



An
Bord
Pleanála

Inspector's Report RL03.RL3572

Question	Whether the construction of a fence measuring 1.8m high is or is not development or is or is not exempted development.
Location	Fountain Cross, Ennis, Co. Clare
Declaration	
Planning Authority	Clare County Council
Planning Authority Reg. Ref.	R17/11
Applicant for Declaration	Patrick Gibney, Roadstone Ltd
Planning Authority Decision	Constitutes development which is not exempted development
Referral	
Referred by	Patrick Gibney
Owner/ Occupier	Owner
Observer(s)	None
Date of Site Inspection	5 th of December
Inspector	Angela Brereton

1.0 Site Location and Description

1.1. The quarry is located in the rural area at Fountain Cross c.3.5kms to the north west of Ennis. There is one access to the quarry located on the southern side of the N85 Lahinch Road, just west of the junction with the R476. The limestone quarry has been non-operational since c.2009. There is an existing roadside boundary wall along the site frontage and a secure gated access from the N85. The fencing in question is to be located within the site on the opposite side of the access road which runs along the northern boundary. It then is to be erected to run in a south westerly direction to the rear of existing quarry buildings and to the south west of the gravel heaps to the unworked area to the west of this gravelled area. Therefore, it would fence off the concrete moulding shed and gravelled area to the north from the previously more active worked area to the south.

2.0 The Question

2.1. Whether the construction of a fence measuring 1.8m high within the property at Fountain Cross, Ennis, Co. Clare is or is not development or is or is not exempted development.

3.0 Background – Referral to the Council

3.1. Patrick O'Donnell, of Earth Science Partnership (Ire) Ltd Consulting Engineers, Geologists & Environmental Scientists has submitted a request for a Section 5 declaration on behalf of their client Patrick Gibney, for development consisting of the erection of a fence within the Quarry Complex of Fountain Cross, Ennis, Co. Clare. This included copies of the site location and layout maps showing the proposed route of the fence through the site, photos and specifications.

4.0 Planning Authority Declaration

4.1. Declaration

4.1.1. On the 23rd of March 2017 the Council decided:

The construction of a fence measuring 1.8m high within the property at Fountain Cross, Ennis, Co. Clare, constitutes development and is not exempted development.

4.2. **Planning Authority Reports**

4.2.1. Planner's Report

The Planner had regard to the planning history of the site. They also noted the Legal Context. They noted that the Referrer proposes that the development is exempted under Part 3 Exempted Development Rural Class 4 and consider that this class of exemption is not relevant to the quarry. They also considered that the exemptions provided for in Section 4(1)(h) of the Planning and Development Act 2000 or Class 11 Part 1 Schedule 2 of the Planning and Development Regulations 2001 were not relevant and did not apply. They had regard to Article 9(1)(a)(i) and considered that the proposal would contravene Condition no.21 of Reg.Ref.04/1064 which relates to boundary treatment. It is of note that there is a subsequent Board permission Ref.PL03.216138 refers. Condition no.21 of the Board also refers to landscaping and boundary treatment in respect of the entire quarry complex. The Council (Planning Authority) concluded that the construction of a fence measuring 1.8m high within the property at Fountain constitutes development and is not exempted development.

The Council carried out a Screening for Appropriate Assessment & Determination and concluded that there is no potential for significant effects to European sites and that this could be ruled out.

5.0 **Planning History**

5.1.1. The Planner's Report relative to this Referral, refers to the extensive planning history of the quarry site and this includes the following permissions granted subject to conditions to Whelan's Limestone Quarries Ltd:

- Reg.Ref. P04 -1064 (Ref. PL03.216138) – Permission granted by the Council and subsequently upheld by the Board for Retention and completion of quarrying works (9.56 hectares) and extension of same (6.64 hectares) to include phased quarrying works, internal haul roads, screening embankment and associated landscaping and restoration works at Fountain Cross Quarry

at Bushypark Townland, Ennis, County Clare. It is of note that an EIS formed part of this application and an Oral Hearing was held.

- Reg.Ref.P06/1130 (PL03.225480) – Permission granted by the Council and subsequently upheld by the Board for amendments to the existing quarry entrance; amendments and extension to car park; relocation of the weighbridge and installation of new weighbridge; relocation of wheelwash; construction and surfacing of internal road and existing yard; relocation of diesel tanks and bunding; lighting poles; extension of existing office; relocation of boundary trees and walls for sight distance purposes; and all associated site works.
- Reg.Ref. P06-1353 (PL03.229040) – Permission granted by the Council (2008) and subsequently upheld by the Board (2012) for the continuation of quarrying activities including the processing of aggregates, landscaping, restoration and associated works at the existing registered quarry lands, in accordance with Section 261 of the Planning and Development Act 2000. An EIS was submitted with this application.

This decision was subject to Judicial Review and was subsequently quashed by the High Court in July 2016.

6.0 Policy Context

6.1. Clare County Development Plan 2017-2023

Section 8.2.3.3 refers to restrictions to Access onto National Roads. The Council has identified four locations where exceptional circumstances to the general policy may be considered for developments of strategic importance. This includes: *Former Whelan's Quarry site at Fountain Cross, Ennis – use as quarry; rehabilitation of site for outdoor activity/adventure park;*

Section 10.4.6 refers to the Extractive Industry and this includes Objective CDP10.13 i.e: *To promote the extraction of minerals and aggregates and associated processing where such activities do not have a significant negative impact on the environment, landscape, public health, archaeology or residential amenities of*

neighbouring settlements and where such operations are in compliance with all national regulations and guidelines applicable to quarrying and mining activities.

Volume 3 deals with Municipal District Written Statement and Settlement Plans and 3a with Ennis Municipal District. The site is in the rural area outside of and to the west of the settlement boundaries.

7.0 The Referral

7.1. Referrer's Case to the Board

- 7.1.1. Patrick O'Donnell of Earth Science Partnership (Ire) Ltd has submitted a Section 5 referral Ref.R17-11 on behalf of Patrick Gibney of Roadstone Ltd., to the Board, and wishes to appeal the Council's decision that the proposed 1.8m fence is development and is not exempted development. Their submission includes site location and layout maps, photos and specifications in relation to the fence and relevant sections from the Planning and Development Regulations. The Site Layout Map shows that the proposed fence is to extend 536m in length in a south westerly direction within the north western part of the quarry property.
- 7.1.2. This notes that Roadstone Ltd have acquired the entire Quarry property formally known as Whelan's Quarry located at Fountain Cross. Roadstone Ltd have entered into a lease agreement with a third party and part of this lease agreement requires that a fence to cordon off a section of the quarry land be erected. The proposed fence is to be 1.8m in height over its entire length. The fence is to be erected wholly within the quarry lands and does not form part of the boundary of the property or of any adjoining property. They believe that the proposed development is exempted as the proposed fence is to be contained entirely within the property and is less than 2m in height.
- 7.1.3. They believe this to be exempted development under Schedule 3 – (Article 6) - Class 4 - Exempted Development - Rural specified in the Planning and Development Regulations 2001 and as amended under SI No.454/2011- Planning and Development (Amendments) (No.2) Regulations 2011.

7.2. Planning Authority Response

- 7.2.1. There has been no response from the Planning Authority to this Referral to the Board.

8.0 Statutory Provisions

- 8.1.1. In order to assess whether or not the activity constitutes development that is exempted development, regard must be had to the following items of legislation:

8.2. Planning and Development Act, 2000

Under Section 2(1), the following is the interpretation of 'fence', includes a hoarding or similar structure but excludes any bank, wall or other similar structure composed wholly or mainly of earth or stone;

Under Section 2(1), the following is the interpretation of 'works':

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

'unauthorised development' includes the "carrying out of unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use."

'unauthorised works' means any works on, in over or under land commenced on or after the 1st of October 1964, being a use which is a material change in use of any structure or other land and 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 of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any conditions to which that permission is subject'

Section 3 (1) states 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 4(1) of the Act states that the following shall be exempted developments for the purposes of this Act:

Section 4 (2)(a) of the Act enables certain classes of development to be deemed exempted development by way of regulation.

8.3. Planning and Development Regulations, 2001

Article 6 (1) provides: Subject to article 9, development of a class specified in column 1 of 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.

Article 9 (1) provides: Development to which article 6 relates shall not be exempted development for the purposes of the Act—

(a) if the carrying out of such development would—

(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.

SCHEDULE 2

Part 1 relates to Exempted Development – General

Column 1 Description of Development	Column 2 Conditions and Limitations
<p><i>Sundry Works</i> CLASS 11 The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of — (a) any fence (not being a hoarding</p>	<p>1. The height of any new structure shall not exceed 1.2 metres or the height of the structure being replaced, whichever is the greater, and in any event shall not exceed 2 metres. 2. Every wall, other than a dry or</p>

<p>or sheet metal fence), or</p> <p>(b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.</p>	<p>natural stone wall, constructed or erected bounding a road shall be capped and the face of any wall of concrete or concrete blocks (other than blocks of a decorative finish) which will be visible from any road, path or public area, including a public open space, shall be rendered or plastered.</p>
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Part 3 relates to Exempted Development – *Rural*

Column 1 Description of Development	Column 2 Conditions and Limitations
<p><i>Minor works and structures</i></p> <p>CLASS 4</p> <p>The construction, erection, or maintenance of any wall or fence, other than a fence of sheet metal, or a wall or fence within or bounding the curtilage of a house.</p>	<p>1. The height of the wall or fence, other than a fence referred to in paragraph 2, shall not exceed 2 metres.</p> <p>2. The height of any fence for the purposes of deer farming or conservation shall not exceed 3 metres.</p>

It is of note that the amendment provided under SI No. 454/2011 Planning & Development (Amendment)(No.2) Regulations 2011 is included above i.e:

Amendment of Class 4 of Schedule 2, Part 3 of the Regulations

Article 10. Class 4 of Schedule 2, Part 3 of the Regulations is amended by the substitution of “construction, erection or maintenance” for “construction or erection”.

9.0 Assessment

9.1. Is or is not development

- 9.1.1. Having Regard to Sections 2(1) and 3(1) of the Planning and Development Act 2000 (as amended) it is considered that the construction of a fence measuring 1.8m high, within the property at Fountain Cross, Ennis, Co. Clare constitutes development.

9.2. Is or is not exempted development

- 9.2.1. Development can be exempted from the requirement for planning permission by either section 4 of the Planning and Development Act, 2000 (the Act), or article 6 of the Planning and Development Regulations 2001 (the Regulations).
- 9.2.2. It is of note that Part 1 refers to Exempted Development – General (Article 6) and Classes 11 is considered under *Sundry Works*. I would not consider that in this context the issue under referral would be exempt under Class 11 in that the proposed fence would exceed 1.2m in height, and the 2m height only refers to a structure that is being replaced. The proposed development is not for a replacement fence and as such this class is not applicable.
- 9.2.3. The Referrer considers that the proposal would be exempt under *Exempted Development -Rural (Class 4)*. This exemption relates to the *construction, erection or maintenance of any wall or fence..* and includes that it shall not exceed 2m in height. As the proposed fence is 1.8m in height and is in the rural area, not bounding the curtilage of a house it could fit into this exemption class. However, note must also be had to the context of the development and the planning history of the quarry.

9.3. Regard to Planning History

- 9.3.1. Reg.Ref. P04 -1064, PL03.216138 is referred to by the Planning Authority relative to this Referral. An EIS was included, which provides that part of the quarry was pre-1964. It is of note that a number of planning permissions were obtained over the years for extensions to the original pre-1964 quarry area and a number of processing activities and buildings within the extensive Fountain Cross Quarry.

- 9.3.2. The aforementioned permission includes that the total area under that application comprised 16.2 hectares. This includes that the area for retention and completion comprised 9.65ha and approx. 6.64ha for extension of quarrying works. A copy of Fig. nos. 1 and 2 from the EIS, showing the extent of the quarry operations at that time and the boundaries of this application site to the south west, are included in the Appendix to this Referral Report.
- 9.3.3. It is of note that the proposed fence that is the subject of this Referral, would be in the area then shown within the blue line as 'existing active quarry – lands under the control of the developer' and the red line application boundary as then comprising the areas for retention and completion and for extension further to the south west. The Phasing Layouts as referred to in Condition no.2 of the Board's permission appear to only show these areas within the application boundary redline.
- 9.3.4. Having regard to the Council's mapping both Reg.Ref.06/1353 (Ref. PL03.229040) and Reg.ref.P06/1130 (Ref. PL03.225480) appear to relate to that part of the site which is the subject of the current Referral rather than (Reg.Ref. P04 -1064, Ref. PL03.216138) which relates more to that part of the quarry to the south west and outside of the Referral area. The Inspector's Report in Ref.PL03.229040 noted that, this application comprised a stated area of 28.35ha within an overall landholding of approx.50ha. It is of note that PL03.229040 which includes the northern part of the site and the area for the proposed route of the fence in the subject referral, was quashed by the High Court in July 2016, (a copy of 2012 871 JR is included in the Appendix).

9.4. Restrictions on exempted development

- 9.4.1. Regard is had as noted in the Statutory Provisions Section above to Article 9 (1) (a)(i) of the Planning and Development Regulations 2001. This provides for a restriction on exemption, if the carrying out of such development for the purposes of the Act would contravene a condition to a permission under the Act or would be inconsistent with any use specified in that condition.
- 9.4.2. In this respect, Condition no.21 of the Board's permission in PL03.216138 is of note in this case, in that it refers to landscaping and boundary treatment of the entire quarry complex i.e. *All details of landscaping and boundary treatment in respect of*

the entire quarry complex shall be subject to the written agreement of the planning authority prior to the commencement of development.... A copy of PL03.216138 is included in the Appendix to this Report.

- 9.4.3. Therefore, it is considered that the issue that is the subject of this referral would contravene Condition no. 21 of this permission and would subsequently be subject to the restriction on exemption provided by Article 9(1)(a)(i) of the Planning and Development Regulations 2001, as amended.

9.5. **Appropriate Assessment**

- 9.5.1. Having regard to the nature and scale of the development proposed and to the nature of the receiving environment, no appropriate assessment issues arise.

10.0 **Recommendation**

- 10.1. I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether the construction of a fence measuring 1.8m high within the property at Fountain Cross, Ennis, Co. Clare is or is not development or is or is not exempted development:

AND WHEREAS Earth Science Partnership (Ire) Ltd on behalf of Patrick Gibney of Roadstone Ltd requested a declaration on this question from Clare County Council and the Council issued a declaration on the 23rd day of March , 2017 stating that the matter was development and was not exempted development:

AND WHEREAS Earth Science Partnership (Ire) Ltd on behalf of Patrick Gibney of Roadstone Ltd referred this declaration for review to An Bord Pleanála on the 4th day of April , 2017:

AND WHEREAS An Bord Pleanála, in considering this referral, had regard

particularly to –

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(1) of the Planning and Development Act, 2000, as amended,
- (d) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Parts 1 and 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the extensive planning history of the quarry,
- (g) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The construction of a fence measuring 1.8m high within the property at Fountain Cross, Ennis, Co. Clare constitutes works, that come within the scope of Section 3(1) of the Planning and Development Act 2000, and therefore, constitutes development,
- (b) The development does not come within the scope of exemption of section 4(1) of the Planning and Development Act 2001,
- (c) The development would come within the restriction on exemption in that it would not comply with Article (9)(1)(a)(i) of the Planning and Development Regulations 2001, in that it would be inconsistent with Condition no.21 of the An Bord Pleanála permission, Ref.PL03.216138,
- (d) The exemptions provided under Classes 11 of Part 1 of Schedule 2

and Class 4 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001, cannot be availed of by virtue of the restriction on exemption imposed under Article 9(1)(a)(i) of the said Regulations.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the construction of a fence measuring 1.8m high within the property at Fountain Cross, Ennis, Co. Clare is development and is not exempted development.

Angela Brereton
Planning Inspector

13th of February 2018