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Sent by email to: bord@pleanala.ie

24th April 2024

Ref. 319217

App. Hudson Brothers Limited

For: Application for substitute consent for quarry

Site: Philipstown and Redbog, Co. Kildare

A Chara,

An Taisce would like to make the following observation on the above application for substitute consent. We have broken this submission into two main parts – Part 1 on the process and exceptional circumstances and Part 2 on the remedial Appropriate Assessment screening (rAA screening) and remedial Environmental Impact Assessment Report (rEIAR).

PART 1: PROCESS & EXCEPTIONAL CIRCUMSTANCES

1. Process

1.1 Leave Application

On foot of the Supreme Court's July 2020 judgement in neutral citation [2020] IESC 39 (three joined cases - *An Taisce v An Bord Pleanála*, *An Taisce v An Bord Pleanála*, and *Sweetman v An Bord Pleanála*)¹, the Planning and Development and Residential Tenancies Act 2020 introduced provisions allowing for public consultation on exceptional circumstances at the substitute consent application phase. However, these provisions did not eliminate the leave phase and did not allow public participation during that phase.

The applicant submitted the leave application to the Board (Ref. 311622) on 8 October 2021, when the provisions of the Planning and Development and Residential Tenancies Act 2020 were still in force (prior to further changes in 2022 removing the leave stage altogether). A group of residents living near the subject site attempted to make a third party observation on the leave application on 13 January 2022, which was subsequently rejected by the Board.

¹ https://www.courts.ie/acc/alfresco/80f2cbbf-4f1e-4065-8ca3-f8c14308035b/2020_IESC_39.pdf/pdf#view=fitH
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While the Board's acceptance of the leave application and rejection of the third party observation appears to be correct under the aforementioned 2020 Act, we would highlight that the 2020 provisions, which we considered to be an unsatisfactory solution to the aforementioned Supreme Court ruling, perpetuate a situation whereby an ongoing breach of planning law (and the EU law to which national law gives effect) is being facilitated. The CJEU has clarified on several occasions that it is not permissible for a Member State to benefit from a failure to apply EU law. Ireland has effectively facilitated the ongoing operation of unauthorised activities and the benefits that accrue from that.

1.2 Stay on Works

We note that s.177J of the Planning and Development Act 2000 (as amended) gives An Bord Pleanála the power to issue a draft direction to suspend works pending determination of an application for substitute consent:

"177J(1) Where the Board has received an application for substitute consent made in accordance with section 177E and is considering that application, it may give a draft direction in writing to the person who made the application requiring the person to cease within the period specified in the draft direction, all or part of his or her activity or operations on or at the site of the development the subject of the application, where the Board forms the opinion that the continuation of all or part of the activity or operations is likely to cause significant adverse effects on the environment or adverse effects on the integrity of a European site.

We would query whether the Board considered issuing such a direction under s.177J in relation to the subject case? If not, why not? If so, what were the reasons for the ultimate decision not to issue a s.177J draft direction?

In light of the points made in the rest of this submission, we recommend that the Board now urgently consider whether a s.177J draft direction is needed.

2. Exceptional Circumstances

2.1 Definition of Exceptional Circumstances

Section 177K(1J) of the Planning and Development Act 2000 (as amended) 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;*
- (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 *Suaimehneas Limited v Kerry County Council* (neutral citation [2021] IEHC 451)² 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.

² https://www.courts.ie/acc/alfresco/942c2409-e346-4a08-b2ed-e9488b943ea3/2021_IEHC_451.pdf/pdf#view=fitH

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)³ nor *Friends of the Irish Environment CLG v Minister for Communications, Climate Action and the Environment & Others* (neutral citation [2019] IEHC 646)⁴ 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.

2.2 Lack of Exceptional Circumstances in the Subject Case

Without prejudice to the above points on the definition of exceptional circumstances, An Taisce submits that the applicant has failed to demonstrate the existence of exceptional circumstances in the subject case, per s.177K(1J) of the Planning and Development Act 2000 (as amended).

2.2.1 Belief that the development was not unauthorised

In October of 2020, Kildare County Council made it abundantly clear that the ongoing works at the site were unauthorised:

"Development at the site, comprising continuance of use of an existing extraction facility, is unauthorised and retention permission is required for the following reason: 1. Development including specifically aggregate processing, washing, screening, crushing, powerhouse, control rooms, office building, portacabin/canteen, water recycling point continued on site in breach of a number of conditions set out in Reg. Ref. 07/267, namely condition no. 5 which requires all activities associated with Reg. Ref. 07/267 to cease following expiry of the appropriate period on 18th September 2020."

The extant planning ran out on the 18th September 2020, and the applicant only lodged a planning application to extend the works on the 27th May. In their cover letter, the applicant outlines that:

"Mindful of the fact that their planning permission under 07/267 expired in September 2020 Hudson Brothers lodged a planning application to essentially renew the 07/267 permission under a separate application under WCC reg. ref. 20/511 earlier that year and well before the expiry of the 07/267 permission";

³ https://www.courts.ie/acc/alfresco/80f2cbbf-4f1e-4065-8ca3-f8c14308035b/2020_IESC_39.pdf/pdf#view=fitH

⁴ https://www.courts.ie/acc/alfresco/1cca7ae8-4d3b-4529-8126-20158df62867/2019_IEHC_646_1.pdf/pdf#view=fitH

and

"Hudson Brothers were mindful of the fact that they had received confirmation from KCC in a letter dated 9th September 2020 that the effective date of expiry of 07/267, based on 9 no. additional days over each Christmas over a period of 10 years (90 days) and a further 56 days due to emergency Covid 19 legislation, was 18th September 2020."

We would observe that applying for a renewal of planning permission with just a little over 16 weeks before the deadline is not, in considered opinion, 'well before the expiry'. Should the Council have been able to decide the case themselves, it would have taken 12 weeks in a smooth, best case scenario (including the five-week mandatory public consultation period, and the four-week waiting period after the conditional decision, during which an appeal may be taken). In such a large and complex case, however, it is entirely possible that the Council would have issued a Further Information Request, likely prolonging the timeframe well beyond the 16 weeks before the expiration of the existing permission.

We would also highlight that per *Friends of the Irish Environment v. An Bord Pleanála and others* (neutral citation [2019] IEHC 80)⁵, the annual nine-day Christmas planning grace period does not apply to permissions where the duration is set by condition, as is the case here. Paragraph 145 of the judgement in that case states:

"On this interpretation, a planning permission which is subject to the default five year duration will cease to have effect some five years and forty-five days after the date of the grant of planning permission. Conversely, if the duration is fixed by the planning permission itself—as in the present case—then the period of grace is not to be included in reckoning the date upon which the permission ceases to have effect."

This means the applicant did not have the benefit of the 90 days as claimed because Condition 5 of the relevant lapsed permission specifically gave a duration of 10 years.

The applicant also states the following in their cover letter:

"That latest application [20/532] was lodged on 27th May 2020 with a Request for Further Information issued on 22nd July 2020 and with Further Information received by KCC on 1st October 2020. As part of the assessment of that FI the planning case officer undertook a site visit on 30th October 2020. As part of that site visit, he/she was able to identify that activity granted under 07/267 was still occurring beyond the effective expiry date of 18th September 2020. The applicant genuinely believed that they could continue their operations beyond 18th September 2020 with a planning application presented to KCC and live well before that date."

We would observe that it is implausible that the applicant believed that a live planning application was equivalent to a grant of planning extension in authorising the continuation of works. Condition 5 of their lapsed planning was very clear, that the permission was for a period of 10 years "unless at the end of this period a further permission **has been granted for its continuance on site**" (emphasis added). No such continuance had been granted, and it is unequivocally stated in that Condition that once extant planning lapses then there is no

⁵ <https://courts.ie/view/judgments/ba3b595c-7f21-4a9b-a48a-31c03021cca5/c34f7269-cb90-489b-8369-418a8ab70730/2019 IEHC 80 1.pdf/pdf>

further authorisation for works until such a time as a new permission is granted. This applicant has had multiple engagements with the planning system going back years, as such we would question the validity of their 'genuine belief' in this instance.

Furthermore, in the applicant's cover letter, it was outlined that: *"The applicant states he believed that at least some of this work was authorised and only became aware that it was not following an approach from the planning authority."* This would appear to suggest that the applicant was fully aware that at least a proportion of the work which was ongoing was unauthorised, further casting doubt on their 'genuine belief' that they were compliant.

The applicant also states this in their cover letter:

"As indicated in the planning statement to support the leave to apply for substitute consent application demands and pressures placed upon the business following Covid, with no opportunity for any alternative form of planning application, and the fact that it was no longer financially viable for the suspension of extraction operations on the Kildare County lands to continue, meant that the applicant had to proceed with their business activities without the benefit of planning permission through the recommencement of business and extraction activity to the south west within the confines of the Reg. Ref. 07/267 boundary where there remained at that time economic reserve. There remains, currently, under planning statutes, no alternative available other than seeking substitute consent to regularise development undertaken to this point in time."

There is no provision allowing unauthorised works to proceed for business reasons, and financial viability in no way constitutes an exceptional circumstance.

We note that Paragraph 7.6 of the Inspector's Report on the leave application states that:

'I accept that the applicant considered that the work carried out including removal of stockpiled aggregate was within the terms of a previous permission. On the basis of the material on file, the various delays in processing applications for permission, the intervention on the covid pandemic and the complexity of distinction between quarrying aggregate and processing it thereafter I conclude that the applicant could reasonably have had a belief that the development, at least in part, was not unauthorised and, notwithstanding that this assumption appears to have been mistaken, that it does not require refusal of leave to make an application for substitute consent.'

On the basis of the above points, we submit that there is substantial evidence in the full substitute consent application that the applicant could not have reasonably believed the works were authorised. We therefore consider that exceptional circumstances in fact do *not* exist and that the Board should now refuse to grant substitute consent.

2.2.2 Effects on the environment or a European site

We consider that the rEIAR and rAA screening have not ruled out or adequately mitigated potential significant adverse effects on the environment or on the integrity of a European site resulting from the carrying out and continuation of quarrying activity on the subject site. We note that sections 7.8 and 7.9 of the Inspector's Report for the leave application only referred to hydrology and did not discuss any other potential impacts, for example, dust or impacts to protected bird species:

"7.8 There are a number of sand and gravel extraction sites in different ownerships in this area along the border between County Kildare and County Wicklow. As pointed out in the planning authority's submission in this case there is some doubt as to the hydrogeological relationship between the nearest European site (Redbog SAC) and these sand and gravel pits. The planning authority refers to a submission from the DAU in the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media dated December 2020 in relation to an application 19/1438 which was not appealed to the Board and referred to a nearby sand/gravel/stone quarry. The significant point in this letter is the reasonable possibility that the aquifer underlying the Redbog SAC may be isolated from the surrounding area and therefore not subject to loss arising from quarrying operations in the area.

7.9 On this basis I conclude that it is not reasonable to ascribe actual or likely significant environmental impacts or adverse effects on the integrity of a European site arising from a grant of leave to make an application for substitute consent in this case."

Please see Part 2 of this submission for details on potential significant effects. We therefore submit that exceptional circumstances do not exist in relation to this point.

2.2.3 Extent to which significant effects can be remedied

In Part 2 of this submission below, we have detailed the deficiencies of the rAA screening and identified potential significant adverse effects on the integrity of a European site which we firmly believe warrant a full stage 2 rAA and rNIS. Since no rNIS has been provided, due to what we consider to be an erroneous screening out of full rAA, no remediation is detailed. Therefore, we consider that remediation would be required and that exceptional circumstances have not been demonstrated in relation to this point.

2.2.4 Compliance with previous planning permissions

We would draw the Board's attention to a warning letter issued by Kildare County Council on 4 November 2020 (Kildare Ref. UD7620), which is appended to this submission. That warning letter not only concerned the operation of the quarry without an active planning permission, but also covered non-compliance and/or alleged non-compliance with 21 conditions of the permission granted under Ref. 07/0267, the majority of which related to environmental protection.

We note sections 7.11 and 7.12 of the Inspector's Report in relation to the leave application:

"7.11. The planning authority is the competent authority in determining if unauthorised development has taken place on the site, has not referred to any enforcement actions currently being taken in relation to this development. Additionally, the planning authority recognises that difficulties have arisen in the timing of applications, in determining applications, delays in site inspections and that the problems associated with covid-19 have delayed assessments of planning applications.

7.12. I am satisfied on the basis of the planning authority's submission that the applicant has substantially complied with previous planning permissions and not carried out an unauthorised development in a manner as to require the refusal of this application for leave to apply for substitute consent."

We also note reason (e) of the final grant of leave: "*the applicant is making reasonable efforts to regularise the planning status of the development and noted that the planning authority is not currently pursuing enforcement proceedings*".

While Kildare County Council may not have been pursuing enforcement proceedings at the time the leave application was determined, their warning letter was clear that there was no record of compliance with numerous conditions over the lifetime of the 10-year planning permission, which would, in effect, render the extant planning permission unauthorised prior to the works which continued without permission after the original permission's expiry. Furthermore, "*making reasonable efforts to regularise the planning status of the development*" does not negate the fact that breaches of planning conditions appear to have occurred. The regularisation attempts also do not appear to address the potential condition breaches. This should all be taken into consideration by An Bord Pleanála in determining whether the threshold for exceptionality has been reached.

2.2.5 Conclusion on Exceptional Circumstances

On the basis of the above points, we submit that exceptional circumstances have not been demonstrated and do not exist in relation to the subject case and that substitute consent should therefore be refused.

PART 2: REMEDIAL APPROPRIATE ASSESSMENT SCREENING AND REMEDIAL ENVIRONMENTAL IMPACT ASSESSMENT REPORT

Without prejudice to the above reasons outlining why we consider that exceptional circumstances do not exist in this case and therefore consider that the subject application should be refused, we wish to make the following comments on the remedial Appropriate Assessment screening (rAA screening) and remedial Environmental Impact Assessment Report (rEIAR).

1. Remedial Appropriate Assessment Screening

1.1 Dust Impacts

Section 4.1.5 of the rAA screening document outlines that:

"As a point of reference, the IAQM (2016) Guidance on the Assessment of Mineral Dust Impacts for Planning indicates that significant dust impacts are typically restricted to 100 m of quarrying activities."

This misrepresents what the IAQM said in their document⁶:

"Large dust particles (greater than 30 µm), which make up the greatest proportion of dust emitted from minerals workings, will largely deposit within 100 m of sources. Intermediate-sized particles (10-30 µm) are likely to travel up to 200-500 m."

Section 5.2.6 of the rAA screening outlines that the IAQM, relying on published literature, including Farmer (1993), found that:

⁶ https://iaqm.co.uk/text/guidance/Mineral-Guidance_ConsultationApril16.pdf

"The level of dust deposition likely to lead to a change in vegetation is very high (over 1 g/m² /day) and the likelihood of a significant effect is therefore very low except on the sites with the highest dust release close to sensitive habitats."

However, we have reviewed the Farmer (1993) paper⁷, and this finding is not contained within it. In fact, Table 1 in that paper makes clear that while some species can indeed tolerate quite high loadings of dust, effects on other species are seen at a sub 1 g/m²/day, with one cited study (Darley, 1966) demonstrating reduced photosynthesis and increased leaf necrosis at 0.6 g/m²/day, and others finding reduced vegetative and reproductive growth at rates about 0.2 g/m²/day.

The rAA screening outlines that:

"The paper by Farmer (1993) refers to studies by Spatt and Miller (1981) and Walker and Everett (1987), both of which examined effects of dust deposition on more sensitive bryophyte communities alongside a major road in Alaska. It was found that species of Sphagnum declined where dust deposition was between 1000-2500 mg/m² /day"

Having reviewed the Farmer (1993) study, we note that this isn't entirely accurate. The study says that Sphagnum subject to dust deposition had a decreased photosynthetic rate and chlorophyll a content, with species decline noted where deposition was circa 1-2.5 g/m²/day. However, they could still detect effects of the dust at a distance from the source where the deposition rate was only 0.07 g/m²/day.

Additionally, the applicant then relies on a table produced by the IAQM in a 2014 document⁸, which specifically assesses demolition dust and advises that above a distance of 50 metres the ecological impact of dust on high sensitivity ecosystems is medium. The applicants rely on this to infer that:

"Whilst the table does not provide details for further distances, it can be reasonably inferred that emissions arising further than 50 m from a receptor of 'High' sensitivity would be considered to pose a low risk of significant impacts."

We would highlight that this does not marry with the distances outlined by the IAQM specifically in relation to quarry dust, whereby distances of up to 500 metres were liable to dust deposition. There is a clear discrepancy here, and it must be logically concluded that demolition dust may have a lesser diameter of influence than quarry dust, and as such the appropriateness of relying on these findings to determine sensitivity must be called into question.

1.1.1 Screening decision

In Table 5.2, likely significant effects of dust are screened out thus:

"With reference to guidance from IAQM (2014, 2016) and literature reviews by Farmer (1993) and Prajapati (2012) (refer to Sections 5.2.6 - 5.2.10), the dust emission levels at this area of the Site have not been of a magnitude so as to give rise to significant

⁷ <https://www.resolutionmineeis.us/sites/default/files/references/farmer-dust-effects-1993.pdf>

⁸ <https://iaqm.co.uk/text/guidance/construction-dust-2014.pdf>

effects on the qualifying habitat of the SAC (transition mires) over the assessment period."

We note that the maximum recorded emission of dust was 698 mg/m² /day from D3K, which equates to 0.698 g/m²/day. Mean dust emissions were 190 and 119 mg/m² /day, equating to 0.19 and 0.119 g/m²/day. The studies which the applicant relies on to reach the conclusion of no impact actually highlight that impacts from dust on sphagnum could be detected at just 0.07 g/m²/day (Spatt & Miller (1981) cited in Farmer (1993)). Additionally, the IAQM outline that the distance these can travel is up to 500 metres, as outlined above. Yet in section 5.4.4 the applicant outlines that: *"in accordance with Table 5-1, dust impacts are considered up to a distance of 50 m from the boundary of Red Bog SAC."*

Table 5.1 is the IAQM study looking at demolition dust, while the IAQM study looking at quarrying dust indicates are far higher distance of impact. We submit that limiting the consideration to only 50 metres from the boundary of Red Bog SAC is flawed, and is not based on best available science.

As such, we strongly submit that the issue of dust emission warrants further assessment in a Stage 2 rNIS. The mean and maximum levels have been previously demonstrated in peer reviewed studies to have a negative impact on sphagnum moss, which is the primary vegetation in the Red Bog SAC, and the SAC is well within the impact zone previously established for quarry dust. We submit that the findings of previous studies clearly indicate that there is reasonable scientific doubt in regard to the potential impact of dust on a European protected site, and in our view screening it out is premature and erroneous.

1.2 Bird Impacts

We would note that the NIS for application number 20/352 clearly outlined potential bird impacts on sand martins and peregrine falcons. It would appear that no dedicated bird survey was carried out as part of the rAA screening, with the rEIAR outlining that on a site visit, over two days in November of 2023 the following was carried out:

"Birds – incidental observations of wintering birds were made – particularly any in association with waterbodies, or any waterfowl grazing on grassland"

It is then further noted that:

"Approximately forty sand martin (Riparia riparia) burrows (nests) were noted at the top of a cliff face in the northernmost corner of the existing quarry pit"

And:

"Whilst WSP ecologists were aware of reports of nesting peregrine falcons onsite, as noted in Golder (2020), none were observed. Sightings of peregrine falcons were not expected, considering that they utilise the quarry as a breeding site and surveys were carried out outside the breeding season."

The rEIAR then notes that both sand martins and peregrine falcon are protected under the Wildlife Act, but they entirely overlook the legal imperative to protect peregrines and sand martins as provided by the Birds Directive. Peregrine are listed on Annex I of the Birds Directive, and Article 4(4) of the Birds Directive provides for protection outside of designated SPAs:

*"In respect of the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. **Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.**" [An Taisce emphasis]*

However, potential impacts on these on-site birds are not even mentioned in the rAA screening, and there is no in-depth assessment of potential impact included in the ecology chapter of the rEIA for the sand martins and peregrine which are known to utilise the site. Table 4.13 in the rEIA only considers an impact on breeding birds insofar as they were impacted by the encroachment onto agricultural land by the quarry. Noise and dust emissions are summarily ruled out as potential risk: *"Noise and dust emissions during the assessment period are comparable to previous levels, indicating no change in circumstance in this regard"*.

However, even if the noise and dust have not changed since the planning permission has lapsed that does not necessarily indicate there is no ecological impact. Were there extant mitigation measures in place on foot of the previous lapsed permission, were they still appropriate and effective for the changing population of bird species? It is imperative that the applicant ascertain and elucidate the potential risks to these species which arose as a result of the ongoing unauthorised development over the last four years.

1.3 Hydrology

We note in the NIS carried out for application number 20/352 it stated the following:

"it is reasonably unlikely that there would be any continuity of flow from the Site to the bog either hydrogeologically or hydrologically. Nevertheless, in the absence of mitigation it is not possible to screen this site out of the AA and the Red Bog SAC is taken forward into stage two of the assessment."

However, Red Bog SAC has been screened out for a further stage two assessment as part of this substitute consent application. We submit that this is premature due to the existence of an unacceptable level of scientific uncertainty regarding the groundwater connectivity between the subject site's extraction sites and the Red Bog SAC.

For example, the interaction between the groundwater aquifers of the quarry extraction sites and the Red Bog SAC seems to have a high degree of scientific uncertainty within the Inspector's Report for the substitute consent leave application:

"there is some doubt as to the hydrogeological relationship between Redbog SAC and the sand and gravel pits"

And

"The significant point in this letter [from the Dept. Of Tourism, see below] is the aquifer underlying the Redbog SAC may be isolated from the surrounding area and therefore not subject to loss arising from quarrying operations in the area."

This last point on the groundwater isolation of the Red Bog SAC relies on a submission from Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, which is referenced in the Cover Letter, regarding Ref. 19/1438, for a quarry owned by Shillelagh Quarries Ltd approximately 1.4 km to the northwest of the subject site. The Department's submission argues that because the SAC is elevated at a height of 260m and a water table contour plot predicts the groundwater elevation of the SAC to be 230m, the Red Bog SAC is likely to be isolated from the water table, and thus isolated from contaminating effects from quarrying operations.

Yet applicant in the subject case bases their hydrogeology argument on these observations from the Department of Tourism on a separate quarry site which is not adjacent to the Red Bog SAC like the subject application. Therefore, there is an unacceptable level of scientific uncertainty which the remedial impact assessments fail to alleviate, casting significant doubt on the applicant's claims that a remedial NIS is not required due to the absence of a hydrological pathway to Red Bog SAC. The depth of extractive activity below the groundwater table also requires confirmation.

There is contradictory information provided from various sources as to groundwater connectivity between the quarry extraction sites and Red Bog SAC. We also note in that regard a scientific assessment submitted to An Bord Pleanála by another third party in relation to this substitute consent application. We submit that a more thorough hydrogeological assessment is necessary as part of a stage two remedial Appropriate Assessment process via an rNIS due to the currently unacceptable level of scientific uncertainty.

1.4 Habitats Directive Legal Requirements

It is now well established in law that approval can only be granted for plans and projects when it has been established beyond all reasonable scientific doubt that the subject proposal will not adversely impact any Natura 2000 sites.

In ***Case C-258/11, Sweetman & Others v An Bord Pleanála & Others***, it was held that the provisions of Articles 6(2)–(4) of the Habitats Directive must be interpreted together “*as a coherent whole in the light of the conservation objectives pursued by the directive*” and that they impose a series of specific obligations necessary to achieve and maintain favourable conservation status. A plan or project will negatively impact upon a site if it prevented the “*lasting preservation of the constitutive characteristics*” of the site for which it was designated, with reference to the site's conservation objectives. Significantly it was determined that:

*“authorisation for a plan or projectmay therefore be given only on condition that the competent authoritiesare certain that the plan or project will not have lasting adverse effects on the integrity of the site. That is so where **no reasonable scientific doubt remains** as to the absence of such effects”* [emphasis added].

The competent authority must therefore refuse authorisation for any plans or projects where there is uncertainty as to whether the plan or project will have adverse effects on the integrity of the site. It was also held in paragraph 44 that:

*“So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it **cannot have lacunae** and **must contain complete, precise and definitive findings** and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected*

site concerned (see, to this effect, Case C 404/09 Commission v Spain, paragraph 100 and the case-law cited)..." [emphasis added].

In ***Kelly v An Bord Pleanála & Others, [2013 No 802 J.R.]*** with reference to ***Commission v Spain c-404/09***, the High Court held in paragraph 36 that the competent authority must carry out an Appropriate Assessment for a plan or project in light of the best scientific knowledge in the field. It was also held that the competent authority must lay out the rationale and reasoning which was used to arrive at the determination.

The Kelly Judgement has provided a very helpful clarification of the requirements of an AA, and in particular in paragraph 40, a summary of what must be delivered by the process in order to be lawfully conducted:

"(i) Must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. This clearly requires both examination and analysis.

(ii) Must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The requirement for precise and definitive findings and conclusions appears to require analysis, evaluation and decisions. Further, the reference to findings and conclusions in a scientific context requires both findings following analysis and conclusions following an evaluation each in the light of the best scientific knowledge in the field.

(iii) May only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where upon the basis of complete, precise and definitive findings and conclusions made the Board decides that no reasonable scientific doubt remains as to the absence of the identified potential effects."

It should therefore be ensured that the requirements of Article 6(3) of the Habitats Directive with regard to the direct, indirect and cumulative impacts of the unauthorised work are satisfied.

2. Remedial Environmental Impact Assessment

2.1 Groundwater Connectivity

Throughout the rEIAR, application documents and wider studies of Red Bog SAC, we note a continued uncertainty associated with the persistent issue of the groundwater connectivity of the quarry extraction sites and the nearby ecologically significant Red Bog SAC. This is exemplified by contrasting definitions of the water recharge mechanism associated with Red Bog SAC by the Geological Survey of Ireland (GSI) and the National Parks and Wildlife Service (NPWS), and this uncertainty is echoed within the Inspector's Report on the application for leave to apply for substitute consent.

Table 4-4 of the Ecology and Biodiversity chapter cites the GSI definition of Red Bog SAC as a 'Groundwater Dependent Terrestrial Ecosystem'. However, according to the NPWS Conservation Objectives associated with this site:

"it is likely that the SAC is fed by rainwater percolating through the ridges of permeable gravel surrounding the SAC until it hits a layer of impermeable till, and then flows along the gravel-till interface to feed into the wetland. Discharge is likely to occur via the permeable gravel layers close to the surface."

The NPWS definition indicates a greater importance for rainwater recharge of the SAC, rather than groundwater recharge as indicated by the GSI.

The uncertainty raised by these conflicting definitions furthers the doubt as to the potential pathway for groundwater connectivity between Red Bog SAC and the quarry extraction sites. This raises doubt about the applicant's assumption of no pathway for impacts on Red Bog SAC given the uncertainty regarding groundwater connectivity:

"The Red Bog SAC is ca. 240 m to the northeast of the site. The Red Bog SAC is a perched water feature and not reliant on the bedrock aquifer beneath the Site. The Red Bog SAC is also up hydraulic gradient from the Site so would not be at risk of migration of contaminants."

These uncertainties require significant clarification, particularly confirmation that the SAC is indeed perched and that quarrying operations have not excavated below the groundwater table.

2.2 Cumulative Impact Assessment

We submit that it is essential to determine the combined effects of the unauthorised work, the portion of the quarry site which extends into Wicklow which has been granted a 25-year planning permission extending into the 2030s (Ref. 066932), in addition to Carnegie's quarry and a Roadstone quarry which are both contiguous with the subject site. We also note a quarry operated by Shillelagh Quarries Ltd which is located approximately 1.4 km from the subject site and appears to have breached planning conditions by continuing unauthorised quarrying operations (see the decision for Kildare Ref. 19/1438).

The water chapter of the rEIAR states the following:

"Due to the predominant lack of hydraulic connectivity and mostly imperceptible or slight nature of the effects assessed, there is not considered to be significant potential for cumulative impacts to occur. Although the flooding effect was marked as slight to moderate, it was contained within the quarried area. There is therefore negligible risk of this water combining downstream with flood waters from the River Morell. The risk cannot be completely discounted as there is some limited connection between the Site and surface water via groundwater baseflow contributions. The activities at the Site are shown not to impact the quantity/quality within the Red Bog SAC water feature. There are neighbouring quarrying activities that border the Red Bog SAC and are up hydraulic gradient of the conservation site. Any future impact on quantity at the Red Bog SAC should take into consideration activities at the neighbouring quarry as well as activities at the Site."

First, the lack of hydraulic connectivity with the surrounding area, Red Bog SAC in particular, is assumed when we consider that it remains uncertain. This again underscores the need for clarity on this issue of the groundwater connectivity of quarries in the area with Red Bog SAC, before initiating a thorough cumulative environmental impact assessment for the sake of the

integrity of nearby ecological sites and the drinking water quality in the area. Second, we submit that any *past and* future impacts on the Red Bog SAC site must be cumulatively assessed, taking into account the unauthorised work and other sites in the area.

2.3 Private Wells

Further to the drinking water point above, we note the presence of five drinking wells within 150m of the subject site. There is a need to determine the sufficiency of the BH8K and BH9K groundwater monitoring stations in particular to assess any potential impacts to these drinking well locations and to ensure the proper detection of contamination. The applicant claims that private wells have not been sampled prior to commencement of works due to access issues, which should be clarified.

Please acknowledge our submission and advise us of any further consultation periods and of any decision made.

Is muidne le meas,

Dr. Elaine McGoff
Head of Advocacy
An Taisce – The National Trust for Ireland

Phoebe Duvall
Senior Planning and Environmental Policy Officer
An Taisce – The National Trust for Ireland

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

Comhairle Contae Chill Dara
Kildare County Council
WARNING LETTER



Ref. No. UD7620

REGISTERED POST

Hudson Brothers Limited,
11 Gortnum Cottages,
Brittas,
Co. Dublin,
D24 NY56.

Dear Sirs,

It has come to the attention of the Planning Authority that unauthorised development **is being / may be** carried out as follows:

- 1. Operation of a quarry without the benefit of planning permission. There is no active planning permission under which extraction and processing is permitted on the lands.**
- 2. Non-compliance with the requirements of conditions no. 1, 2, 4, 5, 6, 11, 15, 16, 21, 22, 25, 26, 28(b), 32(b), 33(a) & (b), 35, 36, 37, 48 & 56 of Planning File Register No. 07/0267.**

Condition No. 1

The development shall be carried out and completed in accordance with drawings submitted to the Planning Authority on 18/07/2007, as altered by revised documentation and details submitted on 12/10/2007, 04/06/2008, 28/01/2009 & 17/09/2009, except where altered or amended by conditions in this permission.

Reason: To enable the Planning Authority to check the proposed development when completed, by reference to approved particulars.

Comment: Condition not complied with as a result of non-compliance with conditions below.

Condition No. 2

The development shall be carried out, completed and maintained in accordance with undertakings for measures to mitigate its impacts as given in the Environmental Impact Statement lodged with the Planning Authority on 04/06/2008 and any additional measures undertaken subsequently, except where altered by the conditions of this permission.

Reason: To enable the Planning Authority to check the proposed development when completed, by reference to approve particulars and to restrict and minimise any adverse environmental impacts resulting from the development.

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Comment: No indication that the development has been carried out or completed in accordance with the Environmental Impact Statement as a result of the absence of submission of information including noise and dust reports along with an Environmental Management Statement (EMS).

Condition No. 4

The development shall be carried out, completed and maintained in accordance with undertakings for measures to mitigate its impacts as given in the Environmental Impact Statement lodged with the Planning Authority on the 04/06/2008 and any additional measures contained in revised documentation, except where altered by the conditions of this permission.

Reason: To enable the Planning Authority to check the proposed development when completed, by reference to approve particulars and to restrict and minimise any adverse environmental impacts resulting from the development.

Comment: Having reviewed the EIE, the Planning Authority has deduced that the quarrying has not been undertaken as permitted on site. In this regard, amongst other matters the Planning Authority note the following:

- No evidence of benches on the site (2.3.1)
- No evidence of any on site restoration (2.3.1)
- No evidence of annual air, noise and water quality data submitted,
- EMS not submitted annually to the Planning Authority

Condition No. 5

This permission is for a period of 10 years from the date of this permission unless at the end of this period a further permission has been granted for its continuance on site.

Reason: To regulate the development and to clarify the duration of the operation hereby permitted and to limit the life of the development, in the interests of amenity and proper planning and sustainable development and to allow the Planning Authority to assess the development at the end of the stated time period.

Comment: Under Planning File Register No. 07/0267 permission was granted for continuation of aggregate extraction and processing at Philipstown and Redbog, by mechanical means, blasting, aggregate processing, washing, screening, crushing, power house, control rooms, office building, portacabins/Canteen, water recycling plant, lagoons, landscape berms and all associated site works. Permission expired on the 18/09/2020 for continuation of aggregate extraction and processing at Philipstown and Redbog, by mechanical means, blasting, aggregate processing, washing, screening, crushing, power house, control rooms, office building, portacabins/Canteen, water recycling plant, lagoons, landscape berms and all associated site works.



Condition No. 6

A detailed Restoration Scheme of the site according to the broad principles indicated in the Environmental Impact Statement and as amended by the details received by the planning authority on the 12th of October 2007 shall be carried out immediately following the cessation of excavation as referred to in Condition No. 5 above, unless, prior to the end of that period, planning permission shall have been granted for the continuance of use. Final details of the restoration, which shall be carried out on a phased basis shall be agreed in writing with the planning authority within three months of the date of this permission and shall be related to the agreed phasing programmed as specified in condition no.4 and shall include details relating to the following:

- a. finished gradients of the quarry cliff face
- b. Prescriptions and programme for initial aftercare and longer term management
- c. proposals for an aftercare programme (on site management and timescale)
- d. The purpose, aims and objectives for the after-use of the quarry complex
- e. Interim and proposed final site levels for excavation and restoration
- f. Details of the proposed final landform and phased progression of workings toward this form
- g. Landscaping proposals and a timescale for implementation of those proposals
- h. All existing trees and hedgerows on the site, specifying those proposed for retention, together with measures for their protection during the period in which the development is carried out
- i. A review of the nature conservation opportunities and constraints of the site
- j. Details of water (ground and surface water) management
- k. Details of soil movement and management, associated with restoration
- l. Description of target habitats and range of species appropriate to the site
- m. Details of habitat linkages and continuity of habitat within and outside the site
- n. Selection of appropriate strategies for maintaining or introducing target habitats and species
- o. Techniques and practices for establishing habitats and species
- p. Sources of soil forming materials, plant stock and other species introductions
- q. Method statement for ground forming, soil preparation and habitat and species establishment

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r. Timing of the restoration operations in relation to phased working of the Final Phase of the site

s. Proposals for monitoring the success of all restoration works

t. Disposal of wastes arising from the restoration

u. Hours of operation of the restoration plan

The site shall be restored and landscaped in accordance with the agreed scheme.

b) A separate report shall be submitted to the Planning Authority for written agreement (or as otherwise agreed) detailing all material to be imported for restoration purposes from the adjoining pits. The location and quantum of material, haulage routes and estimated timeframe for completion shall be included.

c) The restoration and landscaping scheme shall also include an estimate of the total cost of the restoration plan along with an estimate of all individual phases. A suitably qualified and independent person acceptable to the Planning Authority shall prepare the estimate.

Reason: To regulate the development and to allow the Planning Authority assess the proposed restoration plan and to ensure that the site is restored in the interest of visual amenity, traffic safety and adjoining residential amenity and proper planning and sustainable development of the area.

Comment: The 'final details of the restoration, which shall be carried out on a phased basis shall be agreed in writing with the planning authority within three months of the date of this permission and shall be related to the agreed phasing programmed as specified in condition no.4' was not submitted as required by the details of this condition.

Condition No. 11

Within 6 months from the granting of this permission, the developer shall submit to the planning authority for written agreement with the Heritage Officer of Kildare County Council, a detailed report assessing the impact of the Quarry in relation to Red Bog (SAC) in accordance with the Habitats Directive. Prior to the preparation of this report the applicant shall liaise with the Heritage Officer to agree a framework for the study.

Reason: In order to assess the impact of the quarry and the restoration scheme on Red Bog, a Special Area of Conservation.

Comment: No evidence on file that the required information was ever submitted to Kildare County Council.

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Condition No. 15

Within 3 months of this permission, or such other time period as agreed with the Planning Authority, the applicant shall submit details of all existing and proposed signage located or to be located at the site entrance. These details shall also provide for a sign indicating the name of the quarry operator, contact telephone number of the quarry, the permitted working hours of the quarry, the name of the Planning Authority and the planning register number of the development.

Reason: To regulate the development in the interests of proper planning and sustainable development.

Comment: No evidence on file that the required information was ever submitted to Kildare County Council.

Condition No. 16

Within 2 months of the date of this permission, or such other time period as agreed with the Planning Authority, the quarry operator shall submit for the written consent of the Planning Authority details of warning signage to be erected at either side of the quarry entrance to warn road users of the quarry entrance.

Reason: To regulate the development and to alert road users of the location of the quarry entrance in the interests of traffic safety.

Comment: No evidence on file that the required information was ever submitted to Kildare County Council.

Condition No. 21

(a) Within 3 months of the date of this permission, or such other time period as agreed with the Planning Authority, the operator shall lodge with the Planning Authority a bond of an insurance company, a cash deposit, or other security as agreed to secure the provision and satisfactory completion and restoration of the site, coupled with an agreement empowering the planning authority to apply such security or part thereof to the satisfactory reinstatement of the site including all necessary demolition and removal.

(b) The form and amount of the security shall be at least one quarter of the estimate mentioned in Condition No.6 (c) and agreed between the Planning Authority and the developer or, in default of agreement, shall be referred to An Bord Pleanála for determination.

(c) All such security provided shall be increased from January 1st next and annually thereafter (unless previously discharged) in line with the Wholesale Price Index - Building and Construction (published by the Central Statistics Office). The bond shall remain in full force and effect until discharged by the Council.

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Reason: To regulate the development and to ensure the satisfactory reinstatement of the site.

Comment:

- (a) No evidence on record of any bond having been lodged.
- (b) No evidence on record of any bond having been lodged.
- (c) No evidence on record of any bond having been lodged.

Condition No. 22

No muck, dirt, debris or other materials shall be deposited on the public road, footpath or verge by machinery or vehicles travelling to or from the development site during the construction phase. The applicant shall arrange for vehicles leaving the site to be kept clean. A bond of €5,000 shall be paid to the Planning Authority to ensure satisfactory compliance with this condition within 2 months following the date of this permission.

Reason: In the interest of traffic safety, amenity and orderly development.

Comment: No evidence on record of any bond having been lodged.

Condition No. 25

Within 6 months of the date of this decision, or such other time period as agreed with the Planning Authority, the quarry operator shall submit for the written approval of the Planning Authority an Environmental Management System for the site. The Environmental Management System shall provide for a review of the Environmental Management System Plan after 5 years and the proposed review shall be submitted to the Planning Authority for its written approval.

Reason: To regulate the development to ensure that the development is operated in accordance with "best practice", to control environmental, surface water, ground water or atmospheric emissions and to allow the Planning Authority monitor the operation of the development in the interests of proper planning and sustainable development.

Comment: There is no record of an EMS ever having been submitted to the Planning Authority are required by this condition.

Condition No.26

The details of the Environmental Management System shall be in accordance with the conditions contained in this decision.

Reason: To regulate the development to ensure that the development is operated in accordance with "best practice", to control environmental, surface water, ground water or atmospheric emissions and to allow the Planning Authority monitor the operation of the development in the interests of proper planning and sustainable development.

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Comment: There is no record of an EMS ever having been submitted to the Planning Authority are required by this condition.

Condition No. 28

(b) Within six months of the date of this decision, or such other time period as agreed with the Planning Authority, full details of the ground water monitoring programme shall be submitted for the written agreement of the Planning Authority and this programme shall ensure that the existing ground water sources serving local residents and farms in the vicinity of the site are unaffected by the development. The developer shall carry out monitoring of surface water and groundwater in the vicinity of the site to include information on groundwater levels AOD and water quality. The monitoring locations, sampling procedure, frequency and suite of water quality parameters to be tested for shall be agreed in advance with the Planning Authority and the monitoring shall begin prior to the commencement of the authorised activity.

Comment: There is no record on file of the required information having been submitted.

Condition No. 32

(b) A Dust Assessment shall be carried out on the site by a competent Environmental Consultant within 3 months of commencement of on-site operations and continuously thereafter. The locations of the dust monitoring stations shall be agreed with the Planning Authority. The Dust Assessment Reports shall be submitted to the Planning Authority on a quarterly basis.

Reason: In the interest of proper planning and development.

Comment: No record on file of any dust assessment having been submitted.

Condition No. 33

(a) The noise level attributable to all on-site operations associated with the proposed development shall not exceed 55 dB(A) (Leq) over a continuous one hour period between 0800 hours and 1800 hours Monday to Friday inclusive (excluding bank holidays), and between 0800 hours and 1300 hours on Saturdays, when measured outside any noise sensitive location house in the vicinity of the site. Sound levels shall not exceed 45 dB(A) (Leq) at any other time.

(b) A Noise Assessment shall be carried out on the site by a competent Noise Consultant within 1 month of commencement of on-site operations and at 6 monthly intervals thereafter or at any other time specified by the Planning Authority and shall give advance notice as specified by the Planning Authority. The locations of the noise monitoring stations shall be agreed with the Planning Authority. The Noise Assessment Report shall be submitted to the Planning Authority.

Reason: In the interest of proper planning and development.

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Comment: (a) & (b) – No evidence of a noise assessment having been submitted as required.

Condition No. 35

(a) An Environmental Audit of the site operations shall be carried out annually (by the end of January) on behalf of the developer by a competent environmental consultant. Details of the monitoring arrangements, including locations and frequency of monitoring shall be submitted to the Planning Authority within three months of commencement of planning decision. The audit should be prepared with reference and should take into account the requirements of the 2006 EPA publication 'Environmental Management Guidelines in the Extractive Industry' and shall be submitted to the Planning Authority not later than the end of February on an annual basis.

(b) The Environmental Audit shall

(i) be prepared with reference to, and should take into account, the requirements of the 2006 Environmental Protection Agency publication 'Environmental Management Guidelines in the Extractive Industry (Non-Scheduled Minerals)'.

(ii) Contain a summary of all the environmental monitoring results of the year.

(iii) List a full record of any breaches over the previous year of noise, dust and water quality.

(iv) Contain a written record of all complaints and action taken on each complaint.

Reason: In the interest of proper planning and development.

Comment: No evidence that any environmental audit was ever undertaken and/or the results of same ever submitted to the Planning Authority as required by this condition.

Condition No. 36

Within 3 months from the granting of this permission, the developer shall submit to the planning authority for written agreement a proposal for an Environmental Management System (EMS) prepared to the guidelines of Section C of the 2006 EPA publication 'Environmental Management Guidelines in the Extractive Industry'. The EMS should highlight clearly the following:

(a) Proposals for the suppression of on-site noise (in order to comply with conditions set out in this permission).

(b) Proposals for the on-going monitoring of sound emissions at the site boundaries at locations to be agreed with the planning authority.

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(c) Proposals for the suppression of dust on site and on the access road; proposals to prevent dust escaping the boundaries of the site.

(d) Proposals for the bunding of fuel and lubrication storage areas; details of emergency action in the event of accidental spillage (where appropriate) and details of procedures to ensure refueling of vehicles and machinery is carried out in a manner that prevents contamination of the environment.

(e) Details of safety measures for the land above the quarry, to include warning signs and stock proof fencing (works to be carried out within one month of the written agreement of the planning authority to these details).

(f) Management of all landscaping, with particular reference to enhancing the ecological value of the grassland on the boundary adjoining **the proposed NHA** and buffer areas on the perimeter of the site.

(g) Monitoring of ground and surface water quality, levels and any discharges

The details of the Environmental Management System shall be in accordance with the conditions contained in this decision.

Reason: In the interest of proper planning and development.

Comment: No evidence that required EMS report was undertaken and/or the results of same ever submitted to the Planning Authority as required by this condition.

Condition No. 37

Within six months of the grant of this permission, detailed design of the entrance shall be submitted to the Planning Authority for written approval.

Reason: In the interest of traffic safety.

Comment: No record of the required information ever having been submitted to the Planning Authority as required by this condition.

Condition No. 48

A wheel wash unit shall be maintained on the site and used by vehicles exiting the site. No mud or other debris shall be deposited on the roads outside the site. The applicant to ensure that all public roadways in the vicinity of the site are swept clear of all loose material on a regular basis, and that all loose material is removed from the road verges. Details to be agreed in writing with the Planning Authority within 6 months of the grant of permission.

Reason: In the interest of traffic safety.

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Comment: No record of the required information having been submitted to the Planning Authority.

Condition No. 56

Having completed the work, the archaeologist shall submit a written report to the Planning Authority and to the Department of the Environment, Heritage and Local Government for consideration.

Reason: To ensure the continued preservation (either in situ or by record) of places, caves, sites, features or other objects of archaeological interest.

Comment: The required report was not submitted to the Planning Authority for consideration.

3. Possible non-compliance with conditions No. 53, 54, 55, 57 & 58 of Planning File Register No. 07/0267.

Condition No. 53

The applicant is required to engage the services of a suitably qualified archaeologist (licensed under the National Monuments Act 1930-2004) to carry out pre-development testing at the site. No sub-surface work shall be undertaken in the absence of the archaeologist without his/her express consent.

Reason: To ensure the continued preservation (either in situ or by record) of places, caves, sites, features or other objects of archaeological interest.

Condition No. 54

The archaeologist is required to notify the Department of the Environment, Heritage and Local Government in writing at least four weeks prior to the commencement of site preparations. This will allow the archaeologist sufficient time to obtain a licence to carry out the work.

Reason: To ensure the continued preservation (either in situ or by record) of places, caves, sites, features or other objects of archaeological interest.

Condition No. 55

The archaeologist shall carry out any relevant documentary research and may excavate test trenches at locations chosen by the archaeologist, having consulted the proposed development plans.

Reason: To ensure the continued preservation (either in situ or by record) of places, caves, sites, features or other objects of archaeological interest.

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Condition No. 57

Where archaeological material is shown to be present, avoidance, preservation in situ, preservation by record (excavation) and/or monitoring may be required and the Department of the Environment, Heritage and Local Government will advise the Applicant/Developer with regard to these matters.

Reason: To ensure the continued preservation (either in situ or by record) of places, caves, sites, features or other objects of archaeological interest.

Condition No. 58

No site preparation or construction work shall be carried out until after the archaeologist's report has been submitted and permission to proceed has been received in writing from the Planning Authority in consultation with the Department of the Environment, Heritage and Local Government.

Reason: To ensure the continued preservation (either in situ or by record) of places, caves, sites, features or other objects of archaeological interest.

Comment: A archaeological report was required. There is no record of one having been received by the Planning Authority. As the report was not received it is the case that it would appear that the conditions listed above may not have been complied with.

On land at the following address:

Hudson's Quarry site at Athgarrett, Philipstown & Redbog, Co. Kildare.

The Planning Authority's investigation to date indicates that the development as detailed above would appear to be unauthorised.

Under Section 152(4)(b) of the Planning & Development Acts 2000 (as amended) you are entitled to make submissions or observations **in writing** to Kildare County Council (Planning Enforcement Section, Planning Department) in this regard **not later than four weeks from the date of service of this warning letter.** Please clearly state the reference number in any correspondence to the Council.

Where the Planning Authority considers that unauthorised development may have been, is being or may be carried out, an Enforcement Notice, pursuant to Section 154 of the Act, may be issued.

The Planning Authority's officials or its authorised agent(s), may at all reasonable times enter onto the land for the purposes of inspection.

Section 151 of the Planning and Development Acts 2000 (as amended) provides that any person who has carried out or is carrying out unauthorised development shall be guilty of an offence.

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Section 154(8) of the Planning and Development Acts 2000 (as amended) provides that any person on whom an enforcement notice is served who fails to comply with the requirements of the notice within the specified period or within such extended time as the planning authority may allow, not exceeding 6 months, shall be guilty of an offence.

A person who is guilty of an offence under Section 151 and/or 154 shall be liable to a fine or term of imprisonment or both.

The possible penalties involved where there is an offence are as follows:

- **Fines of up to €12,697,380.00 on indictment, or 2 years imprisonment, or both,**
Or
- **Up to €5,000.00 on summary conviction or 6 months imprisonment, or both.**

Under Section 154(7) of the Planning & Development Acts 2000 (as amended) any costs incurred by the Planning Authority in relation to enforcement proceedings may be recovered from a person on whom enforcement notice is served or where a court action is taken.

Your attention is drawn to the provisions of Section 156(6) of the Planning & Development Acts 2000 (as amended), which places the onus on a developer to prove that a development is exempt development and it is to be assumed that it constitutes development until the contrary is shown by the developer. Note also that the onus of proof as to the existence of any planning permission lies with the developer.

Your attention is further drawn to the provisions of Section 162(3) of the Planning and Development Acts 2000 (as amended), which states that enforcement action shall not be stayed or withdrawn (including for an application under Section 160) by reason of an application for permission for retention of a development under Section 34(12) or the grant of any such permission.

Signed: *Minóir Hest*

**Senior Executive Officer
Planning Department
Kildare County Council**

Date: *4th November 2020*