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An Bord Pleanála,
64, Marlborough Street,
Dublin 1.
D01 V902

30th June 2022

Your Case Ref. No: ABP-313730-22

Planning Authority Ref. No. EX1002

AN BORD PLEANÁLA	
LDG-	_____
ABP-	_____
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Time: _____	By: <u>post</u>

Ref: Whether the continuation of quarrying in a manner commensurate with the level of activity which prevailed pre-1963, is or is not development or is or is not exempted development.
Timothy O'Sullivan, Dereendrislagh, Sneem, Co. Kerry.

Dear Sir/Madam,

I refer to your letter of the 7th June last, in which you invited a submission in relation to the referral by Kerry County Council of the request for a Section 5 Declaration, which I submitted on behalf of Timothy O'Sullivan, Dereendrislagh, Sneem, Co. Kerry.

1.0 Introduction

The applicant Mr. Timothy O'Sullivan seeks a declaration that the level of quarrying commensurate (proportionate) with the pre-1963 level of quarrying is exempted development.

The case is summarised as follows:

- (i) It is not disputed by the Planning Authority (PA), that the quarry existed prior to 1963
- (ii) The quarry was subjected to the Quarry Registration process, under Section 261 of the Planning and Development Act 2000 – with a decision issuing from the PA to grant registration with conditions on the 3rd March 2007.
- (iii) Section 24 of the Local Government (Planning & Development) Act 1963 has not been overtaken or superseded by subsequent legislation and as such permits the continuation to completion of works which commenced prior to the date appointed in the Act i.e., 1st October 1964.

2.0 Summary of Recent Planning History

- (i) Quarry operated prior to 1963 - this is an established and is undisputed by the PA
- (ii) Application (QY 117) for Registration under Section 261 of Planning and Development Act 2000 lodged with Planning Authority on 26/04/05. The area of the quarry was given 4.718 hectares with an extraction rate/traffic generation of 16 lorry loads per day.

The PA granted the Quarry Registration subject to conditions with decision signed on 8/03/2007.

It should be noted by An Bord Pleanála that Schedule 1 of the Registration Notification stated as follows:

"SCHEDULE 1

Having regards to –

- (a) The existing use of the land,*
- (b) The claimed existence of the quarry prior to 1 October 1964,*
- (c) the pattern of development in the area,*
- (d) the strategic role of mineral extraction in the regional construction industry and the provisions of the Kerry County Development Plan 2003 in respect of the extractive industry, and*
- (e) the "Quarries and Ancillary Activities - Guidelines for Planning Authorities" issued by the Department of the Environment, Heritage and Local Government in April 2004*

It is considered that, subject to compliance with the conditions set out in the second schedule, the quarry development would not result in a serious risk to the environment generally, would not seriously injure the amenities of the area or of property in the vicinity, would not be prejudicial to public health and would be acceptable in terms of traffic safety and convenience. The quarry would, therefore, be in accordance with the proper planning and sustainable development of the area.

Clearly at the Section 261 stage, the PA had no environmental issues in relation to the quarry – and if there were issues, the registration would not have proceeded.

- (iii) Enforcement case U362-08 was taken by the PA in relation to adherence issues with the conditions attaching to the Registration. However, the proceedings centred on interpretation of some conditions and the level of development charges – not on

- (iv) Under the revised legislation – Section 261A the PA adjudged the quarry to require Substitute Consent, i.e. planning retention from ABP on the basis may be potential effects on the Natura2000 site with PA Appropriate Assessment Screening Report concluding as follows:

“It is understood that these quarry works for the most part occurred before the 3rd of July 2008. Appropriate Assessment of the works carried out post the 3rd July 2008 is not considered to be required in this instance”

The PA EIA Screening Report concluded that *“In the light of the above it is considered that an Environmental Impact Assessment should have been carried out on this quarry. In addition given the extent of development carried out since 1995 and in particular the intensification of the operation on site this period, an EIA screening should also have been carried out.”*

The owner was then notified by the PA that he could apply to the ABP for a review of the decision or apply for Substitute Consent under Section 177E of the P&D Acts 200-2012. A copy of the Section 261A(3)(a) is attached to this response.

- (v) Substitute Consent – for reasons now irrelevant to the case now before ABP, the quarry owner did not apply for Substitute Consent and two subsequent applications to ABP for Leave to Apply for Subsequent Consent, in 2014 and 2019, were not successful.

3.0 Commentary on Planning Procedure

In the case of this quarry, the planning procedure was straightforward – up to and including the Registration process. Any difficulty with the conditions attaching to the Registration were clarified and implemented – and the quarry operated untroubled by the PA or third parties for a period up to 2014, when the PA, effectively, issued closure notice (attached) on foot of the failure of the owner to apply for Substitute Consent. However, a review of the PA files to this point points to a situation that within the PA department, the procedure in relation to Section 261A may not have been fully understood. Certainly, the PA were mindful of the need to make the case that increased production had occurred post 1963 and when it began – and the date they fixed on was 1st February 1990. They arrived at the 1990 date on the basis of their examination of historic aerial photographs from the OSI – but they did no quantitative analysis, which could be undertaken using the photographs and site measurements. Instead, they made an unscientific call on the quantity of rock being excavated after 1st February 1990. However, the important point is that the PA made a distinction between the development carried on up to 1990 and post 1990 and notwithstanding their omission of a quantitative analysis, the manner in which they conducted their business is a tacit admission that the level of activity up to 1990 was permitted – and that level of activity, i.e. development, did not require screening.

4.0 Implications of Section 24 of the Local Government Act 1963

Section 24 allowed works, i.e. development, which had commenced prior to the appointed date, 1st October 1964 to continue to completion. At this stage there are several case histories where the implications of Section 24 have been confirmed.

The author of this letter is in some way appraised of the following judgements:

- (i) *Hehir v An Bord Pleanala* – Judgement of Mr. Justice Baker delivered on the 23rd February 2016 which stated at paragraph 31

‘While I note third party submissions on the status of the application, it can be argued that the ruling of the European Court of Justice in C-215/06 is not directly applicable to this development which commenced pre-1964, as such development was authorised at the time of implementation of the EIA Directive’

and in paragraph 33

In considering an application under the special statutory regime, the planning authority is obliged to first determine whether the activity in respect of which that application was made was the same or substantially the same activity as that carried out in 1964, whether, to use the shorthand found in the authorities, the pre-1964 user was ‘established’. Section 24 of the Act of 1963 is the starting point in understanding the intention of the legislature to confer a class of exemption on pre-1964 works and development. The section permitted the continuation to completion of particular works commenced before the appointed day at an identified location

In his delivery of the his judgement, Justice Baker, at paragraph 34, also refers to an earlier case history as follow:

In Waterford County Council v. John A. Wood Limited [1999] 1 I.R. 556, the applicant sought an order pursuant to section 27 of the Local Government (Planning and Development) Act 1976 restraining the respondent from carrying out quarrying activities on certain lands. The matter came before the Supreme Court by way of a case stated by the High Court on appeal from the Circuit Court. The question posed was whether the quarrying operations being carried on by the respondent were development requiring planning permission. The resolution of that question depended on whether or not the quarrying operations then carried on were or were not development commenced before the appointed day. The Supreme Court held that section 24 of the 1963 Act necessarily permitted the continuation to completion of the works commenced before the appointed day at an identified location, even where they involved a material change in user of the adjoining ground. Murphy J., who delivered the judgment of the Supreme Court, set out the principles to be applied in resolving such an issue in the following terms at pages 561 to 562:-

‘It seemed to me to be clear that the purpose of s. 24 was to permit (among other things) a developer to continue works which he had commenced before the appointed day without the necessity of seeking a planning permission which might not be

forthcoming and the application for which would at the very least involve significant delay.

In Paragraph 38 Justice Baker stated

Accordingly, the point of departure is that a quarrying activity that commenced prior to 1 October, 1964, may lawfully be continued and indeed expanded in a proportionate manner thereafter. As the learned judge noted:-

'[a] mineral extraction operation must, of its nature, expand either down into the ground or up into a mountain, in the case of mining operations, or outwards from an original area of operation in the case of a quarry or open-cast mine'.

As long as such activities commenced before 1 October, 1964, however, and the expansion thereof constitutes a proportionate increase in output and a natural working out of the planning unit, it does not constitute unauthorised development.

- (ii) In the case of Waterford County Council (applicant) v John A. Wood Ltd (respondent) The Supreme Court (The Chief Justice Mr Justice Hamilton, Mr Justice O'Flaherty and Mr Justice Murphy); judgment delivered 29 October 1998 as follows:
Section 24 of the Local Government (Planning and Development) Act 1963 must be interpreted to permit the continuation to completion of works which commenced prior to the date appointed in the Act, i.e. 1 October 1964. This required an examination of all of the circumstances in order to ascertain what was or might reasonably have been anticipated at the appointed date as having been involved in the works then taking place. The Supreme Court so held in declaring that the works carried out by the respondent required planning permission. The crucial factor was that the respondent controlled only eight acres in 1964. The quarrying was now being carried out on a much larger area of land, purchased in 1986. No-one had envisaged in 1964 that the deposit of limestone extended into these lands or that these lands would be acquired by the respondent. Therefore the present operations could not be said to have been anticipated on the appointed date as arising out of the works then taking place.

There are a number of clear directional points to be taken from the above judgements as follows

- that development begun prior to the 1st October 1964 has planning permission and can proceed to completion
- that these developments were in existence prior to the European EIA Directive
- that the development can proceed in a proportionate manner

It is therefore incumbent on ABP to take the above cases, inter alia, into account when considering their decision in this application.

5.0 Conclusion

The applicant, in this case, has been wrestling with a confusing planning process for up to 20 years at this stage. Had the ground rules been clear from the outset the process would have been relatively straight forward and may have involved no more than the Section 261(Registration) with an accompanying environmental report. Had the implications of Section 24 of the Local Government (Planning and Development) Act 1963, been

understood by the people drafting the P&D Act 2000 and in particular viz á viz Section 261, the process could have been simplified and the requirement for supplementary legislation in the nature of Section 261A could have been avoided.

It would have greatly helped planning authorities and quarry owners alike if the process was clearly understood/explained - but although belatedly - it is now fortunate that matters have been finally clarified by the courts.

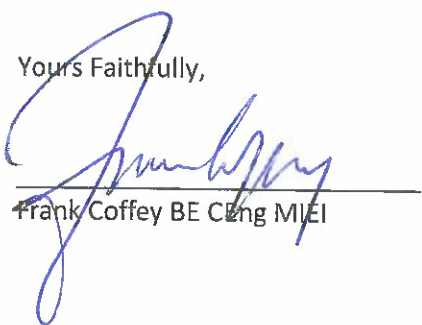
It is irrefutable that Section 24 of the Local Government (Planning and Development) Act 1963 is the overriding legislation in relation to this case – and Gleesk Quarry can continue to operate at a level of activity which prevailed pre-1963 – and can operate in a proportionate manner.

ABP are asked in this case to rule on the very narrow issue of planning only. If ABP agrees with above (and case law) then this Section 5 application must succeed. It is not intended that APB should concern themselves with quantitative assessment or environmental implications of a decision to grant a declaration as sought. These are matters for the PA to consider after a declaration might be given by ABP – and no doubt a declaration that the pre-1963 level of development, i.e. quarrying activity, is exempted – or in other words already permitted by virtue of Section 24, will force planning authorities to re-examine the similar historic processes, which they conducted.

However, be that as it may, APB are asked to confine their examination process to the narrow issue of planning in this case.

We ask the Board to issue the Section 5 Declaration as requested.

Yours Faithfully,



Frank Coffey BE CEng MIEI

Enclosure

Copy of Section 261A(3)(a) Notice

KERRY COUNTY COUNCIL

PLANNING AND DEVELOPMENT ACTS, 2000 TO 2012

SECTION 261A(3)(a) NOTICE

Quarry Reg. No.: EUQY117
Quarry Owner: Timothy O'Sullivan, Derreendrislaugh, Sneem, Co. Kerry
Quarry Operator: Timothy O'Sullivan, Derreendrislaugh, Sneem, Co. Kerry
Quarry Location: Derreendrislaugh, Sneem, Co. Kerry

WHEREAS Kerry County Council has examined the above quarry in accordance with Section 261A of the Planning and Development Acts 2000-2012;

AND WHEREAS Kerry County Council, in considering this determination and decision, had regard particularly to –

- (a) Section 261A of the Planning and Development Acts, 2000-2012
- (b) All relevant information available to it including any submissions or observations received by the authority not later than 6 weeks after the date of the publication of the notice under Section 261A(1)(a)
- (c) Any information submitted to the authority in relation to the registration of the quarry under section 261;
- (d) Any relevant information on the planning register;
- (e) Any relevant information obtained by the planning authority in an enforcement action relating to the quarry;
- (f) Any other relevant information.

AND WHEREAS Kerry County Council hereby **determines** – In accordance with Section 261A(2)(a) that:

- (i) Development was carried out after 1 February 1990, which would have required, having regard to the Environmental Impact Assessment Directive, **an environmental impact assessment** and such an assessment was not carried out.

And

- (ii) Development was carried out after 1 February 1990 which would have required, having regard to the Environmental Impact Assessment Directive, **a determination** as to whether an environmental impact assessment was required, and such determination was not made.

and

(iii) Development was carried out after 26 February 1997, which would have required, having regard to the Habitats Directive, an appropriate assessment, and such an assessment was not carried out.

Reasons:

1. The examination carried out by the Planning Authority concluded that development works carried out after the 1st February 1990 would be likely to have significant effects on the environment. Therefore it is considered that an Environmental Impact Assessment (EIA) is required in this instance.
2. The examination carried out by the Planning Authority concluded that the need for an Environmental Impact Assessment (EIA) could not be ruled out in respect of development works carried out after the 1st February 1990, without the carrying out of a substantial screening assessment. Therefore it is considered that *a determination as whether an EIA is necessary* is required in this instance.
3. The examination carried out by the Planning Authority was unable to rule out the potential for significant effects to Natura 2000 sites in respect of development works carried out after the 26th February 1997. Therefore it is considered that an Appropriate Assessment (AA) is required in this instance.

AND WHEREAS Kerry County Council, hereby **decides** – In accordance with Section 261A(3)(a) that:

(i) The quarry commenced operation before 1 October 1964

and

(ii) The requirements in relation to registration under section 261 were fulfilled

Reasons:

1. The Planning Authority is satisfied that the quarry commenced operation before 1 October 1964, and the requirements in relation to registration under section 261 were fulfilled.

You are therefore directed to apply to An Bord Pleanála, 64 Marlborough Street, Dublin 1 for Substitute Consent in respect of the quarry under section 177E with a remedial environmental impact statement and a remedial natura impact statement in accordance with the determination of the planning authority under subsection (2)(a) not later than 12 weeks after the date of this notice, or such further period as the Board may allow.

You may apply to the An Bord Pleanála, not later than 21 days after the date of this notice, for a review of the determination of the planning authority under subsection 2(a) or the decision of the planning authority under paragraph 3(a). No fee in relation to either application for a review shall be payable.

Referral of this notice to An Bord Pleanála for review, within the time permitted, by the person to whom this notice is issued, or by any other person entitled to be given a copy of the notice, will have the effect of suspending the operation of the notice until the review is disposed of by the Board.

Dated : 07 August 2012


Joan McCarthy

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

