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The Secretary

An Bord Pleanala

64 Marlborough Street

Dublin 1

AN BORD PLEANÁLA
LDG- _____
ABP- _____
03 OCT 2022
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Time: _____ By: hand

30th September 2022

Re: ABP Ref. SU05E.SU0138

P.A Ref. EUQY31

Substitute Consent Application, Gortletragh, Stranorlar, Lifford, Co. Donegal, EUQ731.

Dear Board,

This Response has been prepared by Joe Bonner Town Planning Consultant, The Airport Hub, Unit 1, Furry Park, Old Swords Road, Santry, Dublin 9, D09 WY06 and is submitted on behalf of 'the applicant' Patton Bros Quarry Limited, Gortleteragh, Stranorlar, Co Donegal in response to the letter issued by the Board on 12th of September 2022 enclosing a submission dated the 25th day of July 2022 from the **Health Service Executive** and certain comments from **An Taisce** also dated the 25th day of July 2022 which letter requested any submissions or observations to be made were required to be submitted on or before the 3rd day of October 2022.

The following observations and/or submissions in respect of the documentation submitted by the Health Service Executive and the submission of An Taisce are set out hereunder.

We note that in the second paragraph of the letter of the 12th of September 2022, the Board consider that "*comments that are outside the scope of the matter in question*" cannot be considered. We understand this to refer to the submission made grounding the application and the applicant to limit any submissions to the matter set out in the first paragraph of the letter of the 12th of September 2022 namely that the comments are limited to a response to the submissions from the Health Service Executive and from An Taisce and in the light of the strict application of the requirements contained in the Board correspondence the submission is limited to a response to these matters only.

In general both submissions appear not to take any issue with the applicant's submission of the 26th of August 2021. The report/submission of the Health Service Executive is entirely supportive and accepts and concurs with the submission made both grounding the application and in the subsequent submissions made particularly that of the 26th of August 2021 and therefore while some references are made in responding to the specific matters raised in this documentation we note the broad agreement of both submissions with the content of the submission of the 26th of August 2021.

In the light of the approach adopted by both parties therefore in respect of which we are required to reply, it would appear that there is no basis therefore other than to proceed and determine the application in accordance with the applicant's submission of the 26th of August 2021.

As a preliminary issue it should be noted that An Bord Pleanala has already decided that, by virtue of the decision of the 15th of August 2017, in granting leave to apply for substitute consent that exceptional circumstances such as to permit the making of the application exist in this case.

The submissions do not raise any issue in respect of the basis of the Board's original decision nor on the rationale governing that decision. The approach of the Board and the basis of the Board's decision has not been questioned or even raised. Further given that this decision has been made for over five years and no proceedings have been taken seeking to question that decision, the basis and rationale of that decision cannot now be questioned and given that the principle of Res Judicata applies to planning decisions in the absence of any issue being raised which might undermine that original decision of the Board, it cannot now be revisited.

The submission of the HSE dated the 25th of July 2022 is entirely supportive of the applicant's submission and indeed concurs with each and every element of the submission of the applicant of the 26th of August 2021.

The HSE submission adopts the same broad structure as does the applicant's submission of the 26th of August 2021 and refers to the criteria set out in Section 177D(2) of the Planning and Development Act 2000 (as amended). In identifying the matters at paragraph 2 (a-g) it, in each case, concurs with the approach adopted by the applicant and urges the Board to consider the matter in and on the basis of the applicant's submission of the 26th of August 2021.

The HSE's submission commences with a consideration as to whether the regularisation of the development concerned would circumvent the purposes/objectives of the Environmental Impact Assessment Directive or the Habitats Directive.

As pointed out in the original submission of the 26th of August 2021 the Board has already determined that an Appropriate Assessment is not required in respect of this application. Again this application is made in the

context of the requirements of the Planning and Development Act 2000, subject to Section 50 of the Planning and Development Act and the validity of that decision cannot now be questioned and as a consequence is a decision that is binding on all parties to the process. Neither party has sought to raise any issue in respect of the validity of that decision and indeed no issue was taken with the identification of this determination by the Board in its original decision and therefore there can be no issue arising having regard to the absence of any issue being raised in either submission with respect to the requirements of the Habitats Directive nor can a submission be made that the development could contravene the requirements of the Habitats Directive in the absence of any issue being raised in either submission in that regard. Equally no issue is taken in respect of the applicant's submission with regard to the Environmental Impact Assessment Directive.

The Planning and Development Regulations 2001 (as amended) and in particular Schedule 5 to Part 2 deals with the requirements of the domestic law provisions applying the requirements of the directive. The EIA Directive obligations in respect of an environment assessment only apply as is clear from the provisions of Schedule 5 Part 2 with regard to extraction areas such that the requirements only apply to "new and extended areas". Irish domestic law therefore does not seek to include within the threshold for Environmental Impact Assessment consideration any pre '64 activity that is activity that commenced before the coming into effect of the Local Government (Planning and Developments) Act 1963-1999 nor does it apply to any area other than new and extended areas from the date of the coming in to effect of the EIA requirements. This is to be contrasted for example with licencing requirements under the Environmental Protection Agency Act which applies to all extraction areas whether they be existing or proposed. When one therefore applies these principles and in particular excludes the pre '64 quarry areas to which the Directive requirements do not apply it must be acknowledged that the area therefore in controversy is extremely small and significantly below the thresholds required for a mandatory Environmental Impact Assessment.

Of course it is acknowledged that this smallest area by virtue of the class specified in Part 2 is also subject to a requirement that it did not give rise to significant effects on the environment such as to require a mandatory Environmental Impact Assessment but given the scale and extent of the areas which are required to be calculated in this regard, and the determination by the Board that there is no obligation under the Habitats Directive it is submitted therefore that there can be no question that a mandatory Environmental Impact Assessment is required as even the higher test required under the Habitats Directive does not apply and no Appropriate Assessment is required.

Accordingly, we respectively agree with the submission of the HSE that the regularisation of the development concerned would not circumvent the purposes and objectives of the Environmental Impact Assessment Directive or the Habitats Directive and in the absence of any submission to the contrary in either submission

it is submitted that the position as set out in the applicant's submission of the 26th of August 2021 should be adopted.

The submissions of both An Taisce and the HSE do not seek to raise any issue in respect of whether the applicant could reasonably have had a belief that the development was not unauthorised. The issue of how one reconciles pre '64 development with the obligations under the Directive is still a complex and difficult question and has not been resolved definitively by the Courts. It does however appear to be the case that a failure to comply with the Environmental Impact Assessment Directive does not render the development unauthorised although again this is a complex question and one which has been the subject matter of recent High Court Judgments and in particular that of Ni Raifeartaigh J who appears to have concluded that the position as set out above would apply here. Equally the extent to which a subsequent grant of a planning permission can aggregate or extinguish existing use rights is equally complex and again the position would appear to be that a subsequent permission is to be interpreted as being grafted on to rather than extinguishing existing use rights and as a consequence therefore there is ample evidence that the applicant could have believed that the continued operation of its quarrying activity amounted to a lawful development but certainly was not or could not be construed as an unauthorised development for the purposes of the Planning and Development Acts. When one adds on to this the complex planning history that has been identified and detailed in the applicant's submission of the 26th of August 2021 it cannot but be concluded that the test as set out at B has been fully met and there is no basis to reject the application as not complying with this requirement either.

Having regard to the matters set out above with regard to the Environmental Impact Assessment and Appropriate Assessment it would appear further that there is no difficulty in carrying out an Environmental Impact Assessment or an Assessment for the purposes of the Habitats Directive. This is a small-scale development which it would appear does not on its face fall within the mandatory obligation of both Directives. The applicant has submitted itself to these requirements, but any such obligations must be construed in the light of the mandatory nature of applying these Directives to the particular circumstances of the case and in the light of what has been set out above it would appear that there is no difficulty in complying with the requirements of subparagraph C.

Neither submission again take issue with this and indeed the submission of the HSE is completely supportive of the position adopted by the applicant in its submission of the 26th of August 2021. Accordingly, it is submitted that the approach adopted in the applicant's submission should be applied, particularly in the absence of any submission made on the part of either applicant to the contrary and there would be no basis for taking any view other than that which was adopted by the applicant in its original submissions.

In respect of the actual or likely significant effects on the environment or adverse effects on the integrity of European sites to some extent these matters have been addressed in the previous determinations by the Board but in any event nothing in either of the submissions again seeks to undermine or even question the approach adopted by the applicant in its original submission of the 26th of August 2021. Indeed, the HSE submission is entirely supportive and is consistent with and adopts the position adopted by the applicant and the An Taisce submission is entirely silent in respect of any concerns raised in that regard.

In the light of the position adopted by each of the applicants it is therefore submitted that the requirements of paragraph D have not been questioned or in any sense undermined and accordingly it is submitted that the approach adopted there should be followed in accordance with what was submitted in the applicant's submission.

In respect of the final matter which is the extent to which the significant effects on the environment or adverse effect on the integrity of European sites are concerned again there is no issue raised or taken with the submission made by the applicant in the submission of the 26th of August 2021. We refer to the previous submissions made in that regard in respect of the extent of the site and we refer to the submission made already in that regard on page 32 of the applicant's submission of the 26th of August 2021. Again, neither the submission of the HSE or An Taisce seek to raise any issue or question any of the findings made in that submission and there is no basis or no evidence that would allow the Board to depart from what is set out therein.

In the light therefore of the submissions no matter is raised and nothing that the applicant has raised in its submission has been contradicted and therefore the only evidence that is before the Board in respect of this matter is the submission of the applicant as confirmed and adopted by the HSE and in such circumstances we respectfully submit that it is appropriate that the Board would conclude that the exceptional circumstances exist such as to permit the application be proceeded with.

There is finally the issue of the matter raised by An Taisce in its submission which is an extremely short submission but does not appear to direct any matter to the applicant nor indeed does it address any issue that the applicant could reasonably be expected to reply to.

The submission of An Taisce refers to the exceptional circumstances set out in Section 177D(2) of the Planning and Development Act 2000 and to the definition which the applicant relied on for the purposes of making the submission to the Board and which the Board is equally required to apply.

The submission of An Taisce then refers to the submission in this case which it is stated is *"inconsistent with the view of the European Court on thresholds for exceptional circumstances"*. The submission of An Taisce

appears therefore to be requesting that the Board take issue with or raise a question as to whether the criteria for exceptional circumstances is appropriate. However, the applicant cannot be in a position to make a submission on a matter which is in effect a Governmental decision and a matter for the Oireachtas and therefore to request the applicant in the position that it finds itself in to engage with such a submission is, it is respectfully submitted, not appropriate and the An Taisce submission is misconceived in that regard.

Insofar as it is appropriate for the applicant to respond to this submission, it can be seen from the level of detail submitted that the test set out in Section 177D(2) is an extremely comprehensive test and for this development that would be inconsistent with the requirements and could lead to a decision where an application for such a consent would not be considered. This of course would lead to the gravest of consequences for the applicant in this case who has been operating in a quarry that has continued to exist for many decades, but which is a very small scale quarry with no significant effects on the environment and which wishes to have itself submitted in the particular circumstances of the case to controls of a type that its size and scale would not appear to warrant but which it is happy to comply with.

The whole issue of substitute consent did not arise or have its genesis in developments of a size and scale as this quarry development in respect of which there is no public controversy, there is no objections on the part of the public, there is no effect on the environment, there is no effect on any European site but in respect of a large windfarm which was built other than in accordance with its permission and which caused very significant and irreparable damage and therefore by suggesting that the test here is not sufficiently high is misconceived. If these tests that are set out in Section 177D(2) were to have been applied to the windfarm on the Clare/Galway border or indeed to any of the controversial developments it would be seen that such a consent may not have been granted but it is respectfully submitted that the approach of the Board who adopt an approach consistent with the legislation and consistent with what is appropriate given the objectives of the directive is the appropriate test. In any event of all the cases that one would refer to the High Court, this case which is one where the applicants as small rural and remote operators who are the least likely to be in a position to engage with any such expensive and difficult litigation could ever be in a position to engage or to deal with such a referral to the High Court and simply would not be in a position to do so and where in respect of each of the criteria it is clear beyond argument (and indeed appears to be accepted by An Taisce that it falls in to, and complies with each of the categories required because they have not sought to question any of the tests required) it is respectfully submitted that this is not the appropriate case because the matters of controversy and indeed any test no matter how standard it would be, would have to be applied in favour of the applicant here. Therefore, if An Taisce wishes to have this matter resolved there are many cases where this issue might be more appropriately addressed and certainly not one where each and every one of the criteria can be met. Finally, it is submitted that it is not appropriate for An Taisce to simply make a one-line

submission indicating that the definition used to establish exceptional circumstances is not of sufficient height and not identify the basis of that assertion or give any grounds for the contentions made.

The entire basis of the making of appeals to the Board and the making of submissions is to identify on the basis of detailed argument and detailed submissions why a particular position should be adopted by the Board and to make a submission of such a vague and unsubstantiated type without any identification of which if any of the circumstances it is considered not to be appropriate and indicating what the approach should be, puts the applicant in a position where it is simply not in a position to respond and it is submitted that the submission of An Taisce by virtue of the lack of specificity and the lack of any detail or any argument or any examples does not provide any basis upon which the Board could make a conclusion with the devastating effects that it would have on the applicant and the submission could never be the basis for the matters which An Taisce seek to rely on in that submission.

We trust that this response comprehensively addresses the observations and/or submission of HSE and An Taisce and considering the duration of time that this application for substitute consent has been under consideration by the Board we look forward to an expeditious decision on this application.

Yours Sincerely

Joe Bonner