

Dáine

Daragh Cassells

From: Bord
Sent: Thursday 15 August 2024 16:26
To: Appeals2
Subject: FW: Ref. ABP-308036-20
Attachments: 20240815-ABP-308036.pdf

From: Sean O'Callaghan <socallaghan@antaisce.org>
Sent: Thursday, August 15, 2024 4:10 PM
To: Bord <bord@pleanala.ie>
Subject: Ref. ABP-308036-20

Caution: This is an **External Email** and may have malicious content. Please take care when clicking links or opening attachments. When in doubt, contact the ICT Helpdesk.

A Chara,

Please find enclosed An Taisce's submission on ref. ABP-308036-20.

Is mise le meas,

Seán O'Callaghan
Planning Officer
An Taisce – The National Trust for Ireland



An Taisce

The National Trust for Ireland

5 Foster Place

Dublin 2, Ireland

D02 V0P9

20240815-ABP-308036

An Bord Pleanála,
64 Marlborough Street,
Dublin 1.

Sent by email to: bord@pleanala.ie

15th August 2024

Ref: 308036

App: Drimoleague Concrete Works Limited

For: The substitute consent development is a gravel pit on a landholding extending to 20.22 hectares. The substitute consent application extends to an area of 10.5 hectares.

Site: Ummera Gravel Pit, Ummera Macroom, County Cork.

A Chara,

Thank you for the letter of 19th July 2024 requesting comment on attached documentation on above substitute consent.

1. Exceptional Circumstances

There is a preliminary requirement to address the consideration of exceptional circumstances. We have not identified any statement by the applicant justifying exceptional circumstances in this case, either in the online documents scanned on the Board's website or the documents attached to us with your letter of the 19th of July 2024.

1.1 Definition of Exceptional Circumstances

Section 177K(1J) of the Planning and Development Act 2000 (as amended by Section 30 of the Planning and Development, Maritime and Valuation (Amendment) Act 2022) states the following with regard to defining exceptional circumstances:

"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;

An Taisce is a membership-based charity | Join us at www.antaisce.org/membership

An Taisce ~ The National Trust for Ireland | *Protecting Ireland's heritage, safeguarding its future*

Registered Office: Tailors' Hall, Back Lane, Dublin, D08 X2A3, Ireland | www.antaisce.org | +353 1 707 7076 | info@antaisce.org

Company Limited by Guarantee no. 12469 | Charity CHY4741 | Charity Regulator no. 20006358 | EU Transparency Register no. 473905437651-60

Directors: Stuart McCaul (Chair), Trish O'Connell (Vice Chair), Laura Segura Gutierrez (Hon Secretary), John Conroy (Treasurer)

Olivia Rogers, Rónán O'Brien, Finbarr Murray, Helen Shaw, Terri Morrissey, Sínead Mercier, Phil Doyle

(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."

As a preliminary matter, An Taisce submits that the definition of exceptional circumstances per Section 177K(1J) requires consideration by the Irish Courts to determine its alignment with CJEU judgements regarding the standards for exceptionality in, for example, c-215/06. It is our view that s.177K(1J) is not consistent with the views of the European Court.

First, we would highlight paragraphs 57 and 58 of the CJEU judgment in c-215/06:

"57. While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does 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.

58. A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects."

These two paragraphs set out what Mr Justice Garrett Simons described in *Suaimhneas Limited v Kerry County Council* (neutral citation [2021] IEHC 451)¹ as "the limits of a Member State's discretion to regularise the status of development projects carried out in breach of the requirement of the EIA Directive" (para. 49). Essentially, these limits are:

- A regularisation system (such as substitute consent) should not allow for opportunities to circumvent EU laws and should not incentivise the circumvention of EU laws.
- Any regularisation still must adhere to and apply EU laws.
- Any regularisation should be permitted *only* in exceptional circumstances.

It is our firm view that the current definition of exceptional circumstances in s.177K(1J) incorrectly amalgamates two separate issues: a) what actually constitutes an exceptional circumstance, and b) the other limits on regularisation as detailed above.

Second, the definition in s.177K(1J) gives the Board exceptionally broad discretion to consider any issue it so chooses when determining whether or not exceptional circumstances exist (per s.177K(1J)(g) "*such other matters as the Board considers relevant*").

We would highlight that neither *An Taisce v An Bord Pleanála* (neutral citation [2020] IESC 39)² nor *Friends of the Irish Environment CLG v Minister for Communications, Climate Action and the Environment & Others* (neutral citation [2019] IEHC 646)³ actually examined the adequacy of the definition of exceptional circumstances in s.177K(1J) in comparison with the CJEU's judgements in -215/06, etc. The Supreme Court judgement in [2020] IESC 39 only compared the checks in the leave application process against the requirements of exceptional circumstances in s.177K(1J). Similarly, in [2019] IEHC 646, the High Court was comparing new regulations with the existing definition in the Act at the time.

We therefore submit that An Bord Pleanála should seek a referral to the High Court on the proper definition of exceptional circumstances as laid out in s.177K(1J) of the Planning and Development Act 2000 (as amended) and its alignment with the standards of exceptionality set out by the CJEU in c-215/06 and others.

2. Planning History

Section 1.2.2 of the rEIAR references a determination by Cork County Council under s.261A(3) that EIA was required on 23rd August 2012. It is noted that on 24th February 2004, An Bord Pleanála confirmed the decision of Cork County Council requiring the quarry operator to apply for substitute consent including a remedial Environmental Impact Statement (rEIS). The quarry operator sought and obtained leave for judicial review in April 2014 which was subject to a judgment by Mr. Justice Charleton on 30 July 2014 ([2014] IEHC 382) upholding the Board's determination and the constitutionality of s.261A(3). We are unable to understand the information on page 7 of the rEIAR that judgment has been subject to repeated adjournment when the Court record clearly shows that judgement is in July 2014 and there was no record of any appeal. We are unable to establish the circumstances by which such an extensive time period has prevailed since 2014, with this quarry operating without EIA or any regulatory governance since previous applications had expired both in time period and operating area.

3. AA Screening Requirement

We are unable to locate AA screening documents in any of the online or hard copy documentation referred to us. We submit that an AA screening is required due to potential downstream impacts on European sites. It should be ensured that the requirements of Article 6(3) of the Directive with regard to the direct, indirect and cumulative impacts of the proposed development are satisfied. In this way, it can be determined whether the proposal is likely to have a significant effect, either individually or in-combination with other plans or projects, on European sites in view of their site's conservation objectives.

Regulation 42 of the European Communities (Birds and Natural Habitats) Regulations 2011 ('the 2011 Regulations') provides:

'1. A screening for Appropriate Assessment of a plan or project for which an application for consent is received, or which a public authority wishes to undertake or adopt, and which is not directly connected with or necessary to the management of the site as a European Site, shall be carried out by the public authority to assess, in view of best scientific knowledge and in view of the conservation objectives of the

site; if that plan or project, individually or in combination with other plans or projects is likely to have a significant effect on the European site.

2. A public authority shall carry out a screening for Appropriate Assessment under paragraph (1) before consent for a plan or project is given, or a decision to undertake or adopt a plan or project is taken.

...

6. The public authority shall determine that an Appropriate Assessment of a plan or project is required where the plan or project is not directly connected with or necessary to the management of the site as a European Site and if it cannot be excluded, on the basis of objective scientific information following screening under this Regulation, that the plan or project, individually or in combination with other plans or projects, will have a significant effect on a European site.

7. The public authority shall determine that an Appropriate Assessment of a plan or project is not required where the plan or project is not directly connected with or necessary to the management of the site as a European Site and if it can be excluded on the basis of objective scientific information following screening under this Regulation, that the plan or project, individually or in combination with other plans or projects, will have a significant effect on a European site.

4. Water Framework Directive

We note that the subject site is adjacent to the Laney river which has been designated as high water quality status under the Water Framework Directive. Consequently, in order to retain the high ecological integrity of this water body, the proposal should be assessed against **Article 4** of the WFD to determine whether the project may cause a deterioration of the status of a surface or ground water body or if it may jeopardise the attainment of good surface or ground water status or of good ecological potential and good surface or ground water chemical status.

Is muidne le meas,

Ian Lumley
Heritage Officer
An Taisce – The National Trust for Ireland

Seán O'Callaghan
Planning Officer
An Taisce – The National Trust for Ireland

