

Submission to An Coimisiún Pleanála

Substitute Consent
Application Ballintra, Co.
Donegal (ACP Ref:
QD05E.323037)





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1.

INTRODUCTION

We have been instructed by our client, Mr. Pearse O’Gorman of Ballymagroarty, Ballintra, Co. Donegal, to lodge a submission on an application for Substitute Consent for a quarry located in Ballymagroarty and Glasbolie, Ballintra, Co. Donegal (ACP Ref: QD05E.323037). Mr. O’Gorman is a native and a resident of Ballymagroarty and lives in close proximity to the quarry.

While this submission addresses a range of issues relating to the subject quarry and its operation, the primary focus relates to the scope of the current Substitute Consent application which includes a Statement of Exceptional Circumstances on which the application relies. It is our contention that the Commission cannot and should not assess this application as it does not meet the requirements of Exceptional Circumstances as set out in Section 177(K) of the Planning and Development Act 2000, as amended. The application also includes a number of procedural issues which, in MKO’s view are inconsistent with the provisions of the Planning and Development Act 2000 (as amended) and render the application invalid.

This submission is structured as follows:

- Development Context
- Development Planning History
- Statement of Exceptional Circumstances
- Procedural Issues
- Conclusion

This submission should be read in conjunction with the following documents/inputs which are appended to this submission:

Appendix 1- Client Objection

Appendix 2 – Submission on rEIAR

Correspondence 1998-2001

Cosgrove-Doyle Correspondence

KT Cullen Report

Appendix 3 – Photographic Record

Appendix 4 – Hydrology Report

2.

DEVELOPMENT CONTEXT

For the purposes of this submission, MKO wish to set out the background to quarrying activity on the subject lands. This summary has been prepared with the assistance of Mr. Pearse O’Gorman, Ballymagroarty, Ballintra, Co. Donegal who is from the local area. Where the applicant’s summary of the planning history of the subject lands (as set out in planning application documentation) differs from our clients, this will be highlighted.

2.1

Quarrying Activity - 1960’s & 1970’s

The first blast at the quarry took place in February 1966, and was undertaken by Donegal County Council, to supply stone for the realignment of a section of the N15. Quarrying began on lands in the ownership of Mr. Frank Mulharter in February 1966 and the Council had ceased quarrying by December 1966. After the Council completed the road project the quarry lay dormant for a period of approximately 18 months and was purchased by P McCaffrey & Sons Ltd around mid to late 1968. P McCaffrey & Sons Ltd commenced quarrying at this site in mid to late 1968 or early 1969. It should be noted that the applicant contends that quarrying activity commenced on the subject site in the 1940’s¹, no evidence is provided to support this assertion.

The original lands purchased by P McCaffrey & Sons Ltd from Mr. Frank Mulharter comprised 4.9093 hectares (Folio Ref: DL42273F) (outlined in red in Figure 1 below) in mid to late 1968 and registered on 23rd October 1969. This was quarried by the applicant up to 1982 with an area of excavation of 3.478 hectares. Two adjoining fields closer to local road L7265 were purchased in 1980/81 from Mr Cathal McGrane 1.44 hectares (Green boundary in Figure 1 below) (Folio Ref: DL32349F) and Mr John Carron 0.409 hectares (Blue boundary in Figure 1 below) (Folio Ref: DL16370F). These fields were quarried up to 1986 with an area of excavation of 1.467 Ha, bringing the total area of excavation of the south quarry to 4.945 hectares. The Ordnance Survey aerial photograph dated 21st May 1977 (See Figure 2 below) clearly shows that the extent of the south quarry and that it did not extend to public road L7265, contrary to the position outlined by the applicant in their application documentation. For ease of reference, the historic land ownership of the quarry lands is illustrated in Figure 1 below and outlined in Table 1.

Folio Number	Original Owner	Date Agreement to purchase lands by P McCaffrey & Sons Ltd (from local knowledge)	Date Registered in Land Registry	Area of land Purchased hectares	Area of excavation on that land hectares
DL42273F	Mr Frank Mulharter	mid to late 1968	23 rd October 1969	4.9093	3.478
DL32349F	Mr Cathal McGrane	1980/81	22 nd April 1996	1.44	1.467
DL16370F	Mr John Carron	1980/81	7 th December 1983	0.409	
Total area of quarrying in south quarry in hectares					4.945

Table 1 – Quarry Lands – Historic Ownership

¹ Section 2 – Statement of Exceptional Circumstances prepared by William J Smyth, Cartron South, Ballyhaunis, Co. Mayo – 3rd July 2025

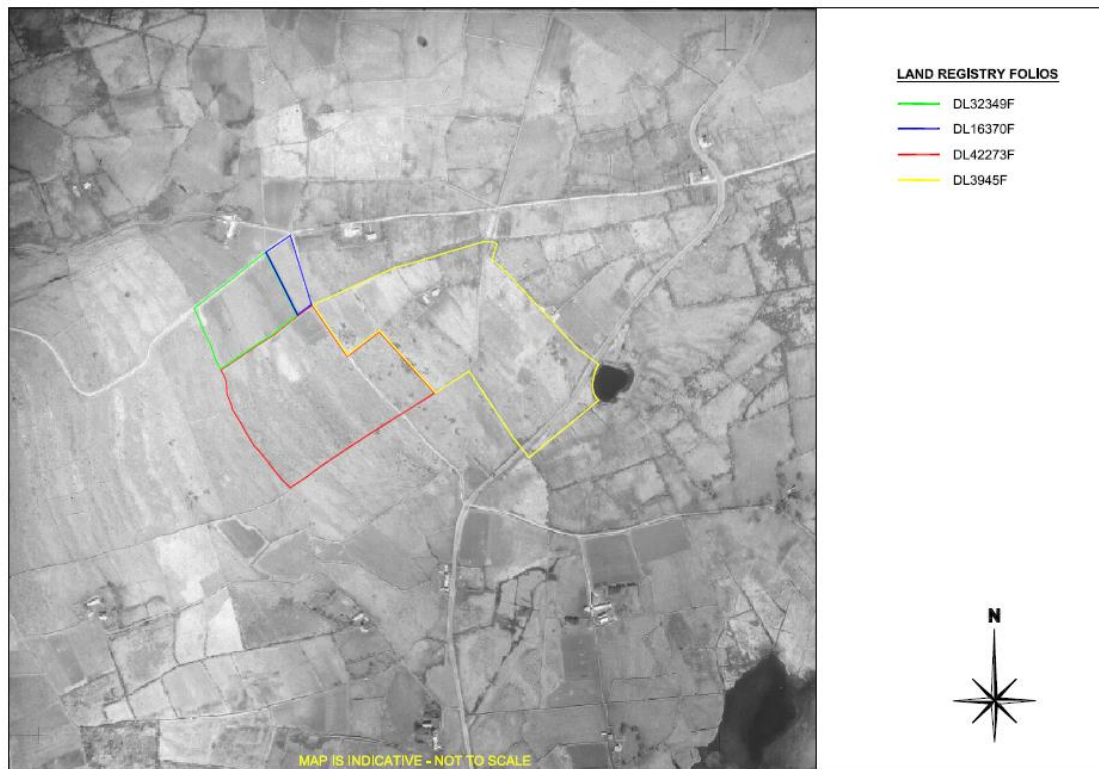


Figure 1 - Land Ownership of South Quarry plotted on aerial photograph from Irish Army dated 17.4.51 or 13.3.58

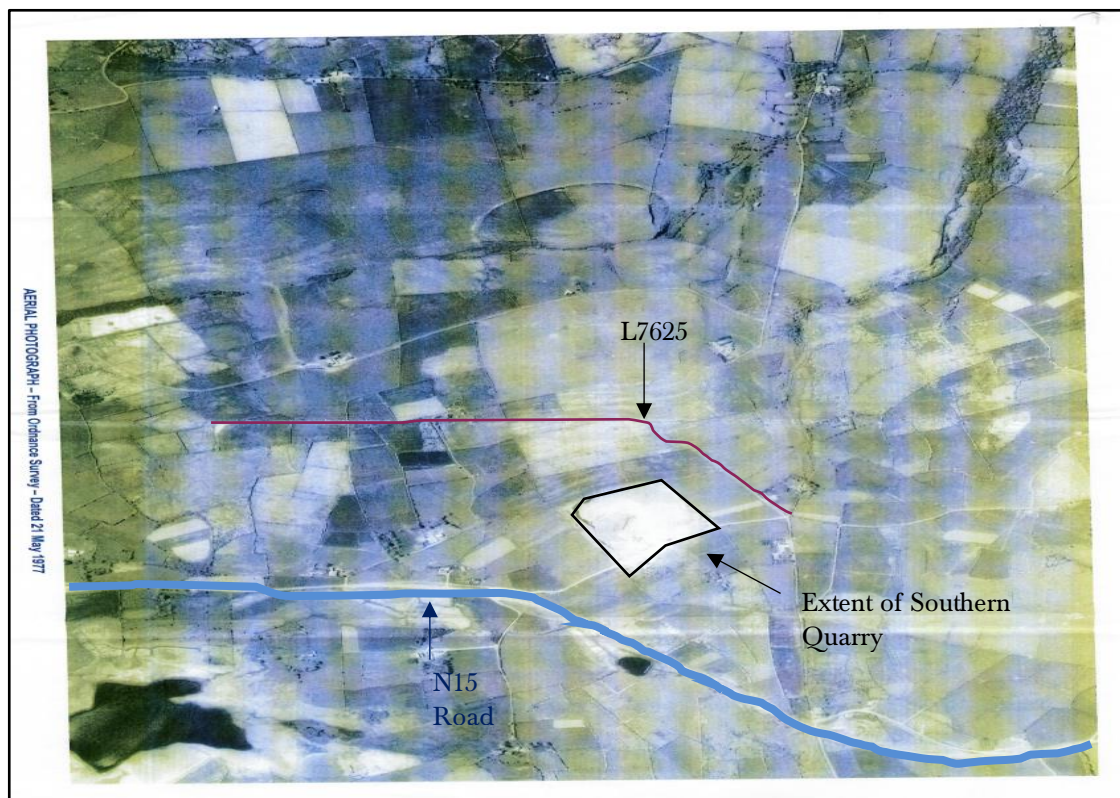


Figure 2 - OS Aerial Map - 21st May 1977

It should be noted that the base aerial map in Figure 1 above is sourced from Irish Army Cathal Brugha Barracks dated either 17.4.51 or 13.3.58. It is worth noting that, notwithstanding the contention of the applicant, there is no evidence of the 'extraction of rock with blasting' that allegedly had been occurring

since the 1940's. On the contrary, it is evident that no quarrying activity had occurred on the date the aerial photo was taken in 1951 or 1958. This evidence has been cited by our client previously, in correspondence with ACP, to demonstrate that the subject quarry never benefited from 'pre-1964' status and did not meet the relevant criteria to be registered under Section 261.

The applicant contends² within the application documentation that quarrying activity in the southern quarry had concluded prior to the transposition of the EIA Directive and AA Directive in 1990 and 1997 respectively and reiterates their original position, as outlined in ACP Sub Con Case Ref: SU0128, that a portion of the quarry does not require regularisation. This position has been rejected by ACP (in their dismissal of SU0128) and the High Court in their subsequent ruling on the matter.

2.2

Quarrying Activity - 1980's, 1990's and 2000's

The quarry operator purchased additional lands in 1986 which would ultimately form the location of the 'North Quarry' following the exhaustion of the 'South Quarry'. Material was quarried in this area during the period 1986-2013 to a depth of approximately 150 metres and below the groundwater table³.

P McCaffrey & Sons Ltd purchased lands from Mr Cathal McGrane to the north of the L7265 in 1986 and adjoining lands to west from Mr Thomas Timoney in 1992. During the period circa 2001 – 2003, P McCaffrey & Sons Ltd widened the North Quarry by 0.416 hectares to the field boundaries to achieve a greater footprint. This resulted in creation of sheer cliff faces leaving no possibility of quarry benching as illustrated on drawings submitted as part of planning application DCC Ref: 01/106 & ABP 05.131103. In 2007, P McCaffrey & Sons commenced further unauthorised extension of the North Quarry to the west, on 0.774 hectares on greenfield lands purchased from Mr William Doherty. This brought the area of extraction in the North Quarry to 4.256 hectares. The quarry operator proceeded to deepen the base of the North Quarry until 2013. Tables 2 & 3 and Figure 3 below provide an overview of land ownership and mapped extent of quarry areas for clarity.

Year	Location	Description	Hectares	Total North Quarry Excavation Hectares
1986 - 1991	North Quarry	Lands purchased from Mr Cathal McGrane	0.946	0.946
1992-1998	North Quarry	Lands purchased from Mr Thomas Timoney	2.120	3.066
2001 -2003	North Quarry	Expansion on Thomas Timoney lands to field boundaries	0.416	3.482
2007	North Quarry	Expansion to lands to west purchased from Mr William Doherty	0.774	4.256

Table 2 - Quarry Lands Composition

² Section 2 – Statement of Exceptional Circumstances prepared by William J Smyth, Cartron South, Ballyhaunis, Co. Mayo – 3rd July 2025

³ The Environmental impact of quarrying activity is discussed in the 'Submission on rEIAR' prepared by Pearse O'Gorman and enclosed in Appendix 2.

Table 3

Original Landowner	No.	Date Agreement to purchase lands (from my local knowledge)	Date Registered in Land Registry	Area of land Purchased ha	Date excavation commenced on land	Area of quarry excavation on that land ha
Mr Frank Mulharter	A	Leased by DCC	N/A	N/A	February 1966	0.052
Mr Frank Mulharter	B	Mid to late 1968	23 rd October 1969	4.9093	Mid to late 1968	3.426
Mr Cathal McGrane	C1	1980/81	22 April 1996	1.44	1980/81	1.467
Mr John Carron	C2	1980/81	7 December 1983	0.409	1980/81	
Mr Cathal McGrane	D	1986	22 April 1996	1.286	1986	0.946
Mr Thomas Timoney	E	1991/1992	29 April 1993	2.876	1991/1992	2.536
Relations of Mr Frank Mulharter	F	1990	26 January 2000	5.752	January 1999	0.065
Mr William Doherty	G	2005	Not registered	1.56	February 2007	0.774

Table 4 - Quarry Lands- Ownership Composition

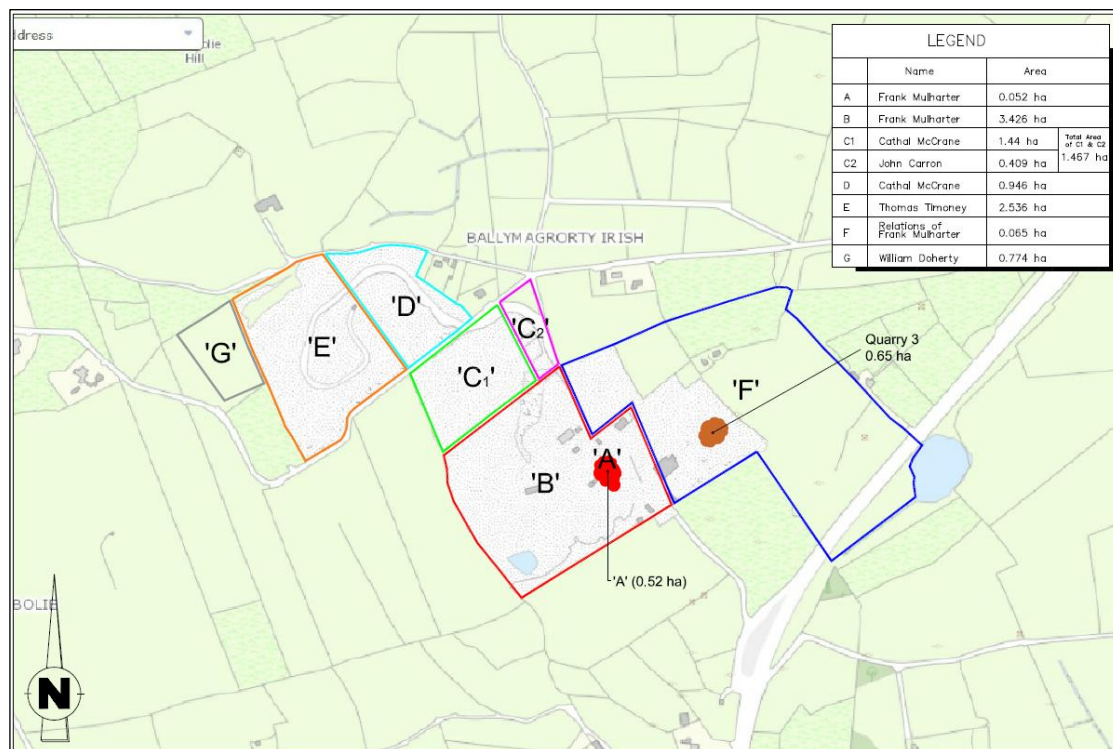


Figure 3 - Overall Quarry Area & Landowners

Materials from the North Quarry were stockpiled in South Quarry for manufacturing and production of aggregate until the stockpile was exhausted. P McCaffrey & Sons Ltd commenced further extraction in the base of the south quarry in October 2015, and this continued until December 2019, to an additional depth of circa 27 metres (59.83mOD). Furthermore, the deepening of the south quarry took the excavation below the water table. In 2020 P McCaffrey & Sons Ltd commenced importation of stone from the nearby Roadstone Quarry.

In summary, the applicant has undertaken extensive quarrying activity on the subject lands from the period c.1968 to 2019, a period of over 50 years, without the benefit of any planning permission. In the context of this substitute consent application, and the requirements set out in Section 177K of the Planning and Development Act 2000 (as amended), it is particularly important to note that extensive quarrying activity took place after ACP's Section 261a determination on 16th October 2013. Furthermore, it is important to note that the applicant's contention that quarrying activity ceased in 2013 is contradicted by the photographic record included in Appendix 3 of this submission but also by Section 6.4.2 of rEIAR which illustrates the south quarry in 2013 with a flat base and present day situation in Drawing No. MM2500709-06 with deep excavation in floor of south quarry. This matter is discussed in further detail in Section 4 below.

2.3

Manufacturing Development

ACP will note from the application documentation and drawings that there is a macadam plant and a concrete manufacturing facility located in the South Quarry neither of which have the benefit of planning permission. Note that the original macadam/asphalt plant was constructed in 1977, followed by a second plant constructed in the 1980's which was replaced by the current plant in 2000. The original concrete plant was erected in 1977, with relocation to the base of the quarry and plant renewal in 1989/1991. The applicant contends that environmental impact of these activities 'is very limited'⁴. Respectfully, this is not a reasonable contention. The environmental impacts of a large scale (unauthorised) quarry and associated (unauthorised) macadam and concrete plants could not be described as minimal. The environmental and residential amenity impacts of the long standing and ongoing activities at the subject site are described and discussed in the '*Submission on rEIAR*' prepared by Pearse O'Gorman and enclosed in Appendix 2. In addition, our client commissioned a '*Report on Investigations into Planning, Environmental Compliance and General Nuisances Associated with a Quarry Operated by P McCaffrey & Sons Ltd*' from KT Cullen & Co Ltd in December 2000, which provides a contemporary record of operation of the quarry, and which is enclosed in Appendix 2 of this submission.

It is noted that the applicant puts forth the position in their *Statement of Exceptional Circumstances* (See Footnote 3 below) that the unauthorised status of the manufacturing development is consistent with a '*high proportion of sixties to eighties manufacturing development without the benefit of planning permission across the construction materials industry*'. ACP will note that this does not change the unauthorised status of the development in question or mitigate its significant environmental impact.

⁴ Section 3 – *Statement of Exceptional Circumstances* prepared by William J Smyth, Cartron South, Ballyhaunis, Co. Mayo – 3rd July 2025

3.

DEVELOPMENT PLANNING HISTORY

The purpose of this Section is to summarise the planning history of the subject quarry from 2001 to the present day.

3.1

2001 Planning Application

In 2001 the applicant applied for planning permission for an extension to, retention and completion of an existing quarry operation and associated buildings [offices, laboratory, garage, store and gravel store] and the extinguishment of a public right-of way adjacent to the quarry [Pl Ref: 01/106]. This grant of permission was appealed to An Bord Pleanála who subsequently refused planning permission [Ref: 05.131103] and the primary reason given was that-

'It is considered that that the proposed development, if permitted, would seriously injure the amenities and depreciate the value of properties in the vicinity of the site and would be unacceptable in terms of risk to environmental pollution and traffic safety'.

While there is some considerable confusion and contradictory information in this planning application with respect to the overall site area, and this is referred to in the Inspectors Report, this application encompassed both the north and south quarry areas. The application refers to a site area of 19.8HA and an excavation area of 10HA.

For the purposes of this application, it is important to note that the planning application was made in respect of the entire quarry, and the Inspectors Report readily identifies this. For ease of reference the extent of the quarry area is identified below.



Figure 4 Quarry Extent

In 2007, two planning applications were made by the applicant to Donegal County Council for the retention of the North Quarry and for the prospective extraction in a separate area non contiguous to the South Quarry. These applications were not progressed and were deemed invalid by the County Council.

3.2

Application for Registration under Section 261

Section 261 of the Planning and Development Act 2000, which deals with the Control of Quarries, came into effect on the 28th of April 2004. Section 261 introduced a once off system of registration for all quarries, except those for which planning permission was granted in the previous 5 years. In 2006 the subject quarry was registered under Section 261 of the Planning and Development Act as set out above. The total site area at that time was stated to be 33.9ha with an extraction area of 10.6ha. This registration related to the entire quarry.

3.3 *Section 261A*

The Planning & Development [Amendment] Act 2010 contained significant changes relating to quarry developments, particularly in relation to applications for retention permission and to planning enforcement. Under section 75 of the new Act (which inserts a new section 261A into the 2000 Act) each planning authority must determine which quarries in its administrative area, would, having regard to the dates of implementation of the EIA Directive and the Habitats Directive, respectively, have required an environmental impact assessment, a determination in relation to environmental impact assessment, or an appropriate assessment in relation to possible effects on the integrity of a European site, and which have not had such assessment/determination carried out.

In 2012, pursuant to section 261a as set out above, Donegal County Council notified the operator of the McCaffrey Quarry of their intention to issue an Enforcement notice requiring the cessation of the operation of the quarry. This determination was undertaken on the basis that the quarry had commenced operation on or after 1st October 1964 and no planning permission had been granted in respect of the quarry.

The applicants made an application for review under section 261A to An Bord Pleanála (ABP) following the Planning Authority's determination. This review and its assessment by ABP relate to the entire quarry operation including both the north and southern quarry areas. Section 2 of the Inspectors report includes a description of the quarry subject to the review. This clearly relates to the entire quarry area.

Section 12 of the Inspectors Report is also relevant, and the following is an extract from this section:

"It is the submission of the quarry owner that notwithstanding that the entire area was registered under S261, the northern quarry (quarry B) is a separate development unit and should not be associated with the main quarry (quarry A)."

I do not accept this argument. It is a statement of fact that the entire area - quarry A, Band C- were registered as a single quarry under section 261. In addition, the planning application for development at the quarry (PL05. 1311 03) included the northern quarry within the development boundary, as have several other submissions from the quarry owner during the lengthy planning history. On the date of my site inspections, material was being excavated in the northern quarry and brought to the main quarry for processing.

It is my reasoned opinion that each of the three quarry areas are intrinsically linked, by ownership, by operation (with the exception of area C which has not been developed) and by custom. I am satisfied that the quarry is a single operation and should be assessed as one.'

The Boards direction on this review application includes a note as follows:

"Having regard to the nature and extent of operations, landownership, and the extent of lands indicated during the S261 registration process, the board considered that it would be appropriate to consider the entirety of the site as a single entity.'

On 5th June 2013 the Board's Inspector found that the quarry had commenced operation before 1st October 1964 and therefore Donegal County Council's decision to issue an enforcement notice was incorrect and should be set aside. This opened the way for the quarry operator to apply to An Bord Pleanála for Substitute Consent.

3.4 *Substitute Consent Application*

In December 2014 the quarry operator applied to An Bard Pleanála for substitute consent under Section 261A of the Planning & Development Act 2000. This substitute consent application related to the northern quarry area only (Area B).

On 9th January 2015 An Bord Pleanála wrote to the quarry operator stating:

'Having regard to the report by Donegal County Council on the 261A process and the Inspector's Report, Board Direction and Order in relation to QT/0128, you are requested to submit the rationale behind your submission of an area of 4.4 hectares for substitute consent and the exclusion of the remainder of the estimated 10.35 hectares [2010 aerial photograph] extracted/working area.'

The applicant's agent responded by way of a letter on 19th January 2015. This response, in our view, relies entirely on an informal communication between Donegal County Council and An Bord Pleanála which was interpreted such that the southern quarry area was deemed to not require substitute consent.

On 29th June 2015 An Bord Pleanála wrote to the quarry operator requesting the following be submitted:

'A revised application including a revised remedial Environmental Impact Statement and revised remedial Natura Impact Statement to incorporate sufficient information to enable the Board to complete an environmental impact assessment and appropriate assessment in relation to the overall quarry development (i.e. North Quarry, South Quarry and quarried lands to the east of the public road and west of the N15'.

On the 15th of December 2015 the quarry operator submitted, to An Bord Pleanála, a revised remedial Environmental Impact Statement (rEIS) and a revised remedial Natura Impact Statement (rNIS). The red line boundary of the substitute consent application site remained unchanged still only encompassing the northern quarry area (Area B) however the revised remedial Natura Impact Statement and revised remedial Environmental Impact Statement which formed the 'revised application' had an extended 'study area' which included the southern quarry area (Area A).

By the applicant's own admission in Section 1.3 of the Revised Remedial EIS, the northern quarry area has supplied stone which is processed in the southern quarry area. While the northern quarry area is not being operated at present, except for disposal of waste material from the southern quarry area, the overall operation involves processing a stockpile of stone extracted from the northern quarry area during a period of intense activity from approx. 2012 when, we understand, an estimated 250,000 tonnes of stone was extracted and stockpiled in the southern quarry area. Both the northern and southern quarry areas therefore form the overall quarry development and operation.

On 23rd May 2017 An Bord Pleanála issued their decision on this case dismissing the application for the following reason:

'The Board noted that the application for substitute consent is required to be made in relation to the development in respect of which the planning authority has made a determination under Section 261A(2)(a) of the Planning and Development Act, 200, as amended. The determination affecting the subject quarry related to the entirety of the quarry (planning authority reference number EUQY01).

A review undertaken by An Bord Pleanála of the planning authority's order (An Bord Pleanála reference number 05E.QV.0128) also referred to the entirety of the quarry.

The application for substitute consent initially received by An Bord Pleanála did not relate to the entire quarry and the Board, by means of a notice under Section 132 of the Planning and Development Act, 2000 sought on two occasions to give the applicant an opportunity to address the deficiencies in the

application, specifically to ensure the application and the supporting documentation extended to the entire site (as per the planning authority's order) and not one element only.

Notwithstanding these communications and the responses received, the Board considered that the identified deficiencies have not been resolved and that consequently the application in respect of the quarry does not comply with the requirements of Section 261A(14) of the Planning and Development Act, 2000, as amended. The Board is precluded under sections 177K(1) and 261a(14) of the Planning and Development Act, 2000, as amended, from making a decision in these circumstances to grant or refuse substitute consent and, accordingly the Board decided to dismiss the application pursuant to Section 133 of the Planning and Development Act, 2000.'



Figure 5 - Quarry Areas

3.5 *Section 37L Application*

Section 37L of the Planning and Development Act 2000 (as amended) allows for applications to further develop existing quarries, which are currently the subject of a substitute consent application under Section 261A of the Act. The legislation states-

'Where an application for substitute consent is or was required to be made by the owner or operator of a quarry pursuant to subsection {7}, {10} or {12} of section 261A the owner or operator may apply for permission to further develop that quarry in accordance with this section.'

The quarry operator made a planning application to An Bord Pleanála under Section 37L of the Planning & Development Act and consisting of-

'Quarrying of 6.2 hectares down to a level of 85m00 and will be subject to extraction primarily by drilling and blasting means and all associated ancillary facilities/works, screening berms and landscaping over a 35-year period.'

An extract from the Environmental Impact Assessment [Non-Technical Summary], which accompanies the planning application, explains the nature of the development in further detail-

'It is proposed to extend the quarry void of the existing main quarry into the application area where suitable reserves have been proven to exist. In order for extraction to take place, overburden will be

removed from the surface of the rock and used to construct berms around the boundary of the quarry. These will be shaped and planted with native trees and shrubs to provide screening. Rock will be extracted from the application site using conventional blasting methods which will fragment the rock to into a manageable size. This will be undertaken on an as required basis by competent contractors. The blasted material will be stockpiled on the quarry floor and transported to the manufacturing area of the main quarry for processing at the fixed crushing and screening plant.'

The 'existing main quarry' referred to in the excerpt above is the Southern Quarry Area referred to throughout this submission i.e. (Area A - the area which has no planning permission and was omitted from the red line boundary of the substitute consent application. On 23rd May 2017 An Bord Pleanála decided to refuse planning permission for the extension of the quarry for the following reason:

'The Board considered that the Environmental Impact Statement submitted with the application is deficient on the grounds that the document failed to adequately quantify the volume of material to be extracted on site and the consequential impact that this would have on the processing and manufacturing of materials within the main quarry area. As a result, the Board is unable to adequately identify and assess the impacts of the proposed extension in terms of traffic, noise and dust generation arising from the proposed extension in isolation and in combination with existing processing and manufacturing activities on site. The Board is, therefore, not satisfied the proposed development, as a consequence of such impacts, would not seriously injure the residential amenities of neighbouring and nearby properties and depreciate the value of such property. It is therefore considered that the proposed development would be contrary to the proper planning and sustainable development of the area.'

3.6

Section 5 Declaration – ABP-313030-22

A referral was made in February 2022 on behalf of Pearse O’Gorman to Donegal County Council stating that quarrying was ongoing at the site. The question they put forward through the Section 5 Referral was *'whether the ongoing quarrying and ancillary activities at P. McCaffery and Sons Ltd Quarry, Ballymagroarty, Ballintra, Co. Donegal is or is not development requiring planning permission from Donegal County Council and is or is not exempted development.'*

This matter was referred to An Bord Pleanála by Donegal County Council who did not make a declaration in relation to the matter raised.

ACP concluded that the:

'nature and scale of the quarry activities and ancillary activities within the quarry area constitutes works within the scope of the definition in Section 2(1) of the Planning and Development Act 2000, as amended, and therefore constitutes development.'

The Board further found that the development is not exempt development and the only substitute consent application made in relation to this quarry was dismissed by An Bord Pleanála under reference PL05E.SU0128.

3.7

High Court Judgement [2024] IEHC 315 between Patrick McCaffery and Sons Ltd and An Bord Pleanála.

Patrick McCaffery and Sons Ltd made an application to the High Court requesting that the Court quash two decisions of the Planning Appeals Board. These decisions were to dismiss an application for substitute consent to continue quarrying operations and the other a decision to refuse conventional planning permission for further development at the same site.

The High Court determined that the Board was required to direct an application in respect of the entire site, not only Site A as put forward in the application. The High Court found that the Board was entitled to dismiss the application to extend the operations at Site C which it states was refused due to the inadequacy of the submitted EIS.

3.8

High Court Judgement [2024] IEHC 476 between Patrick McCaffery and Sons Ltd and An Bord Pleanala

Subsequent to the failed application of Patrick McCaffery and Sons Ltd to the High Court, see above Ref: [2024] IEHC 315, Patrick McCaffery and Sons Ltd submitted a further application to the High Court seeking leave to appeal the High Court's decision.

The High Court refused the application for leave to appeal, stating that the application to the High Court is based on a version of events which has been rejected as a matter of fact, by the Court. *'In these circumstances, it is not possible for the Court to accept that a matter of law, as identified on misstated facts, can truly arise.'*

3.9

Current Application

The applicant, P. McCaffery and Sons Ltd, has now applied for Substitute Consent pursuant to Section 177E of the Planning and Development Act 2000, as amended for development consisting of processing of asphalt and concrete products and associated infrastructure. A redmedial EIAR and remedial NIS were submitted alongside the application.

They state that the development consists of two quarry voids with a total quarry area of c. 13.26ha. This is made up of the North Quarry which has an extraction area of c. 4.62ha and South Quarry which has an operational area of c. 4.9ha. The development includes the following infrastructure; concrete batching plant, asphalt plant, fixed processing and washing plant, screening plant, aggregate stockpiles, aggregate storage buildings, block production and storage area, site office, mobile plant and vehicle parking, laboratory, workshop, welfare facilities, weighbridge, wheel-wash, haulage routes, security fencing, settlement ponds and associated landscaping.

They state that the extraction of rock has ceased on the site and that the development requires the importation of material for processing for the ongoing manufacturing of asphalt and concrete products, the re-exporting of aggregate products and the continued use of all infrastructure and buildings.

The applicant also seeks to secure permission to continue these works for a further 30 years. It is not possible to deal with future works within the framework of the Substitute Consent process. A separate planning application would be required for the continued use of the quarry and ancillary activities.

The applicant continues to claim that the south quarry is authorised, and the extraction of the south quarry is not subject to EIAR/AA. This argument was rejected by the High Court which stated that a quarry with pre-1964 status as a matter of national law has not acquired 'authorised' status absolving it from a requirement to provide an EIA or AA.

4.

EXCEPTIONAL CIRCUMSTANCES

4.1

Exceptional Circumstances

The provisions required to be undertaken by the Commission when assessing Exceptional Circumstances are set out in Section 177(1)(K) of the Planning and Development Act 2000, as amended. The considerations are dealt with on a point-by-point basis below. However, in the first instance, at Section 4.1.1 below, MKO have set out a general consideration on 'exceptionality' in the context of the planning history of the site as well as historic and present-day activities.

4.1.1

General Considerations

In the first instance, the applicant's agents contend in Section 10 of their *Statement of Exceptional Circumstances* that this case is exceptional on the basis that the previous ACP determination on this case and associated high court proceedings. The applicant's agent describes the previous applicant strategy as one which sought to 'vindicate pre-63 rights'. The applicant's agent goes on to contend that 'this application seeks to regularise the site in line with the wishes of the Board and judgement of the High Court.'

Respectfully, the applicant's position as outlined above, is not consistent with ACP's or the High Court's interpretation of this matter. The 'pre-63' status of the quarry (although disputed by our client) was not at issue in the previous case, this position had been accepted by ACP in the Section 261a proceedings, hence why P. McCaffery and Sons Ltd were able to engage with the Section 261a process. What was at issue was P. McCaffery and Sons Ltd failure to include the entirety of the unauthorised quarry in their substitute consent planning application, despite clear direction from ACP to do so. The applicant's position in relation to the 'pre-63' status of the quarry as a basis for excluding it from the previous substitute consent planning application, was rejected by the High Court who cited case law (Flood, Fursey Maguire & McMonagle [2023 IEHC 223] to reject this assertion as follows:

'a quarry with pre-1964 status as a matter of national law has, as the Respondent put it, somehow acquired 'authorised' status which pre-dates the deadline for transposition of the EIA Directive and the Habitats Directive, and does not therefore require planning permission, and cannot as a result, be the subject to an EIA or AA.'

Furthermore, the Court, noted at Section 12.2 of [2017 586 JR] that

'It is a matter for the applicant to satisfy the Board and not for the Board to advise the applicant on how best to phrase its application, or, indeed how to prepare its rEIS.'

The applicant alleges that the subject substitute consent planning application is being made to regularise the site 'in line with the wishes of the Board and judgement of the High Court'. Neither body issued any such direction or preference. ACP dismissed the case on the basis that:

*'applicant an opportunity to address the **deficiencies**⁵ in the application and the supporting documentation' to ensure it extended to 'the entire site (as per the Planning Authority's order) and not one element only'.*

⁵ MKO emphasis

The High Court censured the applicant in its judgement at Section 5.5 of High Court 2017 [586 JR] stating:

‘The applicant itself introduced confusion.....despite the planning history which confirmed the quarry was a single site’.

In High Court [2024 IEHC 476] the judgement stated at Section 3.10 that:

‘The Court has concluded that the entire quarry was to be considered in applying for substitute consent, in a direction that was not appealed, and that the directed application was not made by the applicant such that the Respondent cannot be faulted for dismissing it.’

In summary, P. McCaffery and Sons Ltd were directed at the outset of the S261a process to apply for substitute consent for the entirety of the quarry, they failed to do so. During the course of the original substitute consent application, ACP afforded P. McCaffery and Sons Ltd the opportunity to resolve this matter and apply for consent for the entirety of the quarry, they failed to do so. On foot of ACP's subsequent dismissal of the case, P. McCaffery and Sons Ltd challenged ACP's determination in the High Court, the High Court concluded, as referred to above, that ACP were correct in law to do so.

The outcome of the previous proceedings clearly establishes that the actions of P. McCaffery and Sons Ltd were in contravention of planning legislation, the EIA Directive and the Habitats Directive. The applicant now takes the position that there exists ‘*exceptional circumstances*’ for a repeat attempt to regularise the planning status of the quarry through an application under Section 177E. MKO would contend that the applicant had ample opportunity to resolve this matter under the original Section 261a process yet adopted a position which was contrary to law and which ultimately resulted in a failure of that effort. That outcome should not afford an applicant subsequent attempts at regularisation under Section 177E and would, in MKO's view, certainly not represent an exceptional circumstance for ACP to assess the subject planning application.

The position outlined above should also be considered by ACP in the context of one additional critical consideration. Since the ACP Section 261a determination on 16th October 2013, beginning in October 2015, P. McCaffery and Sons Ltd undertook substantial additional quarrying in the south quarry to an additional depth of circa 27 metres (59.83mOD), with excavation works ceasing in December 2019. The quarry continues to import stone for processing on site as well as operating the associated manufacturing activities. It is considered a reasonable contention that, as of October 2013, P. McCaffery and Sons Ltd understood that the entirety of the quarry required planning permission and assessment against the EIA and Habitats directives. It therefore follows, that P. McCaffery and Sons Ltd understood that any further quarrying activity required the benefit of planning permission and assessment against the EIA and Habitats directives, yet proceeded to undertake extensive additional quarrying activity over a period of 4 years up to 2019 and continued to process material at the quarry to the present day. It should also be noted that ACP's determination on the Section 5 Referral on 18th September 2024 (ABP Ref: 313030-22) concluded:

‘that the ongoing quarrying and ancillary activities at Patrick McCaffrey and Sons Limited Quarry, Ballymagroarty Irish and Glasbolie townlands, Ballintra, County Donegal, is development and is not exempted development.’

Notwithstanding ACP's determination, quarrying and ancillary activities continue at the site. In summary, P. McCaffery and Sons Ltd have undertaken the following development since the ACP Section 261a determination on 16th October 2013:

- flooding of the North Quarry
- illegal dumping of waste material in base of North Quarry
- installation of manufacturing blockwork plant in South Quarry
- unauthorised quarrying in base of South Quarry from October 2015 to December 2019
- importation of stone since 2020 and

- continued operation of quarry

4.1.2 Section 177(k) – Exceptional Circumstances Criteria

4.1.2.1 Would regularisation of the development concerned circumvent the purposes of the EIA Directive or the Habitats Directive?

Fundamentally, the purpose of the EIA Directive and Habitats Directive is to ensure projects will not have likely significant effects on the environment and/or significantly affect a Natura 2000 site. In this case, the applicant has operated a quarry development without the benefit of planning permission for a period of approx. 50 years and for the entirety of the period during which the EIA and Habitats Directives have been in effect in Ireland. Furthermore, the applicant has continued to undertake unauthorised development since 2015 (as per 4.1.1 above) which they know constitutes unauthorised development and they know requires assessment against the EIA and Habitats Directive. It is worth reiterating the High Court's opinion on this matter given the applicant continues to try and justify the current situation under the supposition that planning and/or EIA/AA were not required for a portion of the quarry based on its pre-1964 status:

'a quarry with pre-1964 status as a matter of national law has, as the Respondent put it, somehow acquired 'authorised' status which pre-dates the deadline for transposition of the EIA Directive and the Habitats Directive, and does not therefore require planning permission, and cannot as a result, be the subject to an EIA or AA'.

The Regularisation of the development now would circumvent the purposes of the EIA Directive and the Habitats Directive given the applicant's failure to adopt a procedurally correct approach to the Section 261a process and the ongoing carrying out of unauthorised development in the years since. Therefore, the subject planning application fails fundamentally on this exceptional circumstance's criterion.

4.1.2.2 Did the applicant or could the applicant reasonably have had a belief that the development was authorised?

Respectfully, and notwithstanding the position outlined in the applicant's Statement of Exceptional Circumstances, any objective analysis of the facts of this matter, can only lead to one obvious conclusion – the applicant is aware that the entirety of the quarry development and ancillary activities (including manufacturing development) comprises unauthorised development yet has continued to undertake extensive quarrying activity up to the present day.

If one were to exclude the period prior to 2013 (S261a Direction) where there was a changing consenting and regulatory context, and up to which point the applicant appears to have maintained an understanding that the quarry was at least in part, 'authorised' (an understanding since firmly quashed by the High Court as per 4.1.2.1 above), this leaves the extensive quarry activity that took place 2015-2019 as well as the associated and ancillary activities that continue to occur as of the present day. As outlined above, the applicant has clearly and wilfully engaged in ongoing and extensive unauthorised development, and the subject planning application fails fundamentally on this exceptional circumstance's criterion.

4.1.2.3 Has the ability to carry out an assessment of the environmental impact of the development for the purposes of

EIA or AA, and to provide public participation in such assessments, been substantially impaired?

The quarry has created environmental issues in relation to traffic, noise, dust, odour and flooding and has had a serious impact on the local community. The applicant contends that no ‘*EIA activity of any consequence has taken place post 2013.*’ This assertion is incorrect. There has been significant “EIA activity” undertaken since the Section 261a direction in October 2013. When the North Quarry was exhausted, waste from around the site was dumped into the void and the void was then allowed to flood. A block manufacturing plant was developed on the site in 2020, and quarrying took place in the South Quarry from October 2015 until December 2019. This increased the depth of the South Quarry by 27m and brought it below the level of the water table risking significant impacts on groundwater.

Following the refusal/dismissal of multiple planning applications since 2000, the applicant has continued to operate and further develop quarrying operations on the site without any planning permissions

The applicant concedes in the rEIAR that:

‘A common difficulty encountered throughout the rEIAR was the issue of attempting to identify potential historic impacts which may have once existed, but which are now absent, or which may have reduced over time. Similar difficulties arose regarding the establishment of any historic periods when certain impacts may have become apparent only to subsequently abate. The rEIAR is limited by the availability of, completeness and accessibility of publicly available data for the period of time applicable to the Development subject to Substitute Consent.’

The extract above could be interpreted as an implicit acknowledgment on the part of the applicant, that the nature of the unauthorised development is so complex, and has been going on for so long, that the scope of the rEIAR is necessarily ‘*limited*’. This implicit acknowledgement has the effect, in MKO’s view, of hindering or preventing the applicant from carrying out a robust rEIA. Therefore, the subject planning application fails fundamentally on this exceptional circumstance’s criterion.

4.1.2.4 Are 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 capable of assessment?

The applicant concedes within the rEIAR, as outlined in Section 4.1.2.3 above, that the scope of the rEIAR is ‘*limited*’. Therefore, the likely significant effects of the unauthorised development are clearly not capable of robust assessment. It should be noted by ACP that the extract from the rEIAR referred to above is in direct conflict with Section 10(iv) of the Statement of Exceptional Circumstances which states that:

‘the submitted rEIAR adequately provides for assessment of the likely potential impacts past and present from the entire development’.

Therefore, the subject planning application fails fundamentally on this exceptional circumstance’s criterion.

4.1.2.5 What is the extent to which the significant effects on the environment or adverse effects on the integrity of a European site can be remediated?

The applicant concedes in the rEIAR that the scope of the assessment undertaken is ‘*limited*’ based on the nature of the unauthorised development and the passage of time. If the effect that the proposed

development has had, and continues to have, on the environment are not fully understood, MKO would contend that it is not possible to propose specific or adequate remediation. Therefore, the subject planning application fails fundamentally on this exceptional circumstance's criterion.

4.1.2.6 **Has the applicant complied with previous planning permissions granted or has the applicant previously carried out unauthorised development?**

As outlined at length in this submission, the entirety of the proposed development is unauthorised, and the applicant has continued to wilfully intensify and expand the scope of the unauthorised development over a long period of time. Therefore, the subject planning application fails fundamentally on this exceptional circumstance's criterion.

4.1.2.7 **Such other matters as the Board considers relevant**

The applicant alleges in their Statement of Exceptional Circumstances Submission, under this heading, that the '*established emissions*' associated with the quarry development were part of the local environment prior to the transposition of the EIA or AA Directives. It should be noted by ACP that the extent and intensity of use of the quarry development increased substantially in the period as did the potential for effects/impacts on the environment and the Natura 2000 network of sites.

5. PROCEDURAL ISSUES

5.1 Procedural Issues

On behalf of the applicant, MKO wish to highlight some procedural issues with the subject planning application. Firstly, the address on the Site Notice is incorrect, the correct townland is Ballymagroarty Irish rather than Ballymagroarty. Article 26 of the Planning and Development Regulations 2001 (as amended) states that *'where the notice in the newspaper or the site notice, because of its content or for any other reason, is misleading or inadequate for the information of the public, the planning application shall be invalid'*.

This Substitute Consent application seeks to extend the life of the quarry for a period of 30 years. It is not possible to deal with future works within the framework of the Substitute Consent process. A separate planning application would be required for the continued use of the quarry i.e. under Section 37L or Section 34.

ACP will be aware that Article 224 provides for the public notice requirements for substitute consent applications including the requirement to state *"Application to An Bord Pleanála for Substitute Consent"*. The subject planning application is not an application for substitute consent, it is an application for substitute consent *and* for future development. In MKO's view, this potentially presents 2 no. grounds for invalidation – 1) Applications made for Substitute Consent under Section 177(e) are retrospective only, this subject planning application seeks permission for future works and, 2) The public notice is misleading under the provisions of Article 26 of the Planning and Development Regulations 2001 (as amended) as it purports to pertain to substitute consent when in fact it includes elements for which substitute consent cannot, procedurally, be granted i.e. future works.

6.

CONCLUSION

This is a new application for substitute consent for the P. McCaffery and Sons Ltd quarry. The Board concluded in October 2013 that an EIA and AA were required and that consent was required for the entirety of the quarry. Significant works have continued on the site in the intervening years. Quarrying commenced in the base of the South Quarry in October 2015 and continued until December 2019. This increased the depth of the quarry by 27m (59.83mOD) which brought the base of the quarry below the level of the water table. This work required EIA and was undertaken by the quarry operator in the full knowledge that it comprised unauthorised development. In 2020 the quarry operator commenced further unauthorised development at the quarry by importing stone for processing on site. All of the activities/uses on the site found to be development and not exempted development by ACP. 2024, following the referral of a Section 5 application from Donegal County Council in 2024. In addition to these works, other unauthorised development has taken place at the quarry which includes the disposal of waste in and flooding of the North Quarry, the creation of a lorry park to the east of the South Quarry and the installation of a blockwork manufacturing plant in the South Quarry.

In MKO's opinion, the subject planning application does not meet the criteria on exceptional circumstances as set out in Section 177k of the Planning and Development Act 2000 (as amended) and therefore, ACP are precluded from granting substitute consent. We would also refer ACP to the procedural issues set out in Section 5 above. Finally, we wish to raise concerns in relation to the veracity of the submitted rEIAR and rNIS which the applicant concedes are limited in scope. It is therefore not possible, in MKO's view, for ACP to reach a conclusion that the subject development had no significant effects on the environment. We trust that ACP will consider the contents of this submission in making their determination on this matter.



APPENDIX 1

CLIENT OBJECTION



APPENDIX 2

SUBMISSION ON REIAR



APPENDIX 3

PHOTOGRAPHIC RECORD



APPENDIX 4

HYDROLOGY