

THE HIGH COURT

JUDICIAL REVIEW

2007 No. 419 J.R.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED BY THE PLANNING AND DEVELOPMENT (STRATEGIC INFRASTRUCTURE) ACT 2006)

BETWEEN

ROADSTONE PROVINCES LTD.

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
WICKLOW COUNTY COUNCIL

NOTICE PARTY

Judgment of Ms. Justice Finlay Geoghegan delivered on the 4th day of July, 2008

Preliminary

1. The applicant is the owner and operator of a quarry at Rockbig, Arklow, County Wicklow. For the purposes of this application, it is assumed to have been the owner and operator of the quarry since prior to the appointed date (i.e. 1st October, 1964) for the purposes of the Planning Acts.

2. By letter of 22nd August, 2006, the notice party referred a question pursuant to s.5 (4) of the Planning and Development Act, 2000, to the respondent "as to whether development being undertaken by Roadstone Ltd. at their quarry at Rockbig, Arklow, County Wicklow, is or is not exempted development".

3. By decision issued by the respondent on 26th February, 2007, it determined:

"(a) quarrying operations to date on site are exempted development and,

(b) the further southward expansion of the quarried area into Arklow Rock at Rockbig, Arklow, County Wicklow, is development and is not exempted development."

4. By order of 31st October, 2007, I granted leave to the applicant to seek *inter alia* an order of *certiorari* quashing the decision of the respondent dated 26th February, 2007, "that the further southward expansion of the quarried area into Arklow Rock at Rockbig, Arklow, County Wicklow, is development and is not exempted development". That order was made following a contested application for leave.

5. The grounds upon which leave was granted are alleged errors of law of the respondent, its servants or agents, in answering the question of the notice party. The individual grounds pursued at the hearing are referred to later in the judgment.

Background

6. It appears from the letter of referral of the notice party that complaints were received by it from individuals in the vicinity of the quarry at Rockbig, Arklow. The notice party examined the complaints and held a special meeting on 3rd August, 2006, at which it was agreed that it submit a s.5 referral to the respondent on the basis that it was considered that intensification had taken place at the quarry. The notice party obtained certain further documentation and in the letter of referral indicated *inter alia* the following:

² Planning authority has accepted the pre-64 status of the quarry.

· Planning authority has determined the Section 261 registration and has required Roadstone to submit a planning application together with an EIS prior to April 2007.

· Roadstone appear to be the owner of all the lands enclosed within the quarry boundary, with the exception of some minor areas, from before the appointed day.

· Planning permissions have been granted from 1970 to 2005 for various ancillary activities within the quarry. No permissions have been granted for quarrying".

7. The notice party then stated under a heading "Grounds of Referral":

"Having considered all the information gathered following the Planning Authority's investigations, the discussions with the local area councillors, and the submissions by third parties in relation to a meeting with Roadstone, it would appear that the current and planned extraction may lead to the removal of Arklow Head in its entirety. This would have a material effect on the views from the south of Clogga by removing an important part of the local landscape. Having regard to the planned extension of the quarrying activity and its resultant impact on the form, character and quality of the landscape, which would be irrevocably altered, the Planning Authority is now of the opinion that the current and planned quarrying may represent a material change of use. On this basis the planning authority would request the Bord to decide whether or not the quarrying activity at Arklow Head is or is not exempted development."

8. On 26th September, 2006, the applicant made a submission to the respondent in response to the referral. It disputed the factual assertion that the current and planned extraction may lead to the removal of Arklow Head in its entirety. It lodged plans indicating the impact on Arklow Head of the current and proposed final extent of the quarry extraction area. These disclosed a reduction in the height of Arklow Head which it was contended was not its removal.

9. The applicant disputed that there was a material change in use arising from the current or planned use of the quarry. It set out the facts in relation to the quarrying activity since 1880 and enclosed a legal opinion of counsel supporting its contention that there was no material change in use of the lands by reason of the current or planned quarrying activities at the Rockbig quarry.

10. On 6th November, 2006, the notice party lodged observations on the submissions of the applicant. They stated *inter alia*:

² The Planning Authority does not dispute that the past, present and future use of this site is quarrying. The Planning Authority in the referral referred to information it gathered, discussions with local area councillors and submissions by third parties in relation to a meeting with Roadstone as the evidence on which it based its opinion. This opinion, in relation to the removal of the particular local feature at Arklow Head, has been confirmed in the Roadstone submission. Therefore, there is no need for the Planning Authority to provide any further evidence."

11. It also stated elsewhere in that submission:

"The subject Section 5 referral is not based on intensification of use."

Applicable law

12. The challenged decision of the respondent is made pursuant to s.5 (4) of the Act of 2000. This provides:

"(4) Notwithstanding *subsection (1)*, a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board".

13. It is important to the issues herein to note that the questions which may be referred and upon which the respondent may make a decision under this sub-section are confined to what "is or is not development or is or is not exempted development".

14. It is common case that on the facts relating to the applicant's quarry, notwithstanding the form of question in the referral, there was, in fact, no question arising as to whether part of the current or proposed use or works is or is not exempted development. "Exempted development" is defined in s.4 of the Act of 2000. The question referred, and on which a decision was taken, was therefore properly confined to what "is or is not development" in relation to the facts pertaining to the applicant's quarry.

15. Development is defined in s.3 (1) of the Act of 2000, as meaning:

". . . 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."

It is well established that "material" in the phrase "material change in the use" in s.3 of the Act of 2000 means "material for planning purposes". See, for example, judgment of Keane J. (as he then was) in the High Court in *Monaghan County Council v. Brogan* [1987] I.R. 333 at p.338.

16. On the facts herein, the development which is in question is "the making of any material change in the use of . . . land". The question referred relates to a potential material change in the use of land and that is the basis upon which the question as to whether or not the existing or proposed use of the applicant's land was development was primarily assessed.

17. However, in relation to quarries, there is undoubtedly considerable overlap and, on occasion, confusion in relation to consideration of the works carried out on the land as part of the quarrying operation and the use of the land as a quarry.

18. As appears from s.3 of the Act of 2000, in addition to a material change in use, it is the carrying out of any works in, on, over or under land which constitutes development. There is no limitation or exclusion for works carried out prior to 1st October, 1964, in the definition in s.3 of the Act of 2000. Similarly, there is no requirement that there be any change in the nature of existing works in order that they constitute development within the meaning of section 3. Accordingly, in relation to a quarry which had been in operation prior to 1st October, 1964, with continuing works being carried out therein, it is, and would be, of no practical benefit to the notice party to ascertain whether or not the works currently being carried out, or intended to be carried out by the applicant at Rockbig, Arklow, are development within the meaning of section 3. It is obvious that they are development.

19. The purpose of the referral by the notice party to the respondent under s.5 of the Act of 2000 appears to be to ascertain whether there is development or, in relation to the future planned use of the quarry, would be development which requires permission in accordance with s.32 of the Act. Section 32(1) provides:

"(1) Subject to the other provisions of this Act, permission shall be required under this Part-

(a) in respect of any development of land, not being exempted development, and

(b) in the case of development which is unauthorised, for the retention of that unauthorised development."

Whilst s. 32 (1) does not contain an exclusion from the requirement to seek permission where the development commenced before the appointed day similar to that contained in s. 24 of the Act of 1963, it appears probable, having regard to s.32 (1) (b) and the definition of unauthorised development that it is not intended that permission be required for works that commenced prior to 1st October, 1964.

20. Section (2) (1) of the Act defines "unauthorised development" as meaning:

"In relation to land, the carrying out of any unauthorised works (including the construction, erection, or making of any unauthorised structure) or the making of any unauthorised use."

"Unauthorised works" are defined as meaning:

"any works, on, in, over or under land commenced on or after 1 October 1964, being development other than . . ."

"Unauthorised use" is defined as meaning:

"in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than . . ."

21. The respondent has no jurisdiction on a reference under s.5 (4) of the Act to determine what is or is not "unauthorised development". It may only determine what is or is not "development". Hence, a planning authority, such as the notice party, cannot refer a question under s.5 (4) as to whether the works or proposed works or use constitutes unauthorised works or use and hence unauthorised development. Determination of what is or is not "unauthorised development" will most likely be determined by the courts where a dispute arises on an application under s.160 of the Act.

22. The reason for which I have drawn attention to the fact that the respondent was considering whether or not there was or is a development by reason of a material change in the use of the applicant's lands, as distinct from the carrying out of any works, is because of the reliance placed by both parties, for different purposes, on the decision of the Supreme Court in *Waterford County Council v. John A. Wood Ltd.* [1999] 1 I.R. 556. That is a decision on a case stated from the High Court (determining an appeal from the Circuit Court) on proceedings under s. 27 of the Local Government (Planning and Development) Act, 1976, seeking an order restraining the respondent therein from carrying on quarrying operations on certain lands. Section 27 of the Act of 1976 is similar to s. 160 of the Act of 2000. The question put by the High Court to the Supreme Court in the case stated was whether the quarrying operations being carried out by the respondent "is development requiring planning permission?". The resolution of that question depended upon whether or not the quarrying operations then carried on were or were not "development commenced before the appointed day" and therefore were or were not excluded from a requirement to apply for planning permission under s. 24 (1) of the Act of 1963. That issue was resolved by the Supreme Court by considering whether or not the works then being carried out by the respondent at its quarrying operations were works which commenced prior to the appointed day. The Supreme Court did this by considering what might have been reasonably contemplated or anticipated as the continuation of works commenced before the appointed day. In the context of the definitions in the Act of 2000, it was a determination as to whether the works were or were not "unauthorised works". That is not a question which the respondent has jurisdiction to determine on the instant reference under s.5 (4) of the Act of 2000. The Supreme Court, in *Waterford County Council v. John A. Wood Ltd.*, was not considering whether or not there had been a material change in use of the lands. On the facts, the only objection appears to have been based upon the carrying out of works without planning permission.

23. In *Kildare County Council v. Goode* [1999] 2 I.R. 495, the Supreme Court determined, in relation to a quarry, that the same operations may, in planning terms, be both "a carrying out of works" development and "a material change in use" development. The respondents had contended that it should be either one or the other. Keane J. (as he then was) at p.499 stated:

"The fallacy in the submission advanced on behalf of the respondents is that it assumes that the necessary consequence of these statutory provisions is that a particular series of operations must in planning terms be either a "material change in use" development or "a carrying out of works" development. But that is not so. To confine oneself to the facts of the present case, when people began to extract sand or gravel from this land before 1964, the land in question was no longer being used for agriculture, but for a form of industrial or quasi-industrial use; see the definition of "agriculture" in s. 2 of the Act of 1963. However, since that process involved the "excavation" of sand or gravel from the land, it also constituted the carrying out of "works" within the meaning of section 2. Thus, applying the terminology adopted by counsel for the respondents, this was both a "use development" and a "works development."

24. Since that decision, it appears clear that the same operations may both constitute works on land and, as such, development within the meaning of s.3 of the Act of 2000, and may be evidence or an indication that there has been a material change in the use of the lands. Nevertheless, the two types of development appear to remain separate and distinct where what is being contended for or queried, as in the referral by the notice party herein, is whether or not there has been a material change in the use of lands, such that there is development of the lands within the meaning of section 3. Then that question must be determined in accordance with the principles which apply to the determination of whether or not there exists a material change in use.

25. The position is further complicated by the definition of "use" for the purposes of the Act of 2000. Section 2 (1) states:

" 'Use' in relation to land, does not include the use of the land by the carrying out of any works thereon."

26. Keane J. in *Kildare County Council v. Goode* [1999] 2 I.R. 495 explains the purpose of this artificial definition in the following terms at p.498:

"The reason for the latter provision can be made clear by an example. In ordinary parlance, putting up a building on farmland hitherto used for growing crops would be treated as changing the use of the land. Since, however, the construction of farm buildings is, to some extent, an exempted development, the draftsman found it necessary to provide that the carrying out of works on land, by itself and of itself, was not a use of land for the purposes of the Act of 1963."

I would respectfully agree with the above construction of the definition of "use" by Keane J. as meaning "that the carrying out of works on land, by *itself and of itself*" (emphasis added) is not a use of land for the purposes of the Planning Acts. However, this does not preclude the works carried out on lands being taken into account in determining the use to which lands are being put, or whether there is a change in the use of the lands. However, the works are only indicative of the nature of the use as distinct from constituting of themselves the use of the lands.

27. Control by the planning legislation of pre-1964 quarries has been altered by s. 261 of the Act of 2000. This section obliges the owner or operator of a quarry to register a quarry with the relevant planning authority. Section 261 (6) permits the planning authority to impose conditions on the operation of the quarry and s. 261 (7) permits a planning authority to require the owner or operator of pre-1964 quarries, which meet certain other criteria and whose operation would be likely to have significant effects on the environment, to apply for planning permission and to submit an environmental impact statement. In determining an application for planning permission under s. 261 (7), the planning authority (and the respondent on appeal) is obliged to have regard to "the existing use of the land as a quarry". Where planning permission is refused, the owner or operator has a right to claim compensation. Section 261 means that a pre-1964 quarry may have to obtain planning permission to continue in operation even in the absence of any material change in use of the lands which comprise the quarry or the commencement of any new works. The applicant submits that this is a recognition by the Oireachtas that the continued use of a pre-1964 quarry (without a material change in use) may have planning implications but that in such circumstances permission is not required by s. 32 (1) of the Act of 2000. Hence, that the enactment of s. 261 supports their construction of the proper approach to determining whether or not there is a material change of use (within the meaning of s.3 of the Act of 2000) of a pre-1964 quarry. The notice party has required the applicant to apply for planning permission under section 261(7).

Respondent's decision and Inspector's report

28. The challenged decision of the respondent, dated 26th February, 2007, that "the further southward expansion of the quarried area into Arklow Rock . . . is development and is not exempted development" follows the recommendation made by the Inspector in her

report of 8th February, 2006. It is common case between the parties that the court should look, in addition to the decision of the respondent, to the Inspector's report in considering the applicant's contentions that the decision is invalid and ought to be quashed.

29. The respondent's decision sets out that it had regard, particularly, to:

- (a) sections 2,3 and 4 and sections 127 to 132 (inclusive) of the Planning and Development Act, 2000,
- (b) the submissions of the parties to the referral in relation to the use of the land since the appointed day (namely, the 1st day of October, 1964) and
- (c) the further southward expansion of the quarried area into Arklow Rock, within an area designated as a proposed Natural Heritage Area and in a manner that would significantly alter the visual appearance of Arklow Rock.

The decision also states that the respondent concluded that:

- (a) there is no clear evidence that the existing works on site constitute intensification of use to the extent that these works could be considered a material change of use, and
- (b) the further southward expansion of the quarried area into Arklow Rock would raise new planning issues as compared with the use of the lands on the appointed day and, therefore, these works would constitute an intensification of use that would amount to a material change of use."

30. Paragraph (b) is the conclusion on which the challenged part of the decision is based.

31. The conclusions reached by the respondent flow from the questions extracted by the Inspector from the submission of the notice party. The Inspector, in my view, is justifiably critical of the content of the referral made by the notice party, having regard to s.127 of the Act of 2000. The Inspector summarised the questions which she considered she could extract as:

- 1. Whether recent operations on site could be considered as an intensification of use and as such not be considered exempted development.
- 2. Whether the further southward expansion of the quarried area into Arklow Rock would impact on the form, character and quality of the landscape to such an extent as to be considered an intensification of use and as such not be considered exempted development.

32. It is the formulation of the second question which leads to the conclusion upon which the challenged decision is based. The decision of the respondent resulting from a consideration of the first question is not challenged. It must also be pointed out, in fairness to the Inspector, that in addition to the inadequacy of the form of referral made by the notice party, the question actually put by the notice party was inappropriate insofar as it referred to exempted development. It is common case that on the facts no issue arose as to a whether part of the use of the lands or works under consideration were "exempted development" within the meaning of s.4 of the Act of 2000. I propose, for the remainder of this judgment, ignoring the reference to exempted development. It is clear from the recommendation of the Inspector that what she considered, and the Board determined, was, in substance, the question:

- 2. Whether the further southward expansion of the quarried area into Arklow Rock would impact on the form, character and quality of the landscape to such an extent as to be considered an intensification of use that would amount to a material change of use of the lands.

Conclusions

33. The applicant contends that the decision of the respondent is invalid on a number of grounds. I propose firstly considering the submission that the respondent erred in law in its approach to considering and determining whether the planned southward expansion of the quarry area constituted a material change of use of the lands. It is submitted that the Inspector made the same error in the formulation of the second question set out above and that such error flowed through to the decision as is evidenced by the conclusion reached by the respondent. The applicant submits that where what has to be determined is whether by reason of planned activity there is, or will be, a material change in use of lands, that there are two separate and distinct questions which must be determined and in the following order:

- (i) Firstly, a determination and finding of fact as to whether the planned activity, in this case the further southward expansion of the quarried area into Arklow Rock does, or does not, constitute a change in use of the lands. The applicant submits that this is a question of fact to be determined having regard to all the relevant facts relating to the use of the lands pre-1964 and the planned use of the lands. It also submits that it is a question of fact to be determined independently of any planning considerations arising from the use of the lands.
- (ii) Secondly, if, but only if, there is a determination that the planned activity constitutes a change in use of the lands, then the materiality of that change should be assessed and determined. It is agreed that material in this context means material for planning purposes. The applicant submits that it is only at this point in time that the respondent and its Inspector should have considered whether the identified change in use gives rise to fresh planning considerations, in accordance with the case law of the Supreme Court and High Court and in particular *Galway County Council v. Lackagh Rock Ltd.* [1985] I.R.120.

34. I have concluded that the applicant is correct in its submission that where what has to be determined on a reference under s.5 (4) of the Act of 2000 is whether a future planned use of certain lands would constitute a material change in use of the lands, the first issue which must be determined is the factual issue as to whether what is planned does constitute a change in use of the lands. Where, as on the facts of this reference, it is contended that there will be a change in a pre-1964 use, then the relevant question is whether the planned use constitutes a change from the pre-1964 use. I have further concluded that the applicant is correct that this is a question of fact which must be determined independently of planning considerations. Planning considerations only arise if a change in use is identified and it becomes necessary to consider and determine the materiality for planning purposes of such identified change in use. It is the change in use which, if material, constitutes the act of development as distinct from simply the future use of the lands even if such future use is material for planning purposes..

35. A clear example of the proper sequential approach to the two questions is to be found in the judgment of Keane J. in *Monaghan County Council v. Brogan* [1987] I.R. 333 at p.336. That was an application under s.27 of the Act of 1976. At issue in those proceedings was whether certain slaughtering activity carried on by the respondents from approximately 1983 onwards constituted a material change in use of the lands. Keane J. considered the evidence of the slaughtering activity in the 1940s and 1950s (i.e. pre-1964 activity) and the current slaughtering carried on since 1983 and stated that he was satisfied on the evidence:

"... that the operation which has been carried on since approximately 1983 has been significantly different in its nature. ... It is also clear that the activity now being carried on is essentially a commercial operation in contrast to the relatively modest and intermittent slaughtering which went on prior to 1983."

36. He then stated:

"The question that has to be determined on this application is whether this change [emphasis added] constitutes a material change in the use of the land and hence "development" with[in] the meaning of s. 3 of the Local Government (Planning and Development) Act, 1963, for which permission was required."

Keane J. then considered submissions made by counsel for the respondent that any intensification of use (i.e. change in use) on the facts of that case was not a material change in use. Those submissions were made in part in reliance upon the decision of Barron J. in *Galway County Council v. Lackagh Rock Ltd.* [1985] I.R. 120. Counsel for the respondent submitted that the applicant had not adduced any evidence that the intensification affected in any way the proper planning and development of the area in question. Keane J. rejected that submission and determined that on an application under s. 27 of the Act of 1976, the issue as to whether the change in use is material for planning purposes must be determined by the court as a matter of fact. In the present application that is, of course, not the position as that issue must be determined by the respondent on the s. 5(4) referral. The question to be determined by the referral is, however, the same question as was being determined by Keane J. In the penultimate paragraph of his judgment, he again emphasises the necessary sequential approach to the question to be determined. He stated at p.339:

"The question accordingly resolves itself into one as to whether a change in use which involves the slaughtering of animals on a scale significantly greater than before, forming part of a commercial operation established for the first time on a particular farm, is "material" in the context of planning ... I am satisfied that it is ... a material change in the use of the land in the context of the proper planning and development of the area."

37. The Inspector, in considering the first question in relation to the use to date of the quarry (which is not challenged), correctly addressed the factual issue as to whether an alleged intensification of use constituted a change in use and concluded that it did not. However, when she came to consider the future use by reference to the works proposed to be carried out in the southward expansion of the quarried area, regretfully, she appears to have misunderstood the judgment of Barron J. in *Galway County Council v. Lackagh Rock Ltd.* [1985] I.R.120.

38. The Inspector refers to that portion of the judgment of Barron J. at p.127 where he sets out a test to be applied to determine, as he put it, whether the actual use "is a materially different use" from that on the appointed day. Barron J. stated:

"The question to be answered is whether or not the actual use is a materially different use from that on the appointed day. In neither case has an application been submitted for a permission. To test whether or not the uses are materially different, it seems to me, that what should be looked at are the matters which the planning authority would take into account in the event of a planning application being made either for the use on the appointed day or for the present use. If these matters are materially different, then the nature of the use must equally be materially different. Since no evidence has been adduced to indicate that the applicant would have taken any different matters into consideration in determining an application for planning permission made now rather than on the appointed day, I accept the respondent's contention that there has been no material change of use."

39. However, the above statements by Barron J. must be considered in the context of the submissions made in that case and the earlier finding of fact that there had been a change in the use of the site since the appointed day. The submissions of the parties were summarised by Barron J. at p.125:

"The applicant submits that there has been such an intensification of use of the quarry by the respondent that there has been a material change of use. In particular, the applicant contends that the present scale of operation of the quarry is very considerably in excess of any previous use; that the plant and machinery being used bears no relationship to any plant or machinery previously used; and that the respondent is now producing ground limestone, a product never previously produced at the quarry.

The respondent submits that a material change of use, where intensification is alleged, must be shown to be material in that it gives rise to different considerations relevant to the planning code. Counsel on its behalf submits that in any event what has happened is not an intensification of use but a modernisation of methods of quarrying. If there has been intensification, he submits that no evidence has been adduced nor argument made to show that such intensification in any way affects the proper planning and development of the area or adversely affects anyone living in the area."

40. Barron J. then considered a number of authorities in which it had been held that, as a matter of fact, intensification of use might amount to a material change in use and then stated at p.127:

"In the present case, there is little doubt but that the site is being used quite differently from the manner on which it was used on the appointed day. There are a number of modern buildings on site instead of two huts. There is a mass of modern machinery instead of some minor items. The stone is produced in varying sizes, including powdered stone, where previously it had been produced to a size which required crushing. This activity is for the purposes of a business enterprise where previously there was no commercial consideration. Finally, the quantity of stone being quarried is substantially in excess of that being quarried prior to the appointed day."

41. The above is a finding by Barron J. of the change in use of the site since the appointed day, and it is only, having found the change in use, that he then goes on to consider whether or not such intensification, which constituted the change in use, amounted to a material change in use. The test suggested by Barron J. is one by which materiality is to be ascertained after a change in use is determined. It must also be understood in the context of the submission made by the applicant, Galway County Council, that the differences in use of the site identified by Barron J. were such that, of themselves, they established that the change in use is a material change in use. That submission was expressly rejected by Barron J. in favour of the requirement that it must be established

that the change in use is material for planning purposes. In rejecting the submission, he stated at p.127, immediately before the passage referred to by the Inspector:

"It is clear that essentially these differences spring from an intensification of use of the quarry site. The applicant in effect submits that these differences, from their very nature, establish that the change of use is a material change of use. I do not accept this submission. The applicant points to no matter which affects the proper planning for the area. There is no evidence of the nature of any complaint made by anyone. There is no suggestion that any burden is being imposed upon them in their character as the planning authority or that the proper planning of the locality is affected or that, if an application for permission were brought, they would need to consider any matters which would not have had to be considered if the application were for the actual use on the appointed day."

42. Accordingly, it appears to me that Barron J. intended the test referred to by the Inspector as a test to be applied in circumstances where a change in use is already identified for the purpose of ascertaining whether that change in use is material for planning purposes. Further Barron J followed the same two question sequential approach as Keane J. in *Monaghan County Council v. Brogan* [1987] I.R. 333.

43. It also appears to me that some confusion may have been caused by the way in which "intensification of use" is referred to in a number of the judgments on pre-1964 quarries. It is often said that "an intensification of use may amount to a material change of use". See, for example, Keane J. in *Monaghan County Council v. Brogan* [1987] I.R. 333 at p.336. However, when one reads those judgments carefully, it becomes clear that "intensification of use" is not a term of art or indeed intended to have any special meaning. It is simply a factual description of what may have occurred on the lands since 1964. Further, it is properly intended as a description of the factual change which has occurred in the use of the lands. Hence, whilst, as I have already indicated, some of the judgments indicate that intensification of use may amount to a material change of use, that is a short way of saying more precisely that intensification of use may amount to a change in use in the lands and if such intensification ie change in use is material for planning purposes, then it will amount to a material change in use. Whether or not there has been intensification of use such as to amount to a change in the use of the lands, is the issue which arises for determination under the first question which I have identified above and which must be determined independently of any planning considerations.

44. I am satisfied that neither the Inspector or the respondent made any finding of fact that there would be a change in use in the applicant's lands by reason of the planned southward expansion of the quarried area into Arklow Rock. Further, that in the absence of such a finding, there was not any proper determination in accordance with law, that the planned southward expansion of the quarried area into Arklow Rock constitutes a material change in use of the applicant's lands within the meaning of s.3 of the Act of 2000, and as such, development. They fell into legal error in deducing an intensification of use (i.e. a factual change in use) from their conclusion that the planned future use of the site compared with the pre-1964 use, would raise new planning issues. As was simply put by counsel on behalf of the applicant, "they put the cart before the horse" and in doing so erred in law for the reasons set out in this judgment.

45. The applicant is therefore entitled to an order of *certiorari* of the challenged decision of the respondent.

46. As that part of the s. 5 (4) referral by the notice party relating to the planned southward expansion of the quarried area into Arklow Rock now remains before the respondent for determination in accordance with law, it appears appropriate that I should set out my views on two additional grounds advanced on behalf of the applicant in its challenge to the respondent's decision which relate to a determination in accordance with law.. However, having regard to the conclusion already reached, this part of my decision must be considered obiter and I propose, therefore, only setting out in short form my views and reasons therefore.

47. The first issue arises from the applicant's submission that the respondent was obliged, as a matter of law, to determine whether there would be any change in use in the lands comprising the quarry site by applying the test set out by the Supreme Court in *Waterford County Council v. John A. Wood Ltd.* [1999] 1 I.R. 556. As appears from the observations which I have made earlier in this judgment, the Supreme Court in that case was considering whether or not the current works being carried on by the respondent in the quarry were works which commenced prior to the appointed day. They were not determining whether there had been any material change in use of the lands then comprising the quarry. For the reasons already set out, it appears to me that there remain two separate and distinct potential acts of development in relation to a quarry i.e. a material change in use of the lands or the carrying out of works on the lands having regard to the definition in s. 3 of the Act of 2000. Where as, on the facts of this referral, the respondent is determining whether or not there would be a material change of use in lands, it does not appear to me that it can be said that as a matter of law the respondent is obliged to determine the factual issue as to whether there would be a change in use in the lands by reason of the future planned operations by applying the so-called test established by the Supreme Court in *Waterford County Council v. John A. Wood Ltd.* [1999] 1 I.R. 556.

48. The determination of the factual issue as to whether there would be a change in use of the lands if certain planned operations were carried out thereon, must be determined as a matter of fact from all the relevant factual circumstances. Notwithstanding my view that the respondent cannot be said to be obliged as a matter of law to apply the test applied by the Supreme Court in *Waterford County Council v. John A. Wood Ltd.* [1999] 1 I.R. 556, it does appear to me that this may be a helpful approach to considering whether the planned operations would constitute a material change in use in the lands from the use to which they were put prior to the appointed day. As indicated earlier in this judgment, the works being carried out on land may be indicative of the use to which the land is put. The difficulty which arises with use as a quarry and which has been addressed in a number of cases of alleged intensification of use, is that whilst land may be said to be used as a quarry prior to the appointed day and also now used as a quarry, there may be such significant differences in the type of use or type of quarry between the two dates as to amount to a change in use of the lands. The differences will normally be evidenced or indicated by the difference in the operations or works being carried on in the quarry. Therefore, it may well be useful to consider whether the current operations or works are ones which might have been reasonably contemplated or anticipated as the continuation of the operation or works being carried out prior to the appointed day, as indicated by the Supreme Court in *Waterford County Council v. John A. Wood Ltd.* [1999] 1 I.R. 556 for the purpose of determining whether there has been any change in the use of the land comprising the quarry since the appointed day..

49. Accordingly, it is my conclusion that whilst it may be appropriate for the respondent to apply the test outlined by the Supreme Court in *Waterford County Council v. John A. Wood Ltd.* [1999] 1 I.R. 556 in determining the factual issue as to whether the planned southward expansion of the quarried area into Arklow Rock would or would not constitute a change in use of the lands from the use to which they were being put prior to the appointed day, it is not the only lawful method by which the respondent could make such factual determination. The determination must be made following an assessment of all the relevant facts in relation to the use of the lands of the applicant prior to the appointed day and the planned future use. That factual assessment must be made independently of planning considerations.

50. The second submission of the applicant, upon which I consider it appropriate to express a view, is one which relates to the second question which may have to be addressed if a change in use is determined, namely, the materiality of any such change for planning purposes. The applicant submits that the respondent is confined to considering such materiality by reference to planning considerations in existence on the appointed day and not to matters which may have arisen since the appointed day. That submission does not appear to me correct in law and is not, in my view, supported by the decision of Barron J. in *Galway County Council v. Lackagh Rock Ltd.* [1985] I.R. 120 as contended for by the applicant.

51. As stated earlier in this judgment, the potential act of development which is the subject matter of the referral, is a potential material change in use of the lands by the applicant by the planned southward expansion of the quarried area. If it is determined that such operation will constitute a change in use of the lands, then the change in use will take place once those planned operations commence. The potential act of development is one which takes place at a current time. It therefore appears to me that the materiality for planning purposes of any change in use identified must be determined at the time it takes place which is a current time. Its materiality for planning purposes must therefore be considered in accordance with current planning considerations for the relevant area.

52. However, it must be emphasised that it is the change or difference in use, when compared with the pre-1964 use, which must give rise to the different or new planning considerations. This appears to require that the planning considerations raised by the pre-1964 use and the identified change in use both be considered and compared in the context of the current proper planning and development of the area. The above approach is what I understand to be intended by the passage cited from the judgment of Barron J. in *Galway County Council v. Lackagh Rock. Ltd.* [1985] I.R.120 at paragraph 38 above and relied on by the applicant in support of its submission and in particular the sentence:

"To test whether or not the uses are materially different, it seems to me, that what should be looked at are the matters which the planning authority would take into account in the event of a planning application being made either for the use on the appointed day or for the present use."

Both uses must be considered on a current basis. Hence an external change to the proper planning and development of the relevant area such as the nomination of a proposed National Heritage Area cannot of itself make a change in use of a site material. Both the pre-1964 use and change in use must be considered in the context of such altered proper planning and development considerations of the relevant area.

53. This also appears consistent with the approach of Keane J. in *Monaghan County Council v. Brogan* [1987] I.R. 333 . The only difference between the two judgments as to whether it is a matter for evidence of the attitude of the planning authority or for assessment by the court is not relevant to this issue.

54. Applying the above approach to the facts of this case, it appears to me that it is permissible for the respondent, if it identifies a change in use by reason of the planned southward expansion, to take into account the current planning and development of the area of Arklow Rock including any proposed Natural Heritage Area, but must assess whether the identified difference in use of the site, when compared with the use of the applicant's site as a quarry pre-1964, gives rise to any different planning considerations or issues for the proper planning and development of the area surrounding Arklow Rock. Inevitably, the pre-1964 use as a quarry would give rise to planning considerations, having regard to the current planning and development for the area, but the crucial question is whether any identified factual difference in the planned use of the applicant's land would give rise to different planning considerations or issues from those arising from a current application for planning of the pre-1964 use.

Relief

There will be :

An order of *certiorari* quashing the decision of the respondent dated 26th February, 2007, on the referral by the notice party pursuant to s. 5 of the Planning and Development Act 2000, dated 22nd August, 2006, that the further southward expansion of the quarried area into Arklow Rock at Rockbig, Arklow, County Wicklow, is development and is not exempted development.