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Mary Holohan,  
An Bord Pleanála,  
64 Marlborough Street,  
Dublin 1

26<sup>th</sup> August 2021

Re: **Application for Substitute Consent.**  
**A.B.P Ref** **PL05E.SU.0138**  
**Our Ref.** **Patton Bros Quarry Ltd**

<b>AN BORD PLEANÁLA</b>	
LDG- _____	
ABP- _____	
<b>26 AUG 2021</b>	
Fee: € _____	Type: _____
Time: <u>16:39</u>	By: <u>Hand</u>

Dear Ms Holohan,

On foot of a letter issued by the Board on 30<sup>th</sup> July 2021 regarding an application lodged on 15<sup>th</sup> August 2017 by our client Patton Bros Quarry Limited for Substitute Consent pursuant from a grant of 'Leave to apply for Substitute Consent' which was issued by the Board on 23<sup>rd</sup> February 2017, Patton Bros Quarry Limited has now been requested 'to submit such information as' they 'consider material for the purposes of the Board's satisfying itself on the question of the existence or not of exceptional circumstances that would justify a grant of substitute consent by the Board' in respect of their Quarry at Gortletragh, Stranorlar, Co Donegal.

The Board has requested that a response is submitted no later than 5:30pm on 26<sup>th</sup> August 2021.

## 2.0 Introduction

The request outlined above was issued by the Board on foot of a decision of the Supreme Court on 1<sup>st</sup> July 2020 in respect of the three joined cases of '*An Taisce v An Bord Pleanála, An Taisce v An Bord Pleanála & Ors, Sweetman v An Bord Pleanála & Ors*' [2020] IESC 39, that certain provisions of the Planning and Development Act 2000 (as amended) that dealt with 'Substitute Consent' were inconsistent with *the EIA Directive as interpreted by the Court of Justice, in that they fail to provide adequately for the exceptionality test as demanded by that court.*

The Planning and Development Act 2000 (as amended) was subsequently amended on 19<sup>th</sup> December 2020 via the *Planning and Development, and Residential Tenancies, Act 2020* and following from that the Board issued this request under Section 177K(1C)(a) which states that: -

(1C) (a) The Board shall, in relation to an application referred to in *paragraph (b) of subsection (1B)*, invite the applicant concerned to give to the Board such information as the applicant considers material for the purposes of the Board's satisfying itself as to the matter referred to in *paragraph (a) of subsection (1A)*, and any such information shall be given to the Board by the applicant within such period as is specified in the invitation concerned.

## **2.0 Original Application in 2016 for Leave to Apply for Substitute Consent - LS0027**

This office originally submitted an application for 'Leave to Apply for Substitute Consent' to the Board on 31<sup>st</sup> March 2016, in accordance with Section 177C of the Planning Development Act 2000 (as amended).

The Board Case reference for that application was LS.0027 and the Board granted leave to apply for Substitute Consent on 23<sup>rd</sup> February 2017.

As part of the 2016 application for leave, a detailed document was prepared by this office setting out the case why leave to apply for Substitute Consent should be granted. As the quarry has not been operating since the application for Substitute consent was submitted, significant parts of the 2016 application for leave will be restated in this response, as it sets out the site specific circumstances and planning history of the quarry and also addressed 'Exceptional Circumstances', the text of which remains relevant to the case of Exceptional Circumstances for granting Substitute Consent, which after-all only addresses the past activity at the quarry, some of which was carried out prior to the coming onto effect of the the EIA Directive (1<sup>st</sup> February 1990) and the Habitats Directive (26<sup>th</sup> February 1997) and the balance of the extraction was carried out pursuant to a number of grants of planning permission which are set out below in Section 6.

It will also become apparent throughout this response that the scale and extent of this quarry was misinterpreted on by the Planning Authority and the Board, leading to the necessity to apply for substitute consent in the first place, which has meant that Patton Bros Quarry Limited have not been able to operate this quarry for more than 5 years. This is demonstrated by the fact that this application is for an extraction area of 2.52ha and an area of topsoil removal of 1.62ha (which has been revegetated through inactivity in the last 5 years).

## **3.0 Exceptional Circumstances**

Part XA of the Planning and Development Act 2000 (as amended) addresses 'Substitute Consent' and Section 177(1) provides that: -

In this Part— 'exceptional circumstances' shall be construed in accordance with section 177D(2);

Section 177D (2) of the Planning and Development Act 2000 (as amended) provides that: -

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

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

- (b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;
- (c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;
- (d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;
- (e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;
- (f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;
- (g) such other matters as the Board considers relevant.

These are the same criteria that the Board used to assess the application for 'Leave to apply for Substitute Consent' in 2016-2017 and are addressed in detail below.

#### **4.0 Previous decision of An Bord Pleanála with respect to Exceptional Circumstances**

Before we set out the grounds for why it is considered that there continue to be exceptional circumstances whereby the Board can issue a grant of Substitute Consent to Patton Bros Quarry Limited, in granting 'Leave to Apply for Substitute Consent' in 2017, the Board set out the following 'Reasons and Considerations', why it concluded that exceptional circumstances exist: -

##### **REASONS AND CONSIDERATIONS**

Having regard to Section 177D(1) of the Planning and Development Acts, 2000, as amended, and to the conclusions reached by the Board in its review of the determination made by the Planning Authority under Section 261A of that Act with respect to the quarry on the site (reference number 05. QV.0012), the Board is satisfied that an Environmental Impact Assessment was required for the development upon the site and that one was not carried out. The Board concluded that exceptional circumstances exist by reference to the following matters:

- the regularisation of the development would not circumvent the purpose or objectives of the Environmental Impact Assessment Directive,
- the relatively small scale of the development when compared to the threshold set at class 2(b) of Part 2 of Schedule 5 of the Planning and Development Regulations, 2001,
- the uncertainty regarding the applicant's belief that the development was not unauthorised and that the applicant might reasonably have believed that the development was not unauthorised,

- the ability to carry out an Environmental Impact Assessment and provide for public participation has not been substantially impaired,
- the limited nature of the actual or likely significant effects on the environment resulting from the development,
- the extent to which significant effects on the environment, if any, can be remediated,
- the location of the development and relevant development plan policies and objectives in respect of development of this type and at this location, and
- the planning history of the site based, inter alia, on the information available from the planning authority including:
  - the applicant's history of general compliance with permissions elsewhere and resolution of matters at an early stage,
  - the non-compliance with planning permissions which arose from exceeding the duration of permissions rather than any significant expansion beyond authorised site boundaries, and
  - the applicant's unsuccessful and incomplete engagement in the Section 261A substitute consent process,

and considered that it would be appropriate to consider an application for the regularisation of the development by means of an application for substitute consent.

The Board noted that the proposed development is not directly connected with or necessary to the management of a European Site.

In completing the screening for Appropriate Assessment, the Board accepted and adopted the screening assessment and conclusion carried out in the Inspector's report in respect of the identification of the European sites which could potentially be affected, and the identification and assessment of the potential likely significant effects of the proposed development, either individually or in combination with other plans or projects, on these European sites in view of the site's Conservation Objectives. Having regard to that assessment and the conclusions reached by the Board in its review of the determination made by the planning authority under Section 261A of that Act with respect to the quarry on the site (reference number 05. QV.0012), the Board is satisfied that the development, either individually or in combination with other plans or projects, would not have been likely to have had a significant effect on the River Finn Special Area of Conservation (Site Code: 002301), or any other European site, in view of the site's Conservation Objectives.

## **5.0 Case for Exceptional Circumstances**

The case to demonstrate exceptional circumstances that was made in March 2016 is still relevant in August 2021 and what is set out below is largely the same case that was made to the Board in 2016, because since that time the quarry has not been operating as we will show in section 6.9.1. The previously cleared topsoil area that was cleared in anticipation of quarrying being carried out and forms part of this application for substitute consent, has been revegetated as of 2021 due to inactivity on the site. It demonstrates that the quarry been effectively closed for more than 5 years while the Patton family business in on hold, awaiting the outcome of this decision. That in itself is exceptional considering that if Substitute Consent is granted that a further application will have to be made for continuation of quarrying on the lands, which will take another undefined period of time.

## **6.0 Case made in 2016 and continues to apply in 2021**

In this section we will restate the case, for the benefit of the Board, that was made on behalf of Patton Bros Quarry Limited in the 2016 application for 'Leave to Apply for Substitute consent, as the circumstances of the quarry are the same in 2021 and it is that case that elicited the decision of the Board that is set out in full in Section 4.0 above. Sections 6.1 to 6.9 set the background and chronological planning history while Section 6.10 sets out the 'Exceptional Circumstances' that emanate from the planning history.

This report chronologically reviews the planning history of Patton Bros. Quarry Limited, which in turn will assist in responding to the criteria set out in Section 177D (2) of the Planning and Development Act which the Board must consider prior to determining for a second time whether exceptional circumstances exist in respect of Patton Bros. Quarry Limited.

The basis for our opinion that exceptional circumstances do exist is set out below and is supported by a series of maps prepared by McCullagh Architecture and Surveying and aerial photographs, which trace the evolution of the quarry from the 1840's to the present.

### **6.1 Chronological History of the Patton Bros. Quarry Limited**

### **6.2 Planning History - Pre 1964, Pre EIA Directive and Pre Habitats Directive**

As per the S261A report prepared by Donegal County Council, quarrying had been carried out on the subject lands as far back as the 1840's and while Council archives also noted that there was a quarry on the site in 1909, 1930's mapping indicated that the quarry was 'disused'. Extraction from the quarry did not recommence from the 1930's until after permission was granted in 2000 under planning reg. ref. 99/2647.

During this first life of the quarry, a total area of 0.33ha was extracted. This 0.33ha had already been excavated on the date of coming into effect of the 1963 Planning Act (1<sup>st</sup> October 1964), the EIA Directive (1<sup>st</sup> February 1990) and the Habitats Directive (26<sup>th</sup> February 1997) and should have been deducted from any future calculations of reckonable area for the purposes of both the EIA and Habitats Directives. Image 6.1 showing

the 0.33ha area is taken from the Donegal County Council S261A report from 2012 and is based on an OSI aerial photo.

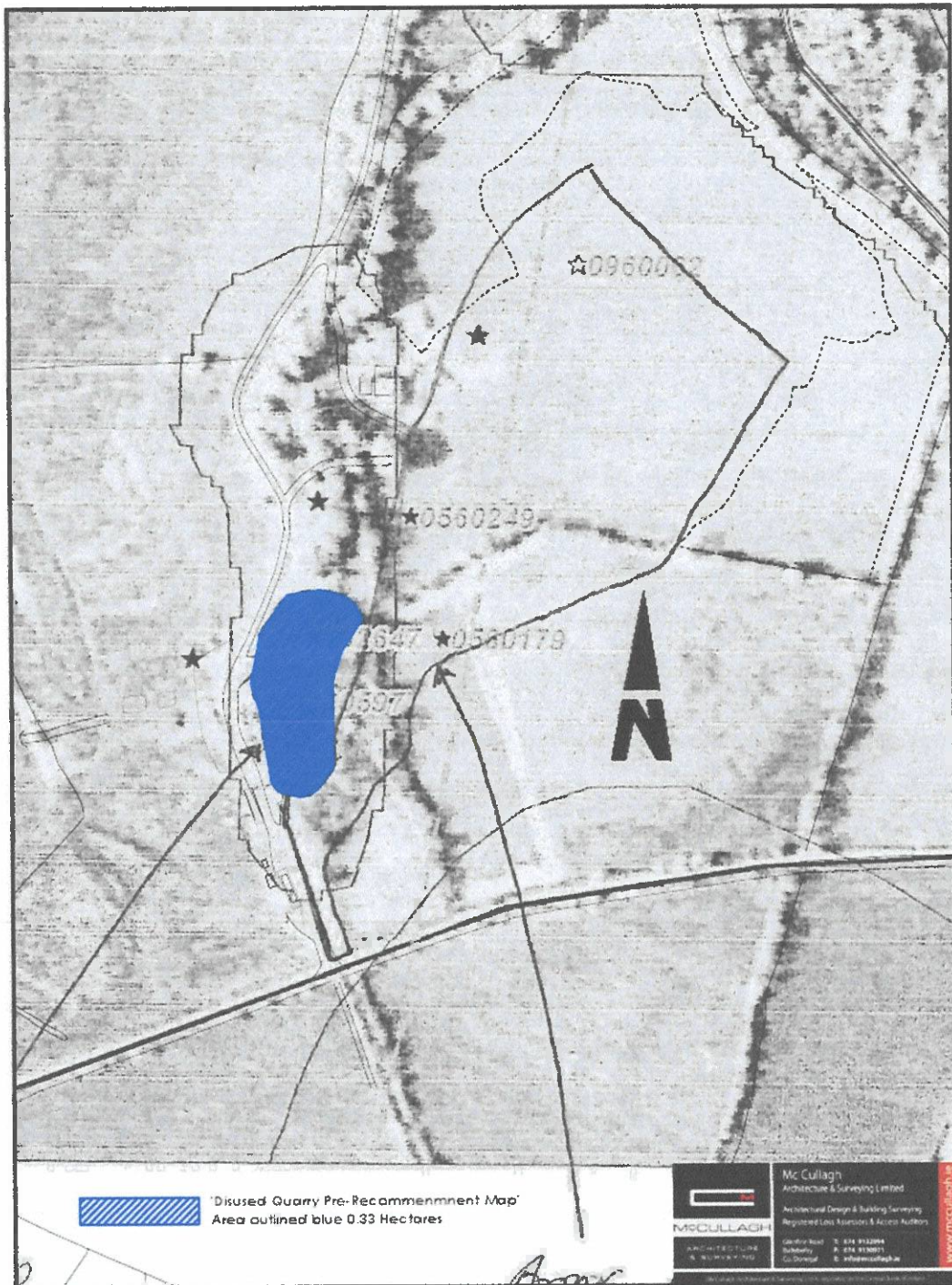


Image 6.1 Area of disused pre EIA and Habitats Directive Quarry

## 2.2 Planning Reg. Ref. 99/2647

Unlike many quarry operators throughout the country, Patton Bros. Quarry Limited did not attempt to claim that the quarry had a pre-1964 authorisation and instead they took the correct step of applying for planning permission (reg. ref. 99/2647) on 26<sup>th</sup> July 1999 for the 're-opening of a disused quarry and extraction of materials on land'. The total area of the proposed quarry was stated to be 1.2082ha (all areas - not just the

extraction area). Permission was granted on 10<sup>th</sup> January 2000, subject to conditions. The reopened quarry included the previously quarried area of 0.33ha. The site is outlined in blue in image 6.2 below.



Image 6.2

Site Location Map of 99/2647 (site area 1.2082ha)

### 6.3 Section 261 Registration

Section 261 of the Planning and Development Act 2000 came into effect on 28<sup>th</sup> April 2004 and required that:-

261.—(1) The owner or operator of a quarry to which this section applies shall, not later than one year from the coming into operation of this section, provide to the planning authority, in whose functional area the quarry is situated, information relating to the operation of the quarry at the commencement of this section, and on receipt of such information the planning authority shall, in accordance with *section 7*, enter it in the register.

The Quarry Guidelines published in April 2004 by the DOEHLG to coincide with the commencement of S261 state that '*Section 261 of the Planning and Development Act, 2000 introduced a new system of once-off registration for all quarries. Only those for which planning permission was granted in the 5 years before section 261 became operative are excluded*<sup>1</sup>.

Notwithstanding the fact that Patton Bros. Quarry Limited has secured a grant of permission from Donegal County Council in January 2000, which was less than 5 years before the coming into effect of S261 and were not required to register their quarry, they nevertheless sought to register the quarry prior to April 2005. The registration was accepted by Donegal County Council and it is recorded as quarry QY31 on Donegal County Council's official register of quarries, which contains 186 quarries.

<sup>1</sup> Section 1.2 - Quarries and Ancillary Activities - Guidelines for Planning Authorities - April 2004 - Department of the Environment, Heritage and Local Government

The total quarry area registered was stated to be 4.906ha, while the area of extraction was stated to be 1.315ha.

#### 6.4 05/60249

Shortly after registering the quarry under Section 261, on 14<sup>th</sup> November 2005, Patton Bros. Quarry Limited applied for permission (reg. ref. **05/60249**) for the *'retention of continuation of works to include the extraction of stone, including blasting, crushing, washing and ancillary site works, retention of site office and canteen and construction of a septic tank*. The grant of permission issued by Donegal County Council on 20<sup>th</sup> February 2006 was for a period of 3 years from the date of the final grant of permission (or correctly 5<sup>th</sup> April 2009 including 9 additional days per annum as per S.251 of the Planning and Development Act 2000 (as amended)). The total site area was stated to be 2.6134ha, which included the access road, porta-cabin office area etc, which is a smaller area than the 4.609ha registered under S261. The overall site area is shown on Image 6.3 below while the site layout plan is shown on Image 6.4.



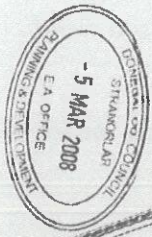
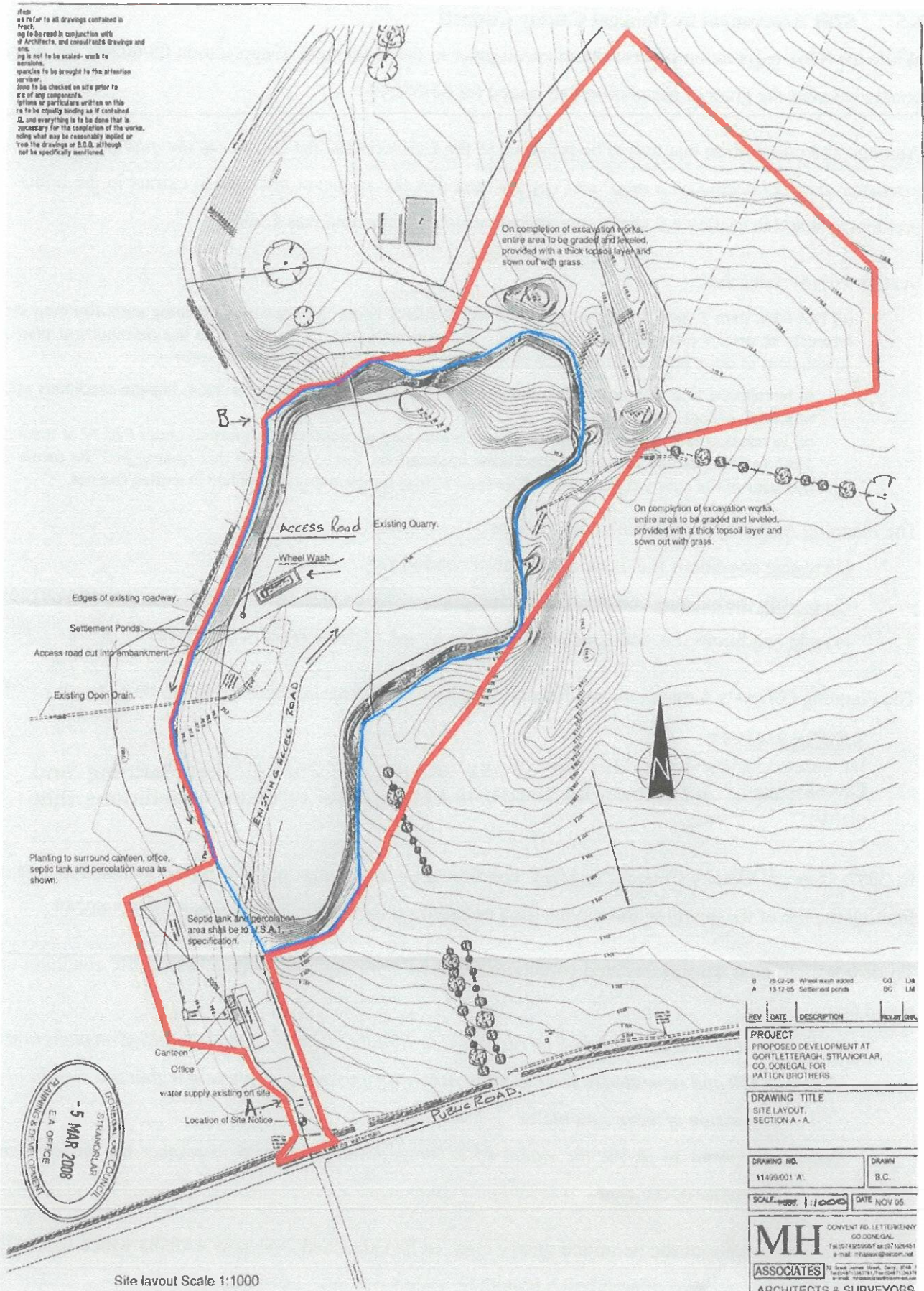
Image 6.3

Site Location Map of 05/60249 (site area 2.6134ha)

The area of extraction at the time has been measured to be c1.26ha (blue in image 6.4 below) excluding the area at the front of the site where the septic tank and access are located.



Refer to all drawings contained in this set for full details.  
 This drawing is to be read in conjunction with the Architect's, and consultant drawings and specifications.  
 This drawing is not to be scaled - work to dimensions.  
 Any discrepancies to be brought to the attention of the architect.  
 This drawing is to be checked on site prior to the commencement of any work.  
 Any variations or particular details written on this drawing are to be carried out as if contained in the specifications and everything is to be done that is necessary for the completion of the works, including what may be reasonably implied or required by the drawings or S.O.D. although not specifically mentioned.



REV	DATE	DESCRIPTION	REVISED BY	CHK
B	25-02-08	Wheel wash added	GO	LM
A	13-12-05	Settlement ponds	BC	LM

**PROJECT**  
 PROPOSED DEVELOPMENT AT  
 GORTLETTERAGH, STRANBOROUGH,  
 CO. DONEGAL FOR  
 PATTON BROTHERS

**DRAWING TITLE**  
 SITE LAYOUT,  
 SECTION A - A.

DRAWING NO. 11499/001 'A'  
 DRAWN B.C.

SCALE: 1:1000 DATE: NOV 05

**MH ASSOCIATES**  
 CONVENT RD. LETTERKENNY  
 CO. DONEGAL  
 Tel: 014255565 Fax: 01425451  
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 15 Great James Street, Derry, BT48 1  
 Tel: 02870 336373 Fax: 02870 336374  
**ARCHITECTS & SURVEYORS**

Site layout Scale 1:1000

Image 6.4

Site Layout Map of 05/60249 (total site area 2.6134ha)

## 6.5 S261 Assessment by Donegal County Council

While the S261 registration process commenced prior to the lodgement of application 05/60249, the process concluded after the grant of permission had issued for 05/60249.

Amongst the information that was to be provided to the Council was '*(a) the area of the quarry, including the extracted area delineated on a map*' and not the area that the applicant intended to extract in the future. As previously stated in section 6.2 above, the overall registered site area was 4.906ha.

Section 261(6) states that: -

(a) Not later than 2 years from the registration of a quarry under this section, a **planning authority** may, in the interests of proper planning and sustainable development, and having regard to the development plan and submissions or observations (if any) made pursuant to a notice under *subsection (4) or (5)*—

(i) **in relation to a quarry which commenced operation before 1 October 1964**, impose conditions on the operation of that quarry, or

(ii) **in relation to a quarry in respect of which planning permission was granted under Part IV of the Act of 1963** **restate, modify or add to conditions imposed** on the operation of that quarry, and the owner and operator of the quarry concerned shall as soon as may be thereafter be notified in writing thereof.

The Planning Authority had the following options: -

- (1) restate conditions (i.e. issue a new set of conditions),
- (2) modify the existing conditions (i.e. changes specific conditions of the previous grant 05/60249) or
- (3) add conditions (i.e. add conditions to those issued with the grant of 05/60249).

The Planning Officer's Assessment and Recommendation stated that conditions were to be restated: -

### ASSESSMENT

In accordance with the provisions of section 261 of the Planning and Development Act I consider that it is appropriate to restate conditions that shall:

In 2007, Donegal County Council 'restated' conditions on the quarry, none of which included a condition limiting the life of the quarry to three years such as had been the case in condition no. 1 of 05/60249.

To demonstrate how the new/restated conditions differed from the conditions of 05/60249, condition no 4 stated that:-

- 4 *Area to be excavated shall be restricted to 4.906ha. Details shall be identified on plans to scale 1:500 and submitted to the Planning Authority for written agreement within two months of the imposition of these conditions.*

**Reason:** *In order to define the extent of existing development and to protect the environmental amenities of the area*

As per the new conditions the permitted quarry area 'to be excavated' was now 4.906ha which is 2.2926ha larger than the total site area of permission 05/60249, which was only 2.6134ha.

It appears that the Planning Authority misunderstood the implications of restating conditions because it issued a letter to Patton Bros. Quarry Limited in October 2007 following the imposition of the restated conditions which stated that: -

*I wish to emphasise that the registration procedure is simply the registration of information submitted and does not confer a planning consent/permission for the continued operation of the quarry.*

However, Section 261(6)(b) of the Act as it was at the time that Donegal County Council imposed the restated conditions, provided that: -

(b) Where, in relation to a grant of planning permission conditions have been restated, modified or added in accordance with paragraph (a), the planning permission shall be deemed, for the purposes of this Act, to have been granted under section 34, and any condition so restated, modified or added shall have effect as if imposed under section 34.

The Planning and Development (Amendment) Act 2010 substituted subsection 261(6)(b) in order to clarify any misunderstandings or misinterpretations of the subsection that may have occurred throughout the country:-

(b) Where, in relation to a grant of planning permission conditions have been restated, modified or added in accordance with paragraph (a), the **planning permission shall be deemed**, for the purposes of this Act, **to have been granted** under section 34, **on the date the conditions were restated**, modified or added, and any condition so restated, modified or added shall have effect as if imposed under section 34.

It appears that Donegal County Council, interpreted the purpose of S261 as did many other Councils on the basis of the following extract from the *Quarries and Ancillary Activities Guidelines for Planning Authorities April 2004*: -

*The registration system has two purposes:*

- *to give a 'snapshot' of the current use of land for quarrying. This will ensure that local authorities have basic information about a quarry's operations. Planning permission may then be required for any proposed expansion or intensification of its operations;*
- *where necessary, to permit the introduction of new or modified controls on the operation of certain quarries. These controls may be imposed in two ways. Quarries may have to comply with certain new or modified conditions on their operation. Certain quarries operating since before 1 October 1964 which may have significant effects on the environment, may have to seek planning permission for their continued operation and submit an Environmental Impact Statement. The same sort of considerations will apply to these applications for permission, as apply to all applications for permission for quarries.*

Like many other Council's in issuing new conditions (restating) Donegal County Council were effectively granting a new planning permission to the quarry as and from that date.

### 6.5.1 What are the implications of the restated conditions?

Under normal circumstances the life of the permission granted under planning reg. ref. 05/60249 would have expired on 5<sup>th</sup> April 2009 as per condition no 1 of the grant of permission, however as the conditions were

restated this meant that the life of the permission (05/60249) recommenced on the date they were restated rather than on 20<sup>th</sup> February 2006. A number of views can be taken of the restated conditions: -

- 1 The life of the permission was three years from the February 2007 restating meaning that it did not expire until March 2010 (including 9 days per annum).
- 2 As no specific condition was included in the restated conditions stating that the duration of the permission was still only 3 years, the life of the permission would by default be 5 years from February 2007 meaning that it did not expire until March 2012.
- 3 As no specific condition was included in the restated conditions stipulating the duration of the permission was only 3 years the life of the permission is indefinite from the date of the restatement of conditions in February 2007 until such time as the quarry is exhausted.

The default duration of a grant of permission if not stated is 5 years and as the Planning Authority did not include a restated condition that the duration of the permission was to be less than 5 years as it had done in the original grant of permission for 05/60249 in 2006, then it is considered reasonable to assume that the duration of the permission did not expire until March 2012 (i.e. scenario 2 above). However, condition no 4 could also be interpreted as giving an indefinite life to the quarry. All of these possibilities demonstrate the confusion that existed in the planning profession leaving aside the non-planning expert Patton family.

By issuing enforcement proceedings against Patton Bros. Quarry Limited under UDSR0928 – “*Operating quarry without benefit of planning permission*” it is clear that S261(6)(b) had not been taken into consideration by the Planning Authority as it was assumed that the life of the permission had expired, when in fact it had not done so. Paragraph 4 of the *261A Quarry Assessment Report* made specific reference to this fact and states that “*this (UD file) was referred for inspection on 07/07/09. File to be closed following the grant of Planning Permission Reference Number 09/60062.*”

Under all three of the time scenarios set out above, the duration of the permission granted under planning reg. ref. 05/60249 had not yet expired in 2009 and the applicant was therefore inappropriately served with enforcement proceedings. During the same period Patton Bros. Quarry Limited lodged a new application for continuation and retention of the quarry and were granted permission for same, within the lifetime of the grant of permission issued under reg. ref 05/60249 and should not have had to refer to retention or pay fees associated with retention.

## 6.6 09/60062

On 23<sup>rd</sup> March 2009 Patton Bros. Quarry Limited submitted an application for the following development: -

*We, Patton Bros. Quarry are applying for Planning Permission / Retention Permission... The development consists of the following (1) continuation of use of quarry and associated works to include the extraction of stone including blasting, crushing and ancillary site works (2) erection of a plant for the manufacture of ready mix concrete including storage silo, aggregate storage and*

associated works (3) retention of existing quarry including weighbridge, wheel wash, lagoons and all associated works (4) retention of fill within site area (5) retention of site office, canteen and associated structures.

As per the planning application form, the total site area was stated to be 5.44ha and consisted of: -

Commercial:-			
Description	Floor Area	Fee per Sq Metre	Fee Payable
RET. QUARRY	2.78 HA	€150 / 0.1 HA	€4,170
PER. QUARRY	1.86 HA	€50 / 0.1 HA	€930
REAR. READMIX			€80
SITE OFFICE / CANTEEN	N/A	MINI FEE	(€240 x 2) €480
Other (Specify):-			
Description	Floor Area	Fee	Fee payable
RET. FILL	0.8 HA	€30 / 0.1 HA	€240
<b>Total Fee Payable</b>			<b>€5,900</b>

Image 5

Extract from fee addendum sheet on application 09/60062

Together the three areas stated above at 2.78ha, 1.86ha and 0.8ha equal 5.44ha. This stated area plays a significant role in later decisions pertaining to the quarry under S261A, and we will return to it later.

Knowing what we now know, i.e. that the life of the previous permission had not expired at the time application 09/60062 was submitted, we can now state that: -

- The applicant should not have been required to apply for retention for the area of 2.78ha and it should simply have been included in the overall area of the quarry that was seeking permission to continue. They consequently paid triple the fee they should have for the continuation of use of that part of the quarry which was authorised but incorrectly deemed unauthorised at that time.
- The retention of fill area (0.8ha) is not an area of extraction and therefore should not be considered as part of the extraction area for any future applications for extraction on the landholding.
- The additional area of extraction which was subject to the application was 1.86ha.

It is clear from the above that Patton Bros were not at all familiar with the actual planning status of their quarry and did not understand how the provisions of the Planning Acts in particular S261 applied to their situation.

Donegal County Council decided to grant permission subject to 11 conditions.

A third party lodged an appeal in respect of land ownership but it was dismissed by An Bord Pleanala on the grounds of 'nature of appeal/any previous permission S.138(1)(b)'.

The final grant issued on 27<sup>th</sup> October 2009 and the life of the permission expired on 11<sup>th</sup> December 2014.

Image 6.6 below shows the site location map as taken from [www.donegalcoco.ie](http://www.donegalcoco.ie) and Image 6.7 is a copy of the Site Layout Plan showing the relevant areas referred to in Image 6.5 above.



Image 6.6

Site of 09/60062 from [www.donegalcoco.ie](http://www.donegalcoco.ie)

The areas highlighted below are 2.78ha in green which was deemed to be the areas already worked out by 2009, 1.86ha of a proposed extended quarry and 0.80ha of an area that had been filled.

While the green area was considered to be the area of extraction as per image 6.7, the non-extraction areas including the entrance, weighbridge, settlement ponds etc, measures 0.42ha leaving a balance of the quarried area at 2.36ha as shown in image 6.8.

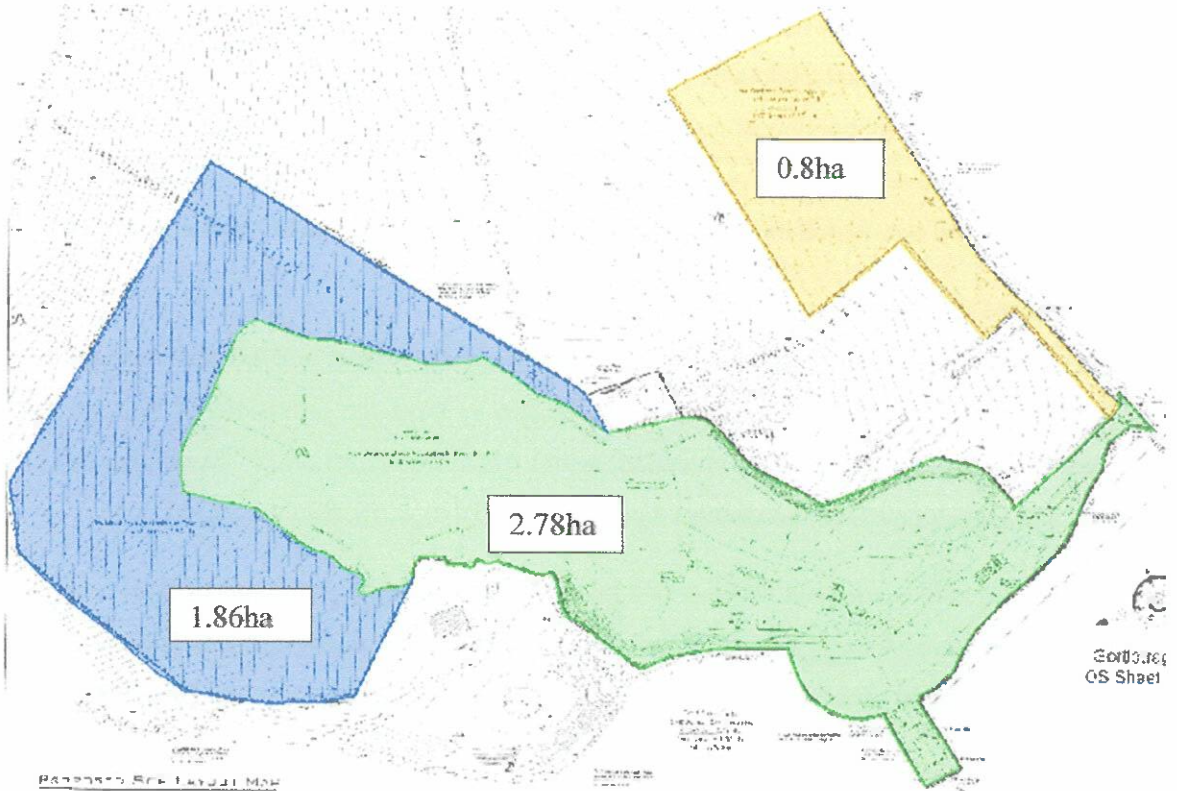


Image 6.7

Areas subject to application 09/60062

[www.donegalcoco.ie](http://www.donegalcoco.ie)

When the pre-1964 area of 0.33ha is removed from the actual area of extraction to that point (2009), rather than the site area, the extent of quarrying that had occurred since the quarry reopened in 2000 is 2.03ha.

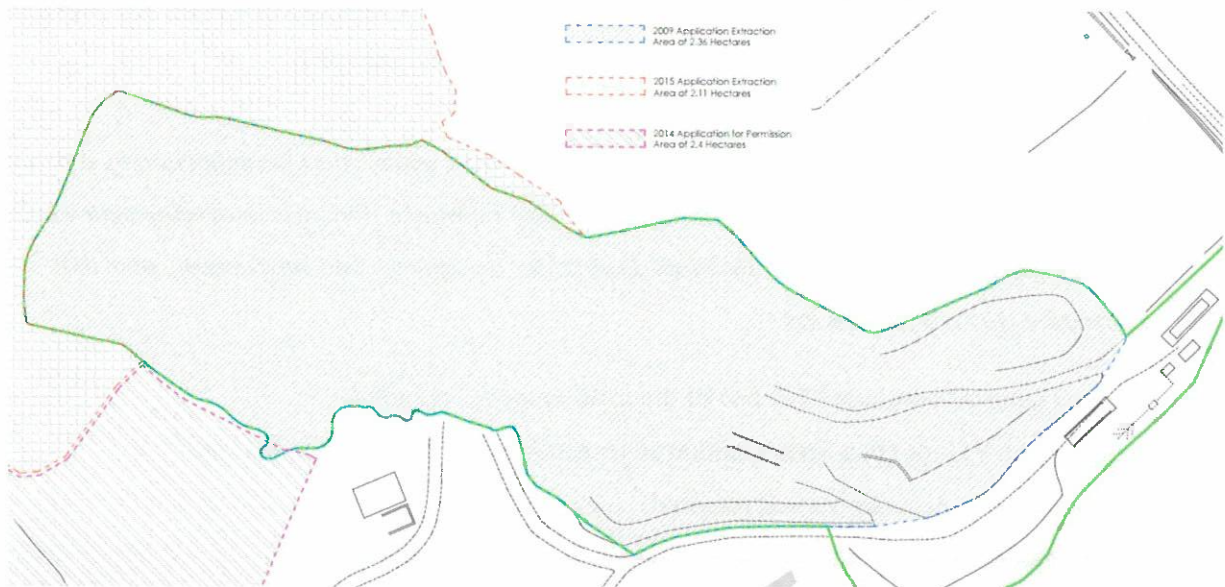


Image 6.8

Actual quarried area was  $2.36\text{ha} - 0.33\text{ha} = 2.03\text{ha}$

The application also included an additional area of 1.86ha that was to be quarried in the future and combined the two areas make up a total area of 3.89ha and not 4.64ha as had been understood by the Planning Authority (and later An Bord Pleanála in reviewing the quarry under S261A). 3.89ha is 77.8% of the mandatory EIA threshold of 5ha so it is possible that a sub threshold EIA may have been required and that an assessment

should have been required. However, on the basis that the Board later decided that the quarry would have no significant impact on any Natura 2000 site, it is quite possible that a sub threshold EIA would not have been required in respect of this application as mandatory EIA is only required *where the area of extraction would be greater than 5 hectares* and sub threshold EIA only required in cases where significant environmental impacts cannot be ruled out, which the Board had done in the case of this quarry under S261A.

## 6.7 Section 261A

Rarely if ever since the commencement of the modern planning system in 1964 has a piece of legislation created as much confusion within the planning profession as have the provisions of Section 261A of the Planning and Development Act 2000 (as amended) which came into effect on 15<sup>th</sup> November 2011 by way of the Planning and Development (Amendment) Act 2010 (30/2010), s. 75, S.I. No. 582 of 2011.

Donegal County Council carried out its functions in accordance with the provisions of S261A and on 9<sup>th</sup> June 2012 wrote to Patton Bros. Quarry Limited to inform them of its determination and decision under S261A and to tell them that they could seek a review of the decision and determination from An Bord Pleanala.

The determination of Donegal County Council was that: -

*Development was carried out after 1<sup>st</sup> February 1990 which was not authorised by a permission granted under Part IV of the Act of 1963, prior to 1<sup>st</sup> February 1990, which development would have required, having regard to the Environmental Impact Assessment Directive, an environmental impact assessment or a determination as to whether an environmental impact assessment was required, and that such an assessment or determination was not carried out or made,*

**and**

*(ii) Development was carried out after 26<sup>th</sup> February 1997, which was not authorised by a permission granted under Part IV of the Act of 1963, prior to 26<sup>th</sup> February 1997, which development would have required, having regard to the Habitats Directive, an appropriate assessment, and that such an assessment was not carried out.*

Donegal County Council concluded that one of the following was required: -

- **either** (a) an EIA **or** (b) a determination as to whether an EIA was required, and
- An Appropriate Assessment was required

and in both instances neither assessment or determination has been carried out.

The notification concluded that: -

*You are therefore directed to apply to An Bord Pleanala for substitute consent in respect of the quarry under Section 177E of the Planning and Development Acts 2000-2011, not later than 12 weeks after the date of this notice, or such further period as the Board may allow.*



A request for a review of the decision of Donegal County Council was submitted to An Bord Pleanála by McCullagh Architecture and Surveying Ltd on behalf of Patton Bros. Quarry Limited.

As part of the assessment, in May 2012, Donegal County Council prepared a map of the quarry with an outline of the overall site and an inner line showing the area of extraction as of May 2012 and this map is included in the Council's S261A Report along with several aerial photographs showing the quarry at different times. No areas were stated on the map so McCullagh Architecture and Surveying who had surveyed the quarry site, measured both areas and Image 6.9 below tells us that as of May 2012 when Donegal County Council carried out its review of the quarry, the overall site area was 3.7ha and the area of extraction was 2.4ha.

When the pre 1964 area (0.33ha) is deducted from 2.4ha, the total area of extraction in May 2012 that should have been considered for the purposes of S261A (i.e., EIA and Habitats Directives) would be **2.06ha**, which is only 0.03ha greater than the quarry was in 2009 when planning application 09/60062 was submitted to Donegal County Council. The minimal difference between the 2009 and 2012 areas confirms that little or no activity occurred in the three year period since the Council had granted permission. This would have been accounted for by the recession and the lack of activity in the economy at that time, with a consequent lack of demand for stone.

2.06ha is only 41.2% of the mandatory 5ha threshold and would be unlikely to require a determination that an EIA was required and is significantly below the 4.64ha extraction area that was considered by the Planning Authority to be the area of extraction. They may have been correct in that a determination whether a sub threshold EIA was required in the 2009 application should have been carried out but that was not the matter they were tasked with assessing in the S261A review.

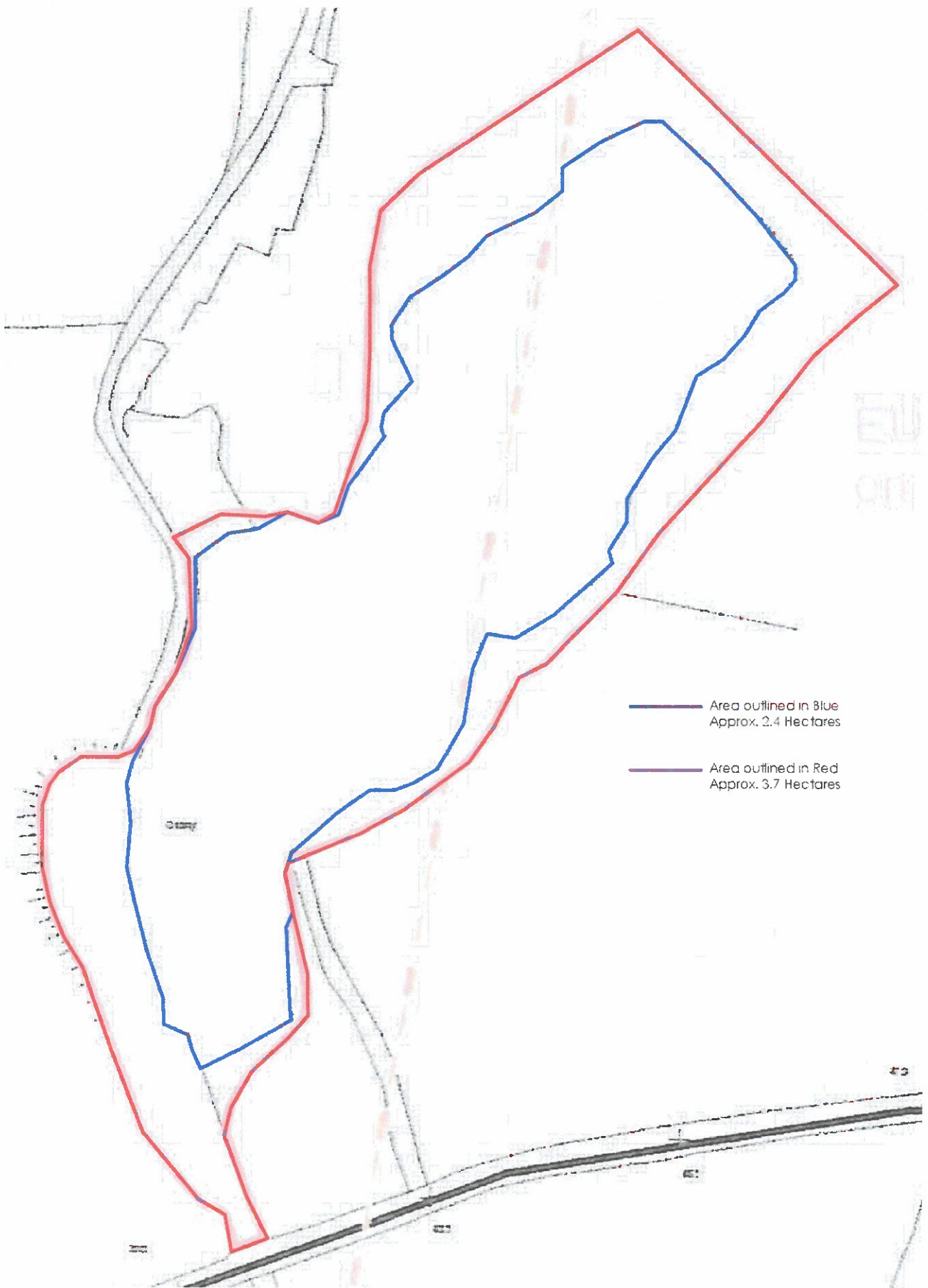


Image 6.9

Extraction area in 2012 for S261A process

[www.donegalcoco.ie](http://www.donegalcoco.ie)

### 6.7.1 What should the PA (and ABP) have considered?

For the purposes of S261A the test that each Planning Authority had to carry out is set out in S261A(2) of the Act which states that: -

(2) (a) Each planning authority shall, ...**examine every quarry** within its administrative area and **make a determination** as to whether—

(i) **development was carried out** after 1 February 1990 F474[...] which development would have required, having regard to the Environmental Impact Assessment Directive, an environmental impact assessment or a determination as to whether an environmental impact assessment was required, but that such an assessment or determination was not carried out or made, or

(ii) **development was carried out** after 26 February 1997, F474[...] which development would have required, having regard to the Habitats Directive, an appropriate assessment, but that such an assessment was not carried out.

The key words, which seems to have been missed by the Planning Authority, are ‘Development was carried out’. At no point had the test been to determine whether a previous decision to grant permission should have been subject to EIA/AA and it is here that it is considered that a significant error has been made.

It is also necessary that the development was carried out, not that a grant of permission had been issued for that development.

Development is defined in Section 3 of the Planning and Development Act 2000 (as amended) as: -

...the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.

Nowhere in the Planning Act does it state that you are required to apply for substitute consent for a development that was subject to a grant of permission if that development has not been carried out.

It appears that both the Planning Authority and the Board (see below) made their S261A decisions on the basis of the 2009 application for permission for the development of a quarry with an extractable area of 4.64ha rather than taking into consideration the fact that the relevant extracted area of the quarry in 2012 was only 2.06ha (at the time the PA determination issued in July 2012).

We have already provided evidence in the form of a site layout plan from the 2009 application (for which permission expired in December 2014) that the extracted area of the site at that time site was 2.03ha, which is c40.6% of the EIA threshold for quarries, while it has grown by 0.03ha to 41.2% of the threshold by 2012.

### 6.7.2 An Bord Pleanala S261A Assessment and Decision

We wish to state at the outset that An Bord Pleanala set aside the determination of Donegal County Council in respect of the requirement for carrying out an Appropriate Assessment.

The Inspector’s report notes that the Planning Authority determined that *the total quarry area is 5.44ha (increased from 1.86)*. 5.44h accords with the total site area set out in the 2009 planning application form in reg. ref. 09/60062.

The Planning Authority response to the Board (paragraph 6.1.0) stated that: -

*as the overall area of the quarry exceeds 5ha and given its proximity to the River Finn SAC, the Council have determined that a determination as to whether an EIA was required or an appropriate assessment was required should have been carried out.*

The above statement confirms that the Planning Authority took immaterial matters into consideration.

At paragraph 11.2.3 the Inspector stated that: -

*The subject quarry, when permission was most recently being sought was for an overall site area of 5.44ha and an area of extraction of 4.64ha.*

In light of the above, the Inspectors had unfortunately followed the incorrect area of extraction stated by the Planning Authority as the application for Substitute Consent that is currently being considered by the Board is for an extraction area of 2.52ha, as well as 1.62ha of topsoil removal (that has been revegetated).

At paragraph 11.2.4 of the Inspector's assessment it is stated that: -

*Given the incremental increase of the excavation area and the overall quarry area over a period when new environmental issues arose, and the fact that the most recent planning application brought the excavation area to just below the mandatory Environmental Impact Assessment threshold, it is considered that a determination as to whether an Environmental Impact Assessment was required should have been carried out. Therefore I concur with the assessment of the Planning Authority and recommend confirmation that development was carried out after the 1st of February 1990 and that a determination as to whether an Environmental Impact Assessment was required and was not carried out or made.*

The conclusion of both the Planning Authority and the Board Inspector was that when a planning application is made for a **total extraction area of 4.64ha** within a site of 5.44ha (as that was the site area in reg. ref. 09/60062) that at the very least consideration should have been given to determining whether or not an Environmental Impact Assessment was required.

However, it is clear that neither the Board nor the Inspector asked themselves the correct question and that they failed to confine their assessments to the actual area of extraction in 2012, but instead focussed upon the area that was subject to a 2009 grant of permission.

#### **6.7.4 An Bord Pleanála's S261A Direction**

An Bord Pleanála issued its decision on 13<sup>th</sup> June 2013 and the direction of the Board stated that: -

The Board decided as follows:

1. To **confirm** the Determination of the planning authority in respect of this quarry made under section 261A(2)(a)(i) of the Planning and Development Act 2000 (as amended); and
2. To **set aside** the Determination of the planning authority in respect of this quarry made under section 261A(2)(a)(ii) of the Planning and Development Act 2000 (as amended)

The Board decision regarding Section 261 261A(2)(a)(i) is generally in accordance with the Inspector's recommendation.

In deciding not to accept the Inspector's recommendation regarding 261A(2)(a)(ii) the Board had regard to history of planning permissions on site including the 2009 permission when the impacts of the surface water discharges from the development to the River Finn SAC were considered at further information stage. The Board also noted that this application was considered in advance of the publication of the 'Appropriate Assessment for Plans and Projects in Ireland – Guidance for Planning Authorities' and noted the planning authority's issuance of a licence to discharge trade effluent to a tributary stream of the River Finn SAC.

### **6.8 First requirement to apply for Substitute Consent**

Following from the decision of the Board on 13<sup>th</sup> June 2013 Patton Bros. Quarry Limited were required to apply for Substitute Consent within a period of 12 weeks of that decision.

As there were still 18 months remaining in the life of permission 09/60062, Patton Bros. Quarry Limited did not apply for Substitute Consent and once the life of the permission expired in December 2014, no additional permission existed for the quarry. All works carried out before that date were authorised and further extraction within the quarry after that date would be deemed to be unauthorised.

The consequences of the decisions and determinations of both Donegal County Council and An Bord Pleanála left Patton Bros. Quarry Limited in a situation that they would not otherwise have found themselves had the correct area of extraction been considered under S261A rather than the much larger area which had been subject to application reg. ref. 09/60062.

### **6.9 15/50834**

Patton Bros. Quarry Limited only became aware of the consequences of their failure to act on the S261A decisions and determinations in July 2015 when a planning application was submitted to Donegal County Council on their behalf for a development of the following description: -

*Planning Permission and Retention Planning Permission for the following: -*

*(1) extension to and continuation of use of existing stone quarry which includes extraction of stone including blasting, excavating, crushing and screening of rock and all ancillary and associated site works including all associated landscaping and restoration works and (2) provision of a designated*

area for storage of demolition waste materials, the waste storage will including (a) demolition brick, concrete and stone to be recycled at the plant; producing crushed aggregates to be used as fill materials; (b) demolition wood to be stored and sent for recycling and (c) steel and metals to be stored and sent to local scrap metal recycling plant and retention permission for (1) existing quarry to include weighbridge, wheel wash, lagoons, storage of machinery ancillary to existing quarry site office, canteen and associated structures including septic tank; (2) removal of top soil over area of proposed extension of quarry and all associated and ancillary site works. the planning application is accompanied by an e.i.a. and an n.i.s.

The most notable element of the application is contained in the very last line which states that: -

*the planning application is accompanied by an e.i.a. and an n.i.s.*

There are a number of facts to note in the application, the first being that Patton Bros. Quarry Limited commissioned the preparation of a Natural Impact Statement (Appropriate Assessment) despite the fact that the Board set aside the determination of Donegal County Council in its meeting of 13<sup>th</sup> June 2013 where it decided: -

*2. To set aside the Determination of the planning authority in respect of this quarry made under section 261A(2)(a)(ii) of the Planning and Development Act 2000 (as amended).*

Patton Bros. Quarry Limited were clearly unaware that the Board had decided an Appropriate Assessment was not necessary. The letter from Donegal County Council that notified Patton Bros. Quarry Limited that the application could not be considered, stated that: -

***I wish to advise you that the Planning Authority has determined that an Environmental Impact Assessment would have been required for the retention element of the application had an application for permission been made before it was commenced.***

*In this regard Section 34(12) of the Planning and Development Act, 2000 (as amended) states that "A Planning Authority shall refuse to consider an application to retain unauthorised development of land where the authority decides that if an application for permission had been made in respect of the development concerned before it was commenced the application would have required that one or more than one of the following was carried out – (a) an environmental impact assessment, (b) a determination as to whether an environmental impact assessment is required, or (c) an appropriate assessment." Section 34(12B) of the Act further states "where a planning authority refuses to consider an application for permission under subsection (12) it shall return the application to the applicant, together with any fee received from the applicant in respect of the application, and shall give reasons for its decision to the applicant."*

*Accordingly I am to advise you that your application cannot be considered by the Planning Authority and is returned herewith.*

The retention element referred to by Donegal County Council refers to an area of 5.0ha as stated in the planning application form and on that basis the decision of the Planning Authority would appear to be logical and correct as they cannot consider an application that includes a retention element and requires EIA.

However, considering that the extraction area of the quarry was only 2.06ha in 2012 we need to investigate where the retention element of 5.0ha have come from in the 3 years to July 2015. In addition, the new works were to be 2.4ha.

<b>11</b>	<b>Site Area</b>	
	Area of site to which the application relates in hectares:	<b>8.34 Ha</b>
<b>12</b>	<b>Where the application relates to a Building or Buildings</b>	
	Gross floor space <sup>5</sup> of any existing buildings in m <sup>2</sup>	See att dwg. no.15/095C
	Gross floor area of proposed works in m <sup>2</sup>	2.40 Ha
	Gross floor area of work to be retained in m <sup>2</sup> (if appropriate)	5.00 Ha
	Gross floor area of any demolition in m <sup>2</sup> (if appropriate)	

### 6.9.1 Scale of quarry in 2015 and 2021

The Site Layout Plan submitted to Donegal County Council in July 2015 showed the extraction area as being 5.0ha with a further 2.4ha being dedicated to new extraction all within a site of 8.34ha. The area earmarked as retention area includes a large area of ground that was previously the subject of applications for permission and retention and as it is exhausted it should simply be shown as part of the site that is seeking continuation rather than retention. Only those areas that are unauthorised should be subject to retention and the description of the development in the public notices is somewhat misleading.

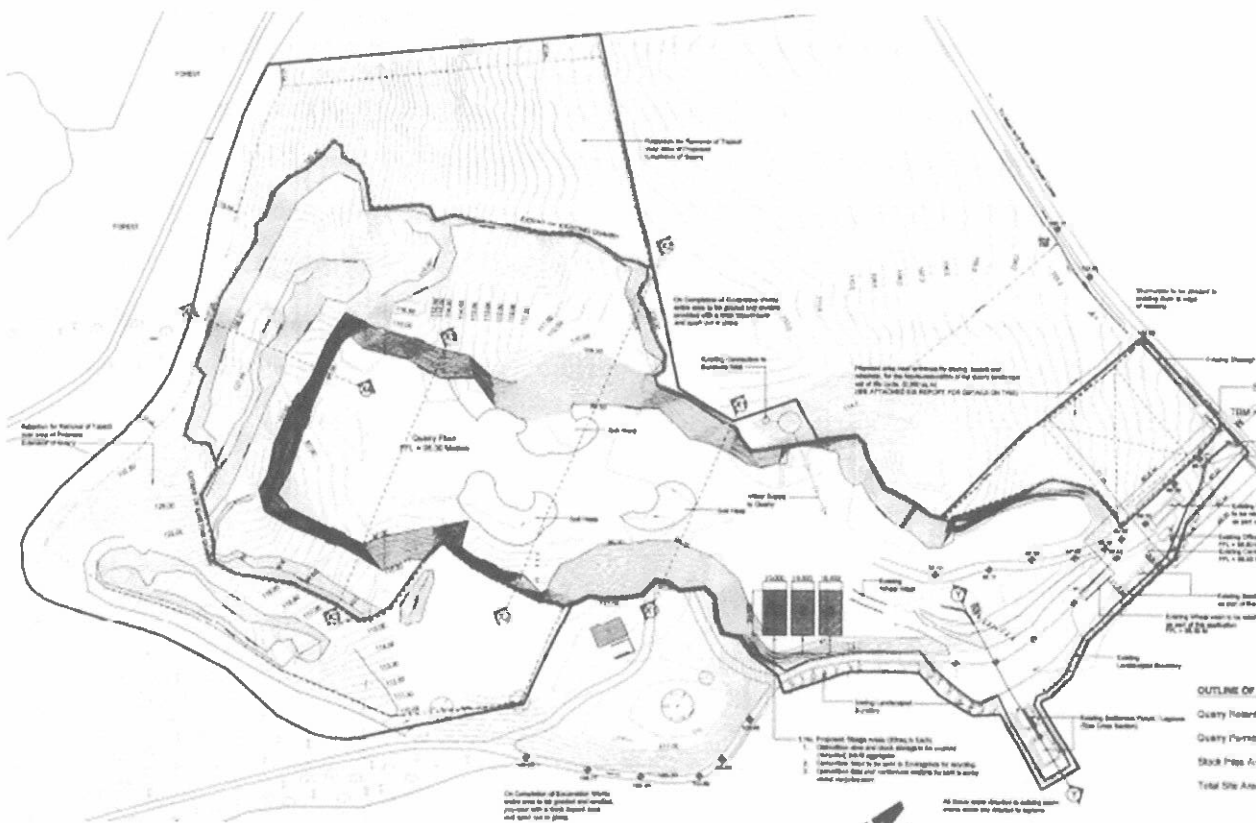


Image 6.10

Site Layout 2015

The area of extraction that could be considered for EIA purposes in 2009 was 2.03ha. The actual increase in area from 2009 to 2015 is shown in image 6.11 below and is 0.49ha. When the two are combined, the total area of extract as of June 2015 was 2.52ha, which is only 50.04% of the EIA threshold of 5ha.

This area of 2.52ha is the area that the Board later determined at the leave to apply stage was the area of extraction.

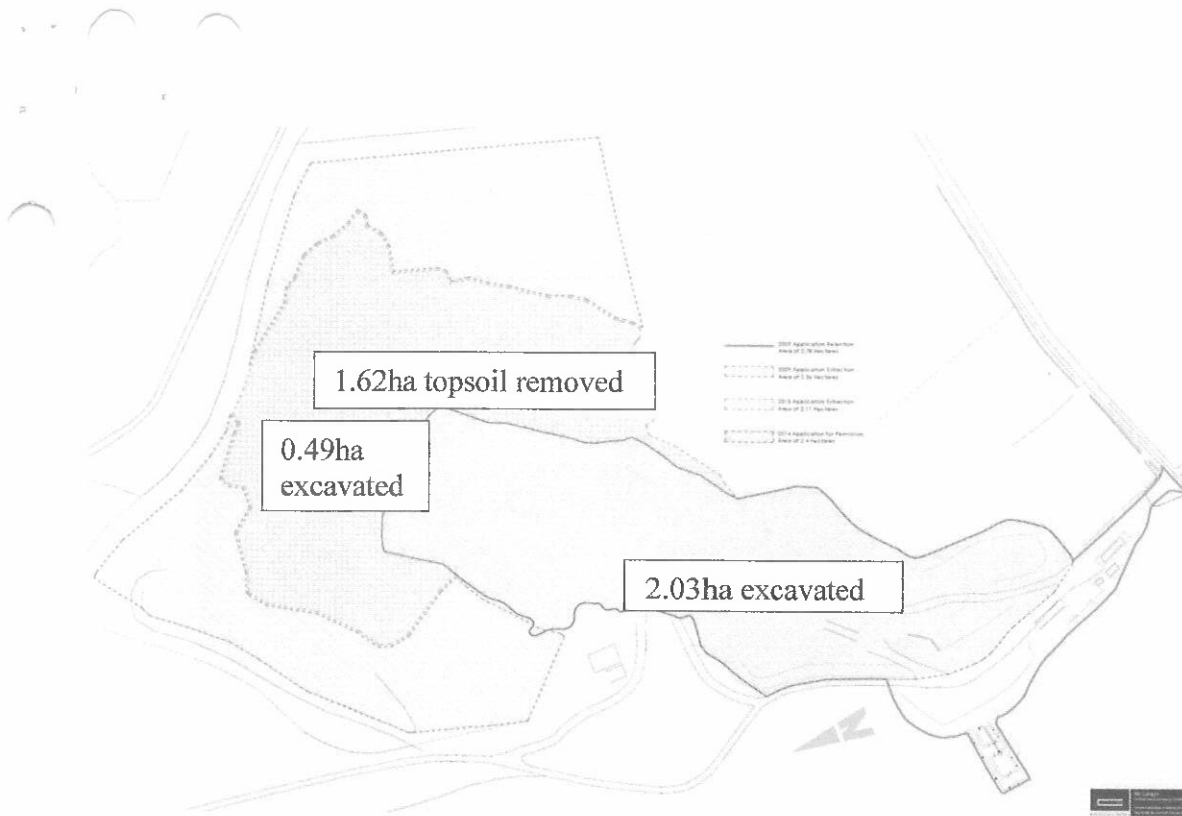
In addition, the applicant had cleared the topsoil from a further 2.11ha of ground prior to the expiration of the 2009 permission in December 2014 the significant majority of which was carried out with the footprint of the extension permitted under 09/60062. The majority of this work was carried out as authorised development (pre December 2014) and should have been subject to permission for continuation rather than retention.



**Image 6.11**                      **Increase in footprint of quarry from 2009-2015**                      **McCullagh Architecture and Surveying**

Following from Images 6.10 and 6.11, had the S261A review been carried out on the basis of what was extracted rather than what had permission for extraction (i.e. as recently as June 2015 the area of extraction was only 50% of the EIA threshold and in 2012 was only 2.06ha), the quarry operators would not have found themselves in the difficult position that did in 2015 and still do in 2021 and had their case been assessed based on the area of extraction they would simply have had to lodge a new application for permission directly to the Planning Authority in the first instance rather than to be seeking leave to apply for substitute consent as they had to do almost five and half years ago, in March 2016.



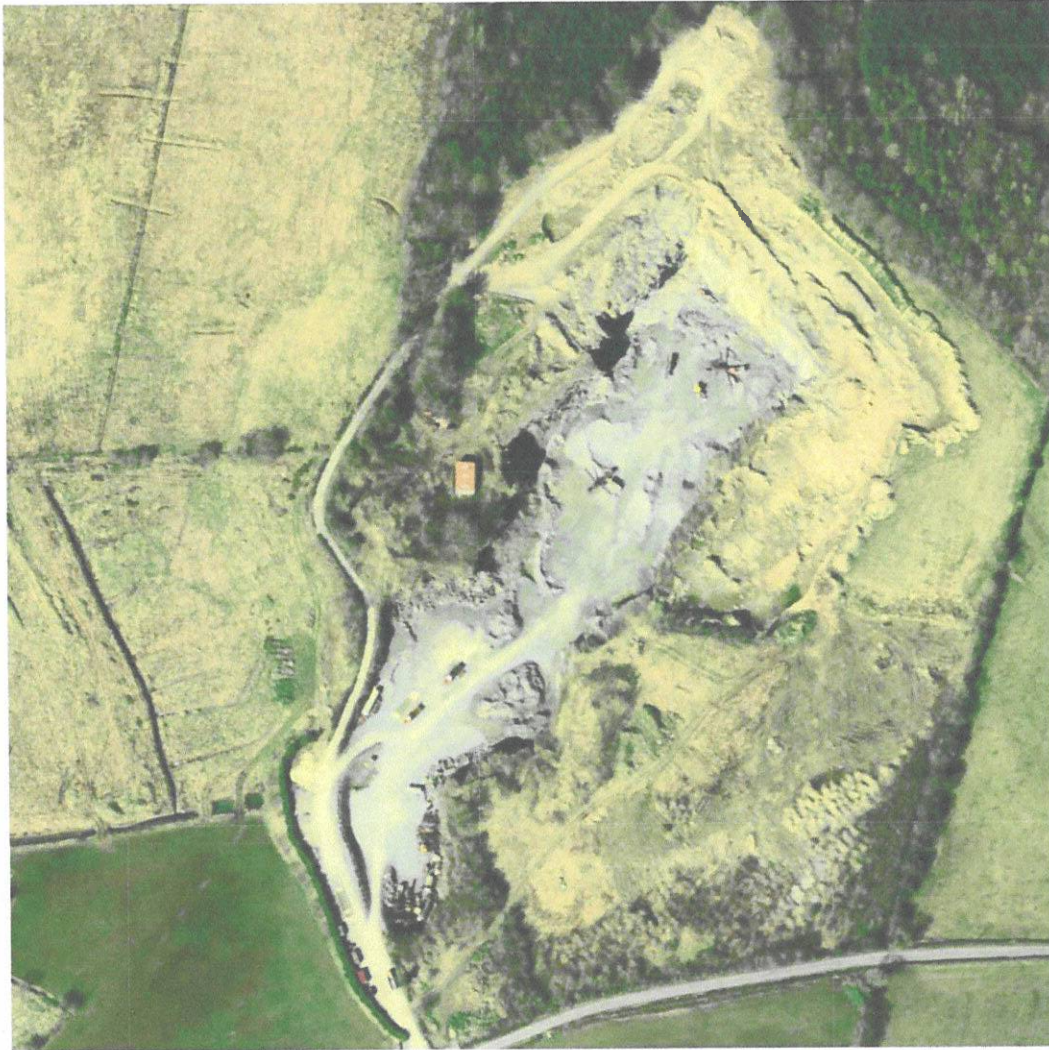


**Image 6.12 Increase in footprint of quarry from 2009-2015** **McCullagh Architecture and Surveying**

The actual areas that have been extracted that would be subject to EIA consideration would be 2.03ha (2.36ha – 0.33 pre 64 area) + 2.11ha (of which 0.49 has been excavated by July 2015 – shortly after the life of the 09/60062 permission expired). Topsoil has been removed from 1.62ha (which combined with the 0.49ha is 2.11ha). The total area that was fully excavated or had the topsoil removed in 2015 was 4.13ha which is still 82.6% of the mandatory EIA threshold.

The areas cited in image 6.13 are the areas that are subject to this application for substitute consent.

Image 6.13 below shows the area that had been cleared of topsoil as part of the preparatory works for further excavation Image 6.14.



**Image 6.13** Cleared topsoil consistent with images 6.10, 6.11 and 6.12 from [www.osi.ie](http://www.osi.ie)

Image 6.14 below which is an aerial photograph extracted from [www.googlemaps.com](http://www.googlemaps.com) and was captured in early summer 2021 shows that much of the area that had been clear in 2015 has seen regrowth due to the level of inactivity and is consistent with the expansion of the quarry shown in image 6.11.

In 2021 the quarry remains as per image 6.13 reflects the tidying up of the quarry that was permitted by Donegal County Council and was noted by the Board Inspector in Paragraph 5.2 of their assessment of the application for leave to apply for substitute consent LS0027, where they stated: -

#### **5.2. Planning Authority Response**

The planning authority submitted copies of correspondence with the applicant which confirmed that there were no outstanding enforcement issues with the site. The correspondence stated the authority's opinion that, although permission for quarry operations had expired in December 2014, the removal of stockpiled material from the site as part of an orderly wind-down over 2016 would be reasonable.



**Image 6.14** Vegetation regrowth evident in 2021 due to inactivity at quarry [www.googlemaps.com](http://www.googlemaps.com)

There has been no new quarrying activity in the quarry since 2015 while a new security fence has been erected around the perimeter of the landholding as per images 6.15 and 6.16 below.



**Image 6.15 New fence erected around perimeter of quarry**



**Image 6.16 New fence erected around perimeter of quarry**

## 6.10 Exceptional Circumstances responses in 2016

We will now set out each of the Exceptional Circumstances criteria (a) to (g) along with responses that include some information previously provided to the Board in 2016 and updated to reflect new information considered material.

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

### Response

At the time the quarry was being considered under S261A both Donegal County Council and An Bord Pleanála were working on the basis that the area of extraction was 4.64ha when in fact the actual area that could be considered as the area of extraction was only 2.06ha which was only 41.2% of the EIA threshold. In addition, the Board also determined that Appropriate Assessment was not necessary. As of June 2015, the area of extraction was only 2.52ha which is 50.4% of the EIA threshold and the quarry has not increase in size since that time as it has been closes pending a decision on this application for Substitute Consent. An additional area of 1.62ha of topsoil that had been removed, most of which was carried out as authorised development under the grant of permission 09/60062 has since been revegetated as per image 6.13 above.

The EIA that was submitted in 2017 was later updated following a request for further information issued by the Board in 2018 to reflect changes in the EIA Directive that came into effect after the rEIA was submitted.

As the Board had determined in 2012 that an application be made for Substitute Consent for the larger area of extraction 4.64ha was appropriate, that the actual area of extraction is only c2.52ha, and that Appropriate Assessment was not necessary, then there is no reason why the regularisation of the quarry through substitute consent *would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive.*

The Board must not lose sight of the stage we are at, in that this is only the stage of addressing the past and is not guarantee that any future applications for further development will be granted at this site.

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

The applicants in this case have relied upon professional assistance and the planning knowledge of the Planning Authority and An Bord Pleanála since the first application was submitted in 1999 and are not planning experts. Such is the complexity and ever changing nature of the legislation relating to quarries that even the Planning Authority was unaware that the quarry was authorised when they served enforcement proceedings in 2009 declaring that the quarry was unauthorised, as it had not realised that in the issuing of restated conditions under S26 it was effectively granting a new permission. As no condition was attached to the restated conditions limiting the life of the permission it could reasonably be considered that permission

only expires when an area of 4.609ha had been extracted. In addition, both Donegal County Council and An Bord Pleanála misinterpreted the area of extraction for the area that was permitted when assessing the quarry under S261A.

The works that have been carried out to date including 2.52ha of extraction and 1.62ha of topsoil removal (since revegetated) were carried out under a series of grants of permission, with the last permission expiring in December 2014.

The quarry had been operated legally under a number of different grants of permission until December 2014 and an area of only c2.52ha had been extracted by that time, which is just over 50% of the EIA threshold. No extraction has occurred within the quarry since then with the exception of works permitted by the Planning Authority as described in paragraph 5.2 of the Board Inspector's report in the application for leave to apply for substitute consent, which set out Donegal County Councils position that it was 'the authority's opinion that, although permission for quarry operations had expired in December 2014, the removal of stockpiled material from the site as part of an orderly wind-down over 2016 would be reasonable'. Extraction and quarrying activity have now ceased at the quarry for more than 5 years. Therefore, the development that has been carried out was done within the life of grants of permission and the applicant could reasonable have had a belief that the development was not unauthorised.

As none of the planning professionals involved in the quarry over the years since 1999 seemed to be aware of the planning status of the quarry, it is very reasonable to conclude that the applicants who are not planning experts 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;**

#### **Response**

Based on the scale of the extraction within the site and the previous decision of the Board that an AA was not required and a remedial EIA could be carried out for a quarry of 4.64ha and now being aware that the actual area excavated was only 2.52ha, the ability to carry out an assessment of the environmental impacts of the development has not been substantially impaired as such an assessment has been carried out and submitted to the Board in respect of 2.52ha of excavation and 1.62ha of topsoil removal and the rEIAR was later modified at the request of the Board to comply with the requirements of Article 391) of Directive 2014/52/EU. The ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment has not been substantially impaired.

With respect to public participation, Section 177H (1) of the Planning and Development Act 2000 (as amended) which came into effect on 19<sup>th</sup> December 2020 by way of Section 7 of the *Planning and Development, and Residential Tenancies, Act 2020* (27/2020), provides that: -

Any person (other than the applicant for substitute consent) or a planning authority may make submissions or observations (including submissions or observations as to the existence or absence of exceptional circumstances justifying a grant of substitute consent) to the Board in relation to an application for substitute consent, and any such submissions or observations shall be in writing.

Therefore, public participation in such an assessment has not 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;**

### **Response**

The Planning Officers report prepared as part of the section 261A review identified the characteristics of potential impacts and stated that: -

*Having considered the nature of the proposal, the planning authority considers that the most likely significant impacts would be as follows: -*

- 1. Impacts on human beings.*
- 2. Impacts on traffic flows and management.*
- 3. Impacts on the Visual Amenity & General Landscape Character of the area.*
- 4. Impact on Historical and Archaeological features.*
- 5. Noise and Vibration*
- 6. Soils and Geology*
- 7. Air and Climate*
- 8. Ecology*

The detailed assessment of the listed potential impacts stated that the *most obvious impacts as noted above are to the residential amenity of the dwellings within 1km of the quarry and to the water quality of the nearby water courses which flow into the River Finn SAC.*

It should be noted that the Board decided that a quarry of 4.64ha on the site did not require an Appropriate Assessment. While the quarry is located within 2.5km of Ballybofey/Stranorlar, there are relatively few houses within 1km of the site and many of those houses have been built since the quarry recommenced in 2000 and would have been built in the knowledge that a quarry was operating in the area.

This matter was addressed in the remedial EIS and modified rEIAR that accompanies the application for Substitute Consent.

The S261A planning report also states that *given the overall size of the quarry now exceeds 5 hectares the most obvious visual impact will be visual (no screening measures have been put in place) and environmental (impact on water courses, water table, loss of flora and fauna)*. Again, visual impact is addressed in the modified EIAR that forms part of this application.

The quarry operators have in place a very high quality system of ponds and regularly monitor the water quality to ensure that all water leaving the site is of a quality that will have no detrimental impact on the environment and this has been acknowledged by the Board in its S261A decision, where it acknowledged that a licence had been issued to Patton Brothers Quarry to discharge trade effluent to a tributary stream of the River Finn SAC.

With respect to 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, we refer the Board to relevant section of the modified EIAR which was submitted to the Board in August 2018 and sets out the impacts of the existing quarry development including cumulative impacts.

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

The Board has already determined that a quarry with an extraction area of 4.64ha on this site would not have a significant effect on a European site and as the actual area of extraction is much smaller at 2.52ha, the same principle applies to the quarry in this instance.

It has been demonstrated in the rEIAR that all of the environmental matters raised by Planning Officer's S261A report can be remediated by appropriate design and have largely been dealt with already. For example, in terms of visual impact, due to the nature of topography in the Finn Valley area and extensive local tree and hedgerow cover, the quarry is not and has not been visible over a wide area and is set below a forested hill into which the quarry assimilates. In the years since the application for Substitute Consent was submitted, the perimeter hedging and trees have continued to grow around the site boundary such that the quarry is not visible in the landscape on approaching the site.

Bi Annual monitoring for the Discharge of Trade Emission (License No. LWat63), in the Annual reports by the Donegal County Council Chemistry lab shows that the quarry has operated the treatment of trade discharging compliance with parameters as set by the local authority.

Matters such as dust, noise and traffic are no longer issues as the quarry is now closed and none were found to be significant in the assessments carried out. We refer the Board to the modified rEIAR and it is considered that there are no significant effects on the environment that need to be remediated that would preclude the Board from granting Substitute Consent. Any future proposals for new quarrying activity on the site will be required to carry out further assessments.



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

As per the chronological planning history above, Patton Brothers Quarry Ltd operated within the confines of several grants of permission.

On October 22<sup>nd</sup> 2015 Donegal County Council wrote to Patton Brothers Quarry Ltd and stated the following (extract from letter): -



**Comhairle Contae  
Dhún na nGall**  
Donegal County Council

[www.ccdhunnangall.ie](http://www.ccdhunnangall.ie) [www.donegalcoco.ie](http://www.donegalcoco.ie)

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**Ref No: EUQY 31 (DCC)  
SH 05E.SH0005 (An Bord Pleanála)**

22<sup>nd</sup> October, 2015.

Patton Brothers Quarry Ltd.  
Castlebane,  
Stranorlar,  
Co. Donegal.

**Re: Application for Substitute Consent / Application for Leave to apply for Substitute Consent via An Bord Pleanála. (Sec. 177D of the Planning & Development Act).**

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You may be aware that Sec. 177D of the Planning & Development Act sets out certain circumstances whereby a landholder / operator of a quarry may seek leave to apply for Substitute Consent, where certain factors are taken into account by An Bord Pleanála.

I wish to confirm to you, should you seek leave to apply for Substitute Consent, Donegal County Council accept as a matter of record, the following:

- There have been no complaints made to the Council in relation to matters of non compliance with Conditions of the aforementioned permission, and there is currently no extant Planning Enforcement proceedings pertaining to the site.

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As the quarry is currently closed no further enforcement matters arise.

A chain-link fence has been erected around the site in the period since the permission elapses at the request of the Planning Authority and is shown in images 6.15 and 6.16 above.

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

In light of the fact that both the Planning Authority and the Board made their S261A decisions on the basis of an incorrect extraction area of 4.64ha and that a determination as to whether or not an EIA should have been carried out but was not, was based on this area, when in fact (as we have proved above) that the actual area of extraction was only 2.06ha in May 2012 when Donegal County Council visited the site, and was only 2.52ha in 2015 after which extraction ceased, it is considered that had the S261A review been based on the actual area excavated to that point in time, that the Board may well have decided that a determination as to whether or not an EIA was required would not have been necessary and Patton Bros Quarry Ltd. would not find themselves in the position that they do today.

In-fact it is considered that Patton Brothers have a decent case to make that as they had permission for everything up to December 2014 (which was marginally only over 50% of the EIA threshold) and the Board and the Planning Authority both erred in taking account of an incorrect extraction area (4.64ha) and as there has been little activity within the quarry since December 2014, that they were entitled to make an application of the form that they did in July 2015 under planning reg. ref. 15/50834 directly to Donegal County Council and that that application should not have been refused to be considered by the Planning Authority.

However, while the legislation is set up to punish offenders who quarry without permission or in breach of their permissions, it does not contain any provisions that permit errors of interpretation such as in this case to be rectified. The Patton Brothers have consistently done the right thing from the first application in 1999 and continue to try to do the right thing, subject to the best available advice and it is considered on that side they have been let down by a lack of fair process and decision making.

It is considered that the Patton Bros Quarry Ltd should never have found themselves in this position in the first place had the S261A review been about the area of extraction rather than the area permitted in the 2009 grant of permission.

### **6.11 Conclusions**

Substitute Consent applies only to the past and not the future and as the area of extraction is only 2.52ha at the time of writing, well below the area of extraction (4.64ha) that the planning authority and Board assessed in 2012 and considered appropriate to be subject to an application for Substitute Consent and the fact that the applicant meets all seven of the Exceptional Circumstances criteria set out in the S177D(2) of the Planning and Development Act 2000 (as amended), that extraction has ceased on site, that the Board has already determined that a larger area of extraction would not require Appropriate Assessment, it is considered that exceptional circumstances exist in the case of Patton Bros Quarry and it is therefore requested that the Board issues a grant of Substitute Consent to allow Patton Bros to proceed to the next stage where the entire quarry will once again be subject to environmental assessment and the full rigours of the planning system.

Yours Sincerely



Joe Bonner

