works carried out on a site at Rathory, Reaghstown, Ardee constitutes quarrying for the purposes of the European Union Regulations. Louth County Council has sought a referral under the provisions of Section 5(4) of the Planning and Development Act 2000.

## **2.0 SITE LOCATION AND DESCRIPTION.**

The subject site is located in the townland of Rathory, Reaghstown, County Louth. The site is surrounded by agricultural land and access is provided by a third class narrow lane which links up with the N2 approximately 6 kilometres north-west of the village of Ardee in West Louth. The local road leading to the site serves a number of dwellinghouses along its alignment and ends in a cul-de-sac. A gateway is located at the end of the cul-de-sac beyond which a private lane leads to the site in question.

The site comprises of a partially excavated rock outcrop on which a copse of deciduous trees is located. The site is roughly circular in shape. Aerial photographs from 2000 indicates that prior to activities being undertaken on site the entire lands were covered by trees. At the time of site inspection, I estimate that approximately 50% of the trees had been removed in order to excavate the bedrock. Also the Board should note that at my time of site inspection no works were being undertaken on site in terms of rock extraction nor was there any machinery, plant or materials or aggregate stockpiles left on site. The site comprised of broken exposed rock (see photographs attached on file). The lands surrounding the site comprise of fields which are used for both pasture and tillage purposes.

## **3.0 BACKGROUND TO THE CURRENT REFERRAL**

According to the information submitted by Louth County Council the Council received a complaint with regard to unauthorised excavation of rock on site. Following a site inspection, a warning letter was sent to the owner/occupier regarding the excavation and removal of bedrock in 2010. Information submitted from Louth County Council states that works then ceased on site. It was further noted that no works were

taking place on site when the site was inspected by council officials for the purposes of Quarry Registration under the provisions of Section 261A in 2012. It was also noted that there were no stockpiles of aggregate or overburden on the site in question.

#### **4.0 PLANNING HISTORY**

One file is attached under RL19.RL3356. A referral was made to An Bord Pleanála as to whether (a) there had been no material intensification of quarrying use of the Section 261 registered area since the 1<sup>st</sup> October, 1964 and (b) quarrying works and use of these Section 261 registered land is or is not development or is or is not exempted development at a site at Belmont, Ferbane, County Offaly. The Board determined in respect of the question that the activity was development and was not exempted development.

#### **5.0 REFERRER'S CASE**

A Section 5 Referral was received from Louth Co. Council under the provisions of subsection 4 of the Planning and Development Act (as amended). It is contended the overall works being carried out on this site and the general surrounding fields consist of quarrying and excavation of rock and the levelling and re-contouring of land together with the infilling of materials as part of land reclamation. Louth County Council is however satisfied that the reclamation/re-contouring of agricultural lands are exempted development under the provisions of Article 8(c) of the Regulations.

The main issue relates to quarrying. It is argued that quarrying activity cannot be considered ancillary to the agricultural use and that the Planning Authority have not granted planning permission for such quarrying activity on the subject lands. Furthermore it was found that on consultation of the Planning Register, that there was no extant permission for such quarrying on the subject site. Furthermore there are no exemptions in respect of quarrying under the Planning and Development Acts.

The subject site comes within the definition of a quarry as per the European Union (EIA and Habitats) (No. 2) Regulations S.I. 584 of 2011. It is further noted that Section 157(4)(aa)(i) removes the seven year enforcement rule in relation to the quarries. Therefore it is totally

irrelevant when quarrying activity commenced on site. The quarry was not registered under the original Section 261 process in 2004 as no quarry existed at this date. The activity only commenced after this date. Aerial photographs indicate that the quarrying activity was only evident from 2009 onwards. It is stated that the total area excavated in August, 2012 amounted to some 0.58 hectares.

An inspection dated 10<sup>th</sup> March, 2015 noted that excavations were still exposed and the site had not been reinstated. Photographs attesting to this are attached to the referral submission. In conclusion therefore the Planning Authority consider that the works undertaken on site constitute development which is not exempted development.

Details of the correspondence between the Planning Authority and the solicitor acting on behalf of the only owner/occupier are attached to the referral.

## **6.0 RESPONSE ON BEHALF OF THE OWNER/OCCUPIER**

A response was received on behalf of Brendan Doyle (owner/occupier) by John C. Kiernan and Sons Solicitors on 31<sup>st</sup> March, 2016. The response is outlined below.

It argues that the entire question before the Board is outside the Board's legal jurisdiction. What the Board is being asked to do in this instance is to determine a question of law in respect of an interpretation of a Statutory Instrument. In the case of Shannon Regional Fisheries Board –v- An Bord Pleanála, it was held that questions of statutory interpretations are matters exclusively for the High Court. The Board has no jurisdiction or expertise to interpret the provision of a Statutory Instrument. The Board is therefore requested to decline jurisdiction on the matter before it.

Furthermore the Planning Authority are clearly making this referral as an intricate element of a planning enforcement case. The Planning Authority are attempting, through the referral case to get the owner of the lands to disclose information which the Planning Authority might rely on in any enforcement case. For this reason the Board are requested to dismiss the case.

The letter also confirms that “works” (my emphasis) were undertaken on the subject site but these “works” have now been completed. However it

is stated that the works on site in question commenced prior to the 19<sup>th</sup> April, 2010. It is further suggested the excavation or a system of excavation does not amount to quarrying. If the excavation or extraction being carried out is for land reclamation or for the re-contouring of land then it does not and cannot fall within the definition of a quarry. The owner/occupier is a farmer who is carrying out works to restore and improve his agricultural holding. The purposes of the works is at the core of any planning consideration when the question of development or exempted development arises. In this case the purpose of the works is for land reclamation. It is not for any commercial purposes and is not for the purposes of getting minerals. Thus the Board cannot find that the activity falls within the definition of a quarry. If ground is being excavated for the purpose of the construction of a building this cannot constitute quarrying under the provisions of the Act. The Board are invited to agree with the above conclusion that no quarrying has taken place and as such it must follow that no unauthorised development has taken place on the site in question.

## **7.0 FURTHER SUBMISSION FROM THE PLANNING AUTHORITY**

The referral in question clearly falls within the provisions of Section 5(4) of the Act. The Planning Authority are not requesting that the Board act outside its legal remit, however the Board has to consider the definition of a 'quarry' in order to determine the Section 5 Referral before it. Definition of quarrying is not a question of law and therefore there is no valid reason why the Board cannot make a decision in respect of the question posed.

With regard to the issue of enforcement, no enforcement notice has been issued and no criminal proceedings have been taken to date. It is totally refuted that the standard Section 5 Referral is in any way unlawful, inappropriate, unfair or improper. The other points raised by the solicitors on behalf of the owner/occupier have already been dealt with in the original report by the Planning Authority.

## 8.0 LEGISLATIVE PROVISIONS

### Planning and Development Act 2000

#### Section 2: Definitions

“*Agriculture*” includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur or for the purposes of its use in the farming of the land), the training of horses and the rearing of bloodstock, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds and agricultural shall be construed accordingly.

“*Quarry*” means an excavation or system of excavations made for the purposes 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 well or borehole or a well or borehole 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 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 materials 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 the 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 rope way provided for the removal from the quarry of material or refuse.

“Works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or the removal of plaster, paint, wallpaper, tiles or other materials to or from the surfaces of the interior or exterior of the structure.

#### Section 3(1): Development

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

#### Section 4: Exempted Development

Section 4(l) development consisting of the carrying out of any works referred to in the Land Reclamation Act, 1949, not being works comprised in the fencing or enclosure of land which is being opened to or used by the public within the 10 years preceding the date on which the works are commenced. All works consisting of land reclamation or reclamation of estuarine marsh land and of callows referred to in Section 2 of the Act.

#### Section 157(4)(ab):

Notwithstanding paragraph (a) or (aa) a warning letter or enforcement notice may issue at any time to require an unauthorised quarry development or unauthorised peat extraction development to cease proceedings for an offence under Section 154 may issue at any time in relation to an enforcement notice so issued.

### **Planning and Development Regulations**

#### Article 6 – Exempted Development Regulations

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

## **9.0 ASSESSMENT**

### **9.1 Legal Jurisdiction of the Board and Enforcement Proceedings**

The solicitor's letter on behalf of the owner/occupied contends that the Board has no legal jurisdiction to determine the referral before it on the grounds that the Board is being requested to interpret a Statutory Instrument and as such, this is a matter for the High Court and not An Bord Pleanála.

Section 5(4) of the Planning and Development Act 2000, is clear and unambiguous in stating that *"a planning authority may, on payment to the Board of such a fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board"*.

The question posed by Louth County Council in this instance clearly relates to a question as to whether or not activities undertaken at the site in question constitutes development, and if its constitutes development, whether or not it is exempted development in accordance with the provisions of the Planning and Development Acts and Regulations. The Board is the Competent Authority to determine such a question under the provisions of Section 5 of the Act. To suggest that the Board has no legal jurisdiction to determine a matter such as that put before it in the current case, implies that the Board has no jurisdiction to determine any referral case put before it under the provisions of Section 5 of the Act. Referrals by their very nature require the Board or the Planning Authority to interpret legislation and legal definition as to what constitutes development and what constitutes exempted development. I therefore consider that the Board has the appropriate legal jurisdiction to determine the development before it.

With regard to the issue of enforcement proceedings, it seems logical that the Planning Authority would refer the question to the Board so as to determine whether or not the activities which have taken place on site constitutes development and in the case where it is found that development has taken place, whether or not such development constitutes exempted development. As a matter of course the Planning Authority should determine these questions prior to deciding whether or not it is appropriate to initiate enforcement proceedings.



## 9.2 Nature of the Works Undertaken.

I note the question posed by the Planning Authority specifically refers to “works” which have been carried out on the site. I further note that the response on behalf of the owner/occupier of the lands in question also refers to “works” carried out on the subject site but it is further stated that these works have now ceased.

For the avoidance of doubt it is proposed to assess the nature of the activities undertaken on site as to whether or not these constitute works in accordance with the definition set out in the Act.

Works are defined in Section 2 of the Act to include “any act of operation or construction, excavation (my emphasis), demolition, extension, alteration, repair or renewal...

There can be no doubt that the activity of excavation has taken place on the subject site. Indeed this is not disputed by the owner/occupier of the lands in question. Excavation therefore constitutes “works” and by extension, “works” therefore constitute “development” under the definition of Section 3 of the said Act. The owner/occupier argues that the activities have been undertaken as part of lands reclamation which constitutes exempted development under the Act. I have no reason to believe that the excavation activities that were undertaken on site were for anything other than land reclamation associated with the lands under the owner/occupiers ownership. I noted, as did the Planning Authority during the site inspection that there was no stock piles of aggregate on the subject site, there was no machinery or plant for the processing of materials on site and there was no advertisement relating to the sale of aggregate. I fully accept therefore that any aggregate excavated from the subject site was used for land reclamation works and these works constitute exempted development under the provisions of Section 4(l) of the Principle Act and also under Article 8(c) of the Planning and Development Regulations 2001 as amended.

While the land reclamation element may constitute exempted development in accordance with the provisions of the Act, the excavation of rock for the purposes of land reclamation in my opinion constitutes development. For example where the land reclamation works carried out using imported fill then it could be reasonably argued that the land reclamation works undertaken constituted exempted development under the provisions of the Act and Regulations. However the excavation of rock in itself constitutes “works” which, as already

stated, constitutes development and there appears to be no provision under Schedule 2, Part 1 in respect of Article 6 or any other parts of the Acts or Regulations which would exempt the works undertaken. I can only conclude therefore that the excavation undertaken on the subject site constitutes “works” in accordance with the definition set out in Section 2 of the Act and therefore falls within the definition of development as set out in Section 3 of the Act.

### **9.3 Non-Commercial Nature of Quarrying Activities undertaken on site**

The submission on behalf of the owner/occupier also argues that the quarrying of rock on site cannot constitute development as all material extracted was not extracted for commercial purposes but for land reclamation works associated with agricultural activities on site.

The definition of a quarry is also set out in Section 2 of the Planning and Development Act 2000 as *“the means of excavation or system or excavations made for the purposes 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 a borehole or a well and a borehole combined and shall be deemed to include*

- (i) any place on the surface surrounding or adjacent the quarry occupied together with the quarry for the storage or removal of 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 rope way provided for the removal of a quarry of minerals or refuse.*

It is clear from the above definition that the excavation undertaken falls within the definition of a quarry and there is no specific reference in the legal definition for the requirement of such excavations to be for commercial purposes. It is clear that a quarry relates to the excavation of material made for the purpose of or in connection with the getting of minerals or products of minerals. In the case of the site in question, the minerals or aggregates were extracted for the purposes of reclamation. While the land reclamation in this instance is not for the purposes of commercial activity, it nonetheless in my view resulted in excavation activities which falls within the remit of the definition of a quarry.

Finally in respect of this issue, I refer the Board to Section 157(4)(ab) of the Act which clearly states that a warning letter or enforcement notice may issue at any time to require any unauthorised quarry development and proceedings for an offence under Section 154 may issue at any time in relation to an enforcement notice so issued. It is clear therefore that in respect of quarry activity there is no seven year timeframe under which action against unauthorised quarry developments can be prohibited. The date under which the quarrying works commenced or ceased is not a material consideration in this instance.

## **10.0 Appropriate Assessment**

Section 4(4) of the Planning and Development Act 2000 states that development shall not be exempted development if an Environmental Impact Statement or Appropriate Assessment of the development is required. The class of development undertaken on the site in question is not a class that would attract the requirement of an environmental impact statement. In terms of appropriate assessment the nearest Natura 2000 site is the Stabannan – Braganstown SPA (Site Code: 004091) which is located approximately 6.3 kilometres east of the subject site. Having regard to the nature and scale of the proposed development and the nature of the receiving environment and the proximity to the nearest European site, no appropriate assessment issues arise and it is not considered that the proposed development would likely to have a significant effect individually or in combination with other plans or projects on a European site.

## 10.0 CONCLUSIONS AND RECOMMENDATION

Arising from my assessment above, I can only conclude based on the nature of activities undertaken on the site in question and the legal definitions set out in the Planning and Development Act and Planning Regulations that the activities undertaken on the site constitute works and by implication constitute development. Furthermore there appears to be no exempted development provisions which would exempt the activities undertaken from requiring planning permission. I therefore recommend that the Board determine the referral case as follows:

**WHEREAS** a question has arisen as to whether activities undertaken on a site at Rathory, Reaghstown, Ardee, County Louth constitute quarrying for the purposes of European Union Regulations,

**AND WHEREAS** Louth County Council requested a declaration on this question under the provisions of section 5(4) of the Planning and Development Act 2000, (as amended) on 1<sup>st</sup> March, 2016

**AND WHEREAS** An Bord Pleanála in considering this referral had particular regard to

- (a) Sections 2 and 3 of the Planning and Development Act 2000, as amended
- (b) Article 8(c) of the Planning and Development Regulations 2000, as amended
- (c) and the nature of excavation works which took place on the subject site

**AND WHEREAS** An Bord Pleanála concluded that the excavation of aggregates and minerals undertaken on the subject site constitute works within the definition set out in Section 2 of the Act and as such falls within the definition of “development” as set out in Section 3 of the Act.

**FURTHERMORE** the Board considered that none of the exempted development provisions in either the Act or the Regulations related to the works undertaken on site.

**NOW THEREFORE** An Bord Pleanála in exercise of the powers conferred on it by section 5(4) of the 2000 Act, hereby decides that the activities undertaken on the subject site constitutes development and is not exempted development.

---

**Paul Caprani,  
Senior Planning Inspector.**

**June, 2016.**

**sg**