STATEMENT OF EXCEPTIONAL CIRCUMSTANCES

Planning Application for Substitute Consent for unauthorised mineral extraction, processing, loading and transportation and erection and use of buildings, structures, plant and machinery at Cartron Quarry

McTigue Quarries Ltd,

Cartron Quarry,

Belclare,

Co Galway,

Date of Report: April 2021

Written by Chris Tinsley BA (Hons), DipTP, MRTPI

Quarry plan
CHARTERED QUARRYING CONSULTANTS

CONTENTS **PAGE**

APPENDICES

1 INTRODUCTION

This report forms part of a planning application for Substitute Consent ('SC') which has been prepared in accordance with the direction of An Bord Pleanála (the Board) dated the 10 July 2020.

This direction was served by the Board via Order Number ABP-306155-19, made under s.177D of the Planning and Development Act 2000 (as amended) ('the PDA'). The order confirms that the Board is satisfied that an environmental impact assessment (EIA) and Appropriate Assessment (AA) is required in the light of the scale and nature of the quarrying and processing activities that have been carried out. Copies of the Board's order and subsequent grant to an extension of time to submit the SC application is held at **Appendix 1**.

The Application being submitted to the Board for SC, is for all the winning and working of minerals, processing and associated activities which have occurred within the applicant's lands during the period between the previous grant of SC for the site in January 2015 (Ref 07.SU.0036) and present day ('the SC period').

The site is located in the Townland of Cartron some 7 kilometres to the south west of Tuam. The site is comprised of a c. 8.46ha L-shaped limestone quarry.

Full details of the SC proposals are provided within the accompanying Remedial Environmental Impact Assessment Report (REIAR).

The aim of this report is to provide the Board with such information as is considered material for the purposes of the Board satisfying itself as to the existence of exceptional circumstance with regards to the SC application.

2 LEGISLATIVE CONTEXT

Section 177K (1A) of the PDA states that:

a) *The Board shall not grant substitute consent (whether subject to conditions or not) unless it is satisfied that exceptional circumstances exist that would justify the grant of such consent by the Board.*

b) *When deciding whether or not to grant substitute consent, the Board shall not—*

   i. *be bound by,*
   ii. *take account of, or*
   iii. *otherwise have regard to,*

   any decision of the Board under section 177D as to the existence of exceptional circumstances in relation to an application under section 177C.

Section 177K (1A) (c) confirms that:

"A member (including the chairperson) of the Board who participated in the making of a decision by the Board under section 177D to grant leave to apply for substitute consent shall not participate in the consideration of, or the making of a decision under this section in relation to, an application under section 177E made pursuant to the grant of leave concerned".

Section 177A of the PDA States that:

"'exceptional circumstances' shall be construed in accordance with section 177D(2)".

Section 177D(2) states that:

"(2) In considering whether exceptional circumstances exist the Board shall have regard to the following matters:

a) *whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;*

b) *whether the applicant had or could reasonably have had a belief that the development was not unauthorised;*

c) *whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;*

d) *the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;*

e) *the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;*

f) *whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;*

g) *such other matters as the Board considers relevant".*

The remainder of this report provides information which the applicant considers material for the purposes of the Board satisfying itself as to the existence of exceptional circumstances in accordance with Section 177K (1A)(a) of the PDA.

3 EXCEPTIONAL CIRCUMSTANCES

3.1 Potential for circumvention of the EIA or the Habitats Directive

The SC application is accompanied by a REIAR and RNIS. The REIAR concludes that the winning and working of minerals, processing and associated activities which have occurred, are occurring and which may be reasonably likely to occur within the applicant's lands during the SC period has not resulted in any significant effects upon the environment.

The RNIS concludes that on the basis of best scientific knowledge, the development has not affected the integrity of any European Sites as a result, taking account of the sites' conservation objectives, either individually or in combination with other plans or projects.

The application site has an extensive planning history with quarrying commencing at the site by the McTigue family in 1954, with recent planning applications being accompanied by Environmental Impact Statements, remedial or otherwise.

Galway County Council previously determined that the site was required to apply for SC under s.261A (3)(a) in August 2012 with consent effectively annulling any previous rights to extraction. The Applicant applied for SC in May 2013 and this was subsequently approved by the Board in January 2015 under the reference 07.SU.0036. The Inspector's Report and Board Direction are held at **Appendix 2**.

The Board stated that the rEIS identified and adequately described the direct and indirect effects on the environment of the development and agreed with the Inspector's report and its conclusion in relation to the acceptability of mitigation measures proposed and residual effects. The Board concluded that the development would not be likely to have or have had a significant effect on the environment.

The Board Direction stated that with regards to the Appropriate Assessment which was submitted as part of Substitute Consent:

"*Having regard to the nature, scale and extent of the development for which substitute consent is sought, the remedial Natura impact statement submitted with the application, the submissions on file and the inspector's assessment, the Board completed an appropriate assessment of the impacts of the proposed development on Natura 2000 sites. The Board concluded that, on the basis of the information available, the subject development, either individually or in combination with other plans or projects, has not adversely affected and is not adversely affecting the integrity of any European site, having regard to the conservation objectives of those sites*".

In relation to the submission of an EIA, the Board:

"concluded that the remedial Environmental Impact Statement submitted identified and described adequately the direct and indirect effects on the environment of the development.

The Board considered that the Inspector's report was satisfactory in addressing the environmental effects of the subject development and also agreed with its conclusions in relation to the acceptability of mitigation measures proposed and residual effects. The Board adopted the report of the Inspector and decided that the subject development would not be likely to have had/or have a significant effect on the environment"

The approach adopted by the Applicant in preparing consecutive Environmental Impact Assessments has delivered analysis of site activities in line with the Environmental Impact Assessment Directive over a period of years.

Therefore, given the conclusions of the REAIR and RNIS for this application and the Board's assessment of the previous SC application and the analysis

of site activities over the two SC periods, it is considered that the regularisation of the development concerned would not circumvent the purpose and objectives of the EIA Directive or the Habitats Directive.

Instead, the SC application allows for transparency and public participation in the EIA process.

3.2 Applicant's belief that the development was not unauthorised

Galway County Council under the provisions of Section 261A of the Planning and Development Act 2000 (as amended) determined that development of the quarry had taken place post 1990 and would have required an EIA and therefore the Council decided that the quarry commenced operation before 1 October 1964 and on that basis, the Council issued a notice under Section 261(A) (3) (a) requiring the quarry owner to apply for SC with the notice being issued on 2 August 2012.

The Applicant applied for SC in May 2013 accompanied by an rEIS and rNIS in May 2013. This was subsequently approved by the Board in January 2015.

Post SC, the Applicant held the belief that extraction consent had been granted in line with the REIS proposal and continued to extract material and operate the quarry. As a result, An Taisce then served a notice under s.160 of the Planning and Development Act 2000 (as amended) that resulted in a High Court appearance.

The High Court held that the continued operation of the quarry was unauthorised development, but it refused to grant an injunction under Section 160 of the Planning and Development Act 2000 restraining its operation, instead remitting the matter for further enforcement to Galway Co. Co. An Taisce appealed the refusal to make the Section 160 order and similarly McTigue Quarries appealed the finding that the continued extraction at the quarry was unauthorised.

The Applicant held the view that developments carried out post SC were in line with the details as provided for in the SC application and as such, was authorised development. The veracity of the Applicant's beliefs is further reinforced by it's application to judicially review the High Court to the Supreme Court at considerable personal expense [S:AP:IE:2017:000012 and 000052].

Find attached the Court judgement and Order by way of example of the certainty of belief held by the Applicant, held at **Appendix 3**.

From a review of the exchanges held in the Supreme Court judgement, the Applicant's position and belief is clear and it is that s.177O of the PD(A)A 2010 should be read literally and implies the quarry has exactly the same status as a planning permission under s.34 of the PDA 2000.

McTigue's counsel argued that the "development" permitted in the consent can and does encompass future works on the main seam and that quarrying development undertaken in accordance with the plans specifications submitted to ABP on 7 May 2013 are permitted, but development outside of that is not permitted.

As further evidence of the Applicant's belief, two phases of remedial work were envisaged with phase 2 only taking place after the extraction had been fully completed. Therefore, further reinforcing the prospective nature of the application.

The case was propelled to the Supreme Court and on the 12 December 2018 the Supreme Court ruled that the appeal be allowed and that said Order of the High Court be set aside on the issue of the grant of the Order pursuant to Section 160 of the Planning and Development Act 2000, as amended, which required McTigue Quarries Ltd to cease all unauthorised development within 6 months, including all works for the extraction of stone and gravel, the carrying out of rock and gravel processing activities, the loading of materials, and the

transportation of said materials from the quarry and all related ancillary works on lands at Cartron Quarry. Pursuant to the Order, all mineral extraction operations at the site ceased on 11th June 2019 .

The key finding of the judgment of the Supreme Court in An Taisce v McTigue is in paragraph 77:

"*I would, therefore, hold that s.177O of the PD(A)A 2010 is to be interpreted as meaning that where a grant of substitute consent is made in accordance with ss.177A-Q of the 2010 Act, such substitute consent has effect for those procedures as if it were a permission granted under s.34 of the PDA 2000, but only where there was a prior, albeit flawed or erroneous, planning permission, where a lawful remedial development in compliance with prior conditions laid down in the PD(A)A 2010 is to be carried out in compliance with the terms of that substitute consent, and in accordance with any conditions to which that substitute consent is subject. It is in those circumstances, only, that such a development may be deemed to be an 'authorised development'".*

It is considered that the Court case documents confirm that McTigue Quarries reasonably held the belief, for all the reasons outlined across the two court cases that SC provided for authorised extraction up to the point at which it delivered the restoration concept, provided for and assessed in the rEIS. This was however confirmed to be an incorrect belief with the Supreme Court confirming the High Court's decision in this regard and extraction from the quarry ceasing in line with the date of stay of June 2019.

3.3 Ability to carry out a remedial EIA/ AA

As demonstrated via the accompanying REIAR and RNIS, the ability to carry out robust assessments has not been hampered. Both assessments have been prepared by competent professionals with input from experienced, technical experts, where relevant. No major issues were encountered in the production of each of the documents.

The information contained within the REIAR and RNIS demonstrates that the activity that has taken place post the previous grant of SC has been in line with what was anticipated and assessed within the original REIS and gives credence to the arguments previously presented by the Applicant and its legal representatives.

Whilst the previous REIS assessed the impacts of continued/ future working, given the limitations of the legislation it was not an option for the Board to grant a consent that in itself included development. This however does not remove the fact that the potential impacts were previously considered by both the applicant and the Board and deemed to be acceptable.

It is considered that the scope of the previously prepared REIS and the continuation of development over the SC period is in line with previously assessed processes has ensured that the ability to carry out an EIA of the development, for the purpose of an EIA/AA and to provide for public participation in such an assessment has not been impaired, substantially or otherwise. The accompany EIAR/RNIS has been prepared by competent experts with no major difficulties encountered.

3.4 The actual or likely effects on the Environment and/or European Sites

The SC application is accompanied by a REIAR and RNIS. The REIAR concludes that the winning and working of minerals, processing and associated activities which have occurred within the applicant's lands during the SC period has not resulted in any significant effects upon the environment.

The RNIS concludes that on the basis of best scientific knowledge, the development has not affected the integrity of any European Sites as a result, taking account of the sites' conservation objectives, either individually or in combination with other plans or projects.

3.5 Extent to which the effects of the development can be remediated

Given the conclusions of the accompanying REAIR and RNIS, the development has been demonstrated not to have resulted in any significant effects on the environment or adverse effects on the integrity of a European Site. As such, no remediation is required.

3.6 Compliance with previous Planning Permissions

It is considered that a rationale has been provided above as to how the Applicant held a bone fide belief that the continued operation of the quarry, following the granting of SC in January 2015, was entirely authorised development which was granted permission under the SC.

The application site has an extensive and progressive planning history dating back to the initial extraction around 1954, which has subsequentially been followed by a sequence of extraction and proposed applications, some of which been accompanied by Environmental Impact Statements (see Table 1 overleaf).

Application Ref	Description	Status
06/3299	Application for the retention of (a) garage/workshop, (b) wheelbase washing unit and c) a weighbridge.	Permission granted 21 July 2007
09/1518	Application for retention of oil storage tanks, office, retention of garage/workshop granted under 06/3299 and retention of and additional garage/workshop	Withdrawn 30 September 2009
10/629	Application for retention of oil storage tanks, office, retention of garage/workshop granted under 06/3299 and retention of and additional garage/workshop.	Withdrawn 13 October 2010
Quarry Registration P.A. Ref QY 71	The site was registered under Section 261 with 14 conditions, which are standard in nature on the 27 April 2007	Quarry registered under S261 in April 2007.
EN09/098	An enforcement notice was served by the planning authority in relation to unauthorised oil storage tanks, unauthorised office, unauthorised extension to existing garage/workshop approved under planning Ref. No. 06/3299 and unauthorised additional workshop/storage unit.	Structures included within REIS for 07.SU0036 however unable to be authorised due to administrative error at the point of submission. Application submitted to Galway Co. Co. in October 2020 for retention of unauthorised structures (see Ref 20/1547 below).
07.SU0036	Substitute consent was applied for in May 2013 and granted in January 2015.	Granted January 2015.
PL15/869	Application for permission for extension on lands to the west of the existing quarry with a new extension area of 3.3 ha. The application was submitted in July 2015.	Withdrawn in March 2016
PL16/953	An application for permission for an extension to an existing limestone quarry on lands to the west of the existing quarry to encompass an area of 3.3 hectares was submitted in July 2016. The application was accompanied by an EIS and a NIS.	Withdrawn in September 2017.
20/1547	Application submitted to Galway Co. Co. in October 2020 for retention of unauthorised structures.	Application deemed invalid by Galway Co. Co. under s34 (12) of the Planning and Development Act 2000 (as amended) and returned in December 2020. Structures included within current SC Application.
20/2013	Application submitted to Galway Co. Co. in December 2020 for Further quarrying of mineral (limestone) at lands to the west of lands authorised under Substitute Consent Ref 07.SU.0036 (Carton Quarry).	Application deemed invalid by Galway Co. Co. under Article 26 of the Planning and Development Regulations 2001 (as amended) and returned in February 2021.

Table 1 Planning Applications at Cartron Quarry

The Applicant was required to apply for SC subject to a notice issued by the Planning Authority on foot of Section 261A of the Planning and Development Act 2000 as amended under P.A. file ref (QSP71). The requirement for the application of these sunset provisions was not as a result of impropriety with respect to permission compliance, but moreover the erroneous implementation of the EIA and Habitats Directives by the State and County Councils.

As detailed in the accompanying EIAR, the site contains structures ancillary to the primary development and McTigue's sought to regularise these at the same time as the remainder of the site as part of the SC process, unfortunately due to a draughting error by their then agent, the particular structures were not referenced within the development description and despite the provision of appropriate plans and elevations and consideration within the Project, the Board confirmed that consent could not be provided.

A number of the structures referenced in the Enforcement Notice have been removed and the applicant has sought to regularise the remaining structures via an application submitted to Galway Co. Co. (Ref 20/1547) in October 2020. The application was however deemed invalid consequent to Section 34(12) of the PDA, by Galway Co. Co. and returned in December 2020.

As outlined above McTigue's also sought to mitigate against the potential that the Courts would ultimately not find in their favour with respect to arguments promoted that following the granting of SC that the consent for the development was within the meaning of Section 177O which had the same legal effect as if it had got planning permission under Section 34 of the Planning and Development Act 2000.

An application was therefore submitted for an extension into virgin lands to Galway County Council under s.34 (16/953) and was accompanied by an

Environmental Impact Statement and a Natura Impact Statement this application was subsequently withdrawn in July 2017.

An application was also submitted in December 2020 for an extension into virgin lands to the west of the quarry. The applicant considered that the development did not constitute EIA development nor would it result in adverse impacts upon the integrity of European Sites. The application was deemed invalid by Galway Co. Co. in February 2021 under article 26 (3) (b) of the Planning and Development Regulations 2001 (as amended). The Applicant believed this decision of the Planning Authority to be incorrect and wrote to it seeking confirmation of evidence as to how the Council has arrived at its decision however no response was received.

Therefore attempts have been made to regularise the ancillary structures and provide for alternative resources outside the SC area, however, these have been frustrated by the reluctance of the Planning Authority to deal with an application either whilst court cases were ongoing or due to concerns with the potential validity with respect to s.34(12) of the PDA.

A pre-application meeting has been held with Galway Co. Co. regarding revisiting the previous extension application for the extraction of minerals on lands lying adjacent to the existing Cartron Quarry, which is a new planning application for planning permission for new development on lands that are not and have not been the subject of any previous development;

The only conditions of the extant SC permission that remain to be complied with relate to financial contributions and McTigue's have chosen not to comply with these during the Court proceedings and would envisage if successful in this application, the financial conditions would be restated in any new consent. However, it is worthy of note that the requirement to submit a comprehensive restoration plan under condition 3 of 07.SU.0036 was complied with in September 2015.

It is considered that the above information demonstrates McTigue's efforts to comply with previous planning permissions and reveals justifications for the unauthorised development, post the issue of SC which has been undertaken on site, under the belief that these works were authorised. Several attempts have been made to regularise the development at the site and provide alternative resources outside of the previously granted SC area.

3.7 Other Relevant Matters

McTigue Quarries Ltd are a family owned company based in Belclare, Tuam, Co. Galway and supply quarry products across Galway and Mayo. They provide aggregates to personal and commercial customers with a variety of end uses such as road building, housing, drainage and for use in commercial buildings.

As part of their mobile crushing business, McTigue Quarries Ltd provide an all-inclusive service which consists of drilling, blasting and crushing. A limited selection of a broader customers base include Galway County Council, Roadbridge Ltd., Sisk, OPW, ESB, and Balfour Beatty.

McTigue Quarries Ltd also have a waste collection permit enabling them to remove and dispose of material from construction sites to their licensed waste facility.

Cartron quarry has been operational since 1954 when Mattie McTigue began quarrying operations on site with the quarry products consisting of limestone and associated aggregates. The quarry was taken over by Gary McTigue, son of Mattie McTigue, approximately 30 years ago.

3.7.1 Benefits to the Local Economy

The McTigue's quarry is crucial to the economic development and viability of the local area, particularly given the remote nature of the site and the distance

from any nearby large centres of employment. Creating employment and generating economic activity in areas outside of major cities and towns provides significant social and environmental benefits, as employees are not required to spend long hours commuting to major cities for well remunerated employment.

In terms of employment, when Gary McTigue took over the quarry 30 years ago, five employees worked at the quarry during the 1990's, however, as Gary began to grow the company and McTigue Quarries Ltd. was formed in 2001, there are currently 31 employees directly employed by the wider business, all of whom are living within a 15km radius of the quarry.

It is a core value of McTigue Quarries Ltd. to employ local people and ensure members of the local community benefit from the presence of the quarry within their area.

Developments within the extractive industry provide direct employment to local people which requires a skilled labour force which can be available locally. Due to the historic nature of these sites generations of families tend to pass on skills through the generations.

Operational quarries contribute to the local economy as they can deliver a number of long-term benefits including the production of a valuable raw material which is utilised locally for the construction sector, job creation and long-term job stability. These benefits can potentially stimulate new development and economic prosperity within the local area bringing further economic benefits.

The National Spatial Strategy highlights the role of the extractive industry in providing an alternative and sustainable source of income away from traditional agricultural activities.

The quarry directly employed 12 employees, to include truck drivers, machine operators, loader and crusher operators and office staff, prior to its closure. Prior to the cessation of extraction at the site in 2019, Cartron Quarry had an average spend of around €200,000 per annum on external suppliers on goods and services over the working period, as well as contributing to the national and local tax base.

Direct benefits associated with the quarry include direct employment of local people across semi-skilled, skilled and professional sectors. It is anticipated that ongoing employment opportunities will remain available to the local population for years to come, along with providing job security for those currently employed by the business.

The socio-economic impacts associated with the operation of the quarry over the SC period have been positive. This employment and expenditure is considered to have resulted in a tangible positive impact in this rural location in Co Galway, providing local direct employment and the resultant indirect and induced economic benefits as outlined above.

3.7.2 Local Social Development

McTigue Quarries Ltd. has always supported local community groups and has also supplied aggregates and financial assistance to a number of local organisations including:

- Corofin GAA club;
- Belclare Community Pitch Development Fund;
- Sylane Hurling Club;
- Belclare National School;
- Castlehackett National School;
- Tuam GAA Stadium; and
- A variety of other local charities and clubs.

3.7.3 Need for Construction Aggregates

The Cartron Quarry resource has provided a vital local source of aggregates for local construction projects.

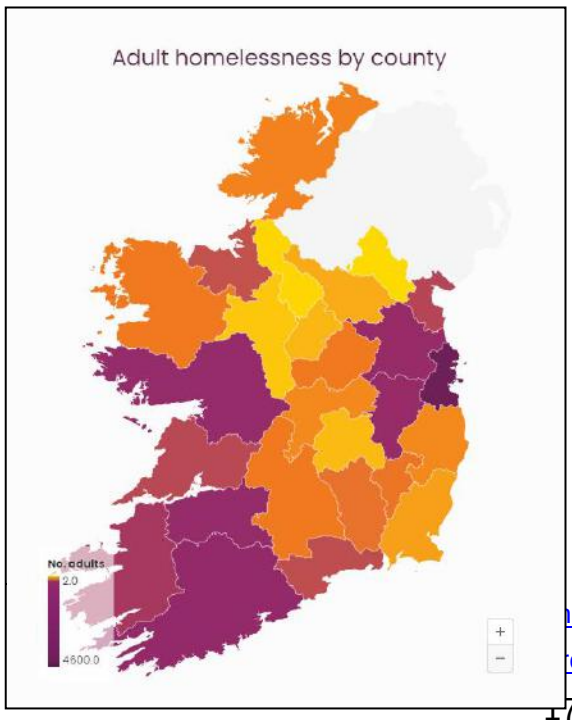
Housing

The quarrying sector is intrinsically linked with the construction sector. By association, the continued and steady supply of mineral and mineral products is of significant importance in delivering housing growth.

It is well documented that there is a housing crisis being experienced in Ireland. Homelessness in Ireland has nearly quadrupled in the last five years, according to government statistics. Official figures[1] for February 2021 showed 8,238 homeless people, including 935 families. Many more, who emigrate or move in with parents or friends, go uncounted.

Mapping produced by Homelessness charity, Focus Ireland[2], shows that County Galway is one of the counties most affected by homelessness. The County has 213 Adults in official homeless emergency accommodation and 3146 households on the social housing waiting list.

Figure 1: Homelessness in Ireland, by County, Feb 2021



[1] g/homelessness/other/homelessness-data

[2] rce-hub/latest-figures-homelessness-ireland/

The nationwide crisis has therefore manifested itself locally, with Galway County Council calling for a state of emergency over the local housing crisis[3], with local demand far outstripping supply.

As a result, the Government has introduced the "Rebuilding Ireland" Plan, designed to accelerate housing supply in the Country and tackle the housing shortage. The plan seeks to deliver a supply of 25,000 new homes per annum[4]. This drive to provide more housing will put a huge strain on planned mineral deposits and given the paucity of operational quarries in Galway County the steady supply of locally available resources is essential to maintaining competition and supplying the market.

Geological Survey Ireland (GSI) estimates that 60 tonnes of aggregate is required for the construction of a typical house. This increases to some 400 tonnes when roads and utilities are included.

In February 2018, the Irish Government launched Project Ireland 2040, a national commitment over a multi-annual period, of significant investment in Ireland's infrastructure. The plan seeks to deliver some 550,000 homes for an extra one million people required over the next 20 years in Ireland[5]. At present there is less than 20,000 homes constructed per year[6] and current demand for aggregates in Ireland at 12 tonnes per capita is twice the average demand in the EU 28 member states[7]. In response to the Project Ireland 2040 plan, the Irish Concrete Federation (ICF) have advised that the State will need to produce an estimated 1.5 billion tonnes of aggregates to meet housing and infrastructure demand arising from the Government's plan.

---

[3] https://www.rte.ie/news/2019/0410/1041939-galway-housing-crisis/

[4] Available at https://rebuildingireland.ie/#About2

[5] Ireland 2040 Our Plan

[6] CSO statistical release, 11 February 2020 Available at https://www.cso.ie/en/releasesandpublications/er/ndc/newdwellingcompletionsq42019/

[7] Irish Concrete Federation, Essential Aggregates providing for Ireland's needs to 2040

With the widely recognised unprecedented demand for housing, naturally the demand for aggregate to construct the housing units reflects this demand. The opportunity for regularistion and the potential for future quarrying operations as a consequence, would have a number of positive impacts in terms of a local supply of the raw aggregates to facilitate the necessary housing growth in the County.

3.8 Sustainable Travel Patterns

Census data (2016) indicated that the average travel time for commuting workers in Ireland is 28.2 minutes, compared to an average travel time of 29.3 mins in Galway County and 21.7 mins in Galway city.

Within Galway County, 47.6% of people spent less than 30 mins commuting to work, compared to 67.4% of people in Galway City (see figure 2 overleaf).

The rural nature of the quarry ensures that McTigue's employees benefit from travel times significantly less than the average and reduce the number of commuters drawn towards the Galway City conurbation for employment.

Furthermore, in terms of sustainable travel, the Cartron Quarry resource has provided a vital local source of aggregates for local construction projects. This local resource means that construction firms can avoid the need to source aggregates from further afield, avoiding increased haulage impacts both in terms of costs but also in terms of fuel consumption, congestion and vehicle emissions.

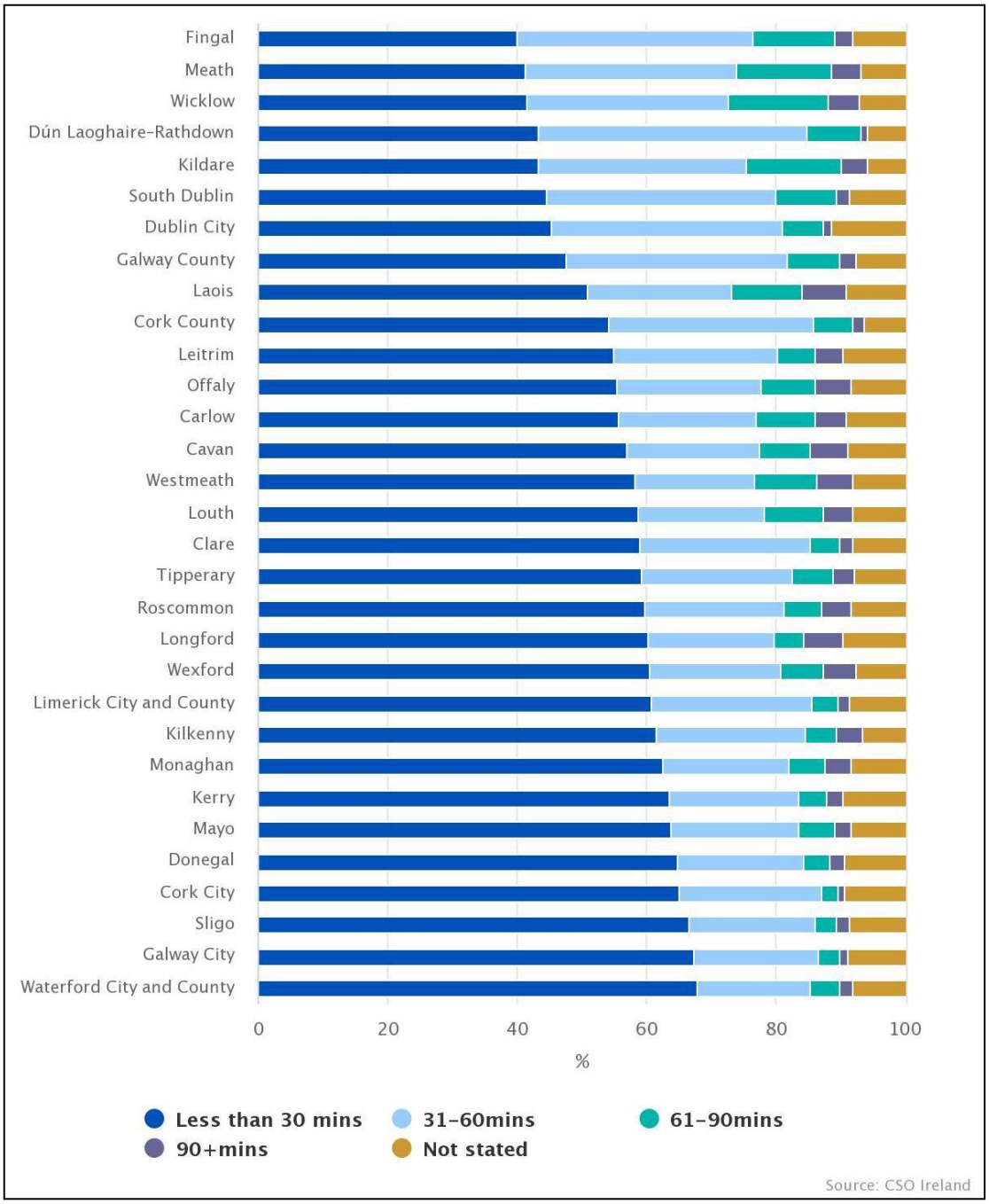


Figure 2: Time spent travelling to work, by county, 2016

4 CONCLUSION

Prevailing planning legislation states that the Board shall not grant substitute consent (whether subject to conditions or not) unless it is satisfied that exceptional circumstances exist that would justify the grant of such consent by the Board.

The legislation prohibits the Board from considering its previous conclusions as to the existence of exceptional circumstances in relation to the application in its decision to grant leave to apply for SC, under section 177D of the PDA.

With reference to the provisions of Section 177D(2) of the PDA, this report provides information which the applicant considers material for the purposes of the Board satisfying itself as to the existence of exceptional circumstances. in accordance with Section 177K (1A)(a) of the PDA.

The report details how:

- The SC application is accompanied by a REIAR and RNIS which concludes that the development has not resulted in any significant effects upon the environment or affected the integrity of any European Sites;

- The conclusions of the REIAR and RNIS and the Boards previous conclusions for the previous SC application at the site demonstrates that no circumvention of the EIA or Habitats Directive has been experienced;

- The applicant was under the belief that the previous grant of SC at the site allowed for future working at the site for the reasons set out in the Applicant's High Court and Supreme Court applications;

- The ability to carry out a remedial EIA/AA has not been impinged. The accompanying REAIR and RNIS has been prepared by competent experts with assessments following best practice guidance;

- Given the conclusions of the EIAR/RNIS, no remediation is required;

- The applicant's efforts to comply with previous planning permissions and justifications for the unauthorised development, post the issue of SC is provided. Details of further attempts to regularise the development at the site have also been provided, which have been frustrated under the guise of s.34(12) without any reasons provided;

- The subject development plays an important role in the local economy with the quarry providing direct employment for 12 staff, with over 30 staff employed across the wider McTigue's business. The quarry had an average spend of around €200,000 per annum, much of which was spent locally;

- Aggregate produced by the quarry will assist in the local delivery of housing and infrastructure; and

- The quarry provides local employment, avoid the need to travel further distances for work. The utilisation of the resource has benefits local construction projects in terms of haulage costs but also in terms of reduced fuel consumption, congestion and vehicles emissions.

The above is considered to demonstrate the existence of exceptional circumstances that would justify the grant of such consent by the Board.

Appendix 1

Grant of Leave to Apply and Time Extension

An Bord Pleanála

Board Order
ABP-306155-19

Planning and Development Acts 2000 to 2019

Planning Authority: Galway County Council

Application for Leave To Apply For Substitute Consent by McTigue Quarries care of Quarryplan Limited, Chartered Quarrying Consultants of 10 Saintfield Road, Crossgar, Downpatrick, County Down.

Development: Quarry at McTigue Quarries, Carrton Quarry, County Galway.

Decision

GRANT leave to apply for substitute consent under section 177D of the Planning and Development Act 2000, as amended, based on the reasons and considerations set out below

Matters Considered

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

Reasons and Considerations

Having regard to Section 177D of the Planning and Development Act, 2000, as amended, the Board is satisfied that an environmental impact assessment and an appropriate assessment is required, in the light of the scale and nature of the quarrying and processing activities that have been carried out.

Furthermore, the Board examined whether or not exceptional circumstances exist such that it would be appropriate to allow the opportunity for regularisation of the development by permitting leave to make an application for substitute consent.

In this regard the Board

(a) considered that the regularisation of the development would not be likely to circumvent the purpose and objectives of the Environmental Impact Assessment Directive or of the Habitats Directive,

(b) considered that the applicant could reasonably have had a belief that the development that took place was not unauthorised, having regard to the planning and legal history relating to the site and the application,

(c) considered that the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment and to carry out an appropriate assessment, and for the public to participate in such assessments, has been substantially impaired,

(d|) considered the nature of the actual/likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out of the development,

(e) considered that the actual or likely significant effects on the environment, and likely significant effects on a European site resulting from the development could be remediated,

Taking all of the above into consideration, it is considered that exceptional circumstances exist such that it would be appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

Dr. Maria FitzGerald

Maria FitzGerald
Member of An Bord Pleanála
duly authorised to authenticate
the seal of the Board

Dated this 9th **day of** July **2020**

Our Case Number: ABP-308837-20

Your Reference: McTigue Quarries

An Bord Pleanála

Quarryplan Limited
10 Saintfield Road
Crossgar
Downpatrick
Co. Down
BT30 9JN
Northern Ireland

Date: 15 DEC 2020

Re: Extension of Time Application pursuant to section 177E(4) of the Planning and Development Act 2000 (as amended) for quarry at:
McTigue Quarries, Cartron Quarry, Co. Galway.

Dear Sir / Madam,

An order has been made by An Bord Pleanála determining the above-mentioned matter under the Planning and Development Acts 2000 to 2020. A copy of the order is enclosed.

Please note that the final date for the making of an application for substitute consent is the 15th day of June, 2021.

In accordance with section 146(5) of the Planning and Development Act 2000, as amended, the Board will make available for inspection and purchase at its offices the documents relating to any matter falling to be determined by it, within 3 days following the making of its decision. The documents referred to shall be made available for a period of 5 years, beginning on the day that they are required to be made available. In addition, the Board will also make available the Inspector's Report, the Board Direction and Board Order in respect of the matter on the Board's website (www.pleanala.ie). This information is normally made available on the list of decided cases on the website on the Wednesday following the week in which the decision is made.

The Public Access Service for the purpose of inspection/purchase of file documentation is available on weekdays from 9.15am to 5.30pm (including lunchtime) except on public holidays and other days on which the office of the Board is closed.

Teil	Tel	(01) 858 8100
Glao Áitiúil	LoCall	1890 275 175
Facs	Fax	(01) 872 2684
Láithreán Gréasáin	Website	www.pleanala.ie
Ríomhphost	Email	bord@pleanala.ie

64 Sráid Maoilbhríde
Baile Átha Cliath 1
D01 V902

64 Marlborough Street
Dublin 1
D01 V902

A further enclosure contains information in relation to challenges by way of judicial review to the validity of a decision of An Bord Pleanála under the provisions of the Planning and Development Act, 2000, as amended.

Yours faithfully,

Miriam Baxter
Executive Officer
BP100N

Teil	**Tel**	(01) 858 8100
Glao Áitiúil	**LoCall**	1890 275 175
Facs	**Fax**	(01) 872 2684
Láithreán Gréasáin	**Website**	www.pleanala.ie
Ríomhphost	**Email**	bord@pleanala.ie

64 Sráid Maoilbhríde
Baile Átha Cliath 1
D01 V902

64 Marlborough Street
Dublin 1
D01 V902

Planning and Development Acts 2000 to 2020

Planning Authority: Galway County Council

Application for an Extension of Time to Apply for Substitute Consent by McTigue Quarries care of Quarryplan Limited of 10 Saintfield Road, Crossgar, Downpatrick, County Down, Northern Ireland pursuant to the determination by An Bord Pleanála on the 9th day of July, 2020, granting the owner/operator leave to apply to An Bord Pleanála for substitute consent.

Development: Quarry at McTigue Quarries, Cartron Quarry, County Galway.

Decision

Grant an extension of the period for the making of an application for substitute consent under section 177E (4) of the Planning and Development Act, 2000, as inserted by section 57 of the Planning and Development (Amendment) Act 2010, for a Further Period of six months from the date of this Order, based on the reasons and considerations set out below.

Matters Considered

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

Reasons and Considerations

Having regard to the request from the applicant and taking account of the current circumstances including restrictions arising from Covid-19, the Board decided to grant an extension of time for the submission of an application for substitute consent by six months from the date of this Order.

Dave Walsh

Member of An Bord Pleanála
duly authorised to authenticate
the seal of the Board.

Dated this 15th **day of** December **2020.**

Appendix 2

07.SU.0036 Inspectors Report and Board Direction

An Bord Pleanála

Inspector's Report

Ref. No SU.07.0036.

DEVELOPMENT:	Existing limestone quarry at Cartron, Belclare, Tuam, Co. Galway.

PLANNING APPLICATION

Planning Authority:	Galway County Council
Planning Authority Ref.	QSP71
Applicant:	McTigue Quarry's Ltd.
Application Type:	Application for Substitute Consent
OBSERVERS	1. Catherine Ó Ceóinín. 2. Peter Sweetman and Associates 3. National Roads Authority 4. Frank Mortimer 5. Health Service Executive 6. An Taisce 7. Galway County Council.
DATE OF SITE INSPECTION	27th August 2013 and 10th January 2014.
Inspector:	Derek Daly

1.0 INTRODUCTION

A notice was issued under the provisions of Section 261A (3)(a) by Galway County Council on the 3rd of August 2012 instructing the owner/operator of a quarry at Cartron, Tuam, County Galway to apply for substitute consent for the works undertaken on the site and that the application for substitute consent be accompanied by a remedial Environmental Impact Statement and a remedial Natura Impact Statement.

The applicant applied for an extension of time pursuant to Section 177E(4) of the Planning and Development Act, 2000 as amended. On the 17th of January 2013 it was decided to grant an extension of time of 26 weeks for the making of an application for substitute consent.

An application for substitute consent accompanied with the above documents was lodged by the applicant with An Bord Pleanála on the 7th May 2013. The application has been made in accordance with Section 177E and is accompanied by a Remedial Environmental Impact Statement and Remedial Natura Impact Statement.

2.0 SITE LOCATION AND DESCRIPTION.

The site is located in the townlands of Cartron and Ermina in a rural area approximately 7 kilometres southwest of Tuam and the 1.5 kilometres southwest of the village of Belclare in County Galway. The appeal site has no direct frontage onto a public road but is connected via a private road to the public road, which is part of a local road network, which links into the R333 Tuam to Headford Regional Road approximately 1.5 kilometres to the north and the N17 Galway Sligo National Primary Route approximately 3 kilometres to the east. The private road also serves another quarry (Mortimers) located to the south and east of the appeal site.

The quarry on the site is an active working stone quarry characterized by benching and cliffs with stockpiling of materials, and processing areas for the screening, crushing and grading of material with associated plant.

Many of the roads are relatively narrow and the alignment of the R333 Tuam to Headford Regional Road in proximity to the N17 is of a relatively poor vertical and horizontal alignment with a large section of the carriageway having a solid white line.

The general area is dominated by agricultural use but with a relatively high level of dwellings many of recent construction located along the road network largely arising from the relative close proximity to Tuam and the N17. The landscape is relatively flat and low lying but the appeal site is located on the eastern lower

slopes of Knockmaa Hill, which is the dominant feature in the landscape and which is highly visible from a considerable distance in all directions.

The site is irregular in configuration but the main of quarrying operation is roughly L-shaped in configuration. There is also an area to the west of the active quarry which was part of the registration process which has not been excavated.

The overall site has a stated area of 12.11 hectares with 8.64 hectares the subject of substitute consent and 3.47 hectares to the west which is undeveloped.

3.0 PLANNING HISTORY.

The planning history relating to the site is detailed below:

P.A Ref. 06/3299
Permission granted on the 21st of May 2007 for the retention of (a) garage/workshop, (b) wheelbase washing unit and c) a weighbridge subject to 3 conditions.

P.A Ref. 10/629.

An application for retention of oil storage tanks, office, retention of garage/workshop granted under 06/3299 and retention of and additional garage/workshop was withdrawn.

P.A Ref. 09/1518.

An application for retention of oil storage tanks, office, retention of garage/workshop granted under 06/3299 and retention of and additional garage/workshop was withdrawn.

Planning Registration P.A. Ref QY 71.

The site was registered under Section 261 with 14 conditions, which are standard in nature on the 27th of April 2007.

P.A. Ref. No. EN09/098

An enforcement notice was served by the planning authority in relation to unauthorised oil storage tanks, unauthorised office, unauthorised extension to existing garage/workshop approved under planning Ref. No. 06/3299 and unauthorised additional workshop/storage unit.

4.0 DETAILS OF DETERMINATION UNDER SECTION 261A

The planning authority determined under file ref **QSP71** that

(i) Development was carried out after 1st 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.

(ii) Development was carried out after 26th February 1997 which was not authorised by a permission prior to 26th February 1997, which development would have required having regard to the Habitats Directive an appropriate assessment and that such an assessment was not carried out.

The reasons referred to the quarry being less than 0.5 km from Knockmaa Hill a proposed NHA Code 001288 and the quarry exceeds the threshold of 5 hectares.

Accordingly, a notice was served on the applicant directing to apply for substitute consent and to submit a Remedial EIS and a Remedial Natura Impact Statement.

The Planning Officer's assessment report noted the size of the quarry as 11.29 hectares; the proximity to Knockmaa Hill pNHA; the planning history including a grant with conditions under P.A Ref. 06/3299 a garage/workshop, wheelbase washing unit and a weighbridge; the site has pre 1964 commencement and both EIA and AA is required.

5.0 SUBMISSIONS.

5.1 Applicant's submission.

Included in the application documentation are,

- Public notices.
- A Remedial Environmental Impact Statement (rEIS).
- A Remedial Natura Impact Statement (rNIS).
- Associated drawings and maps.

It is indicated that the substitute consent application is on a site of c12.11 hectares covers the pit and also includes the associated processing area, existing buildings and processing plant and other associated operations and boundary treatments. The actual extraction area is stated as 8.64 hectares

5.2 Catherine Ó Ceóinín

Catherine Ó Ceóinín in a submission refers to a record of stockpiling tyres on the site; to the absence of scrutiny on quarries the growth of quarries from small areas and encroachment on commonages.

5.3 Peter Sweetman and Associates.

Peter Sweetman and Associates in a submission indicate,

- The application is invalid as there is no reference in the public notices to the construction of the additional workshop/ storage serving the quarry.
- There is no facility for a retention application in rEIS.
- Mc Tigue Quarry Ltd appealed the decision of their Section 261 (QR071) stating the extraction area did not exceed 5 hectares and this application is for an extraction area of 8.64 hectares.
- It is the submission of the observer that the Section 261A legislation does not cover this unauthorised development of 3.64 hectares, the extraction was willfully and knowingly unauthorised and contrary to the EIA Directive and cannot be rewarded with substitute consent.
- The grant of retention would fly in the face of CJEU Case C-215/06 as in this case no exceptional circumstances are claimed.
- The claim to pre 1963 is untrue.
- Reference is made to aerial photographs in 1995 and 2000 and the presence of limestone pavement a priority habitat.
- There is a history of unauthorised development on the site.

5.4 National Roads Authority

The NRA in a submission indicate have no specific comment to make other than consideration be given to any recommendations arising from the TTA as conditions in any grant of permission.

5.5 Frank Mortimer.

Frank Mortimer in a submission indicates,

- The quarry never obtained planning permission and has been determined by Galway County Council to be exempt from planning permission due to pre 1964 operations and are at a loss as to how such a determination was made.
- There is no evidence to support pre 1964 quarry development.
- There is no evidence of an access road or works in 1995.
- The applicant has no title to the access road.
- Documentary evidence is support of above positions is submitted.
- There is a history of unauthorised development in relation to the quarry.
- There was not an appropriate enquiry made into the pre 1964 status of the quarry other than an affidavit of the operator of the quarry in support of this claim and contrary to the position stated by other parties.
- The weight of evidence is that quarrying commenced in late 1999/early 2000 and this is supported by aerial photographs of the period.
- There is no evidence of a road accessing the quarry in 1995; there is evidence of a road in 2000 bit not of quarrying and significant intensification in 2005 and 2010.
- Issues of road access arise.

- Reference is made to the current application being used as a means to extend the boundary further to the west into a new area expressly omitted from previous applications.
- Conditions are outlined in the event of a decision to grant the current application.

5.6 Health Service Executive.

The HSE in a submission note that

- No complaints were received in relation to the quarry,
- Reference is made to drinking water supplies in the area and the absence of proper evaluation of possible impacts on groundwater.
- That background levels of noise be taken when the quarry is not operational.
- Reference is made to mitigation measures in relation to air and dust.

5.7 An Taisce.

An Taisce in a submission refer to cumulative environmental impact arising from the subject quarry and the adjoining quarry. Reference is made to the legal status of the registration process, the absence of information on the level/scale of quarrying in 1964 and 1990. The proposal does not constitute an exceptional case.

5.8 Galway County Council.

The planning authority in a submission indicate,

- The planning history
- Development plan provisions.
- Reference is made to the report of the environment department and the risks arising to groundwater and effects from noise.
- Reference is made to a report from the roads department.
- Permission is recommended for the development.
- Conditions are outlined including conditions relating to restoration of the site and a contribution of 25,000 euro.

5.9 Applicant's response.

The applicant in a submission indicates,

- The pre 1964 status of the quarry was determined by Galway County Council.
- The remit in the current proposal is substitute consent.
- Notwithstanding this signed statements relating to the use of the site as a quarry are submitted.

- Small amounts of building stone were extracted on an ongoing basis from the 1950s and late 1999 when more intensive mechanized extraction methods commenced.
- The matter of the existence of quarry between 1990 and 1999 was determined by Galway County Council.
- Although the 1995 aerial photograph is vague the white arcs within the site are areas where stone was extracted. There is also evidence of an access track which was surfaced in 2000 and evidence to the extraction in this period is submitted in the form of statements.
- The owner is the full owner of the subject application site and the right of way and has sufficient legal interest to use the right of way.
- The status of the quarry and its extent was established by the registration process. The legislation directed the applicant to prepare EIA and the applicant did not have to claim exceptional circumstances.
- The structures on the site without planning permission can form part of the substitute process.
- Oil tanks were on the site but were removed. The rEIS assessed the impact of these tanks and the only tank on the site is to meet the needs of the quarry. There is no evidence of accidental spillage from the tanks.
- Tyres previously on the site were removed.
- The production of lime occurs on the site and is assessed in the rEIS.
- In relation limestone pavement the rEIS and rNIS found no evidence that this habitat existed on the site or directly within the vicinity of the site. (Refer to appendices 5 and 6 with submission).
- In relation to groundwater mitigation measures are consistent with best environmental practice.
- In relation to noise the methodology follows best practice for the preparation of a rEIS.
- In relation to dust the applicant is not aware of any complaint on this matter.
- The submission has a number of appendices in support of the above.

6.0 PLANNING POLICY CONTEXT.

Galway County Development Plan 2009-2015.

Section 4.6 of the plan relates to Extractive Development and 4.6.1 outlines policies and objectives specifically relating to extractive development which include,

Policy ED16:
Facilitate the extraction of stone and mineral material from authorised sites having regard to its location in the landscape sensitivity rating.

Policy ED17:

Restrict development in the neighbourhood of existing extractive sites or sites which have obvious resource potential, and so avoid conflict in development activities.

Policy ED18:
Control all new operations and carefully evaluate all proposed developments to ensure that the visual or other environmental impacts of such works will not materially injure the amenities of the area.

Policy ED19:
The Planning Authority shall be favourably disposed towards planning applications for the use of temporary borrow pits for aggregates or materials that are located adjacent to or adjoining major public roads or infrastructure projects serving the county where the need to haul along public roads is eliminated. All normal planning considerations shall apply.

Objective ED6:
The Planning Authority shall have regard to the Quarries and Ancillary Facilities Guidelines published by the DoEHLG in 2004 and to DM Standard 36 of this Plan in the assessment of any applications for extractive developments.

Objective ED7:
Consider the preparation of an Extractive Industry Policy to provide greater clarity and guidance regarding extractive industry operations, planning application requirements and environmental and rehabilitation provisions.

Section 11 relates to Development Management standards and guidelines.

DM Standard 35 sets out requirements in relation to Extractive Development covering a range of matters and refers to compliance with relevant Guidelines, mitigation methods to reduce environmental impact, access, rehabilitation, EIS, landscaping and screening and heritage and biodiversity

7.0 ASSESSMENT.

7.1 Having inspected the site and examined the associated documentation, the following are the relevant issues.

- Principle of substitute consent.
- Principle of development.
- Environmental Impact Statement.
- Environment Impact Assessment.
- Appropriate Assessment

7.2 Principle of substitute consent:

The applicant it is noted was required to apply for substitute consent subject a notice issued by the Planning Authority on foot of Section 261A of the Planning and Development Act 2000 as amended under P.A. file ref (QSP71).

This application, I consider, complies with the provisions of the Planning and Development Act, 2000 as amended in regard to applications for substitute consent resulting from the issue of a notice by the Planning Authority.

7.3 **Principle of development**.

In section 3 of this report I have outlined the planning history relating to the site and in section 6 the policy context.

The subject site is located in a rural area where the predominant land-use is agricultural use and the site was the subject of registration under Section 261. The site has a history of planning applications and planning enforcement and quarrying and extraction is therefore well established on the site.

I note that many of the observer submissions raise questions relating to pre 1964 use and also the use of the site up to 1999. These matters relate to the issue of registration under Section 261 and are not material to the issue of substitute consent which relates to the current proposal.

In general terms the policies and objectives of the current county development plan support the principle of the expansion of an extraction industry which offers opportunity for employment and facilitates economic development. This largely supports national guidelines as set out in guidance on quarries and ancillary activities. The current county development plan also recognises a continuing need for some new or expanded aggregate quarrying operations on land to meet regional and local requirements and to ensure adequate supply of aggregates to meet likely scale of future demand.

The site itself has no specific zoning and it can be assumed that use is as the existing established use which in this case is an established quarry which is currently in active use.

It is therefore important to state at this preliminary stage of assessment that there is no specific provision in the Development Plan which specifically precludes the operation of a quarry at this particular location subject to satisfying development management standards and policies set out in the Development Plan.

The principle of the subject development is I consider acceptable subject to complying with standards as stated in national guidance in relation to the extractive industry and also development management standards stated in the county development plan and subject to the consideration that it does not

adversely impact on the amenities of the area or is not in contravention of other defined statutory provisions and provisions of the county development plan.

7.4 **Environmental Impact Statement.**

The application is accompanied by a remedial environmental impact statement.

In relation to the adequacy of the rEIS, I consider that it contains the information specified in Schedule 6 of the Planning and Development Regulations 2001, as amended and can be considered as a contribution towards the process of assisting making the relevant decision maker and the competent authority, in this case the Board, to enable a decision to be made. The various sections of the rEIS where relevant are considered in environmental impact assessment.

7.5 **Environmental Impact Assessment**.

The application for substitute consent in relation to EIA will be considered under the following headings:

- Impacts on human beings.
- Environmental impact including air emissions, noise and vibration and impacts on the water environment.
- Landscape and visual impact.
- Cultural heritage.
- Roads and transportation.
- Ecology

7.5.1 **Impacts on human beings.**

Chapter 4 of the rEIS relates to Human Beings.

In relation to human beings, the direct benefits of the proposal in relation to employment are outlined. Impacts which arise from quarrying activity relating to landscape, noise and dust are referred to and addressed in other sections of the rEIS but mitigation measures to address impacts are in place to mitigate these impacts.

I would consider that impacts identified are as stated in the rEIS and that visual impact also arises in the local context. These impact issues are however I consider adequately addressed in the relevant chapters of the rEIS.

7.5.2 **Environmental Impact**.

7.5.2.1 Air impacts.

Chapter 8 of the rEIS relates to Air and Climate.

In relation to air impacts the quarry development and its associated activities and processes has implications for air quality and potential direct and indirect impact arising from dust generation associated with general excavation, movement and processing of material and associated traffic movements internally within the site. There is also a potential impact on air quality due to traffic emissions and also the creation of dust from traffic entering and leaving the site. Blasting also occurs on the site the frequency of which it is indicated in the rEIS is dependent on demand for materials.

The rEIS indicates that dust is not currently a significant issue and monitoring confirms no elevated levels of dust deposition at site boundaries and reduction of levels have occurred over the years arising from these measures.

On the basis of the information submitted I consider that impacts relating to air emissions and quality have been assessed and there is nothing to suggest that significant adverse impacts have arisen as a result of the operations on the subject site.

I would conclude that the overall impacts on air quality would be acceptable having regard to mitigation measures in place.

7.5.2.2 Noise and Vibration.

Section 9 of the rEIS relates to Noise and Vibration.

The rEIS refers to the local receiving environment; the location of sensitive receptors and the presence of noise monitoring locations (figure 9.1 of rEIS). It is also noted that the operations of the quarry are located at lower levels increasing below the original ground level which provides additional acoustic screening. The monitoring stations have recorded noise levels which are indicated in table 9.2 of the rEIS and are below permitted levels. An assessment of noise levels are also indicated and related activities such as drilling, blasting rock braking and other associated activities. Reference is made to cumulative effects taking into account the adjoining quarry but that past activities are unlikely to have exceeded permitted levels.

Mitigation measures which were put into operation over the years and which are currently in operation are outlined. No additional remedial measures are indicated as required.

I would consider that the mitigation measures as outlined in the rEIS were satisfactory to ensure that the development did not adversely impact on the amenities of the area.

7.5.2.3 Soils and Geology.

Chapter 10 of the rEIS relates to Soils and Geology.

The nature of the operations carried out on the site by their nature has given rise to impacts arising from the removal of soil and subsoil and the flora contained within and the removal of limestone to depths considerably below previous ground levels.

The receiving environment is outlined in relation to soils and geology in the rEIS and the primary impacts are identified as the removal of soil and the substrata consisting of limestone ranging in depth from 10 to 25 metres. The removal of rock is a permanent irreversible impact.

7.5.2.4 Water

Chapter 11 of the rEIS relates to Water.

In relation to water there are implications for both surface water and ground water with regard to potential impacts arising from quarry activities. It is important to note in this context that the subject site is not a wet working site with extraction above the watertable. The working site is extracting limestone rock which permits transmission/conduit of water vertically and horizontally with high porosity. There are also processing activities associated with the quarry involving washing of material for the purpose of screening and grading aggregates. In the absence of a robust management system to contain and control discharges dirty water with suspended solids can I consider impact on sensitive water based receptors.

There is no watercourse in the immediate vicinity but is part of the Lough Corrib catchment and Lough Corrib is located approximately 9 kilometres to the west of the site.

The rEIS in an appraisal and survey of water catchments initially examined the receiving environment including the Lough Corrib Water Management Unit. The surveys also refer to turloughs within 5 kilometres of the site with no defined hydraulic connection identified between the site and the turloughs.

Groundwater flows are indicated and reference is made to the extreme vulnerability of the underlying aquifer which in the context of the site being karstic limestone formation with removal of overlying soils is a reasonable position. Although the aquifer in the wider Corrib/ Clare River water body is classed as of poor groundwater quality tests outlined in the rEIS and carried out within the site indicate no contamination on the subject site itself.

Essentially in relation to this site the primary impacts which are identified in the rEIS are discharges of contaminated water to ground water and also accidental spillages from oils and other chemical agents to groundwater.

The rEIS outlined the water management scheme in situ and also proposals in relation to further mitigation measures to be implemented on the site. Given that the site is essentially a dry working site this reduces potential risks other than recharge of contaminated water back into the groundwater. In relation to water impacts having reviewed the information I consider that the measures in place and proposed address potential impacts to water and that no significant impacts have arisen and are likely to arise from the operation of the quarry on the subject site.

The rEIS concluded that the quarry would not have significant impacts on water and I would concur with this conclusion.

7.5.4 **Landscape and visual Impact**.

Chapter 6 of the rEIS relates to landscape.

Quarrying by the nature of its surface extractive process will give rise to visual impact. The stripping and removal of soil cover and vegetation in relation to the subject site has resulted in a significant visual impact on the site and its immediate vicinity. Away from the immediate site the nature of the landscape and topography to absorb visual impact requires to be considered and also in relation to the subject site the cumulative impact when taking the adjoining quarry site into consideration.

A landscape appraisal was carried out of the site and refers to the residual effects after the cessation of quarrying activity indicating that mitigation measures will in the long term help in restoring the landscape and increase biodiversity in the area through re-vegetation and the maturing of woodland planted in the quarry floor and along the site boundaries. Reference is also however made that will not be possible to fully restore the quarry faces and the cumulative impact arising from having two adjoining quarries and two possible periods when cessation of quarrying will occur.

In relation to the proposed site the site is located on a hill within a low lying flat landscape but the appeal site is located on the northeastern lower slopes of Knockmaa Hill, which is the dominant topographical feature in the landscape and which is highly visible from a considerable distance in all directions. Although the site is not within an area designated of a high scenic value it is an attractive rural landscape. The proximity of the two quarries is a factor in increasing the visibility of quarrying operations. The proposed site by virtue of its relative location and the actual area of excavation is less prominent than the adjoining quarry to the south.

The development by its nature therefore will impact on the visual amenities of the area as it involves a change in the character of the local landscape with scarring of the hillside and unless the quarried area is filled in its entirety result in an

irreversible change in the landscape. The fact that there will be an impact however does not necessarily infer that the impact is entirely negative, that the impact cannot be ameliorated by screening during the operational life of the quarry and provisions for landscaping which will mature post quarrying. In this regard I consider that the mitigation measures carried out to date and proposed into the future are reasonable.

The site is in a rural area, which is an attractive landscape with mature hedgerows and trees. Knockmaa Hill is the dominant feature of the landscape and quarrying already occurs in two quarry operations on its lower slopes and vicinity. In general terms, the quarrying works are therefore a dramatic and irreversible impact on the local landform as a result of scarring and changes in the topography. The principle visual impact will be in the vicinity of the site and the impact diminishes further from the site and with appropriate landscaping it would not, therefore, be excessively intrusive and will not be I consider significant.

I therefore conclude that the impacts of the proposed works, while adversely impacting the immediate landscape, are in broad terms acceptable subject to appropriate landscaping.

7.5.5 **Cultural heritage**.

Chapter 12 of the rEIS relates to cultural heritage.

The rEIS refers to the significant archaeological evidence in the area with six identified sites on Knockmaa hill. Reference is also made to the designated monuments within a 1 kilometre radius of the quarry but there are none within the subject site and given the extent of quarrying operations no sites are likely to be identified. In general terms therefore no direct or indirect impacts are identified and the ongoing operation of the quarry will not give rise to residual impacts.

In relation to cultural heritage I would consider that having regard to the subject site and the documentation on the file it is likely that there would be no direct impacts on the existing archaeological environment. I do not consider that the impact of the development would significantly impact on the cultural heritage of the immediate area.

7.5.6 **Traffic and transportation.**

Chapter 7 of the rEIS relates to Traffic and Transportation.

In relation to traffic associated with the development there are implications for the existing road network arising from increased traffic generated, the nature of the traffic in particular HGVs utilizing the road network and the actual characteristics of the road network. The development is a resource tied based activity utilising a

local road network and the origin and destination of traffic extends to a wider area and requires journey time to use the N17 the main traffic artery in the area.

In addition to the direct traffic based impacts there are interactions with other potential sensitive receptors including human beings as the development generates a distinctive level and usage of HGV traffic with potential impacts of noise from vehicles and of potential impacts on air quality through emissions from vehicles.

The existing public road network serving the site is narrow in places and poorly aligned and this would apply also to the R333, which in turn links onto the N17.

The rEIS has assessed the existing environment in relation to the site operations and the road network in terms of road with alignment and condition immediate to the site and also in relation to several key junctions (figure 7.3 of rEIS) concluding that the traffic generated by the quarry is significantly below threshold of capacity on these routes and consequently will have a negligible impact on the road network.

Overall I would note that the development by its nature will generate traffic and in particular HGV traffic on the road network. The development is however a tied resourced based industry and the network has been upgraded in sections to facilitate free flow of traffic. The development also is within a reasonable distance of the regional and national road network.

I consider that the development would not have had an adverse impact on the road network in the area nor would the development endanger public safety by reason of traffic hazard. I would also conclude that no significant impact arises in relation to sensitive receptors in the area directly or indirectly.

7.5.7 **Ecology**

Chapter 5 of the rEIS relates to Flora and Fauna**.**

The main impacts of concern in a quarry development would be the removal of habitats which support unique or designated species as quarrying by the nature of its operation involves ground disturbance which would remove the ground conditions and cover which support those habitats.

In relation to ecology/flora and fauna the site is not located within a Natura site, the nearest being in excess of 2.5 kilometres away. This is the Lough Corrib SAC and SPA, a large site encompassing the Lough and many of the rivers within its catchment. The nearest designated site is the Knockmaa Hill pNHA site code 001288 approximately 500 metres to the west of the subject site where the main features of interest relate to woodland and areas of limestone pavement which support distinct flora species.

The quarry activities on the site has removed the soil and vegetation and also resulted in significant lowering of ground level. The rEIS has identified no designated protected species on the site based on field studies carried out and considers the site of low ecological value. It is also concluded that the site would not support protected species in its current species.

By way of mitigation it is indicated that restoration of the site will provide the opportunity for recolonising areas of the site. In effect therefore the rEIS in relation to flora and fauna has outlined that irreversible loss of habitat has occurred arising from the extraction process giving rise to areas of bare ground with little or no cover. The ongoing quarry process has also generated disturbance arising from noise and movement of machinery and humans which has led to a site which is not conducive to fauna.

There is no evidence presented to suggest there were significant flora or fauna species on the site. Nor is there any data to conclude that the quarry has had any perceptible impact on such species. Equally in considering interactions I would refer to other sections of the assessment and I would consider, and would be in concurrence with the rEIS, that the interaction of the impacts does not lead to significant environmental impacts and effects beyond those identified for each of the individual environmental topics.

7.6 APPROPRIATE ASSESSMENT.

The application for substitute consent lodged by the applicant with An Bord Pleanála on the 7th May 2013 submitted in relation to Appropriate Assessment (AA) a remedial Natura Impact Statement (rNIS).

I would note that activities, plans and projects can only be permitted where it has been ascertained that there would be no adverse effect on the integrity of a Natura 2000 site, apart from in exceptional circumstances. In considering AA I have had regard to the provisions of Planning and Development Act 2000 as amended and in particular to Section 177G.

The primary issue to consider is whether the development has individually and in combination with other plans or projects adversely affect the integrity of the European site concerned having regard to its conservation objectives.

It is indicated that the site is not within or adjacent to any Natura 2000 sites. As part of the screening process five Natura 2000 sites within 15 kilometres of the site are identified. Each of the five sites are individually outlined in the context of their conservation objectives and listed habitats and species. NHAs are also identified on the basis that they are important in supporting wildlife and habitats and often support Natura 2000 sites.

The position presented in the rNIS has in effect concluded that no measureable adverse impact has occurred to affect the integrity or qualifying interests of a Natura site arising from the development.

The primary issue therefore to consider is whether the development under consideration individually and in combination with other plans or projects has or has not adversely affected the integrity of the European site concerned having regard to its conservation objectives.

The site is not within a European site. Having considered the matter I consider on the basis of the information presented that the development has not adversely affected the integrity of the European site concerned having regard to its conservation objectives.

In relation to the impact on qualifying habitats and species the rNIS did examine potential impacts on European sites within a 15 kilometre radius site of the site. The rNIS assessed impacts in relation to identified potential impacts on the receiving environment in the context of source, pathway and receptor and I consider that no link has been established between the site and these sites.

I note that in the submission of Mr. Sweetman reference is made to aerial photographs in 1995 and 2000 and the presence of limestone pavement a priority habitat. In response to this reference to limestone pavement the applicant indicates that the rEIS and rNIS found no evidence that this habitat existed on the site or directly within the vicinity of the site. I would note that the quarrying operations have removed any current visual evidence of any possible presence of limestone pavement. There is therefore no conclusive information submitted by any party in relation to this matter.

In relation to this matter Limestone pavement code 8240 is a listed priority habitat under the Habitats Directive. They are included as listed habitats in European sites and pNHAs but the site as already stated is not listed for designation.

I have examined the aerial photographs including those relating to the years 1995 and 2000 before the areas were significantly excavated. The photographs do appear to indicate areas of exposed bare rock. Whether they are areas of limestone pavement or limestone outcrops or area which were the subject of excavation is not in any way conclusive. There is nothing in an examination of the aerial photographs to indicate that the rock would conform to the definitions for limestone pavement as set out in the publication "*The development of methodologies to assess the conservation status of limestone pavement and associated habitats in Ireland*" Irish Wildlife Manuals No. 43 published by the National Parks and Wildlife Service in 2009.

I would however note that the Knockmaa Hill pNHA site code 001288 located approximately 500 metres to the west of the subject site was designated for

reasons which included the presence of limestone pavement and it would be reasonable to consider that the subject site could have been similarly considered if limestone pavement was present.

Having considered the matter I consider on the basis of the information presented that the development has not adversely affected the integrity of any European site concerned having regard to their conservation objectives. There is nothing to suggest that the loss of woodland has resulted in any loss of Annex 1 habitat or in the fragmentation of habitat and any qualifying interest.

I therefore consider it reasonable to conclude on the basis of the information available that the proposed development, individually and in combination with other plans or projects would not adversely affect the integrity of a European site.

7.7 DEVELOPMENT CONTRIBUTION.

The local authority has recommended to the Board that the application for substitute consent be granted subject to relevant conditions environmental and financial associated with the operation of the sand and gravel quarry. Galway County Council have in a submission to the Board indicated payment of a contribution of €25,000 to defray additional maintenance cost of the local road network due to the use of the local roads to transport material from the quarry. In the context of the site's location and the requirement for the use of local roads prior to accessing the national network a contribution as stated is I consider reasonable.

I also consider that the standard development contribution scheme condition and similarly a bond should also be applied as I cannot see any basis for departing from normal practice in the matters of general financial contributions or bonds.

7.8 OTHER MATTERS.

I wish to refer to the legal requirement to consider whether or not there should be a cessation notice issued in the subject case. Based on my assessment in relation to any significant impacts, I do not consider it would be appropriate to require a cessation of activities.

The applicant has indicated as part of the substitute consent application that there is an intention to regularise all ancillary structures on the site and which were the subject of enforcement action by the planning authority. Specifically there is reference to an extension to an existing garage/workshop (Building A on submitted drawings) and the construction of an additional workshop/storage serving the quarry (Building B on submitted drawings) forming part of the substitute consent application. The basis for applying for these structures is to house and maintain the large plant machinery on the site.

There is also reference to other ancillary structures included as part of the substitute consent application, the canteen, pumphouse, lime crushing enclosure and water tank. It is noted that none of these structures are referred to in the public notices and therefore do not form part of the substitute consent application.

The substitute consent process relates to consideration and assessment of the quarry and its processes. Buildings irrespective of possible ancillary activities should I consider be addressed by a separate planning application.

8.0 CONCLUSION AND RECOMMENDATION.

The development which has occurred essentially comprised the extraction of limestone in an existing quarry at this site. Matters are raised in relation to right of access and also in relation to matters of a civil nature which are not related to the issue of substitute consent.

Arising from my assessment above and based on the information available therefore I conclude that the quarry has not given rise to significant adverse impacts on the environment and that ongoing impacts are limited in terms of scale and significance and can be remediated. I also consider that the subject development, either individually or in combination with other plans or projects, has not adversely affected the integrity of a European site.

I therefore recommend that the application for substitute consent should be granted in this instance based on the reasons and considerations and subject to the conditions set out below.

REASONS AND CONSIDERATIONS

The Board had regard inter alia to the following:

- The provisions of the Planning and Development Acts 2000-2011 as amended and in particular part XA.
- The Quarry and Ancillary Activities, Guidelines for Planning Authorities issued by the Department of the Environment, Heritage and Local Government 2004.
- The provisions of the Galway County Council Development Plan 2011-2017.
- The remedial Environmental Impact Statement and the remedial Natura Impact Statement submitted with the application for substitute consent.
- the planning history of the site,
- Submission received,
- The pattern of development in the area.

- The nature and scale of the development, the subject of this application for substitute consent.

The Board completed an Environmental Impact Assessment in relation to the development in question and concluded that the statement identified and described adequately the direct and indirect effects on the environment of the development and also the acceptability of mitigation measures outlined and proposed and residual effects arising.

The Board considered the remedial Natura Impact Statement submitted with the application for substitute consent and carried out an Appropriate Assessment of the development having particular regard to the potential for impacts on Natura 2000 sites The Board completed an Appropriate Assessment and having regard to the nature and scale of the development, the nature of the receiving environment and the mitigation measures and water management proposals set out in the remedial rNIS and the Board is satisfied that the development, on its own or in combination with other plans or projects, has not adversely affected the integrity of a European site.

Having regard to the acceptability of the environmental impacts as set out above, it is considered that the development, subject to compliance with conditions set out below, is not contrary to the proper planning and sustainable development of the area.

CONDITIONS

1 The grant of substitute consent shall be in accordance with the plans and particulars submitted to An Bord Pleanala with the application on the 7th May 2013. This grant of substitute consent relates to only works undertaken to date and does not authorise any future development on the subject site. This grant of substitute consent relates to the matters referred to in the public notices and not to the regularization of buildings on the site.

Reason: In the interest of clarity.

2 A detailed restoration scheme for the site shall be submitted to the planning authority for written agreement within three months of the date of this order. The following shall apply in relation to the design and implementation of the restoration plan:
(a) The site restoration shall provide for the immediate re-vegetation of the site where suitable and/or the provision of features to control sediments which could result in surface water pollution.

(b) Prior to commencement of works, a further survey of the site by an ecologist shall take place to establish, in particular, the presence of species of ecological value, including flora, which may recently have taken up occupancy on the site. The restoration plan shall have regard to the results of this survey.
(c) A timescale for implementation and proposals for an aftercare programme of five years shall be agreed with the planning authority.

Reason: In the interest of pollution control, to enhance the visual amenities of the area, to enhance ecological value and to ensure public safety.

3 The developer shall pay to the planning authority a financial contribution a contribution of €25,000 to defray additional maintenance costs of the local road network due to the use of the local roads to transport material from the quarry. The contribution shall be paid within six months of the date of this order or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment and shall take account of any previous payments made in respect of the development on the site. The application of any indexation required by this condition shall be agreed between the planning authority and the developer or, in default of such agreement, the matters shall be referred to the Board to determine.

Reason: It is considered reasonable in the context of the nature of the development and its impact on the local road network that a condition requiring a contribution be applied to the consent.

4 The developer shall pay to the planning authority a financial contribution of in respect of public infrastructure and facilities benefiting development in the area of the planning authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000. The contribution shall be paid within six months of the date of this order or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment and shall take account of any previous payments made in respect of the development on the site. The application of any indexation required by this condition shall be agreed between the planning authority and the developer or, in default of such agreement, the matters shall be referred to the Board to determine.

Reason: It is a requirement of the Planning and Development Act 2000 that a condition requiring a contribution in accordance with the Development Contribution Scheme made under section 48 of the Act be applied to the consent.

5. Within three months from the date of this order, the developer shall lodge with the planning authority a cash deposit, a bond of an insurance company, or other security to secure the provision and satisfactory restoration of the site, coupled with an agreement empowering the local authority to apply such security or part thereof to the satisfactory completion of any part of the development. The form and amount of the security shall be as agreed between the planning authority and the developer or, in default of agreement, shall be referred to An Bord Pleanála for determination.

Reason: To ensure the satisfactory restoration of the site.

_____

Derek Daly,

Senior Planning Inspector.

24th March, 2014.

An Bord Pleanála

PLANNING AND DEVELOPMENT ACTS 2000 TO 2014

Galway County

Planning Register Reference Number: QSP71

An Bord Pleanála Reference Number: 07.SU.0036

APPLICATION FOR SUBSTITUTE CONSENT by McTigue Quarrys Limited care of Gabriel Dolan Associates of Main Street, Craughwell, County Galway in accordance with section 177E of the Planning and Development Act, 2000, as amended by the insertion on section 57 of the Planning and Development (Amendment) Act, 2010, and as further amended by the European Union (Substitute Consent) Regulations, 2011 and European Union (Environmental Impact Assessment and Habitats) Regulations, 2011.

LOCATION OF QUARRY: Cartron, Belclare, Tuam, County Galway.

BOARD DECISION

The Board, in accordance with section 177K of the Planning and Development Act, 2000, as amended, and based on the Reasons and Considerations set out below, decided to **GRANT** substitute consent in accordance with the following conditions.

MATTERS CONSIDERED

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

REASONS AND CONSIDERATIONS

The Board had regard, inter alia, to the following:

(a) the provisions of the Planning and Development Acts, 2000 to 2014, and in particular Part XA,

(b) the Quarries and Ancillary Activities, Guidelines for Planning Authorities issued by the Department of the Environment, Heritage and Local Government in April, 2004,

(c) the provisions of the current Galway County Development Plan,

(d) the remedial Environmental Impact Statement submitted with the application for substitute consent,

(e) the remedial Natura impact statement submitted with the application for substitute consent.

(f) the report and the opinion of the planning authority under section 177I of the Planning and Development Act, 2000, as amended,

(g) the submissions made in accordance with regulations made under section 177N of the 2000 Act, as amended,

(h) the report of the Board's Inspector,

(i) the planning history of the site,

(j) the pattern of development in the area, and

(k) the nature and scale of the development the subject of this application for substitute consent.

Appropriate Assessment

Having regard to the nature, scale and extent of the development for which substitute consent is sought, the remedial Natura impact statement submitted with the application, the submissions on file and the Inspector's assessment, the Board completed an appropriate assessment of the impacts of the proposed development on Natura 2000 sites. The Board concluded that, on the basis of the information available, the subject development, either individually or in combination with other plans or projects, has not adversely affected and is not adversely affecting the integrity of any European site, having regard to the conservation objectives of those sites.

Environmental Impact Assessment

The Board completed an Environmental Impact Assessment in relation to the subject development and concluded that the remedial Environmental Impact Statement submitted identified and described adequately the direct and indirect effects on the environment of the development.

The Board considered that the Inspector's report was satisfactory in addressing the environmental effects of the subject development and also agreed with its conclusions in relation to the acceptability of mitigation measures proposed and residual effects. The Board adopted the report of the Inspector and decided that the subject development would not be likely to have had/or have a significant effect on the environment.

Planning Considerations

Having regard to the acceptability of the environmental impacts as set out above, it is considered that, subject to compliance with the conditions set out below, the subject development is not contrary to the proper planning and sustainable development of the area.

CONDITIONS

1. This grant of substitute consent shall be in accordance with the plans and particulars submitted to An Bord Pleanála with the application on the 7th day of May, 2013. The grant of substitute consent relates solely to quarrying development undertaken as described in the application, and does not authorise any future development including excavation on this site.

   Reason: In the interest of clarity.

2. All environmental mitigation measures identified within the remedial Environmental Impact Statement and the remedial Natura impact statement shall be implemented in full, save as may be required in order to comply with other conditions attaching to this order.

   Reason: To protect the environment and the amenities of the area and to ensure the proper planning and sustainable development of the area.

3. A comprehensive plan for the restoration of the quarry, including timelines, shall be submitted to, and agreed in writing with, the planning authority within six months of the date of this order. This plan shall include the following:-

   (a) details relating to the finished gradients of the quarry faces, and re-vegetation of quarry faces,

   (b) re-shaping and re-contouring of boundary bunds,

   (c) a scheme of landscaping and tree planting,

   (d) removal of all buildings on site, and

   (e) proposals for an aftercare programme of five years.

   Reason: In the interest of the visual amenities of the area and to ensure public safety and environmental protection.

4. Within three months of the date of this order, the oil storage tank, and any remaining stored tyres, shall be permanently removed from the site.

Reason: To protect the environment and the amenities of the area.

5. Within six months of the date of this order, the developer shall lodge with the planning authority a cash deposit, a bond of an insurance company, or other security to secure the satisfactory restoration of the site, coupled with an agreement empowering the local authority to apply such security or part thereof to the satisfactory completion of the restoration of the site. The form and amount of the security shall be as agreed between the planning authority and the developer or, in default of agreement, shall be referred to An Bord Pleanála for determination.

Reason: To ensure the satisfactory restoration of the site.

6. The developer shall pay to the planning authority a financial contribution of €25,000 (twenty-five thousand euro) in respect of improvement works to the local public road network in the area that has benefited the quarrying development that has taken place in accordance with section 48 of the Planning and Development Act, 2000, as amended. The contribution shall be paid within six months of the date of this order or in such phased payments as the planning authority may facilitate and shall be updated at the time of payment in accordance with changes in the Wholesale Price Index – Building and Construction (Capital Goods), published by the Central Statistics Office.

Reason: It is considered reasonable that the developer should contribute towards the specific exceptional costs which have been incurred by the planning authority which are not covered in the Development Contribution Scheme made under section 48 of the Act and which have benefited the development.

Philip Jones

Member of An Bord Pleanála
duly authorised to authenticate
the seal of the Board.

Dated this 5th **day of** January **2015.**

Appendix 3

Supreme Court Judgement and Order

SUPREME COURT

S:AP:IE:2017:000012

S:AP:IE:2017:000052

Wednesday the 12th day of December 2018

BEFORE

THE CHIEF JUSTICE

MR JUSTICE McKECHNIE

MR JUSTICE MacMENAMIN

MR JUSTICE CHARLETON

MR JUSTICE EDWARDS

2015 No. 302 MCA

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS 2000 TO 2011 AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

AN TAISCE – THE NATIONAL TRUST FOR IRELAND

APPLICANT

AND

MCTIGUE QUARRIES LIMITED AND GARRY MCTIGUE AND CAROLINE MCTIGUE

RESPONDENTS

The Motion on the part of the Applicant pursuant to Notice of Appeal dated the 17th day of January 2017 by way of appeal from the Judgment of the High Court (Mr Justice Barrett) given and on the 8th day of November 2016 and the Order made on the 6th day of December 2017 refusing the Applicant's motion pursuant to Section 160 of the Planning and Development Act as amended for an Order requiring the Respondents their servants and agents to cease all unauthorised development including all works for the extraction of stone and gravel the carrying out of rock and gravel processing activities the loading of materials and the transportation of the said materials from the quarry and all related and ancillary works on lands located at Cartron Belclare Tuam Co Galway and for an Order

setting aside the said Judgment and Order on the grounds and as set forth in the said Notice of Appeal coming on for hearing before this Court on the 7th day of March 2018 together with the Motion on the part of the Respondents pursuant to Notice of Appeal dated the 4th day of April 2017 by way of appeal from the said Judgment and Order of the High Court that the said quarry was unauthorised development within the meaning of Section 2(1) of the Planning and Development Act 2000

Whereupon and having read the said Notice of Appeal the said Order the documents therein referred to the judgment of the High Court and the written submissions filed on behalf of the respective parties and having heard Counsel for the Applicant and Counsel for the Respondent

IT WAS ORDERED that the case should stand for judgment

And the matter having been listed on the 24th day of July 2018 and the Court having directed that additional written submissions be filed in respect of a number of issues communicated to the parties

And having read the additional written submissions filed on behalf of the respective parties and having heard further oral argument from respective counsel on the 25th day of October 2018

And the same having been listed for judgment on the 7th day of November 2018 and having been called on accordingly in the presence of said respective Counsel

IT WAS ORDERED AND ADJUDGED that this appeal be allowed and that the said Order of the High Court be set aside on the issue of the grant of the Order pursuant to Section 160 of the Planning and Development Act as amended

And the questions of the final Order and of costs having been adjourned and coming on accordingly this day and having read the written submissions filed on the issue of costs

IT IS ORDERED pursuant to Section 160 of the Planning and Development Act as amended that the Respondents their servants and agents cease all unauthorised development including all works for the extraction of stone and gravel the carrying out of rock and gravel processing activities the loading of materials and the transportation of the

said materials from the quarry and all related and ancillary works on lands located at Cartron Belclare Tuam Co Galway this Order to be stayed for a period of 6 months from the date hereof

AND IT IS ORDERED that the Order made in the High Court in respect of the application for a protective costs order in the said Order dated the 6th day of December 2016 in favour of the Applicant be affirmed

AND IT IS ORDERED that the Respondents do pay to the Applicant the costs of the Section 160 application in the High Court and in this Court when taxed and ascertained such costs to be limited to 1 day in the High Court and 1 day in this Court.

JOHN MAHON
REGISTRAR
Perfected this 20th day of December 2018

Judgments Of the Supreme Court

Judgment

Title: An Taise- The National Trust for Ireland v **McTigue Quarries** Ltd & ors

Neutral Citation: [2018] IESC 54

Supreme Court Record Number: 12 & 52/17

High Court Record Number: 2015 302 MCA

Date of Delivery: 11/07/2018

Court: Supreme Court

Composition of Court: Clarke C.J., McKechnie J., MacMenamin J., Charleton J. Edwards J.

Judgment by: MacMenamin J.

Status: Approved

Result: Appeal allowed

THE SUPREME COURT
[Appeal Nos. 12/17 & 52/17]

Clarke C.J.
McKechnie J.
MacMenamin J.
Charleton J.
Edwards J.

IN THE MATTER OF THE PLANNING & DEVELOPMENT ACTS, 2000 TO 2011, AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING & DEVELOPMENT ACT, 2000

BETWEEN:

AN TAISCE/THE NATIONAL TRUST FOR IRELAND
APPLICANT

V.

McTIGUE QUARRIES LIMITED, GARY McTIGUE AND CAROLINE McTIGUE

RESPONDENTS

Judgment of Mr. Justice John MacMenamin dated the 7th day of November, 2018

Introduction

1. For more than a decade, the respondents ("**McTigue**") have operated a quarry located in the townlands of Cartron and Emina in rural County Galway, approximately seven kilometres south-west of the town of Tuam and 1.5 kilometres south-west of the village of Belclare.

2. The appellants ("An Taisce") contend the quarry is an unlawful development and contravenes s.2 of the Planning and Development Act, 2000, as amended ("the PDA 2000"). They initiated proceedings in the High Court seeking a declaration to that effect, and for an order under s.160 of the same Act restraining the respondents from continuing to operate the quarry.

Decision of the High Court

3. The key to this case lies in one apparently simple statutory provision. In the High Court, [2016] IEHC 620, Barrett J. concluded the quarry was unauthorised. He interpreted s.177O of the Planning and Development (Amendment) Act, 2010 (the "PD(A)A 2010") by reference to the judgment of the Court of Justice of the European Union (the "CJEU") in *Commission v. Ireland* (Case C-215/06) [2008] ECR I-04911. But, observing that he was sitting at a remove from the factual situation in the local area, he declined to grant an injunction under s.160 of the PDA 2000. Instead, he remitted the question of any further enforcement to Galway County Council as the local authority involved. The judge also delivered a second judgment with the same title, [2016] IEHC 701, which addressed An Taisce's application pursuant to s.3(4) of the Environmental (Miscellaneous Provisions) Act, 2011, as amended, granting a protective costs order. This Court did not grant leave to appeal on this latter judgment.

Overview of the Parties' Positions in the Appeal

4. An Taisce stand over the trial judge's conclusion on the first issue, but appeal his decision on the second issue, that is, the refusal to grant a s.160 injunction. They say the judge erred in concluding that it was not incumbent upon him to grant such an order. **McTigue**, for their part, appeal the High Court judge's determination that the quarry is unauthorised, although are obviously also concerned by the decision to remit the question of enforcement to the local authority. As a matter of logic, the first issue for determination in this appeal is whether the continuing operation of the quarry is lawful. If it is lawful, then no injunctive relief can be granted.

Section 177O of the Planning and Development (Amendment) Act, 2010, PD(A)A 2010

5. Section 177O, as set out in the PD(A)A 2010, relates to "Enforcement", and provides:

> *"(1) A grant of* ***substitute consent shall have effect as if it were a permission granted under section 34 of the Act*** *and where a development is being carried out in compliance with a substitute consent or any condition to which the consent is subject it shall be deemed to be authorised development."* (Emphasis added)

Sub-section (2) then provides:

> *(2) Where a development has not been or is not being carried out in compliance with a grant of substitute consent or any condition to which the substitute consent is subject it shall, notwithstanding any other provision in this Act, be unauthorised development."*

6. **McTigue**'s case is, in one sense, stark in its simplicity. They contend that s.177O should be interpreted literally; that they received such a "substitute consent"; and that this has effect in law as if it were a permission granted under s.34 of the PDA 2000, which deals with the procedures normally applicable in a range of circumstances.

European Union Law

7. The issues in this appeal can only be fully understood against the historical background of European Union ("EU") law, and the legislative intention of the PD(A)A, 2010, the statute where s.177O is to be found. As this judgment seeks to explain, the section in question is not to be seen as some remote and isolated island, but rather, as attached to an extensive and revealing legislative hinterland which lends perspective.

The EIA Directive of 1985

8. In 1985, the European Commission promulgated European Community ("EC") Directive 85/337 ("the Environment Impact Assessment Directive"; "the EIA Directive"). This was later amended by Directive 97/11/EEC and codified in Directive 2011/92/EU, as amended by Directive 2014/52/EU. This instrument and its successors set out rigorous conditions in the area of environmental law, especially the need to assess the environmental impact of developments identified in Annexes to the EIA Directive. Counsel for **McTigue**, in a focused submission, submits the EIA Directive was addressed to member states and cannot be applied "horizontally"; that is, between two private parties. He says that this, in effect, is what the trial judge did in interpreting the section. Whether the EIA Directive, in fact, has direct effect was not developed fully in argument before this Court. The point is, of course, highly important, and in itself could potentially have been determinative of the first issue. But, as will be seen, what is contained in the EIA Directive is nonetheless central to establishing the legislative intention behind s.177O.

9. The recitals in that EIA Directive make clear that, in a development with environmental effects, such effects are to be taken into account at the earliest possible stage in the decision-making process for planning permission. Referring then to planning authorities, the Directive defined the concept of "development consent" as being "the decision of the competent authority or authorities which entitles the developer to proceed with the project". Article 2(1) requires that an environmental impact assessment ("EIA") should take place *before* consent is given. As a consequence, the twin concepts of "development consent" and an EIA are closely and inextricably linked. While not directly necessary

for the determination of this case, other decisions of the CJEU must now be briefly discussed. In light of the fact that certain of these decisions had not been referred to in argument at the original hearing, the Court permitted the parties to address questions arising from these decisions in a resumed hearing some months later.

Other CJEU Case Law

10. Consideration of these other background case law must start with *R (Delena Wells) v. Secretary of State for Transport, Local Government and the Regions* (Case C-201/02) [2004] ECR I-00723 which has been cited to this Court, and *R (Diane Barker) v. London Borough of Bromley* (Case C-290/03) [2006] ECR I-03949. The CJEU laid emphasis on the point that development consent must be received *prior* to a development (*Wells*, at paras. 42 and 43). In *Barker*, the Court explained that the term "development consent" itself remained a "Community concept", and therefore its meaning fell to be determined exclusively within what was then EC, and is now EU, law (*Barker*, at para. 40). Thus, classification of a planning decision as a "development consent" within the meaning of Art.2 of the EIA Directive must, therefore, be carried out pursuant to national law, but in a manner consistent with what is now EU. (*Barker*, at para. 41). The CJEU explained that, whether the development referred to one or more stages, it was a matter for the national court to identify whether each stage in a consent procedure, considered as a whole, constituted a "development consent" for the purposes of the Directive. (*Barker*, at para. 46). (See, generally, Áine Ryall, *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland* (Hart Publishing 2009) at pp. 133-135, a text which sets out this background with admirable clarity).

***Commission v. Ireland* (Case C-215/06)**

11. The important judgment of the CJEU in *Commission v. Ireland* (*op.cit.*, at para. 2) is even more directly on point. The factual background is well known. A decision was made to develop an expansive windfarm on a bog at Derrybrien in County Galway. Due to considerable development and foundation work, the bog itself became unstable, causing a huge landslide. It transpired that the windfarm had been developed without an EIA ever having been carried out. Instead, Galway County Council, the planning authority, had granted what was then defined under the PDA 2000, in its unamended form, as a "retention permission". The European Commission complained to the CJEU that Ireland had inadequately transposed Arts. 2, 4 and 5-10 of the EIA Directive, both in its original form and as amended by Directive 97/11/EC. The Commission submitted that Irish law allowed a developer to seek "retention permission" for unauthorised development *after* that development had begun, and thereby defeated the preventative objectives of the EIA Directive.

12. In its subsequent and far-reaching judgment delivered on the 3rd July, 2008, the CJEU emphasised the meaning and effect of Art. 2(1) of the EIA Directive. This stipulated that Member States were to adopt "*all measures*" necessary to ensure that *before* planning consent is given, projects likely to have significant effects on the environment, by their nature or location, were made subject to an EIA with regard to those effects. The Court did make reference to Art. 2(3) of the Directive which provides that Member States might "in exceptional cases" exempt a "specific project" in whole or in part from the provisions laid down in the Directive. This wording is significant, and will be referred to later. The CJEU observed that the wording of Art. 2(3) was entirely unambiguous

and was, therefore, to be understood as meaning that *unless* an applicant had successfully applied for the required development consent, and had *first* carried out an EIA when it was required, works could not be commenced without disregarding the requirements of the Directive. (para. 51). The court pointed out that this analysis was valid for all projects falling within the scope of the Directive. (para. 52). The court recalled Recital 5 of the Preamble to the subsequent Directive 97/11/EC, which points out that a project for which an assessment is required should be subject to a requirement for development consent, and the assessment should be carried out "***before*** *such consent is granted*". (para. 53). (Emphasis added)

13. Having observed that the then Irish legislation did provide that EIAs and planning permissions could be obtained prior to the initiation of works, the CJEU remarked that, *per contra*, it was undisputed that Irish legislation *also* established the concept of:

> *"retention permission and equates its effects to those of the ordinary planning permission which precedes the carrying out of works and development. The former can be granted even though the project to which it relates and for which an environmental impact assessment is required pursuant to Articles 2 and 4 of Directive 85/337 as amended has been executed."* (para. 55).

The court went on to point out that, in the absence of exceptional circumstances, the grant of retention permission, which Ireland accepted as having been "common" in planning matters, had the result that the obligations imposed by the EIA Directive would be considered to have, in fact, been satisfied *post hoc*. (para. 56). The court went on to warn that while Community law could not preclude the applicable national rules from "*in certain cases*" allowing the regularisation of operations or measures which are unlawful under its rules, such a possibility must not "*offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.*" (para. 57). The Court highlighted the fact that a system of regularisation by retention permissions could have the effect of encouraging developers to forgo the process of ascertaining whether intended projects satisfied the criteria of Art. 2(1) of the Directive. (para. 58).

14. It is helpful to pause to reflect on some of the phraseology which the CJEU adopted. The court criticised the fact that retention permission could, in effect, be "*equated*" to that of an *ordinary* planning permission which preceded the carrying out of works and development. (para. 55). The word "*equated*" can only be a cause for hesitation in an unthinking acceptance of an interpretation of s.177O for which **McTigue** contend. The quarry owners submit simply that a substitute consent "shall have effect ***as if it were*** a permission granted under s.34 of the Act." (Emphasis added) One might observe that there may be a certain resonance between the word "*equated*", as used by the CJEU, and the words "*as if*", contained in the section. The CJEU was, indeed, prepared to countenance the possibility of allowing for regularisation *in certain cases*, but affirmed that such a possibility should not result in a circumvention of Community rules. The question in this case is the extent to which the general statements of principle can be reconciled with the interpretation which is urged by **McTigue**?

15. In subsequent case law (*World Wildlife Fund and Others v. Autonome Provinz Bozen and Others* (Case C-435/97) [1999] ECR

I-05613), the Court of Justice went so far as to hold that an exemption, as provided for under Art.1(5) of the EIA Directive, required that it be stipulated by a *specific act of national legislation* containing all the elements that might be relevant to the assessment of the effects of the project on the environment. (*Bozen*, at para. 59; Ryall, *op.cit.*, at para 10; at p. 138).

16. Although not cited, other more recent judgments of the Court of Justice are material to this case.

17. In the case of *Stadt Wiener Neustadt v. Niederösterreichische Landesregierung* (Case C-348/15) [2016], the CJEU considered the EIA Directive in the context of the lawfulness of a decision in which the Government of the Land of Lower Austria took the view that the operation of a substitute fuel treatment plant should be *deemed* authorised. The CJEU held Art.1(5) of the EIA Directive, as amended by Directive 97/11, was to be interpreted so as to cover a project which has been the subject of a decision taken in breach of the obligation to carry out an EIA, in respect of which the time limit for an action for annulment had expired, and was regarded under national law as lawfully authorised. The CJEU held EU law precludes such a national legislative provision insofar as it might provide that a prior EIA may be deemed to have been carried out for such a project. The court held that member states must make good any harm caused by the failure to conduct an EIA. Thus, the competent authorities are required to take all general or particular measures for remedying the failure to carry out the EIA (paras 45-48). This decision raises what can only be described as a rather significant point as to how s.177O should, or *must*, be interpreted to accord with EU law.

18. In *Comune di Corridonia v. Provincia di Macerata* and *Comune di Loro Piceno v. Provincia di Macerata* (Joined Cases C-196/16 and C-197/16) [2017], the CJEU had to consider whether authorisation of two plants built without an EIA should be annulled on the basis that the law exempting them from an EIA was contrary to the EIA Directive. The Italian court referred a question to the ECJ: whether Art.2 of a subsequent further Directive, 2011/92/EU, required that failure to conduct an EIA under the EIA Directive cannot be regularised, following the annulment of the original consent, by an assessment being carried out after that plant has been built and entered into operation? The CJEU held, rather, that neither the EIA Directive, nor Directive 2011/92/EU, provided for the consequences of a breach of the obligation to carry out a prior assessment. However, the Court did hold that EU law does not preclude national rules which, on an exceptional basis, permit the regularisation of operations or measures which are unlawful in the light of EU law (para. 37 citing *Commission v. Ireland*, para. 57; *Jozef Križan and Others v. Slovenská inšpekcia životného prostredia* (C-416/10) [2013], para. 87; *Stadt Wiener Neustadt*, para. 36). But, it held that such regularisation must be subject to the condition that it does not offer the opportunity to circumvent EU law or to dispense with its application, and that it should remain the exception (para. 38, citing the same references as the previous paragraph). Consequently, in *Corridonia*, the CJEU held that legislation which attached the same effect to a regularisation permission, which could be issued even where no exceptional circumstances are proved, as those attached to prior planning consent, failed to have regard for the requirements of the EIA Directive (para. 39, citing *Commission v Ireland*, para. 61 and *Stadt Wiener Neustadt*, para. 37). Furthermore, the CJEU concluded that an assessment carried out after a plant has been constructed and has entered into operation cannot be confined to its future impact on the

environment, but must also take into account its environmental impact from the time of its completion (para. 41).

19. In *Stadt Papenburg v. Bundesrepublik Deutschland* (Case C-226/08) [2010] ECR I-00131, the CJEU held that a plan or project likely to have a significant effect on the site concerned could not be authorised without a prior assessment of its implications for the environment (*Landelijke Verenigung tot Behoud van de Waddenzee and Anor v. Nederlandse Vereniging tot Bescherming van Vogels* (C-127/02) [2004] ECR I-07405, at para. 36). If, having regard in particular to the regularity or nature of the maintenance works at issue in the main proceedings or the conditions under which they are carried out, the development could be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, such maintenance works can be considered to be one and the same project for the purposes of Art.6(3) of Council Directive 92/43/EEC ("the Habitats Directive") (para. 47).

20. The decision of the Court of Justice in *Commission v. Ireland* had a considerable impact across many areas of Irish planning law, not least in the area of **quarries**. There were, it seems, a number of **quarries** in the State which were operating in the absence of EIAs. Some of these had received planning permissions granted by local authorities. Other **quarries**, such as the **McTigue** quarry, had never actually received any planning permission, nor had it ever been subject of an EIA.

21. Counsel for **McTigue** argues that, from an EU law perspective, it is immaterial if planning approval is called a "consent", a "substitute consent", a "permission", a "planning permission", an "authorisation", or some other entitled legal construction. I reject this submission. "Development consent" is, in fact, a term of EU law defined, and linked to an EIA, in the EIA Directive which provides such consent must be carried out in accordance with EU law (*Barker*, at para. 41), and the later judgments referred to above. The very concept of development consent, in this context, *hinges* on there being an EIA for the development. Insofar as it is contended that the point of the decision in *Commission v. Ireland* is that existing permissions be simply revoked or suspended to allow an environmental impact statement to be carried out, I also disagree. Such a submission does not reflect the principles set out in *Commission v. Ireland* and subsequent CJEU jurisprudence.

Did the High Court judgment impermissibly give direct effect to the EIA Directive?

22. Counsel on behalf of **McTigue** submits s.177O means that "where a development is being carried out in compliance with a substitute consent or any condition to which the consent attaches, it is deemed to be authorised development." He criticises Barrett J.'s conclusion in the High Court that s.177O, if so interpreted, might contravene EU law, and criticises the fact that he proceeded with the application on the basis of his understanding of the doctrine of direct effect, thereby giving the section a strained meaning. I would comment here that the learned High Court judge's concern regarding contravention of EU law was, at minimum, not unjustified.

23. This raises an issue of quite profound importance. Relying on the cases of *Kolpinghuis Nijmegen BV* (Case 80/86) [1987] ECR I-03969, at para. 13, and *Maria Pupino* (Case C-105/03) [2005] ECR I-05285, counsel for **McTigue** submits that the effect of the

High Court judgment is to impart horizontal effect to the Directive, which he contends is addressed only to member states, and cannot be relied upon by individual private parties.

24. For reasons which appear below, it is unnecessary to decide whether the Directive has direct effect. But again, one might observe, *obiter*, there are indications that, in the opinion of the CJEU, the terms of the Directive *may well* be sufficiently clear so as to be directly and horizontally effective in member states. (See *Commission v. Germany* [1995] ECR I-02189; the opinion of Advocate General Cosmas in *Stichting Greenpeace Council (Greenpeace International) and Others v. Commission of the European Communities* (Case 321/95) [1998] ECR I-01651, para. 58; and *Aannemersbedrijf P. K. Kraaijeveld BV and Others v. Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1996] ECR I-05403). In *Kraaijeveld*, the CJEU, speaking of the right of an individual to invoke a Directive in a national court, observed that it is for the national courts to take account of whether the relevant competent authority has exceeded the limits of its discretion, be that discretion under Article 2(1) or Article 4(1) of the EIA Directive. In such circumstances, it appears the national court must set aside such a measure (para. 61). The court did not, however, in that case, specify what steps a national court is to take where a specific planning decision is said to be in breach of the requirements of the Directive.

25. However, in *Bozen* (*op.cit.,* at para. 15) and *State of the Grand Duchy of Luxembourg v. Linster* (Case C-287/98) [2000] ECR I-06917, the court went further, imparting what might be described as "direct effect terminology" (*effet utile*), in order to permit reliance upon the Directive to challenge the exclusion from it of a specific project by a national authority, and requiring the setting aside of national rules and measures deemed inconsistent with Article 2(1) and Article 4(2) of the Directive.

26. It is unnecessary to express a concluded view on the effect of these judgments, as the question in this case can be resolved by reference to national legislation, including the Interpretation Act, 2005.

Procedures Adopted in the Aftermath of Commission v. Ireland

27. Arising from the *Commission v. Ireland* judgment delivered by the Second Chamber on the 3rd July, 2008, the Minister for the Environment directed local authorities to carry out a number of preliminary steps for the registration and assessment of **quarries** in order to consider their legal status. The **McTigue** quarry did engage in what could be called three planning "procedures" by Galway County Council. These were, first, a decision by the County Council to "register" the quarry pursuant to s.261 of the PDA 2000 on the 27th April, 2007; second, and subsequent to the enactment of the PD(A)A 2010, a determination by Galway County Council made on the 3rd August, 2012, that the quarry had commenced operation prior to the 1st October, 1964, and was, therefore, eligible to apply for what was by then termed a "substitute consent"; and third, directing the quarry owner to avail of, and apply for, a substitute consent process by a decision pursuant to s.261A(3) of the PD(A)A 2010. This is referred to later in the judgment. Thereafter, An Bord Pleanála ("the Board") decided on the 5th January, 2015, to grant substitute consent to the quarry pursuant to s.261A of the PD(A)A 2010. This, too, is considered later. A subsequent statutory procedure, which allowed for quarry owners to further develop their quarry in conjunction with an

application for substitute consent is considered briefly further on in this judgment, but does not affect the instant case, as it was introduced in 2015.

An Observation

28. I pause here to make an observation. The Planning and Development Acts have been the subject of many judgments of this and other courts. In one, *O'Connell v. The Environmental Protection Agency and Ors* [2003] 1 I.R. 530, Fennelly J. described the legislation then as being a "statutory maze". (At p. 533). One scholar later described the Acts in 2011 as being a "conceptual morass". (Oran Doyle, 'Elusive **Quarries**: A Failure of Recognition' (2011) 34(2) DULJ 180, 197-208). There have been countless further amendments since then. It is not unfair to comment that the present state of the legislation is an untidy patchwork confusing almost to the point of being impenetrable to the public. This is in an area where, of its nature, legislation is supposed to have a strong public participation aspect. Confused legislation engenders litigation which, in turn, causes delays in lawful developments, including infrastructure. The entire subject matter requires urgent codification. (See, generally, Doyle *op.cit.*).

The Planning and Development (Amendment) Act, 2010

29. Historically, events, and CJEU case law, have shown that obligations arising from the EIA Directive did not always "sit comfortably" with certain well established features of national planning law and practice. (See Áine Ryall, 'Case C-215/06 *Commission v. Ireland*' (2009) 18(2) Review of European, Comparative and International Environmental Law 211). The issues in this case concern the protection of the environment. In fact, the legislature did seek to make the statutory *intent* behind the PD(A)A 2010 crystal clear, beginning from its first provision. Thus, by inserting a new section 1A in the principal Act through s.3 of the PD (A)A 2010, it was made clear that:

> *"Effect or further effect, as the case may be, is given by this Act to an act specified in the Table to this section, adopted by an institution of the European Union or, where appropriate, to part of such an act."*

Beneath s.1A is a table which includes eleven different categories of EU legislative instruments, including the EIA Directive and the Habitats Directive. Thus, insofar as national law is concerned, the Court must proceed on the basis that the intent behind this statute was to give effect to the EIA Directive. The interpretative questions in this case must be seen from this starting point. The facility for retention development was removed by virtue of s.39(12) of the PDA 2000, as inserted by s.23 of the PD(A)A, 2010. This new provision set out that a planning authority was to refuse to consider an application for retention where the planning authority decided that, if the application had been made for permission prior to development, an EIA, and a determination as to whether an EIA was required, an appropriate assessment was necessary.

30. The 2010 Act also introduced a number of new concepts. One was that of "substitute consent", a second, the "remedial Environmental Impact Assessment". It commenced further ideas such as "remedial Natura impact statement[s]" also in connection with the substitute consent process. (See, first, s.177A(1)). All are discussed later. But the circumstances in which "*retention permissions*" might be granted by the Board were very limited to a particular category. The Act provided that such applications must be made under ss.177A-Q of the PD(A)A 2010.

31. Thus, s.177B requires close consideration, because it sets out the scope of the amendments. It clearly confines that scope to developments which come within the relevant sections of 177A-Q, that is, to those which, *through error*, had previously received *faulty or flawed planning permissions* because there had been no EIA. Thus, s.177B provides:

> *"(1) Where a planning authority becomes aware in relation to a development in its administrative area* ***for which permission was granted by the planning authority or the Board,*** *and for which -*
>
> *(a) an environmental impact assessment,*
>
> *(b) a determination in relation to whether an environmental impact assessment is required, or*
>
> *(c) an appropriate assessment,*
>
> *was or is required, that a final judgment of a court of competent jurisdiction in the State or the Court of Justice of the European Union has been made that the permission was in breach of law, invalid or otherwise defective in a material respect because of -*
>
> *(i) any* ***matter contained in or omitted from the application*** *for permission including* ***omission of an environmental impact statement*** *or a Natura impact statement or both of those statements, as the case may be, or inadequacy of an environmental impact statement or a Natura impact statement or both of those statements, as the case may be, or*
>
> *(ii)* ***any error*** *of fact or law or* ***procedural error,***
>
> *it shall give a notice in writing to the person who carried out the development or the owner or occupier of the land as appropriate."* (Emphasis added)

Again, the legislative intention is entirely clear. It is, inter alia, to address a final judgment of the CJEU: i.e. *Commission v. Ireland*. This section then goes on to identify the procedure thereby laid down by the legislature to obtain a form of consent in this category. But, critically, the wording of s.177B is that the provisions of the section are to apply to a development *"for which permission* ***was*** *granted by the planning authority or the Board"* (Emphasis added), and for which an EIA or a determination as to whether an EIA had been necessary, or an appropriate assessment ("AA") had been required, but not carried out. The legislative scope of **quarries** eligible relates only to those which received *flawed or erroneous* permissions. It did not include a quarry which was exempt from the requirement for planning permission, by reason of its continued operation prior to the 1st October, 1964, the "appointed day" designated by S.I. 211/1967, promulgated under s.24 of the Local Government (Planning and Development) Act, 1963. Thus, the scope of the section did not include a quarry which had not been obliged to obtain a planning permission in respect of works which "commenced" prior to the 1st October, 1964.

32. This leads inexorably to the conclusion that it claims to have been in operation prior to the 1st October, 1964, while the **McTigue** quarry was never a development for which permission *had been* granted by the planning authority or the Board. It is not disputed that it never held or received a planning permission at any stage prior to the grant of substitute consent. It is not, either, an exempted development under s.4 of the PDA 2000, or Schedule 2 of the Planning and Development Regulations, 2001 (S.I. 600/2001) which sets out categorised exempted development. What was intended by the grant of substitute consent?

33. But against this, it did undergo a certain registration procedure with Galway County Council; it has received a substitute consent from the Board; are such considerations irrelevant? **McTigue** submits one must carefully examine the planning inspector's report, and the Board's subsequent grant of substitute consent, to see what was intended by the Board. It submits that, in this sense, the Board's grant of substitute consent is determinative, and that whatever may be An Taisce's objections to the grant of the substitute consent, the clock cannot be turned back.

34. As will become obvious, the fact that the Board was not joined as a party to this proceeding was, to say the least, a hindrance in reaching any clear conclusion on the Board's full approach, its statutory remit, and the consequences of decisions made. But the question as to whether this quarry was ever eligible for any substitute consent process is unavoidable. While, as pointed out at para. 27 of this judgment, the quarry was indeed "registered", and was later the subject of a County Council "determination" regarding its date of commencement, neither of these processes were preceded by an EIA. Here, it will be recalled, the concept of "development consent" is defined in Art. 1(2) of the EIA Directive as being the decision of the competent authority, or authorities, which *entitles* the developer to proceed with the project. In *Wells*, the CJEU held that the EIA should be carried out *prior* to the implementation deadline. (para. 52). If "development consent" is defined in the Directive, and explained by CJEU jurisprudence, as so closely linked with an EIA, these factors cannot easily be ignored when interpreting s.177O.

35. One turns next to s.177B, which also sets out the procedure to be adopted by a planning authority in cases falling within the scope of the Act of 2010. These include a planning authority giving notice in writing to the person who carried out the development, informing them of the fact that a *defective permission* had *been granted* in the absence of an EIA, a determination, or an AA, and directing the person or entity concerned to apply to the Board for a substitute consent, such application to be accompanied for that purpose by a *remedial* environmental impact statement, or a remedial Natura Impact Statement, or both. (See s.177C of the Act). Again, the scope of the section is clear, and limited to cases where a *permission* was flawed.

36. Section 177D deals with "exceptional circumstances". Subsection (1) provides that the Board is *only* to grant leave to apply for substitute consent where it is satisfied that one of the three categories of assessment was required. Here the antecedent condition as to scope is again relevant. The Board must be satisfied that a ***permission previously granted*** for a development was rendered in breach of law, or invalid, or otherwise defective by a judgment of a court or the CJEU, by reason of any matter contained in, or omitted from, the application for permission. The three qualifying categories of assessment are an error or fact or

law, procedural error, or "*that exceptional circumstances exist such that the **Board** considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.*" (s.177D(1)(b)). (Emphasis added)

37. But s.177D(2) provides that, in considering whether exceptional circumstances exist, the Board is to have regard to, *inter alia,* the following matters:

> *"(a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;*
>
> *(b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised..."*

Then, further criteria are set out, including whether the potential to carry out an assessment has been substantially impaired; the actual or likely significant effects on a European site; the extent to which there may be significant effects on the European site which can be remediated; whether the applicant has complied with previous planning permissions granted; or whether an applicant has previously carried out an unauthorised development, as well as such other matters as the Board considers relevant. (s.177D(c) -(g)).

38. In the circumstances where the quarry owners accept that there was, strictly speaking, *never* a planning permission for the quarry, can it then be said that **McTigue** had, or could reasonably have had, a belief that the development was authorised? Could the Board then have lawfully proceeded to determine that **McTigue** had complied with previous planning permissions granted, or should the Board have asked itself whether **McTigue** had previously carried out an unauthorised development? These questions lie outside the scope of this appeal. The Board is not a party to this case.

39. Throughout ss.177A-Q, there is phraseology redolent of the judgment in *Commission v. Ireland*. Thus, remedial environmental impact statements created by s.177F of the Act of 2010 are to identify both the effects which "have occurred or which are occurring or which can reasonably be expected to occur because the development the subject of the application for substitute consent was carried out..." (s.177F(1)(a)), and setting out that what is to be required is:

> *"(b) details of -*
>
> *(i) any appropriate remedial measures undertaken or proposed to be undertaken by the applicant for substitute consent to remedy any significant adverse effects on the environment;*
>
> *(ii) the period of time within which any proposed remedial measures shall be carried out by or on behalf of the applicant..."* (s.177F(1)(b)).

40. But, in response, **McTigue** points out, with some justification, that parts of the language of ss.177A to Q do indeed seem to contemplate future or ongoing work. How is this consistent with mere remediation? For example, what precisely is considered by s.177F(1)(a) when it speaks of the effects on the environment

which *have* occurred, or which "*are occurring*", or which "*can reasonably be expected to occur",* because a development, the subject of an application for substitute consent, has been carried out? To my mind, what is contemplated is that there can only be future remedial work confined to that category of quarry which already had received a permission, but where that permission was flawed because of non-compliance with the EIA Directive. However, surely this can only arise in the context of a quarry which had received permission in the first place. I confine myself to questioning whether uncertainty as to the scope of the PD(A)A 2010 may have created problems of interpretation in cases beyond this one?

41. A *remedial* EIA has an entirely different scope of reference from an EIA proper; the scope of the former is remediation work only in the context of certain developments which originally had received planning permissions, but which did not receive an EIA, a screening, or an AA. A remedial EIA cannot, therefore, be used as a surrogate for an EIA as the scope of reference and "time range" of the two are, or should be, entirely distinct. An operator cannot utilise a remedial EIA without there first having been a "planning permission" which, however flawed, was, at least *prima facie* valid. A remedial EIA, in this context, refers to a situation where permission "was granted" and where an assessment was required. There was never such a permission in this case. The subsequent procedural decisions of Galway County Council, described earlier, cannot be described as consents, but rather pre-registration procedures. Thus, by reference to the Directive, there was never a "development consent".

42. Whether, and even if, there are certain provisions in the Act which might be glossed over as supporting the proposition of an alternative, "forward looking", reading of s.177O, *that* provision itself must only be read within its terms of reference for eligibility within the more general legislative framework; the legislative intent, and in accordance with the Directive, and the terms defined therein in the judgments of the CJEU, including *inter alia*, in *Commission v. Ireland*. It is not, in fact, necessary to interpret the EIA Directive or its successors as having direct effect in order to define the scope of s.177O.

43. Insofar as it might be argued that the judgment in *Commission v. Ireland* does not directly address s.177O, this is, of course, true, as the section post-dates that judgment. But one cannot accept a contention that what is intended by the judgment is that projects which *never* had an EIA should, in some sense, simply be "suspended". The intention reflected in the PD(A)A 2010 is, rather, to create a regularisation gateway for projects which had received a permission, albeit flawed. Insofar as there may be exceptions, they must come within the category of application discussed. It is not correct to argue that, from an EU law perspective, it is "immaterial" how the approval process is characterised. That is not so. There is a world of difference between these procedures and a true development consent. This is predicated on whether or not the correct, or here, any, form of EIA has been carried out.

Pathways to Regularisation

44. The PD(A)A 2010 did set out pathways of regularisation of unauthorised developments which required an EIA, screening for an EIA, or an AA, under the Habitats Directive, but always subject to the caveats laid down by the CJEU in relation to exceptional circumstances, and for achieving substitute consent. One of these is to be found in s.177C(2)(b), which allows a person who has

carried out a development where there should have been an EIA, a screening for an EIA, or an AA under the Habitats Directive, to apply to the Board for leave to seek substitute consent in respect of the development, where the applicant is of the opinion that "exceptional circumstances" exist such that it may be appropriate to permit the regularisation of the development through substitute consent.

Quarries

45. Another pathway is to be found in the special provision for **quarries** contained in s.261A of the Act. This section is extremely lengthy and unwieldy, stretching out over several pages. Insofar as material, it required each planning authority to examine every quarry in its area to ascertain whether development *was carried out* which would have required an EIA, a determination as to whether an EIA would have been required, or an appropriate assessment under the Habitats Directive. Essentially, and to the degree relevant, the section provides that a substitute consent would permit a "regularisation" of what had been done hitherto, as well as the undertaking of certain remedial measures thereafter. However, s.261A does not, itself, allow for continuing or future development of an unauthorised quarry. Rather, such future development would require separate planning permission to be obtained following the issuance of a substitute consent. Neither of these pathways can assist the respondent, however. (See the incisive critique of these provisions in Doyle, *Op.cit.,* at para. 28; at pp. 194-198).

Subsequent Amendments

46. For completeness, one might mention three associated legislative amendments to the substitute consent procedure. These were introduced in 2015, via the European Union (Environmental Impact Assessment and Habitats) Regulations 2015 (S.I. No. 301/2015), commenced with effect from 14th July, 2015; the Planning and Development (Amendment) (No. 2) Regulations 2015 (S.I. No. 310/2015), commenced with effect from 16th July, 2015; and the European Union (Environmental Impact Assessment and Habitats) (No. 2) Regulations 2015 (S.I. No. 320/2015), which was commenced with effect from the 22nd July, 2015. None of these instruments, however, enacted outside the timeframe of this case, have a bearing on the situation which arises for consideration here.

47. It appears that as a result of these amendments, an operator can now apply for substitute consent in respect of a quarry under s.261A which, if granted, might regularise what was done previous to the consent. Under the law as it now stands, therefore, s.37L of the PDA 2000, inserted by Regulation 4 of S.I. No. 301/2015, permits a person to apply for *prospective* permission for *further* development of a quarry. Counsel for An Taisce submits that this new facility to make AN application for substitute consent and planning permission simultaneously is a clear indicator that the substitute consent is not itself a grant of planning permission, and does not have the prospective effect of a grant of permission under s.34. Counsel for An Taisce contends that the requirement for substitute consent being, in effect, a condition precedent, the obtaining of prospective development consent is evident from the terms of s.34(12), that is, one applies for, but does not receive, substitute consent, or if an operator does not apply for substitute consent, but should have, then there has been no retrospective regularisation and, therefore, any application that has been made for prospective consent, if it involves retaining a quarry the subject of an application, should not be granted due to the prohibition contained in s.34(12), and by virtue of the judgment in

Commission v. Ireland. Counsel argues this is consistent with the sequencing of the respective decisions on applications for substitute consent, and prospective permissions, pursuant to s.37L (8), viz. if an operator applies for both, he or she will receive substitute consent first, that is the decision for prospective permission under s.37L should be made as soon as possible after the decision on the application for substitute consent.

48. Here, however, counsel for **McTigue** relies on the statement of Finnegan J., speaking for this Court in *DPP v. Power* [2007] IESC 31; [2007] 2 I.R. 509, where that judge pointed out that it is well settled that the subsequent legislative history of a provision is relevant only as to the view which the legislature took, whether correctly or not, regarding the law with which the enactment deals. I accept this submission. These provisions must, therefore, be disregarded and set to one side, and cannot assist in the process of interpretation. One might, however, comment that, as a consequence, an operator who has already obtained a substitute consent might be precluded thereby from making an application for permission, thereby creating a "Catch-22", which might well impact on the **McTigue** quarry.

The Quarry

49. It is necessary next to consider this quarry, as it stands, "on the ground", in a little more detail. It is common case that it is an active working stone quarry, characterised by benching and cliffs with stockpiling of materials, and processing areas for the screening, crushing and grading of material associated with the plant. The general surrounding area is dominated by agricultural use, but with a relatively high level of predominantly recently constructed dwellings located along the nearby road network. The landscape is relatively flat and low-lying, but the quarry itself is located on the eastern lower slopes of Knockma Hill, a dominant feature in the landscape, which, according to An Bord Pleanála, renders the quarry highly visible from a considerable distance in all directions. The overall site is of 12.11 hectares, irregular in configuration with an extraction area of 8.64 hectares. The main quarrying operation is roughly L-shaped. There is also an area of 3.47 hectares to the west of the active quarry, also part of the registration process, but which has not been excavated.

The Application for Substitute Consent

50. While not directly material to the determination of this case, there was, apparently, considerable controversy at the time surrounding the application for substitute consent. There has been considerable dispute about how long the quarry has been in operation, and whether it could, in any sense, be categorised as a pre-1964 process. Not only was there strong opposition from local residents, but also from a quarry adjoining the **McTigue** quarry operated by a Mr. Frank Mortimer.

51. Much relevance was placed on what was intended by the planning inspector's report, and the Board's substitute consent. As this formed part of **McTigue**'s argument, the judgment, therefore, must next consider the latter part of the process to regulate the legal status of the quarry. This post-dates the registration procedure described earlier. As outlined abover, on the 3rd August, 2012, Galway County Council issued a notice under the provisions of s.261(A)(3)(a) of the PDA 2000, as amended, instructing **McTigue** to apply for substitute consent for the works being undertaken at the quarry. The local authority required that the application be accompanied by a remedial environmental impact statement, and a remedial Natura impact statement. Both of these

are necessary steps for compliance with the regime set up under the PD(A)A 2010. An application for substitute consent is, as a matter of law, brought directly to An Bord Pleanála. As part of the process, the Board requested its planning inspector to examine the site. There were two such inspections, during the course of which it is recorded that Mr. Peter Sweetman, one of the objectors to any grant of substitute consent, contended that in a earlier Board decision, **McTigue** had indicated that the extraction area did not exceed 5 hectares, whereas the application in the instant case was for an extraction area of 8.64 hectares ("the main seam").

Objections

52. It is also part of the record that the objectors, who included Mr. Mortimer, contended that the PD(A)A 2010 could not cover the development of the extra 3.64 hectares over and above the 5 acres, and that this extra extraction had been carried out by **McTigue** wilfully and knowingly. It is recorded that they said this was unauthorised, contrary to the EIA Directive and that **McTigue** should not be "rewarded" with the grant of a substitute consent. The objectors are noted as contending that the quarry should not be granted any "retrospective" consent as it did not fall within the category of "exceptional" circumstances which had been mentioned by the Court of Justice in *Commission v. Ireland*. In fact, they said, the grant of the substitute consent would fly in the face of that judgment. It is said they argued that the quarry was ineligible for any grant of substitute consent as it had not been in operation prior to the 1st October, 1964, the cut-off date as identified in the PDA 2000 for such eligibility. In fact, the objectors went further, saying that the weight of the evidence identified that the true quarrying had commenced in late 1999, or early in the year 2000. An Taisce supported these objections.

53. It is recorded that for its part, **McTigue** pointed out that the pre-1964 status of the quarry had already been determined by Galway County Council; that the remit of the current proposal before An Bord Pleanála was simply in respect of substitute consent; that small amounts of building stone had been extracted on an ongoing basis since the 1950s; and that late in 1999, more intensive mechanised extraction methods had commenced in the quarry.

54. It is true, as **McTigue** submits, that the planning inspector's report contained observations on the principle of the development, the remedial EIA carried out as part of the planning process, and the impact that the operation had on human beings, the environment, noise and vibration, soils, and landscape, in addition to its visual impact. The report referred also to cultural heritage, transport and transportation, and ecology. Similar assessments were carried out under the rubric of an AA and a remedial Natura impact assessment concerning any impact on the integrity of a Natura 2000 site. The report stated that the principle of the development was acceptable, subject to complying with standards as stated in national guidance in relation to the extraction industry, and also development management standards stated in the County Development Plan. Counsel for **McTigue** makes the point, valid insofar as it goes, that compliance with standards would not be relevant if, after the 5th January, 2015, there was to be no further quarrying at all.

55. There are indeed also statements from the Inspector to the effect that the principle of the "subject development" (i.e. the quarry) was "acceptable"; that there could be direct benefits for the proposal in relation to employment; that, while blasting

occurred at the quarry, its frequency was dependent on demand for materials; that the overall impact on air quality would be acceptable, having regard to mitigation measures; and that, taking into account noise and vibration, no additional remedial measures were indicated.

56. It must be accepted, therefore, that there are some passages in the report which are capable of being read in more than one way, and, arguably, are indeed capable of being interpreted as being "forward looking", without being clear as to the scope of what is envisaged, whether it was simply remediation, or completion of the main seam and then remediation. However, there remains the underlying question as to the absence of the detailed range of conditions which one would expect to find in a prospective consent – if that was what was contended.

57. But, in fact, none of these are determinative as a matter of law. Without doubt, when a permission refers to other documents, such as here, "the development described in the application" as Condition 1 puts it, the permission is to be read in a light of those documents (*Readymix (Eire) Limited v. Dublin County Council and the Minister for Local Government*, Supreme Court, Unreported, 30th July, 1974). It is true also that the plans submitted made clear that the quarry seam had not been fully extracted and envisaged that there would be ongoing operations until that was done. But this begs the question: what development was envisaged? Ultimately, none of this is to the point: the issue at hand is the meaning of s.177O.

58. Much play was made of the role of Mr. Peter Sweetman, planning consultant. It was said that he had allied himself with the neighbouring Mortimer quarry while at the same time acting as a consultant to An Taisce. This issue is, frankly, a debating point not relevant to the issue of interpretation now before this Court.

59. Counsel for **McTigue** relies on passages from these reports, submitting that they do not preclude, and are actually consistent with, the concept of continuing development to the exhaustion of the main seam of 8.64 hectares. It must be accepted that these passages might beg a number of questions. But what is in question is interpretation of the section, not the reports, or even the wording of the substitute consent itself.

The Grant of Consent

60. On the 5th January, 2015, An Bord Pleanála granted substitute consent having regard to the provisions of Part XA of the Planning and Development Acts 2000 to 2014. The Board recited that the grant was to be in accordance with the plans and particulars submitted to it. The Board's determination stated that the grant of substitute consent related solely to quarrying development undertaken "as described in the application", but did not authorise any further development, including excavation on the site. One would have thought this was clear. But it must be pointed out that, in this appeal, both parties relied on some of the phraseology in the consent and the planning inspector's report. An Taisce contended that the wording was consistent with the operators being permitted *only* to carry out remedial work to restore the quarry, and no other work. In response, **McTigue** claimed that the wording was coherent with it being permitted to proceed with extraction from the main seam of 8.64 hectares until that was exhausted. They argued that the terms of the consent and the inspector's report only made sense in that context. There is some force in both submissions, as far as they go as debating points. But the question

is, what does the Act say? It must be said that there is ambiguity both in the planning inspector's report and in the decision of An Bord Pleanála.

61. It is, in fact, quite hard to discern whether, in its true meaning, the inspector's report proposed that *all* excavation was to stop immediately and only remedial work was to commence, or whether, rather, it permitted continuance of the works, and if so, what work? The Board's consent itself stipulated that all environmental mitigation measures identified in the remedial environmental impact statement and the remedial Natura impact statement were to be implemented in full. The conditions to the Board's substitute consent set out the headings for a comprehensive plan for restoration of the quarry, including timelines. Unfortunately, even resort to these timelines is not entirely determinative of what was intended by the consent. Did it mean that only restoration work be permitted, or that the operation be permitted to complete mining product work from the main seam before restoration? A certain ambiguity remains, even though conditions were laid down for the removal of certain temporary buildings which had been placed on the site; that **McTigue** was to lodge with Galway County Council a cash deposit as security for satisfactory restoration work; and also to pay a contribution of €25,000 to Galway County Council in respect of improvement works to the local public road network in the area, on the basis that this network had been of benefit to the quarrying development that had taken place. In all, it is fair to say that some of the phraseology in the substitute consent, and the reports it was based on, were in many aspects, rather unclear.

62. But, standing above this is the fact that despite the ambiguities, the *focus* of the substitute consent is undoubtedly on remediation; if the consent did relate to future operation, then an entire range of conditions as to future development were not fully addressed: the extent of the permitted development is not specified; and there are no regulations as to blasting hours, noise, dust, waste, water, and traffic. There are no limits on excavation rates or the area of the development. Standing above this again is the hazard that the effect of interpreting the consent as urged by **McTigue** would be to permit an unregulated quarry, the operation of which would run contrary to EU law, at least in spirit.

The Board's "Note" on the Consent

63. With these considerations in mind, one might advert to a puzzling aspect of the Board's consent. The inspector referred to a series of objections from local residents, some of whom hotly disputed the quarry's pre-1964 operation status, without which it would not be entitled to planning permission in any case. At the conclusion of the Board's grant of substitute consent, there is what is described as "a note", which reads:

> *"The Board noted the points raised by the parties regarding the "pre-1964" status of this quarry. Having undertaken an appropriate enquiry, and on the basis of the documentation provided by the planning authority on this file, and on history files, including the s.261 registration file, (QY71), the Board was not satisfied that the subject quarry had commenced prior to 1964, or was covered by a "pre-1964 authorisation". However, it noted the determination made by the planning authority under s.261A of the Act in this respect, and noted that no review of this determination had been made. The Board, accordingly, considered*

that it was not open to it to adjudicate on the matter within the context of an application for substitute consent that was required to be made by this determination."

64. I would confine myself to commenting that, prima facie, there appears to be some tension, not only between the Board and Galway County Council, the planning authority, but between this "note", on the one hand, and on the other, the provisions of s.177D (2) of the PD(A)A 2010, referred to earlier, which, in its various paragraphs, enjoins *the Board* to have regard to, *inter alia*, whether an applicant for substitute consent could reasonably have had a belief that the development was authorised; whether that applicant had complied with previous planning permissions, or had previously carried out an unauthorised development, and *"such other matters as the Board might consider relevant"*. The significance of the observation in the note regarding "pre-1964 authorisation" touched on earlier is explained when one turns to s.261A of the Act, which sets out special provisions regarding **quarries** which devolved upon planning authorities such as, in this case, Galway County Council. But it also raises a question as to how the Board saw the limits of its statutory role?

Allocation of Statutory Roles

65. The judgment turns next to other submissions by **McTigue** which may best be described as ancillary to the main point. Relying on *Sherwin v. An Bord Pleanála* [2007] IEHC 227; [2008] 1 I.R. 561, and *Grianán of Aileach Interpretative Centre Company Limited v. Donegal County Council (No. 2)* [2004] IESC 43; [2004] 2 I.R. 625, counsel for **McTigue** submitted that there was an allocation of powers between the courts and the Board, and that the Court was not invested with the jurisdiction to consider matters of special skill and competence in planning issues. It is said that this is such a question. I reject this argument. What is in issue here, ultimately, is a matter of statutory interpretation. This is pre-eminently a question for the courts. The Board is not a party to this appeal. I make no other observation.

Literal Interpretation and the Facts "on the Ground"

66. Setting all peripheral considerations to one side, the essence of **McTigue**'s submission is clear: it is that s.177O of the PD(A)A 2010 should be read literally, as imparting to the quarry exactly the same status as a planning permission under s.34 of the PDA 2000. Counsel for **McTigue** unequivocally submits that the "development" permitted in the consent can and does encompass future works on the main seam, given the express meaning of the section. He submits that the quarrying development, undertaken in accordance with the plans and specifications submitted to An Bord Pleanála, on the 7th May, 2013, are permitted, but that development outside of that is not authorised.

67. Looking at the question in its practical effect, one might comment that the substitute permission, read in this way, would allow for the continued insufficiently conditioned extraction from the seam upon which the quarry is presently operating until that seam is exhausted. Presumably, this could take years. But, counsel submits this would not be future development; it would simply be "permitted development". Counsel does concede that any further development, such as extraction from what is called the "reserved lands", not comprised within any pre-1964 use, would be a matter which would constitute future development. But this again begs the question as to whether such an interpretation allows for, or countenances, the continued operation even of this seam of this

quarry without there ever having been an appropriate EIA or an AA, and where the range of conditions one would normally expect in a consent or permission for future operations is absent?

68. It is said that two phases are envisaged in the remedial works. Counsel for **McTigue** argues that Phase 2 of the plan could only arise after extraction had been fully completed. These remedial works simply could not occur until excavation is complete, at which point the development, the subject of the consent, is also complete. But all of this is to ignore the key question: the meaning of s.177O.

A True Construction of the Section

69. As will now be explained, the issue resolves itself as a matter of interpretation of *national law*: what is in question here is not a matter of *imparting* horizontal effect to the EU Directive, nor interpreting a national law in a manner conforming with EU law, as in *Marleasing SA v. La Comercial Internacional de Alimentacion SA* (C-106/89) [1990] ECR 1-04135, but rather interpreting this *national* statutory provision in accordance with the intention of the Oireachtas under s.5 of the Interpretation Act. The PD(A)A 2010 stipulates, in terms, that the intent is to achieve concordance with the EIA Directive. This must necessitate that, in interpreting the section in its appropriate context, terms used in the Directive are given their correct meaning under EU law as defined by the CJEU. The term "development consent" has an autonomous meaning in EU law, which is predicated on there being an appropriate EIA in this category of "development". Thus, for there to be a valid planning permission in this case, there must either have been a valid EIA, or the development must come within the category of development identified in s.177O of the PD(A)A 2010. Neither of these is true in this case.

70. At para. 5 of the High Court judgment ([2016] IEHC 620), Barrett J. expressed himself this way:

> *"At first glance, a reading of s.177O(1) would suggest that the grant of a substitute consent, such as that issued by An Bord Pleanála on 5th January, 2015, is to be treated as if it were a grant of permission under s.34."*

71. **McTigue** submit that this "first glance" is the only construction that s.177O can, or is intended to, bear. But, even on a literal interpretation, this raises a question: if this interpretation is correct, why does the section provide that a development being carried out shall be *deemed* to be authorised development? The section does *not* simply say it shall be *"an authorised development within the meaning of s.34",* which would assist **McTigue**'s case far more. In my view, this usage is consistent with An Taisce's submission that such substitute consent will "only" permit the remedial works which are the subject of a substitute consent for qualifying developments which had previously received flawed permissions.

72. In interpreting s.177O, and the PD(A)A 2010 as a whole, a court should have regard to the overall framework and scheme of the Act. (cf. the recent judgment of O'Malley J., for this Court, in *Cronin (Readymix) Ltd. v. An Bord Pleanála and Ors.* [2017] IESC 36; [2017] 2 I.R. 658, para. 47). What does that framework and scheme tell the reader? The words are consistent only with a legislative intention to comply with the EIA Directive. It is not consistent with a literal interpretation which would permit the

quarry continuing in operation without appropriate conditions as to that operation for perhaps years to come. The Interpretation Act, 2005 makes clear the approach a court should adopt. 73. Section 5 of the Interpretation Act, 2005 provides:

> *"In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) -*
>
> *(a)* ***that is obscure or ambiguous****, or*
>
> *(b) that* ***on a literal interpretation*** *would be absurd or would fail to reflect the plain intention of -*
>
> *(i) in the case* ***of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas****, or*
>
> *(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*
>
> ***the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*** (Emphasis added)

73. A literal interpretation of the section would not "reflect the plain intention of the Oireachtas", as the legislative intention can be ascertained from the Act as a whole. The PD(A)A 2010 is to give effect to the EIA Directive. These were the words of the legislature.

74. The PD(A)A 2010 was limited to that category of development where permission previously "was granted" by the planning authority or the Board, where an EIA or an AA had not been carried out, and where the Court of Justice had determined that the permission was in breach of law, or otherwise offended because of an omission of an EIA. But this exceptional category is confined to those applicants who had received an otherwise valid permission (cf. s.177B). Any other interpretation would be entirely inconsistent with the terms of s.177O, coming, as it does, under the rubric of "*Enforcement*". What is argued for is, in fact, not "*enforcement*", but exceptionality.

75. The intention of the Oireachtas, evident from s.1A of the PD(A) A 2010 (See para. 29 above), is to give effect to Acts adopted by an institution of the EU, that is to say, the EIA Directive and the Habitats Directive. The wording of s.177O is, in fact, consistent with this intention, even if the section may be ambiguous. The true intention of the section is manifest by reference to its legislative framework, in particular, the text of each of the provisions of ss.177A-Q. The same intention is reflected in Part XAB of the PD(A) A 2010, relating to appropriate assessment; and in s.261A of the PDA 2000. It is to permit consents only for remedial work within the scope of the Act for developments that had previously received "erroneous" planning permissions.

76. It is true that a literal interpretation could, on the face of things, favour **McTigue**. But what is the effect of this submission? Could it realistically be argued that, contrary to the expressed intent, the actual intent of the Oireachtas was to "carve out" some

"exceptional" legislative regime for a category of non-compliant **quarries** which, under the guise of undergoing preliminary registration procedures obtaining remedial EIAs and substitute consents, would be permitted to continue operation, and thereby navigate a passage around the law, without an EIA ever having been conducted? When the question is posed in this stark way, the contention is untenable.

77. I would, therefore, hold that s.177O of the PD(A)A 2010 is to be interpreted as meaning that where a grant of *substitute consent* is made in accordance with ss.177A-Q of the 2010 Act, such substitute consent has effect for those procedures as if it were a permission granted under s.34 of the PDA 2000, but *only* where there was a prior, albeit flawed or erroneous, planning permission, where a lawful remedial development in compliance with prior conditions laid down in the PD(A)A 2010 is to be carried out in compliance with the terms of that substitute consent, and in accordance with any conditions to which that substitute consent is subject. It is in those circumstances, only, that such a development may be deemed to be an "authorised development".

78. It follows from these conclusions that this quarry is an "unauthorised development" as defined in s.2 of the PDA 2000. For the reasons set out above, I would uphold the High Court judge's decision on this first issue.

The Second Issue: Section 160 of the PDA 2000

79. Section 160 of the PDA 2000, as amended, and, insofar as relevant, provides:

> *"160(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:*
>
> > *(a) that the unauthorised development is not carried out or continued;*
> >
> > *(b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;*
> >
> > *(c) that any development is carried out in conformity with -*
> >
> > > *(i) in the case of a permission granted under this Act, the permission pertaining to that development or any condition to which the permission is subject, or*
> > >
> > > *(ii) in the case of a certificate issued by the Dublin Docklands Development Authority under section 25(7)(a)(ii) of the Dublin Docklands Development Authority Act 1997 or by the Custom House Docks Development Authority under section 12(6)(b) of the Urban*

Renewal Act 1986, the planning scheme made under those Acts to which the certificate relates and any conditions to which the certificate is subject."

80. Was the High Court judge correct in declining to grant an order under s.160 of the PDA 2000? It is true that the section vests a discretion in the Court. The manner in which that discretion should be operated has recently been considered in detail by this Court, in *County Council of Meath v. Michael Murray and Rose Murray* [2017] IESC 25; [2018] 1 I.R. 189. As McKechnie J., speaking for this Court (Denham C.J., O'Donnell, McKechnie, Laffoy, and Dunne JJ.) pointed out, the s.160 process is intrinsically summary in nature. (para. 35). It is frequently used to address urgent situations requiring immediate action so as to stop or prevent an unauthorised development. (para. 35). There may be cases where a more thorough exploration of intricate issues of law may be necessary in order to determine the outcome. (See para. 35 of *Murray*, and the cases therein cited). However, it is necessary to advert to the fact that, on the fundamental issues facing this Court, there appears to be little factual conflict.

81. Again, as mentioned earlier, Mr. Gary **McTigue** accepts that, "strictly speaking", it may be correct to say the quarry has no planning permission. The form of "authority" relied on is, ultimately, simply the substitute consent, which, in turn, was based only on remedial assessments, both as to the environment and habitat. There was never a lawful planning permission *per se.*

82. *Prima facie*, therefore, the facts fall within s.160(1) of the PD (A)A 2010 (as amended). Here, the Court is concerned with an unauthorised development, which is being "carried out", or "continued", in what would be an unregulated and unconditional manner. The core focus of s.160 is on whether or not there is an "unauthorised development". (See *Murray* para. 52). Any individual, with or without an interest in this development, and whether damnified or not, can invoke s.160 even though the overarching supervisory guardian of planning control at the executive level must be the statutory body established to that end. (*Murray*, para. 60). To refer to the criteria identified in *Murray*, (para. 64), there is no dispute that:

1. There exists a quarry, significant in its scale of operations;

2. It constitutes a "development" within the meaning of that term, as defined in s.3 of the 2000 Act;

3. Unless some lawful exception exists in respect of such a property, planning permission for its existence and use was required;

4. The "substitute consent" is not sufficient to warrant the form of continued operation which **McTigue** seeks;

5. No valid permission exists for its operation or use; and

6. This situation is not congruent with the duties of the State under EU law and national law.

Statutory Based/Equitably Controlled

83. There is no doubt that what is in question under s.160 is a judicial discretion. (See *Stafford v. Roadstone* [1980] 1 I.L.R.M. 1; *Avenue Properties Limited v. Farrell Homes Limtied* [1982] 1 I.L.R.M. 21, c.f. cited in *Murray*). However, it is not an equitable jurisdiction, as such. Rather, it is a statutory form of injunction which has a basis distinct from the general equitable jurisdiction of the High Court. (*Mahon v. Butler* [1997] 3 I.R. 369; *Murray*, para. 79).

84. At para. 87 of *Murray*, McKechnie J. refers to Henchy J.'s strong observations in *Morris v. Garvey* [1983] I.R. 319, where he observed, at p.324, that:

> *"It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or suchlike extenuating or excusing factors) before the court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is 'necessary to ensure that the development is carried out in conformity with the permission."*

85. With all this in mind, one looks to the factors to be considered in assessing whether a s.160 order should be made. These include:

> (i) The nature of the breach: The breach involved here is not minor, technical or inconsequential. It comes, rather, within the category of something material, significant and gross, as described earlier.
>
> (ii) The conduct of the infringer: It can, of course, be said that, subsequent to 2008, there has been some interaction between the operators and the planning authorities. However, whilst important, even acting in good faith will not necessarily excuse the making of a s.160 order. The issue of the applicability of s.177O to this quarry has been addressed;
>
> (iii) The reason for the infringement: The reason for the infringement here does not come within the category of genuine mistake, indifference, or indeed, culpable disregard;
>
> (iv) The attitude of planning authority: Undoubtedly, there are unusual features in this case. There are suggestions in the correspondence that the planning authority, that is, Galway County Council, has been a customer of the quarry, using stone won from it for infrastructural development work. If true, there is a risk of conflict of roles in such circumstances;
>
> (v) The public interest: There is a strong public interest in upholding the integrity of the planning and development system;
>
> (vi) The public interest, such as employment for those beyond the individual transgressors, or the importance of the underlying activity: The Court has insufficient evidence on these issues to express any view, but this cannot be a bar to an order being made in this case;

(vii) The conduct and, if appropriate, personal circumstances of the applicant: The applicant is a statutory body, entrusted, inter alia, to carry out work relating to the protection of the environment;

(viii) The issue of delay: There is no evidence that An Taisce has been in delay, or has acquiesced;

(ix) The personal circumstances of the respondent: While these are factors, they cannot stand in the way of an order being made; and

(x) The consequences of any such order. This is dealt with below.

Conclusion on the Second Issue

86. To my mind, the factors which have been identified point only towards the granting of a s.160 injunction order. But one cannot be blind to the fact that this will have significant consequences for **McTigue**. This Court has not had the opportunity to hear submissions upon, or consider in detail, any evidence regarding the upshot of the making of an order for the operators and employees of the quarry.

87. In my opinion, an order under s.160 must follow. As the learned High Court judge found, **McTigue** was carrying out an unauthorised development. What is in question here, therefore, is a "notable breach of the planning and development code", as Barrett J. pointed out at para. 12(ii) of the High Court judgment. It seems to me that only the granting of a s.160 order would be in keeping with the obligation of the courts as a judicial organ of the State to give effect to the national law. I would reverse the order of the High Court on this issue, and grant the s.160 order.

88. Counsel may wish to address the Court on any issues arising. There will be a stay of six months on the order to allow the owners to address the legal situation of the quarry.

Back to top of document