Neutral Citation Number: [2010] IEHC 415

THE HIGH COURT

JUDICIAL REVIEW

2009 941 JR

BETWEEN

AN TÁISCE – THE NATIONAL TRUST FOR IRELAND

APPLICANT

AND
IRELAND AND THE ATTORNEY GENERAL
AND
AN BORD PLEANÁLA

RESPONDENT

AND

MONAGHAN COUNTY COUNCIL,

JOHN McQUADE QUARRIES LIMITED

AND

PETER SWEETMAN AND ASSOCIATES

NOTICE PARTIES

JUDGMENT of Mr. Justice Charleton delivered on 25th November 2010

1. An Táisce seeks to overturn a decision of An Bord Pleanála dated the 20th July 2009, granting permission to John McQuade Quarries Limited to continue to use a quarry at Lengare, Clontibert, County Monaghan subject to conditions. The permission was granted under s.261 of the Planning and Development Act 2000 ("the Act of 2000") (Quarry reference no. Q04/303) and the decision is PL 18.225398. An Bord Pleanála granted permission predicated on the basis that the quarry had begun to operate prior to the implementation of the Local Government Planning and Development Act 1963 on 1 October 1964 and had not been changed as to the use thereof by intensification.

2. The grounds on which judicial review is sought may be concisely stated as follows:

> (1) An Bord Pleanála failed to consider if the quarry was not an authorised development by reference to its usage prior to the implementation of the planning code on the 1st October 1964 and whether same was proportionate;
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> (2) An Bord Pleanála engaged in an irrational approach to the issue as to whether the quarry had been proportionately used prior to the 1st October 1964;
>
> (3) An Bord Pleanála failed to at all consider the issue of the use of the quarry prior to the 1st October 1964;
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> (4) An Bord Pleanála failed to give any reason for any decision it may have made to the effect that the quarry had been used in a proportionate manner prior to the 1st October 1964;
>
> (5) An Bord Pleanála failed to give any consideration as to whether there were exceptional circumstances, absent proportionate pre-1st October 1964 use, which would have allowed for the retention of the use of the quarry.
>
> 2. Because of the thorough nature of the arguments presented by counsel, for which the Court is grateful, the issues which this case has raised may be disposed of concisely.

Proportionate Use

3. Ordinarily, the use of land prior to 1 October 1964 is outside the scope of planning control, once a building exists since before that day or a use has been established and, proportionate to that use, carried on after that date. Quarries were made an exception to that legal exemption from planning controls in the Act of 2000. Section 261 ensures that all quarries in the State must be registered, subjected to planning scrutiny, and then, if appropriate, subjected to a requirement to abide by planning conditions, to apply for planning permission or to carry out and submit an environmental impact statement. No other industry sector has been subjected to requirements equivalent to those set out in s. 261 of the Act. Quarrying is, of its nature, an activity that must be carried out over many years. Upon the coming into force of the planning code on the 1st October 1964, there were many quarries which had an entitlement to continue with their operation in a proportionate fashion. The Oireachtas made a decision that all such quarries should be registered and, when their operation had been properly analysed by local planning authorities as to the information which must be supplied for this process, quarries might need to be further regulated beyond the restrictions that the commencement of operations prior to 1st October 1964 would have necessarily attracted. In that context, I have referred to the continuance by a business or a quarry, on a proportionate basis, of operations on the implementation of the first planning code. By this I mean that no quarry would have been entitled to intensify the use of its operations after that date so as that intensification of use amounted to change of use and which had an impact, proven directly or by necessary implication, on planning considerations for the area in which it is situate. 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. Quarries which are proposed to be developed with an extraction area of 5 hectares or more are subject to a requirement under the Act of 2000 to submit an environmental impact study when applying for planning permission. That did not apply, up to the Act of 2000, to existing quarries,

proportionately carrying on a pre-1 October 1964 use. Further, it is clearly established both in relation to Council Directive 85/337/EEC of 27 June, 1985 on the assessment of the effects of certain public and private projects on the environment, O.J. L 175, 5.7.1985 ("the EIA Directive") and Council Directive 92/43/EEC of 21 May, 1992 on the conservation of natural habitats and of wild fauna and flora, O.J. L 206, 22.7.1992 ("the Habitats Directive"), that projects which had already commenced when these directives were transposed into Irish law were not then subject to the restrictions later made possible under s. 261(5) and (7) of the 2000 Act; see Haarlemmerliede en Spaarnwoude and others v. Gedeputeerde Staten Van Noord-Holland (Case C-81/96) [1998] E.C.R. I-3925 Stadt Papenburg v. Bundesrepublik Deutschland (C-226/08) (Unreported, European Court of Justice, 14th January, 2010). .

4. Intensification of use as a breach of an existing pre-1964 lawful use of land is not to be decided solely by reference to criteria set out in Galway County Council v. Lackagh Rock Limited [1985] I.R. 120. Modern methods as a replacement for manual work do not necessarily establish an unlawful intensification of use but neither is that an indication of lawful intensification. That, furthermore, is only one principle. Whether intensification of use is established, as opposed to a proportionate and therefore lawful continuance of pre-planning control use, is a question for analysis based on the relevant case law. Where there has been an intensification of use, it must also be considered if that intensification impacts on the proper planning and sustainable development of an area. The establishment, however, that such intensification has affected the proper planning and development of the area does not necessarily have to be subject to separate submissions to either a planning authority or An Bord Pleanála. As with other areas of proof, this may arise by necessary implication arising out of a comparison of this nature and scale of the operation as compared to the base line against which it is to be judged. Further, a planning application is not a court process. Proofs are absent. The duty that is cast on a planning authority, or on An Bord Pleanála on appeal, is to make an appropriate enquiry. See Weston Limited v. An Bord Pleanála [2010] IEHC 255, (Unreported, High Court, Charleton J., 1st July, 2010).

Section 261(7)

5. Section 261 of the Planning and Development Act 2000 provides as follows:-

> "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.
>
> (2) Without prejudice to the generality of subsection (1), information provided under that subsection shall specify the following
>
> (a) the area of the quarry, including the extracted area delineated on a map,
>
> (b) the material being extracted and processed (if at all),
>
> (c) the date when quarrying operations commenced on the land (where known),
>
> (d) the hours of the day during which the quarry is in operation,
>
> (e) the traffic generated by the operation of the quarry including the type and frequency of vehicles entering and leaving the quarry,
>
> (f) the levels of noise and dust generated by the operations in the quarry,
>
> (g) any material changes in the particulars referred to in paragraphs (a) to (f) during the period commencing on the commencement of this section and the date on which the information is provided,
>
> (h) whether -
>
> (i) planning permission under Part IV of the Act of 1963 was granted in respect of the quarry and if so, the conditions, if any, to which the permission is subject, or
>
> (ii) the operation of the quarry commenced before 1 October 1964,and
>
> (iii) such other matters in relation to the operations of the quarry as may be prescribed.
>
> (3) A planning authority may require a person who has submitted information in accordance with this section to submit such further information as it may specify, within such period as it may specify, relating to the operation of the quarry concerned and, on receipt thereof, the planning authority shall enter the information in the register.
>
> (4) (a) A planning authority shall, not later than 6 months from the registration of a quarry in accordance with this section, publish notice of the registration in one or more newspapers circulating in the area within which the quarry is situated.
>
> (b) A notice under paragraph (a) shall state -
>
> (i) that the quarry has been registered in accordance with this section,
>
> (ii) where planning permission has been granted in respect of the quarry, that it has been so granted and whether the planning authority is considering restating, modifying or adding to conditions attached to the planning permission in accordance with subsection (6)(a)(ii), or
>
> (iii) where planning permission has not been granted in respect of the quarry, that it has not been so granted and whether the planning authority is considering—
>
> (I) imposing conditions on the operation of the quarry in accordance with subsection (6)(a)(i), or

(II) requiring the making of a planning application and the preparation of an environmental impact statement in respect of the quarry in accordance with subsection (7),

(iv) the place or places and times at which the register may be inspected,

(v) that submissions or observations regarding the operation of the quarry may be made to the planning authority within 4 weeks from the date of publication of the notice.

(c) A notice under this subsection may relate to one or more quarries registered in accordance with this section.

(5) (a) Where a planning authority proposes to—

(i) impose, restate, modify or add to conditions on the operation of the quarry under this section, or

(ii) require, under subsection (7), a planning application to be made and an environmental impact statement to be submitted in respect of the quarry in accordance with this section, it shall, as soon as may be after the expiration of the period for making observations or submissions pursuant to a notice under subsection (4)(b), serve notice of its proposals on the owner or operator of the quarry.

(b) A notice referred to in paragraph (a), shall state—

(i) the reasons for the proposals, and

(ii) that submissions or observations regarding the proposals may be made by the owner or operator of the quarry to the planning authority within such period as may be specified in the notice, being not less than 6 weeks from the service of the notice.

(c) Submissions or observations made pursuant to a notice under paragraph (b) shall be taken into consideration by a planning authority when performing its functions under subsection (6) or (7).

(6) (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.

(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.

(c) Notwithstanding paragraph (a), where an integrated pollution control licence has been granted in relation to a quarry, a planning authority or the Board on appeal shall not restate, modify, add to or impose conditions under this subsection relating to—

(i) the control (including the prevention, limitation, elimination, abatement or reduction) of emissions from the quarry, or

(ii) the control of emissions related to or following the cessation of the operation of the quarry.

(7) (a) Where the continued operation of a quarry—

(i) (I) the extracted area of which is greater than 5 hectares, or

(II) that is situated on a European site or any other area prescribed for the purpose of section 10 (2) (c), or land to which an order under section 15, 16 or 17 of the Wildlife Act, 1976 , applies,

and

(ii) that commenced operation before 1 October 1964, would be likely to have significant effects on the environment (having regard to any selection criteria prescribed by the Minister under section 176 (2)(e)), a planning authority shall not impose conditions on the operation of a quarry under subsection (6), but shall, not later than one year after the date of the registration of the quarry, require, by notice in writing, the owner or operator of the quarry to apply for planning permission and to submit an environmental impact statement to the planning authority not later than 6 months from the date of service of the notice, or such other period as may be agreed with the planning authority.

(b) Section 172 (1) shall not apply to development to which an application made pursuant to a requirement under paragraph (a) applies.

(c) A planning authority, or the Board on appeal, shall, in considering an application for planning permission made pursuant to a requirement under paragraph (a), have regard to the existing use of the land as a quarry.

(8) (a) Where, in relation to a quarry for which permission was granted under Part IV of the Act of 1963, a planning authority adds or modifies conditions under this section that are more restrictive than existing conditions imposed in relation to that permission, the owner or operator of the quarry may claim compensation under section 197 and references in that section to compliance with conditions on the continuance of any use of land consequent upon a notice under section 46 shall be construed as including references to compliance with conditions so added or modified, save that no such claim may be made in respect of any condition relating to a matter specified in paragraph (a), (b) or (c) of section

34 (4), or in respect of a condition relating to the prevention, limitation or control of emissions from the quarry, or the reinstatement of land on which the quarry is situated.

(b) Where, in relation to a quarry to which subsection (7) applies, a planning authority, or the Board on appeal, refuses permission for development under section 34 or grants permission thereunder subject to conditions on the operation of the quarry, the owner or operator of the quarry shall be entitled to claim compensation under section 197 and for that purpose the reference in subsection (1) of that section to a notice under section 46 shall be construed as a reference to a decision under section 34 and the reference in section 197 (2) to section 46 shall be construed as a reference to section 34 save that no such claim may be made in respect of any condition relating to a matter specified in paragraph (a), (b) or (c) of section 34 (4), or in respect of a condition relating to the prevention, limitation or control of emissions from the quarry, or the reinstatement of land on which the quarry is situated.

(9) (a) A person who provides information to a planning authority in accordance with subsection (1) or in compliance with a requirement under subsection (3) may appeal a decision of the planning authority to impose, restate, add to or modify conditions in accordance with subsection (6) to the Board within 4 weeks from the date of receipt of notification by the authority of those conditions.

(b) The Board may at the determination of an appeal under paragraph (a) confirm with or without modifications the decision of the planning authority or annul that decision.

(10) (a) A quarry to which this section applies in respect of which the owner or operator fails to provide information in relation to the operations of the quarry in accordance with subsection (1) or in accordance with a requirement under subsection (3) shall be unauthorised development.

(b) Any quarry in respect of which a notification under subsection (7) applies shall, unless a planning application in respect of the quarry is submitted to the planning authority within the period referred to in that subsection, be unauthorised development.

(11) This section shall apply to—

(a) a quarry in respect of which planning permission under Part IV of the Act of 1963 was granted more than 5 years before the coming into operation of this section, and

(b) any other quarry in operation on or after the coming into operation of this section, being a quarry in respect of which planning permission was not granted under that Part.

(12) The Minister may issue guidelines to planning authorities regarding the performance of their functions under this section and a planning authority shall have regard to any such guidelines.

(13) In this section—

"emission" means—

(a) an emission into the atmosphere of a pollutant within the meaning of the Air Pollution Act, 1987,

(b) a discharge of polluting matter, sewage effluent or trade effluent within the meaning of the Local Government (Water Pollution) Act, 1977, to waters or sewers within the meaning of that Act,

(c) the disposal of waste, or

(d) noise;

"operator" means a person who at all material times is in charge of the carrying on of quarrying activities at a quarry or under whose direction such activities are carried out;

"quarry" has the meaning assigned to it by section 3 of the Mines and Quarries Act, 1965."

6. I do not intend to make any comment on the procedures under the section. They are irrelevant to this case. I have previously commented thereon in O'Reilly v Galway County Council [2010] IEHC 97 (High Court, Charleton J., Unreported 26 March 2010). The procedures under the subsection involve compulsory registration of quarries, consideration by the planning authority, notices and procedures that are designed to allow the public to comment, and authority granted to planning bodies to regulate quarries depending on their type and status. It is clear that a planning authority, or An Bord Pleanála on appeal, are obliged under s. 261(7) to have regard to the existing use of land in respect of a quarry which consists of a subtracted area of greater than 5 hectares. That consideration applies to the quarry in question here. What is crucial, however, to the proper operation of the subsection is that an unlawful use of land must be disregarded. To otherwise interpret the provision would deprive it of necessary compliance with law. It would be contrary to any rational intention of the Oireachtas that when, on 28th April 2004, this section came into force, those who had been plotting to deal with it over the previous months or year could, without planning permission, open a gigantic quarry, register it and then suggest that the planning authority, or the board on appeal, should "have regard to the existing use of the land as a quarry". In this context, the subsection applies only to operations of a quarry which commenced prior to the 1st October 1964 and which would be likely to have a significant effect on the environment. If a quarry commenced operation on a small scale prior to the 1st October 1964 and was then unlawfully intensified in use, as opposed to continuing its operations in the proportionate way to which I have previously referred, a new planning application for retention of use is appropriate. Section 261(7) is irrelevant in that situation. Where it is relevant, as with the proportionate continuance of use lawfully established prior to 1 October 1964, the requirement to take into account an existing use of land cannot apply in respect of an unlawful activity or an activity that has become unlawful by reason of intensification.

7. Regrettably, it is apparent on the face of the order that a number of significant errors were made in the decision of the Board. Firstly, by board direction dated 10th July 2009 it is provided:-

"The board considered that the pre-1964 status of the quarry had been established and accepted in the registration of the quarry, which led to the current application and subsequent appeal. The board also noted the presence of mining on

this site which dated to the 19th Century."

This is not correct. Mining is not to be equated, in terms of the use of land, with quarrying. Quarrying can have significant adverse effects on the landscape, on the necessity for reinstatement after extraction, on noise and on the emission of pollutants which are markedly more significant as to planning considerations than those which may be referable to mining. Further, the mere registration of a quarry does not establish a pre-1964 use. The statement is a legal error. Nor was there anything before the Board which established that there had been no intensification of use since that time.

8. It is settled as a matter of law that the registration of a quarry under s. 261 does not alter its status. If the use of a quarry was unlawful before registration, that status remains afterwards. It is incumbent on the planning authority to consider, in any application under s. 261(7), whether a lawful use has been established. No burden of proof exists as to an objector in that respect. The planning process is not to be turned into a kind of adversarial system. It is an enquiry into the appropriateness or otherwise of a proposed development. Legal status, where relevant to that process, can be established by reference to the enquiry which the Board or the planning authority undertakes. If An Bord Pleanála is not satisfied with the information which it has at its disposal it can cause further enquiries to be made.

9. Even the imposition of conditions, consequent upon registration under s. 261(5), of the Act does not alter the status of a quarry. As regard is to be had under s. 261(7) of the existing lawful use of the land, it would be wrong for the planning authority or the Board to take the lawful use of the land as having been established or implied by registration. In Pierson and Others v. Keegan Quarries Limited [2009] IEHC 550 (Unreported, High Court, Irvine J., 8th December, 2009), at para. 40. Irvine J. offered the following view, with which I agree:-

> "I do not accept that a decision made by a planning authority to register a quarry subject to the imposition of conditions under s. 261 of the 2000 Act has the legal effect contended for by the respondent. If the quarry constituted unauthorised development at the start of the s. 261 process, its registration subject to conditions does not, in my view, alter its status. Neither does that decision have any legal effect on the right of a party with the appropriate locus standi, such as the applicants in the present case, to challenge that development as being unauthorised under s. 160 of the 2000 Act."

10. To that observation I should add that s. 157(4) of the Act provides that no warning letter or enforcement notice is to issue, and no proceedings are to be commenced for an offence, in respect of any development where there is no permission after seven years from the date of commencement of the development. Proceedings may be commenced, however, at any time, in respect of any condition concerning the use of land to which permission is subject. This provision does not operate so as to bypass s. 261(7). An ability to enforce planning controls in relation to development does not equate to lawful use under section. 261(7).

Irrational Approach

11. It is further argued that there has been an irrational approach by the Board to the issue as to pre-1964 use. A decision on this ground is not necessary. Some observations are. In that regard, the inspector noted that an issue was raised by An Táisce as to the lawful use of the site. Specifically, the thorough report of Suzanne Kehely of An Bord Pleanála Inspectorate, dated 22nd May 2008, raises this issue in the following passage:-

> "An Táisce, however, makes the case that a large portion of the site is unauthorised. In the submission received on 20th November 2007 the maps and photographs show the pattern of quarry development advancing from the confinement of a couple of fields with a frontage of about 180 metres to encroachment into adjoining fields. The maps also outline ownership and land transfer dates. The case is made, quite convincingly in my opinion, that effectively the pre-64 quarry relates to only a portion of the subject's site, therefore the extension of the quarry is unauthorised. This supported by the Planning Authority's declaration that the quarry works are not exempted development. This would appear to be based on the same maps and information submitted to the board. Consequently it is argued by the appellant that the unauthorised status of the existing quarry extension invalidates the public notices and the [environmental impact statement] by inadequate description and erroneous base data."

12. The information before on An Bord Pleanála indicated a degree of pre-1964 use. That use, however, was limited to some blasting where the removal of stones by horse and cart and brief anecdotal evidence that does not appear to support a quarry which, on its current level of operation as declared at registration, involves over forty lorry roads of minerals and over ten tractor and trailer loads of minerals being removed on each working day. The maps and photographs provided by An Táisce should have been dealt with on the basis of the modern legal analysis of change of use through intensification. This did not happen beyond the consideration by the inspector. Whereas it may be argued that an ore body is what is intended to remove when a mine begins, and that the application of modern methods does not necessary constitute an intensification of use, nonetheless a marked increase in extraction and the purchase of additional lands are very important factors to be taken into account before the lawful use of land as a quarry can legitimately be said to be established and so taken into consideration by An Bord Pleanála under s.216(7); see Waterford County Council v. John A. Wood Limited [1999] 1 I.R. 556 on the issue of quarrying and development from an original site of extraction.

Reasons

13. Under s.34 (10) of the Planning and Development Act 2000, a Planning Authority or An Bord Pleanála on appeal, must give reasons for its decisions. Specifically, the subsection states that where a planning authority, or the Board on appeal, decides to grant or refuse permission on a basis of not accepting a recommendation in a local authority planner's, or an appeal an inspector's, report, the main reasons for not accepting that recommendation should be stated. Further, the obligation to give reasons is statutorily defined as a requirement to "state the main reasons and considerations on which the decision is based". Where conditions are imposed then it is required that "the decision shall state the main reasons for the imposition of any such conditions…"

14. Established authority clearly provides that An Bord Pleanála, or a planning authority, is enabled to give reasons by reference to the acceptance of a relevant report. This incorporates the relevant reasons and constitutes a fulfilment of the statutory obligation outlined.

15. In the decision in question, those reasons are manifestly absent. There is no consideration of the issue as to pre-1964 use. The matter was properly raised. A small error in terminology is argued to excuse this requirement. It does not excuse it.

Exceptional Circumstances

16. Were an intensification of use to have occurred subsequent to the implementation into Irish law of the relevant Directives, then it is doubtful as to whether retention permission could be sought. A number of possible options might be available to someone seeking planning permission at the site of the quarry, including applying for extraction on a green field area under their control or shutting the

quarry and applying again. I make no comments in relation to any of this. It is established by The Commission of the European Communities v. Ireland (Case 215/06) [2008] E.C.R. 4911 that a member State fails to fulfil its obligations under that directive, as amended, where after the event retention permissions are given, even where there are no exceptional circumstances proved.

17. This issue was not considered by An Bord Pleanála. A legislative amendment makes an application under a different route possible. Again, since this is not before the court, I refrain from comment.

Result
18. In the result the planning permission issued by An Bord Pleanála is quashed.