Neutral Citation Number: [2009] IEHC 426

THE HIGH COURT

2008 766 JR

Between

M. & F. Quirke and Sons

And

David O'Connor

Applicants

And

An Bord Pleanála, Ireland AndThe Attorney General

Respondents

And

Kerry County Council

Notice Party

2008 693 JR

Between

Martin Corduff

Applicant

And

An Bord Pleanála

Respondent

And

Meath County Council

Notice Party

2008 395 JR

Between

John A. Wood Limited

Applicant

And

An Bord Pleanála

Respondent

And

Cork County Council

Notice Party

Judgment of O'Neill J. delivered the 6th day of October 2009.

1. Relief Sought

1.1 Leave was granted to the applicants in the first set of proceedings by this Court on the 26th May, 2008, to seek *inter alia* the following reliefs:-

1. An order of *certiorari* quashing the decision of the first named respondent, dated the 14th December, 2007, whereby the respondent confirmed with modifications the decision of Kerry County Council made on the 6th March, 2007, to impose conditions on the operation of a registered quarry on lands at Ballymacadam, Castleisland, Co. Kerry, owned by the second named applicant and directing the said council to attach conditions numbers 4, 6 and 29, to remove conditions numbers 2, 3 and 7 and to amend conditions 5 and 30.

2. Further or in the alternative, an order pursuant to s.50A (9) of the Planning and Development Act 2000, as inserted by s.13 of the Planning and Development (Strategic Infrastructure) Act 2006 declaring to be invalid and/or quashing that part of the said decision whereby the first named respondent directed Kerry County Council to attach condition no.29 to the operation of the said quarry at Ballymacadam, Castleisland, Co. Kerry.

1.2 Leave was granted in the second set of proceedings by this Court (Hanna J.) on the 14th July, 2008, for the applicant to seek the following reliefs:-

1. An order of *certiorari* quashing condition no.2 imposed by the respondent on the continued operation of the applicant's quarry, in its decision dated the 22nd April, 2008.

2. An order of *certiorari* quashing condition no.3 as imposed by the respondent on the continued operation of the applicant's quarry in its decision dated the 22nd April, 2008.

3. In the alternative and only if necessary an order of certiorari quashing the decision of the respondent dated the 22nd April, 2008, on an appeal against certain conditions imposed by the notice party on the continued operation of the applicant's quarry pursuant to s.261(6) of the Planning and Development Act 2000.

4. Consequent on the making of an order in the terms of no.3 above, an order remitting the appeal to the respondent for reconsideration in the light of the findings of the High Court.

5. A declaration that the respondent erred in its interpretation of the provisions of the Department of the Environment's Quarries and Ancillary Activities Guidelines for Planning Authorities, April 2004. In particular and without prejudice to the generality of the foregoing, a declaration that the respondent erred in applying the provisions of Chapter 4 of the guidelines and in particular section 4.9 relating to the life of planning permissions to a quarry registered under s.261(6) of the Planning and Development Act 2000.

6. A declaration that the respondent acted *ultra vires* and erred in law in imposing, pursuant to s. 261(6) of the Planning and Development Act 2000, conditions on the operation of the quarry the effect of which was to require the immediate cessation of quarrying activities in fields which were being excavated at the time of registration of the quarry under s.261.

7. A declaration that the respondent acted *ultra vires* and erred in law in imposing pursuant to s.261(6) of the Planning and Development Act 2000 conditions which prevent the applicant from continuing to natural completion excavation works which commenced prior to the 1st October, 1964.

1.3 In the third set of proceedings leave was granted by this Court (MacMenamin J.) on the 28th April, 2008, for the applicant to seek the following reliefs:-

1. An order of *certiorari* quashing the decision of the respondent dated the 13th February, 2008.

2. In the alternative, an order remitting the application, planning register reference QR03, An Bord Pleanála reference 04.QC.2009, to the respondent for the application to be determined in accordance with law.

3. An order deleting condition 66(1) from the decision of the respondent dated the 13th February, 2008.

4. An order deleting from the decision of the notice party any reference to the matters contained at condition 66(1).

5. A declaration that the respondent in determining the application failed to have regard to the statutory scheme set out in the Planning and Development Act 2000 and misapplied the relevant statutory provisions insofar as they applied to the applicant's development as it was carried out and is currently operated.

6. An order severing condition 66(1) from the remainder of the decision of Cork County Council as directed by the decision of the respondent dated the 13th February, 2008.

1.4 In all three cases the applications for leave were unopposed. All three cases concern conditions imposed on the applicants' quarries pursuant to s. 261(6) of the Planning and Development Act 2000 ("the Act of 2000").

2. Facts in the first proceedings

2.1 The second named applicant is the owner of lands, 2.7 kilometers east of Castleisland, County Kerry at Ballymacadam. The first named applicant holds a licence in respect of these lands to operate a quarry. The quarry commenced operation before the 1st October, 1964. It was claimed by the applicants that the quarry enjoyed the benefit of existing land use rights for quarrying purposes, which included, *inter alia*, blasting methods of extraction, as these were employed prior to that date and for a number of years thereafter.

2.2 The application for registration of this quarry was lodged with the notice party by Munster Limestone Ltd. on the 21st April, 2005. A decision was taken by the notice party on the 6th March, 2007, to impose conditions on the operation of the quarry, including, *inter alia*, condition no.29 which stated that:-

"No blasting operations shall take place on this site.

Reason: In the interest of protecting local amenities, local property and public safety".

2.3 The applicants appealed the imposition of certain conditions imposed by the notice party, including the above condition. In its decision dated the 14th December, 2007, the above condition was attached or upheld by the respondent. The respondent also amended two conditions and removed three conditions that had been imposed by the notice party. In the section headed "*Reasons and Considerations*" it was stated as follows:-

> *"Having regard to the provisions of Section 261 of the Planning and Development Act, 2000 and to the pre-1964 status of the quarry, it is considered that the conditions to be attached and amended are necessary to control the extent, operation and reinstatement of the quarry so as to protect the environment and in the interest of the proper planning and sustainable development of the area."*

2.4 In the third party submission of Mr. T.J. Brennan dated the 24th April, 2007, (and marked received by the respondent the next day) in respect of the appeal, twelve affidavits from local residents were enclosed which averred that blasting had not taken place at the quarry during their lifetimes (one of the residents has been living in the area since 1940). A report from Malachy Walsh and Partners, Consulting Engineers, was also included in this submission. In opposition to this, three statutory declarations had been submitted by the applicants to the notice party describing recollections of blasting taking place at the quarry. These were forwarded to the respondent. The respondent's inspector concluded that, as a matter of fact, blasting had not taken place on the site for several years before the coming into force of s.261 of the Act of 2000 on the 28th April, 2004, thereby selecting this date as the relevant reference point for assessing the activities of a quarry operator. In his report to the respondent dated the 19th August, 2007, he stated as follows:-

> *"In my opinion the range of submissions made during the Registration process would seem to indicate that an activity such as blasting did not occur on the site for several years prior to the coming into operation of Section 261 so that the imposition of this condition is reasonable and appropriate. The initiation of a programme for blasting represents a significant expansion of operations and consequently requires planning permission in the normal manner."*

As stated, the decision of the respondent was made on the 14th December, 2007, and included *inter alia* condition no.29. These proceedings were initiated on the 14th February, 2008. A constitutional challenge to s.261 of the Planning and Development Act 2000 was withdrawn.

3. Facts in the second proceedings

3.1 The applicant operates a quarry on lands at Ardmulchan, County Meath. He owns lands which have an area of approximately 22 acres and he holds a licence to use approximately 38 acres of adjoining lands for quarrying excavation. The total area of the lands is approximately 60 acres. These 60 acres used to be held in single ownership and as of the 1st October, 1964, they comprised a single planning unit. It was agreed that quarrying activities had been carried out continuously on these lands prior to and since the 1st October, 1964.

3.2 The application for registration of the quarry pursuant to s.261 of the Act of 2000 was made to the notice party on the 14th April, 2005. By letter dated the 28th March, 2007, the notice party wrote to the applicant imposing 23 conditions on the operation of the quarry. The applicant took issue with conditions nos. 2 and 3, in particular, which imposed conditions relating to the time in which planning permission would have to be sought and the area of the quarry where quarrying could take place, respectively. The applicant appealed the decision of the notice party to the respondent on the 24th April, 2007. The respondent wrote to the applicants' solicitors on the 13th June, 2007 enclosing the submissions of the notice party and gave an opportunity to comment in respect of same, which was done by letter dated the 2nd July, 2007. An inspector of the respondent, in his report, dated the 16th October, 2007, recommended that conditions nos. 2 and 3 should be retained. The respondent wrote to the applicant's solicitors on the 20th February, 2008, seeking evidence as to the applicant's interest in the land and this was supplied by the applicant by letter dated the 7th March, 2008. In its decision of the 22nd April, 2008, the respondent modified condition no.2 and confirmed condition no.3. The modified condition no.2 reads as follows:-

> *"2. Quarrying activity shall cease on or before 10 years from the date of this order and shall be restricted to the fields marked 2.655 acres, 8.165 acres, 1.142 acres and 0.624 acres, as identified on the 25 inch Rural Place Map submitted to the planning authority, unless before the end of that period, permission for the continuance of the use beyond that date shall have been granted.*
>
> *Reason: To define the extent of quarrying activities."*

Condition no.3 reads as follows:-

> *"3. Within 6 months of the date of this order, the owner/operator of the quarry shall agree*
>
> *1. the exact area of the quarry within which future extraction shall be confined.*
>
> *2. the maximum depth of quarry excavation.*
>
> *Reason: In the interests of orderly development."*

In the section headed "*Reasons and Considerations*" it was stated as follows:-

> *"Having regard to the pre-1964 status of the quarry and the decision of the planning authority to impose conditions on the operation of the quarry in accordance with the provisions of sections 261(6)(a)(i) of the Planning*

and Development Act, 2000, and the provisions of 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 the continued operation of the quarry would not be contrary to the proper planning and sustainable development of the area.

The Board considered that condition numbers 2..., as modified, and condition numbers 3… are necessary in relation to the continued operation of the quarry, having regard to the proper planning and sustainable development of the area, including the control of emissions in this environmentally sensitive location."

3.3 Judicial review proceedings were instituted by the applicant on the 16th June, 2008.

4. Facts in the third set of proceedings

4.1 The applicant company owns and operates a quarry at Barnagore, Ovens, County Cork. The quarry is 93.12 hectares in size. The extraction area is 85.02 hectares. Planning permission was granted by the respondent in 1983 authorising the use of the land as a limestone quarry and was made subject to 29 conditions. The applicant registered its quarry with the notice party on the 6th December, 2004. The notice party then sought to modify and to add to the conditions imposed by the respondent in 1983 pursuant to s. 261(6) of the Act of 2000. The notice party imposed, *inter alia*, condition no.66(1), limiting the vertical extent or depth of the excavation to 21m O.D. The applicant appealed the decision of the notice party. In its decision on the appeal of the applicant, dated the 13th February, 2008, the respondent modified this condition to read as follows:-

"66(1) No excavation shall take place below 21 metres OD without the grant of a separate planning permission. A programme for phasing of development shall be submitted to the planning authority for written agreement within three months of the date of this order.

…

Reason: In the interest of orderly development and in the interest of environmental protection."

In the section headed "Reasons and Considerations" it stated:-

"…it is considered that the conditions to be restated and modified adequately control the extent, operation and reinstatement of the quarry so as to protect the environment and in the interest of the proper planning and sustainable development of the area.

…

In relation to condition 66, the Board agreed with the Inspector that this condition was reasonable and modified the condition to incorporate environmental safeguards set out originally in condition 62 (now removed)."

4.2 These proceedings were instituted on the 7th April, 2008. At hearing the applicant confined its case against the respondent to the *vires* of the respondent's decision. The case was made that the respondent, in imposing a condition limiting the depth of extraction, assumed a power it did not have, to bring about, in effect, the cessation of quarrying. Arguments relating to the selection of a depth of 21m O.D. in respect of excavation at the applicant's quarry were not pursued.

5. The Law

5.1 Section 261 of the Act of 2000 introduced a system of registration for quarries (excluding those quarries in respect of which planning permission was granted in the five years preceding the coming into force of the Act of 2000, on the 28th April, 2004) and it authorised the imposition of conditions on the operation of a quarry which had commenced prior to the 1st October, 1964. Section 261(1) of the Act of 2000 places an onus on "*operators*" of quarries, within one year of the coming into operation of the section (i.e. before the 27th April, 2005), to provide to the relevant planning authority information relating to the operation of the quarry as at the 28th April, 2004.

5.2 A quarry is defined in s.261(13) of the Act of 2000 as "*an excavation or system of excavations made for the purpose of, or in connection with, the getting of minerals (whether in their natural state or in solution or suspension) or products of minerals, being neither a mine nor merely a well or bore-hole or a well and a bore-hole combined.*" An operator is defined in s.261(13) as "*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".*

5.3 Once this information is received from the operator, the planning authority is obliged to enter the information on the planning register pursuant to s.7 of the Act of 2000, which provides for a comprehensive register of planning data relating to the functional area of the planning authority. Section 261(2) sets forth a non-exhaustive list of information which a quarry operator must provide under s. 261(1) (e.g. the area of the quarry; the material being extracted and processed; the hours of the day the quarry is in operation; levels of dust and noise generated by the operations in the quarry; traffic generated by the operation of the quarry; any material changes in these matters between the 27th April, 2005 and the date on which information is provided). Section 261(3) permits the planning authority to require further information to be submitted by the operator or owner. Section 261(4) requires a planning authority to publish a notice of the registration of a quarry in one or more newspapers circulating in the area. Submission or observations can be made to the planning authority within four weeks of publication of the notice. Section 261(5) requires that a planning authority must, as soon as may be after the expiration of the period for making observations or submissions, serve notice of its proposals on the owner or operator of the quarry. The notice must state the reason for the proposals and permit submissions or observations from the owner or operator within a specified period, being not less than six weeks.

5.4 Section 261(6), the focus of these proceedings, authorises the imposition of conditions in respect of a quarry which commenced operation prior to the 1st October, 1964, and the restatement, modification or addition of conditions in

respect of a quarry which was previously granted planning permission. It states as follows:-

"(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."

5.5 Section 261(7) requires the making of an application for planning permission for certain quarries. It provides as follows:-

"(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."

5.6 Section 261(8) provides for compensation for quarries where the new conditions, following the addition or modification of conditions, are more restrictive than conditions under the original grant of planning permissions and for quarries in respect of which planning permission has been refused under s.34 of the Act of 2000 or granted pursuant to that section subject to conditions. It states:-

"(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."

5.7 Section 261(9)(a) permits an operator to appeal to An Bord Pleanála a decision of the planning authority to impose, restate, add to or modify conditions under s.261(6). Such an appeal must be made within four weeks of the planning authority's decision. Section 261(9)(b) authorises the Board to determine an appeal by confirming with or without modifications the planning authority's decision or by annulling that decision. Section 261(10) states that a quarry, in respect of which the owner or operator fails to provide information as required by s. 261(1), shall be unauthorised development.

6. The Issues

6.1 The central issue that arises in these three cases is to what extent, under the guise or umbrella of regulation, can existing land use rights be encroached upon? In particular, does s. 261(6) of the Act of 2000 allow for the imposition of conditions by a planning authority and/or the respondent of the type imposed in these cases i.e. requiring an application for planning permission, prohibiting blasting; prohibiting excavation outside a certain area; prohibiting excavation beyond a certain timeframe and prohibiting excavation below a certain depth? Also, does s.261(6) of the Act of 2000 contain a power to impose a condition, the effect of which is to require the termination of a right to quarry if a subsequent application for planning permission is unsuccessful? These issues involve an examination of the scope of the respondent's powers under s. 261(6) of the Act of 2000.

6.2 The second issue that falls to be determined is whether the decisions taken by the respondent can be impugned on the irrationality ground. The third issue is whether the respondent failed in its duty to give reasons or adequate reasons for the imposition of all or any of the said conditions. Another issue that arises in respect of the first set of proceedings is whether the respondent failed to afford fair procedures to that applicant. In the second set of proceedings an issue arises as to whether condition no.3 is void for uncertainty or ambiguity.

7. To what extent can existing land use rights be encroached upon?

Counsels' Submissions

7.1 The second set of proceedings was opened to the Court first. Mr. Simons S.C., for the applicant, submitted that conditions nos.2 and 3 imposed on the applicant, imposing a time limit of ten years after which an application for planning permission would have to be made and limiting the area where quarrying could take place, brought about the actual cessation of the quarrying activities and that such a condition was the antithesis of what s.261 of the Act of 2000 is intended to regulate i.e. the "*operation*" of the quarry. He submitted that if it were the case that an established right to quarry, as recognised by the Supreme Court in *Waterford County Council v. John A. Wood Ltd.* [1999] 1 I.R. 556, was to be taken away, then there needed to be express statutory language providing for this. He argued that as s. 261(6) of the Act of 2000 involved interference with established use rights that it must be strictly construed as per *the State (F.P.H. Properties SA) v. An Bord Pleanála* [1987] I.R. 698 and *Ashbourne Holdings Ltd. An Bord Pleanála* [2003] 2 I.R. 114.

7.2 Mr. Simons submitted that the respondent could not achieve under s. 261(6) of the Act of 2000 that which should properly be dealt with under s. 261(7) and contended in this regard that the respondent and the planning authority had failed to distinguish between the separate jurisdictions under ss.261(6) and 261(7) respectively. He submitted that a general power, such as that contained in s. 261(6) cannot be relied upon to produce the result or objective of a specific power under s.261 (7) and in this regard he relied on the *dicta* of Hardiman J. in *Ashbourne Holdings Ltd. An Bord Pleanála* [2003] 2 I.R. 114.

7.3 He observed that compensation is not available to persons whose operations are affected by conditions imposed under s. 261(6) of the Act of 2000 and that if the respondent's interpretation of that section was correct, it would mean that it could impose an obligation to seek planning permission but with no corresponding compensation or safeguards. He further noted that other statutory provisions in the Act of 2000 provide for cessation, such as s.46 which allowed for an existing use to be discontinued, but these make provision for corresponding compensation in contrast to s.261(6).

7.4 Mr. Galligan S.C., for the applicants in the first and third set of proceedings, adopted the above submissions of Mr. Simons in respect of s. 261(6). Addressing the first set of proceedings Mr. Galligan submitted that the applicants had a right to blast, which had been exercised prior to the 1st October, 1964, and as such it formed part of existing use rights, which are protected by Articles 40.3.2 and 43 of the Constitution. He submitted that if the respondent seeks to restrict those rights, through the imposition of condition no.29 which prohibits blasting at the quarry, it must have a cogent reason for doing so, especially given the absence of any statutory provision for compensation for the attachment of such a condition. Mr. Galligan noted the four criteria for a valid condition, as identified by the U.K. Court of Appeal in *Pyx Granite and Company Limited v. Ministry of Housing and Local Government* [1958] 1 Q.B. 554. He accepted that the respondent was entitled to impose conditions to regulate environmental compliance on the quarry site but he argued that these conditions could only be imposed as part of a rational process which considered alternative options.

7.5 As to the third set of proceedings Mr. Galligan similarly contended that the applicant enjoys constitutionally protected property rights and that s.261(6) of the Act of 2000 does not entitle the respondent to impose any condition such as condition no.66(1), limiting the vertical extent of the quarrying operations, which would, in effect, terminate operations, as, once the specified depth is reached across the entirety of the site a new planning permission will be required.

7.6 Ms. Butler S.C., for the respondent, submitted firstly that it was not accepted as factually correct by the respondent that the imposition of the conditions pursuant to s. 261(6) of the Act of 2000 in respect of the quarries in these proceedings would lead to the cessation of quarrying at those quarries. She submitted that, even if it were accepted that the conditions required the cessation of quarrying activities, if this was required for the "*proper planning and sustainable development*" of the area, as per s. 261(6), it would not be *ultra vires* the respondent. She submitted that the applicants' cases were premised on the assumption that the conditions imposed in these cases were *ultra vires* the respondent without any explanation, in her submission, for this.

7.7 Ms. Butler submitted that s.261 of the Act of 2000 was intended by the Oireachtas to impact on existing use rights, in that, it required the registration of quarries and provided a power to impose conditions. She noted that the Act of 2000

dealt with activities that had become increasingly difficult to control in the context of the Act of 1964 e.g. foreshore, fun fairs and quarries. She submitted that the legislature frequently introduces licensing or regulatory regimes that have the effect of curtailing an activity that previously could have taken place without restriction.

7.8 She contended that it is well established that property rights are not absolute and can be interfered with by the Oireachtas and the fact that s.261 impacts on existing use rights does not mean it is unconstitutional or that it is to be interpreted in such a way as that it constitutes "*control light*". She acknowledged that s.261 of the Act of 2000 is indeed restrictive and that it allows for controls to be made where no controls existed before or where controls are outdated. She further submitted that s.261(6) did not constitute a substantial encroachment or abrogation of property rights sufficient to require compensation and, that, in such circumstances the absence of a provision for compensation in s.261(6) was not material. She submitted that the extent of the conditions imposed by the respondent in these cases was to require a fresh authorisation or permission at a future date for the continuation of activities which had manifest deleterious consequences for the environment and even if the permission was refused, this would not result in the land being taken away from the applicants.

7.9 Ms. Butler rejected the proposition, in the first proceedings, that the applicants had existing use rights which included the right to blast. She argued that the factual determination made by the respondent that blasting had not taken place on the site for several years before the coming into force of s.261(6) could only be set aside on grounds of irrationality as per *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39. She continued that even if it was accepted that the applicant had an existing blasting use at the relevant time, the respondent had the power to impose condition no.29 as it was in the interests of proper planning and sustainable development.

7.10 Ms. Butler submitted that the meaning of the phrase "*conditions on the operation*" in s.261(6) could not mean that the operation had to be allowed to continue indefinitely, subject only to modifications in the manner in which it operates. She submitted that this was, in fact, recognised in the case of *Waterford County Council v. John A Wood Ltd* [1999] 1 I.R. 556. She argued that the applicants could not maintain a complaint that their property rights, including quarrying activities, have been interfered with or extinguished, prior to the making of and determination on an application for planning permission.

Decision

7.11 Section 261 of the Act of 2000 permits a planning authority to regulate existing quarries, in circumstances where the continued operation of such quarries would not normally require planning permission. This is done by the imposition of conditions. The precise type of conditions that may be imposed to regulate the operation or the carrying on of activities of a quarry must be considered in these three proceedings. Section 261(6) allows for the imposition of conditions on the "*operation*" of the quarry which is "*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)*". These are the criteria against which the validity of conditions must be tested. Nowhere in s.261 are the precise types of conditions that may be imposed described.

7.12 The applicants complain that their existing land use rights to quarry their land are being interfered with by the imposition of the conditions to such a degree as to eliminate them entirely. In the first and second cases the existing land use rights to quarry emanate from their pre-1964 status. Section 24 of the Local Government (Planning and Development) Act, 1963 ("the Act of 1963"), excluded from the necessity to obtain planning permission, development of land commenced before the 1st October, 1964. Section 3 of the Act of 1963 defined development as including the carrying out of works on, in or under land. "*Works*" is defined to include "*any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.*" Existing use rights in respect of pre-1964 quarries were confirmed by the Supreme Court, in *Waterford County Council v. John A Wood Ltd.* [1999] 1 I.R. 556. The Court recognised that s.24 of the Act of 1963 permitted the continuation to completion of particular quarrying works commenced before the 1st October, 1964, without the necessity of obtaining planning permission. In the third proceedings the existing use rights of the applicant to quarry stems from the planning permission that was granted in 1983.

7.13 The applicants in all three cases have demonstrated existing rights to quarry. However, in the first proceedings the applicant goes further and contends that blasting is an integral part of his established quarrying rights. As blasting is merely a method of extraction, I am satisfied that it cannot be considered to be synonymous with or an integral part of an existing right to quarry and, as such, it is properly an activity that can be controlled under s.261 of the Act of 2000.

7.14 It is well settled that property rights, as protected by the Constitution, are not absolute. The power of the State to regulate the use of land has been recognised in a number of cases. For example, in *Central Dublin Development Association v. Attorney General* [1975] I.L.T.R. 69 Kenny J. stated as follows at p.90:-

> *"[Article 43.2.1] does not require that the exercise of the rights of property must in all cases be regulated by the principles of social justice. It recognises that the exercise of these rights ought to be regulated by these principles and that the State accordingly may delimit (which I think means restrict) by law the exercise of the said rights with a view to reconciling it with the exigencies of the common good."*

The Supreme Court in *Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 I.R. 321 upheld a restriction on property rights in the form of a requirement that a developer cede up to 20% of the land in a particular development at agricultural use value rather than market value.

7.15 There is no provision for the payment of compensation in s.261 of the Act of 2000. The presence or absence of such a provision is of relevance in considering whether an interference with property rights is justified or not. As Kenny J., in the *Central Dublin Development Association* case stated at p.84:-

> *"The State pledged itself by Article 40.3.2 by its law to protect as best it may from unjust attack the property rights of every citizen and while some restrictions on the exercise of some of the rights which together constitute ownership do not call for compensation because the restriction is not an unjust attack, the acquisition by the State of all the rights which together make up ownership without compensation would in almost all cases be such an attack."*

It is clear from the above that not all interferences with property rights will require compensation to be paid to ensure constitutional legitimacy. Compensation will be required in circumstances where property is wholly expropriated or where the bundle of rights which constitute ownership are substantially taken away but lesser interferences with the right to private property would not require compensation. Murray C.J. adopted a similar view in *Re Article 26 and the Health Amendment (No.2) Bill 2004* [2005] 1 I.R. 105 at p.201 when he stated:-

> *"…where an Act of the Oireachtas interferes with a property right, the presence or absence of compensation is generally a material consideration when deciding whether that interference is justified pursuant to Article 43 or whether it constitutes an 'unjust attack' on those rights. In practice, substantial encroachment on rights, without compensation, will rarely be justified."*

7.16 As noted above, the first two cases involve existing use rights predating the 1st October, 1964, and in the third case stemming from a planning permission granted in 1983. Inevitably, over the years, changes will have taken place in the lands quarried, in the surrounding area and in science and technology. Any argument to the effect that because a quarry was being operated in a certain way over forty years ago, that it should continue in the same manner must be untenable. For example, in the third set of proceedings several of the conditions imposed treat of matters that could not have been addressed in 1983 when planning permission was first granted for example, the fact that the nearby River Blackwater was designated as a special area of conservation in the 1990s. Over the years the area in which a quarry is located may change significantly, so that the effects of the quarrying operations on the surrounding area may be very different to the effects in 1964. Developments in environmental science may now make apparent environmental damage from quarrying which was not known in 1964. Apart from statutory provision, the law of nuisance has long recognised that activity carried out on land may be restrained where that activity causes deleterious effects to escape which cause damage to adjoining property. It could never be said that there was an unrestricted right to use property for any activity, including quarrying, regardless of the effects that activity had on the enjoyment of other persons of their lives, health and properties. Many activities are regulated and restricted in a variety of statutory codes in the interest of the common good. I see no difference in principle or in substance between these statutory regulatory regimes and the type of regulation provided for in s.261(6). In all cases the activity restricted by statue would have been unregulated or unrestricted before the enactment of that type of legislation.

7.17 Section 261 of the Act of 2000 introduced a fresh regulatory scheme for the control of all quarries, those which operated before 1964 and thereafter. The power granted to the respondent under this section is to restate, modify, add to or impose conditions on the operation of a quarry. In the absence of a description of the types of conditions to be imposed in s.261(6) and in light of the wide criteria under which conditions may be imposed (i.e. "*in the interests of proper planning and sustainable development*") I am satisfied that the conditions that can be imposed on the operations of quarries can encompass the wide spectrum of the various normal planning concerns as these are or are likely to be affected by the works carried on at a given quarry in its particular location. To suggest that a condition which required the obtaining of planning permission at some stage in the future was *per se ultra vires* s. 261(6) is, in my judgement, to impermissibly restrict the scope of sec. 261(6), in effect, adding to the language of the subsection words of restriction which are clearly not there, and, therefore, not intended to be there by the Oireachtas. In my view, whether one adopts a literal approach or a purposive approach to the interpretation of s.261(6), the result will be the same.

7.18 The concept of the "*operation*" of a quarry clearly envisages the carrying on of continuous activities at the quarry. However, I am satisfied that the effect of the conditions imposed in these cases do not, in fact, as was submitted, bring about the cessation of the quarrying operation. At their height an application for planning permission for a fresh authorisation for the continuation of quarrying will be have to be made at a future date. It cannot be assumed that planning permission will be denied and that the cessation of the quarry will ensue. An application for planning permission would give the applicants an opportunity to make their cases and would enable environmental issues, amongst other proper planning concerns, to be properly considered by a planning authority or the respondent, thereby enabling the quarrying operations to be regulated by more appropriate conditions in the light of prevailing relevant planning considerations. This process, which is clearly in the interest of the common good, cannot be equated with nor does it amount to the extinction of the existing quarrying rights of operators of quarries. If the applications for planning permission, now required by the conditions impugned in these proceedings, for the continuation of a quarrying operation were to be refused such that a quarrying operation had to cease, at that point, the issue as to whether such a cessation could be brought about by s.261(6) could arise, but, until then any such consideration is premature.

7.19 As to the argument that the mandatory requirement to obtain planning permission under s. 261(7) of the Act of 2000 precludes the imposition of a condition to obtain planning permission under s.261(6) of the Act of 2000, in my view, the respondent is entitled to impose a condition on the operation of a quarry which is in the interests of proper planning and sustainable development. This may necessarily include a condition requiring planning permission to be sought at a future date, notwithstanding the existence of s.261(7) of the Act of 2000. This is so because a quarry's operations may have significant effects on the environment but not meet the requirements laid down in s. 261(7), and the interest of proper planning and sustainable development could require in the future the imposition of revised conditions, the appropriateness of which could only be assessed through the mechanism of the planning permission process. The absence of a provision for compensation in s.261(6) is not a material consideration in arriving at the foregoing construction of s.261(6), as the mere requirement to obtain planning permission could not per se be said to injure property rights to an extent sufficient to warrant compensation. Neither could the imposition of conditions necessary for proper planning and sustainable development, be said to give rise to a right to compensation. Should the conditions which may be imposed in a future planning permission have the effect of bringing about the cessation of quarrying at any of the quarries operated by the applicants, then, at that stage, an issue would arise as to whether any such applicant was entitled to compensation under s.197 of the Act of 2000. In light of the provisions of s.197, in my opinion, the absence of a provision for compensation in s.261(6) does not indicate that s.261(6) should be construed as preventing a planning authority from imposing a condition requiring an application for planning permission at some point in the future as occurred in these cases.

7.20 For these reasons I am of opinion that the conditions imposed in these three cases are not *ultra vires* the powers given to the respondent under s.261(6).

8. Irrationality

Counsels' Submissions

8.1 Mr. Galligan, in the first set of proceedings, submitted that condition no.29 in this case was not cogently justified and was made in error of law, in that, the report of the respondent's inspector used the date of registration and the time immediately preceding it in determining the extent of the existing use rights, instead of the date of the coming into force of the Act of 1963, the 1st October, 1964. He submitted that by looking at the position as of the date of registration and the years preceding it, the inspector concluded that there was an increase in size and intensification of the quarry and that this gave rise to a requirement for planning permission. It was submitted that this finding was irrational and ran contrary to law, as a material change of use was required for an application for planning permission and not a mere increase in scale or intensification of the operations.

8.2 Mr. Simons, in the second set of proceedings, argued that the respondent acted inconsistently and/or irrationally in purporting to include condition no.2 as the purported effect of this was to require the cessation of ongoing activity in the other fields owned by the applicant, notwithstanding the fact that it was accepted by the respondent's inspector and, by implication, the respondent itself that the other fields constituted part of the quarried area. He surmised that for reasons of administrative convenience that the respondent's inspector "*rounded down*" the quarry area so as to include only those fields which, in their entirety, came within the quarried area. He submitted the respondent's inspector found that, as a matter of fact, extraction had taken place in certain fields but that the respondent now required the applicant to apply for planning permission to excavate in these same fields. Mr. Simons argued that the selection of the limited area for quarrying was not reasonable or rational and he suggested that the inspector was confused as to the function he was exercising. He submitted that as the inspector quoted from departmental guidelines which were concerned with conventional planning permission, that this was an error and that he drew the wrong inference from those guidelines.

8.3 Ms. Butler, in respect of the first proceedings, submitted that the 28th April, 2004, was the crucial date for the assessment of quarrying activities and that the 1st October, 1964, was a meaningless date insofar as s.261 of the Act of 2000 is concerned. She argued that an entirely new, separate scheme for the regulation of quarries was introduced by the Oireachtas in the form of s.261 and that it brought about a new date for assessing the activities of quarry operators.

8.4 As to Mr. Simon's argument that the respondent's inspector misinterpreted the departmental guidelines, Ms. Butler submitted that even if the view of the inspector was erroneous that this would not affect the jurisdiction of the respondent to make the decision impugned. She did not agree, however, that the inspector was in error and noted that the respondent had excised the reference to "*permission*" as it appeared in the inspector's report.

Decision
8.5 The respondent used the reference point of the 28th April, 2004, for assessing whether blasting took place and not the 1st October, 1964. Section 261 of the Act of 2000, under which the relevant condition is imposed, requires information as to the activities of a quarry operator as at the 28th April, 2004. In such circumstances the correct reference point was adopted by the respondent. It was for the applicant to establish that it had existing use rights at the relevant time. If the applicant showed that it had an existing blasting use at that time, the imposition of a condition prohibiting blasting would be permissible if the respondent found that it was in the interests of proper planning and sustainable development. Section 261(6) empowers a planning authority and the respondent, on appeal, to impose controls. The legislature has provided for controls to be imposed on quarries which are registered regardless of existing use rights. The nature of the quarrying operations as of 1964 is irrelevant to the issue this Court has to decide because the state of operations carried out in 1964 is not relevant to the process or decisions to be taken by a planning authority under s.261, which is there to provide for regulation of quarrying operations being carried out as of the date of registration, which, of course, may be completely different to quarrying operations carried on 40 years earlier. It would be nonsensical to attempt to regulate current quarrying activity on the basis of an historical position 40 years earlier. I am satisfied that there was no error of law or irrationality in the selection of the date of registration as the correct date by reference to which the operations of a particular quarry should be assessed and conditions fashioned to regulate or control those operations.

8.6 Applying the appropriate test as laid down in *O'Keefe v An Bord Pleanála* [1993] 1 I.R. 39 I am also satisfied that there was ample material before the respondent to support its conclusion that no blasting had occurred for many years prior to the date of registration and that there had a been a significant increase in activity in the form of blasting occurring in 2005 which in the ordinary way would have required planning permission.

8.7 As to the second set of proceedings, again applying the *O'Keefe v An Bord Pleanála* test, there was, in my opinion, ample material before the respondent to support its decision to impose conditions nos. 2 and 3. Whilst it may have been the case that excavation had taken place in the fields in respect of which a requirement for planning permission was imposed, it cannot be said that such control as was imposed on further quarrying in those fields by conditions 2 and 3 is in any sense invalid on the irrationality ground.

8.8 Insofar as the third set of proceedings is concerned, the decision of the respondent to impose condition no.66 was, in my opinion, also amply supported by the material before the respondent and its decision cannot be impugned on the irrationality ground.

9. Failure to give reasons

Counsels' Submissions
9.1 Mr. Galligan, in the first proceedings, submitted that the reasons and considerations furnished by the respondent in support of the imposition of conditions were inadequate. He stated that they were vague and formulaic and the reasons and considerations only related to the decision to attach and/or amend certain conditions. He further submitted that an explanation was not provided for the decision to remove conditions nos. 2, 3 and 7. He relied on the decision of Kelly J. in *Mulholland v. An Bord Pleanála* (No. 2) [2006] 1 I.R. 453 in this regard.

9.2 Mr. Simons, in the second set of proceedings, also submitted that the respondent failed to give proper reasons. He argued that there was no explanation given as to why it was considered necessary to impose a time limit at all or why a time limit of ten years was chosen as opposed to a shorter or longer duration than that. He further submitted that no explanation was given by the respondent as to why it was considered appropriate to confine the quarrying to a particular area of 12.5 acres. Condition no.3 was criticised by him on the basis that the reason for it was given in the baldest of terms. He noted that there was no express statutory requirement to give reasons under s. 261(6) but that there was a general common law duty to give reasons. He relied on the cases of *Grealish v. An Bord Pleanála* [2007] 2 I.R. 536, *Weston v. An Bord Pleanála* [2008] 2 I.L.R.M. 542 and *Deerland Construction Limited v. Acquaculture Licences Appeal*

Board [2008] I.E.H.C. 289 in this regard. He sought to distinguish the case of *Ní Éilí v. Environmental Protection Agency* [1999] I.E.S.C. 64.

9.3 With regard to the duty to give reasons it was submitted on the part of the respondent by Ms. Butler that, when looked at in their totality, the decisions of the respondent adequately state the reasons for the conditions. She acknowledged that there was a general common law duty on the respondent to give reasons in these cases. She submitted that the reasons given in the instant cases were apparent and that they did not require further explanation. She cited *Grealish v. An Bord Pleanála* (No.2) [2006] I.E.H.C. 310 where, she submitted, this Court described the statutory obligation on the Court to give reasons as a minimal obligation. She also relied on the Supreme Court case of *Ní Éilí v. Environmental Protection Agency* [1999] I.E.S.C. 64.

9.4 Ms. Butler contended that it was difficult to understand the basis of Mr. Galligan's complaint that reasons were not given for the removal of certain conditions.

Decision
9.5 Finlay C.J. in *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39 at p.76 held that it was permissible for An Bord Pleanála to rely "*on a combination of the reason given for the decision and the reasons given for the conditions, together with the terms of the conditions.*" He formulated the correct approach in the following terms:-

> *"What must be looked at is what an intelligent person who had taken part in the appeal or had been appraised of the broad issues which had arisen in it would understand from this document, these conditions and these reasons."*

This passage was approved of and applied by Murphy J. in the later case of *Ní Éilí v. Environmental Protection Agency* [1999] I.E.S.C. 64.

9.6 Having regard to this it is clear that in the first case (the Quirke case) that there was not a failure on the part of the respondent to give reasons when the reasons set out in the conditions coupled with the reasons set out in the section of the decisions entitled "*Reasons and Considerations*" are taken together. The reason for the condition no.29: "*In the interest of protecting local amenities, local property and public safety*", taken in conjunction with the condition itself, is, in my view, self explanatory. The applicant's complaint in this case concerning the removal of conditions 2, 3 and 7 is difficult to understand. This applicant does not object to the removal of these conditions but asserts that the decision is vitiated by the absence of reasons given for the removal of these conditions. As the conditions were removed in their entirety, the applicant was put in the same position he was in, if they had not been imposed in the first place by the planning authority. In my judgement there was no duty on the respondent to give reasons in these circumstances.

9.7 In light of the contents of the inspector's report in the second case (the Corduff case) as to the location and dispersal of quarrying activity, in my view, the reasons for condition nos. 2 and 3 namely "*To define the extent of quarrying activities*" (condition no.2) and "*In the interest of orderly development and in the interest of environmental protection.*" (condition no.3) are self explanatory.

9.8 I am satisfied that the reasons given in respect of the impugned conditions in all three cases sufficiently satisfy the test for adequacy as set out in the above cases.

9.9 In the second case complaint was made concerning the reliance of the Inspector on paragraph 4.9 of the Quarries and Ancillary Activities Guidelines for Planning Authorities, published by the Department of the Environment, Heritage and Local Government on the basis that part 4 of the those guidelines applied only to applications for planning permissions for quarries and did not apply to the imposition of conditions under s.261(6). In my judgement, any error on the part of the inspector in this regard, could not vitiate the entirely separate exercise by the respondent of its self contained statutory jurisdiction to make the decision required from it. The status of the error in question was no more that that of any other piece of mistaken information which the respondent was free to consider and reject in the overall discharge of its statutory function. The decision of the respondent, on its face, contains no such error and indeed it is noteworthy that the recast condition no.2 omits the unhappy use of the expression "*This permission*" at the commencement of condition no.2 as imposed by the Meath County Council.

10. Fair Procedures

Counsels' Submissions
10.1 In the first set of proceedings Mr. Galligan complained that there was a failure to afford the applicants fair procedures, in that, they were denied an opportunity to make submissions to address matters referred to in the findings of the inspector at para. 7.2 of his report dated the 23rd October, 2007, and on certain third party written observations, in particular, a report by engineering firm Malachy Walsh & Partners which was enclosed in the submission of Mr. Brennan, a local resident, which was put before the respondent. Mr. Galligan argued that as the appeal was de novo that the applicants should not have to seek out documents that may have already been on the planning authority's file.

10.2 Ms. Butler submitted that the information referred to by the applicants was not new information and that the third party affidavits were on the notice party's file when it made its initial registration decision to impose condition no.29. She rejected any argument to the effect that there was a general obligation on the respondent to circulate every response to other parties for comment.

Decision
10.3 The notice party was required by s.128(2) of the Act of 2000 to forward documents to the respondent as it was "*information or documents in their possession which is or are relevant to the matter*". In addition, once an appeal is taken, s.130 of the Act of 2000 permits third parties to make observations or submissions to the respondent within four weeks of the date of the receipt of the appeal by the respondent. The appeal is not a *de novo* hearing. It is a more limited type of appeal. The appeal was lodged in the first proceedings on the 30th March, 2007. The third party submission of Mr. Brennan was received on the 25th April, 2007, within the statutory four week time limit. The information was, therefore, properly before the respondent. I am satisfied and in this respect would respectfully follow the judgment of Birmingham J. in the *Mulhaire v. An Bord Pleanála* [2007] I.E.H.C. 478 wherein it was held that fair procedures did not require that an inspector's report be furnished to an appellant prior to the respondent making its decision. As the material contained in the third party observation was already well known to this applicant from the procedure which had taken

place when the matter was before the planning authority, in my judgement, it cannot be said that there was any breach of fair procedures by the respondent in the conduct of the appeal in this regard

11. Condition no.3 in the second set of proceedings
11.1 Mr. Simons argued that condition no.3 is vague, in that, it requires the applicant, within eight weeks of the date of the order, to agree "*the exact area of the quarry within which future extraction will be confined*", thereby purporting to define the future extraction area with an unnamed party within eight weeks.

11.2 Ms. Butler contended that as it was a condition imposed by the planning authority that, implicitly, the agreement is between the operator and the planning authority in whose functional area he is operating. She further argued that the applicant lacked *locus standi* to make this complaint as he did not raise the matter before the respondent and she relied on the case of *Cicol Ltd v. An Bord Pleanála* [2008] I.E.H.C. 146 in this regard.

Decision
11.3 It is apparent that the applicant did not make any argument regarding this matter before the respondent. In such circumstances the applicant is estopped from raising this matter at this juncture. However, as it was the notice party who imposed this condition at first instance, which was upheld by the respondent, and as the notice party is the relevant planning authority it can easily be inferred that the notice party is the only party with whom the agreement sought could be made. As to the content of the condition, in my view, taken in conjunction with condition no.2, its meaning is sufficiently clear to enable this applicant to comply with it. What is clearly required is agreement relating to the parts of the quarry where quarrying can take place as distinct from those parts of the quarry where quarrying is excluded under condition no.2 unless planning permission is obtained.

12. Conclusion
12.1 For the reasons set out above, I must refuse the reliefs sought in these three cases.