THE HIGH COURT
JUDICIAL REVIEW

[2023] IEHC 223

RECORD NO: 2013/966JR

BETWEEN

DONNAL MCMONAGAIL AGUS A MHIC TEORANTA TRADING AS MCMONAGLE STONE
APPLICANT

-AND-

IRELAND AND THE ATTORNEY GENERAL , DONEGAL COUNTY COUNCIL AND AN BORD PLEANÁLA
RESPONDENTS

THE HIGH COURT
JUDICIAL REVIEW

RECORD NO. 2020/497 J.R.

IN THE MATTER OF SECTION 50
OF THE PLANNING & DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

DONAL MCMONAGAIL AGUS A MHIC TEORANTA TRADING AS MCMONAGLE STONE
APPLICANT

-AND-

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL
RESPONDENTS

JUDGMENT of Mr Justice Cian Ferriter delivered this 28th day of April 2023

Introduction

1. This judgment sets out my decision in respect of two sets of judicial review proceedings brought by the same applicant, being *Donal McMonagail agus a Mhic Teoranta t/a McMonagle Stone v. Ireland, The Attorney General, Donegal County Council and An Bord Pleanála* (Record Number 2013/966 JR) ("the 2013 proceedings") and *Donal McMonagail agus a Mhic Teoranta t/a McMonagle Stone v. An Bord Pleanála, Ireland and The Attorney General* (Record Number 2020/497 JR) ("the 2020 proceedings"). Both cases concern

challenges by way of judicial review to decisions bearing upon the planning status of a quarry at Largybrack, Glencolmcille, County Donegal, owned and operated by the applicant ("*the quarry*"). Both proceedings also involve, as a fall back, challenges to the constitutionality of various provisions of the Planning and Development Act 2000, as amended ("*the 2000 Act*").

2. The 2013 proceedings concern a challenge by the applicant to a determination and decision of Donegal County Council ("*the Council*") made on 22 August 2012 under s.261A(2) and (4)(a) of the 2000 Act that the quarry required an Environmental Impact Assessment ("*EIA*") and an Appropriate Assessment ("*AA*"), that the quarry had commenced operation on or after 1 October 1964 and that no permission was granted in respect of the quarry under Part III of the 2000 Act or Part IV of the Local Government and Planning and Development Act 1963 ("the 1963 Act"). The Council's decision also notified that the Council intended to issue an enforcement notice in relation to the quarry under s.154 of the 2000 Act requiring the cessation of the operation of the quarry.

3. The applicant applied for a review of the Council's determination and decision to An Bord Pleanála ("*the Board*") pursuant to s.261A(6) of the 2000 Act. The Board gave its decision on the review application on 25 October 2013 ("*the Board's 2013 decision*"), confirming the Council's decision. This paved the way for enforcement action by the Council in respect of the quarry. The applicant also challenges the Board's 2013 decision in the 2013 proceedings.

4. On 10 October 2018, the applicant made an application seeking leave to apply for substitute consent in respect of the quarry (substitute consent being a form of retention permission). This is an application made directly to the Board pursuant to s.177C of the 2000 Act. Leave to apply for substitute consent to regularise the development was sought under the "exceptional circumstances" criteria set out in s.177D of the 2000 Act. On 16 April 2020, the Board gave its decision refusing leave to apply for substitute consent under s.177D ("*the substitute consent decision*"). The 2020 proceedings concern a challenge to the Board's substitute consent decision.

5. The applicant's case in each set of proceedings is that the impugned decisions were arrived at in breach of fair procedures. In the 2013 proceedings, the applicant's core case is that the Board (and the Council) acted in breach of fair procedures in determining that there had been no pre-1964 use of the quarry; in particular, it was contended that the Board (and the Council) had determined there was no quarry on the site pre-1964 on the basis of a single aerial photograph from 1995, without putting that photograph to the

applicant or otherwise giving the applicant an opportunity to address the intended finding as to the absence of quarry use pre-1964.

6. The fair procedures case in relation to the 2020 proceedings is that the Board arrived at its adverse determination on the application for leave for substitute consent by rejecting the applicant's evidence as to pre-1964 user without giving the applicant an opportunity to properly make submissions on that issue and that, further, the Board determined that there had been an enlargement of the scope of quarry activity between 2012 and 2019 on the basis of aerial photography not put to the applicant.

7. The Board contends that very similar arguments were made and rejected recently by the High Court (Hyland J.) in the cases of *Fursey Maguire & ors v. An Bord Pleanála* and *Phoenix Rock Enterprises v. An Bord Pleanála* [2022] IEHC 707 which were the subject of a single judgment by Hyland J. handed down on 12 December 2022 last; for ease I will refer to that judgment as "*Fursey Maguire*". The applicant maintains that *Fursey Maguire* is distinguishable and that it can make out its case in each of its two proceedings on their own facts.

8. In order to put the issues in the proceedings in their appropriate context, it is necessary to briefly explain particular aspects of the planning regime in place for quarries as set out in the 2000 Act as amended.

The planning regime for quarries

9. Section 261 of the 2000 Act ("s.261") was enacted to regularise the planning position of quarries, in circumstances where many quarries had operated in a planning "*grey area*", particularly where quarrying activity may have taken place on a quarry site pre-1964 and was not the subject of a planning permission since then. Section 261 introduced a new system of registration of all quarries. This system was intended to give a snapshot of the current use of land for quarrying and, where necessary, to permit the introduction of new or modified controls on the operation of certain quarries. Section 261 commenced on 28 April 2004.

10. As part of the registration process, an owner or operator was required not later than one year from the coming into operation of the section (i.e. by April 2005), to provide information on the operation of the quarry to the planning authority in the functional area in which the quarry was situated. On receipt of such information, the planning authority

was required to enter it into a register. The information required included the area of the quarry, with the extracted area delineated on a map, and data from quarrying operations on the land. Section 261(6)(a)(i) provided for the imposition of conditions on quarries so registered, provided the quarry had commenced operation before 1 October 1964. (In broad terms, quarries which had commenced prior to 1 October 1964 would not have required permission under the 1963 Act.) Alternatively, under s.261(6)(a)(ii), where a quarry had planning permission, the local authority could restate, modify, or add to conditions imposed on the operation of that quarry.

11. As noted by Hyland J. in *Fursey Maguire* (at para. 25), following the enactment of s.261, the legal landscape changed considerably in relation to quarries. As she points out, the evolution of the obligations on quarry operators has been set out in some detail in the decisions in *J.J. Flood v. An Bord Pleanála* [2020] IEHC 195 ("*J.J. Flood*") and *McGrath Limestone v. An Bord Pleanála* [2014] IEHC 382 ("*McGrath Limestone*") and there is no need to repeat that detail here.

12. A further very material development in the legal regime applicable to quarries happened with the decision of the CJEU in Case C-215/06 *Commission v. Ireland* (EU:C:2008:380) [2008] ECR I-4911 ("*Commission v. Ireland*"). Effectively the CJEU found in *Commission v. Ireland* that retention permission was too readily available in Ireland for developments requiring an EIA under the EIA Directive and that this did not properly give effect to Ireland's obligations under the EIA Directive as it led to potential circumvention of the EIA regime.

13. The CJEU's decision in *Commission v. Ireland* necessitated the removal of the facility to apply for retention permission for developments requiring an EIA under the EIA Directive in all but exceptional circumstances. The relevant legislative changes were introduced by the Planning and Development (Amendment) Act 2010 (the "2010 Act") and the Environment (Miscellaneous Provisions) Act 2011 (the "2011 Act"). Amongst the key amendments to the 2000 Act effected by the 2010 Act and 2011 Act were the following:

(i) prohibition on retention permission in certain circumstances (s.34(12));

(ii) provision for a new species of permission described as "substitute consent" (Part XA); and

(iii) an obligation imposed on planning authorities to examine and make decisions on quarries within their area (s.261A).

14. The decisions impugned in the 2013 proceedings were made under s.261A.

15. The material parts of s.261A for present purposes are as follows. Under s.261A(1), each planning authority was obliged within four weeks of the coming into operation of the section to publish a notice stating its intention to examine every quarry in its administrative area to determine whether an EIA or an EIA screening or an AA was required. Importantly, under s. 261A(2)(a), each planning authority was required not later than nine months after coming into operation of s.261A to make a determination in relation to every quarry within its administrative area as to whether development carried out after 1 February 1990 would have required an EIA (or EIA screening) and whether development after 26 February 1997 would have required an AA and whether same were in fact carried out. As s.261 commenced in November 2012, the relevant determinations were required to be made by July 2012.

16. Assuming the local authority in question concluded that an EIA/EIA screening/AA was required, it was then required to look at the planning history of the quarry. Only quarries that either had planning permission or had commenced operation before 1 October 1964 and had fulfilled registration requirements under s.261 (if imposed) could automatically seek substitute consent from the Board.

17. As confirmed in *J.J. Flood* (at para. 88), s. 261A expressly contemplates that, even if a quarry benefits from a pre-1964 user, it may still involve development requiring an EIA/EIA screening or an AA.

18. Under s.261A(4)(a), where a planning authority makes a determination under s.261A(2)(a) (i.e. development post-1 February 1990 which required an EIA or EIA screening but such was not carried out, or development post-26 February 1997 which required an AA but no such AA was carried out) and the authority decides that the quarry commenced operation after 1 October 1964 and had no planning permission under the 1963 or 2000 Act, the planning authority shall issue a notice to the owner or operator of the quarry. The s.261A(4) notice must set out the planning authority's determination under s.261A(2)(a) and its decision under s. 261A(4)(a) and, importantly, must state that the authority intends to issue an enforcement notice in relation to the quarry under s.154. Under s.261A(6), a party can apply to the Board for a review of the planning authority's s.261A(2)(a) determination and s.261A(4)(a) decision and the Board on review can confirm or set aside the relevant determination or decision. Section 261A(6)(f) provides that notice of the Board's decision on the review "*shall, for the purposes of this section be*

considered to be the disposal, by the Board, of the review". The decisions being challenged in the 2013 proceedings relate to the Council's determination under s.261A(2)(a) and its decision under s.261A(4)(a) in relation to the quarry, and the Board's confirmation of same following review under s.261A(6).

The substitute consent regime

19. All was not lost for quarries which did not have planning permission and which had commenced operations post-1 October 1964 (or had materially intensified operations since then) as such quarries could be the subject of an application for leave to apply for substitute consent under the procedures set out in sections 177C and 177D of the 2000 Act.

20. In broad terms, the substitute consent procedure deals with a situation where a quarry was compliant with domestic law but may nonetheless have been non-compliant with EU law requirements in relation to EIA and AA. It provided a mechanism whereby such EU law non-compliance could be regularised. The substitute consent regime was legislated for by the insertion of Part XA into the 2000 Act in September 2011.

21. As explained by Faherty J. in *Redrock Developments Ltd v. An Bord Pleanála* [2019] IEHC 792 ("*Redrock*") (at paras. 11 and 12), there are a number of mechanisms ("gateways") to obtaining substitute consent provided for in the 2000 Act.

22. Pursuant to s.177B, a planning authority must issue a notice requiring a developer/owner to apply for substitute consent where the planning authority becomes aware in relation to a development for which permission was granted and for which, *inter alia*, an EIA was required, that a final judgment of a national court or the CJEU has been made that the permission was in breach of law, invalid or otherwise defective in a material respect.

23. Pursuant to s.177C, a developer or owner to whom no notice has been given under s.177B may make an application for leave to apply for substitute consent. The section envisages two situations where a developer/owner's application for leave to apply for substitute consent can arise. The first situation is where the developer/owner is applying for leave to apply for substitute consent because he or she believes that the permission granted was in breach of law, invalid or otherwise defective in a material respect. In this

situation, the developer/owner is relieved from having to show exceptional circumstances. The second situation is where no permission has been in place but the developer/owner believes that "exceptional circumstances" exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent.

24. The criteria for assessing whether exceptional circumstances exist for the purposes of s.177C are set out in s.177D(2), as follows:

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

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

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

(c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;

(d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;

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

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

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

25. The 2020 proceedings concern the applicant's application to the Board for leave to apply for substitute consent under the ss. 177C and 177D procedure and the Board's refusal to grant such leave.

Material Factual Background

The 2013 proceedings

26. The material factual background to the s.261A(2) determinations and (4) decisions in issue in the 2013 proceedings is as follows.

27. On 25 April 2005, the applicant registered the quarry pursuant to s.261. It specifically answered "*no*" to a question as to whether the quarry commenced operation before 1 October 1964 (as we shall see, this was later said to be in error). It said on the registration form that quarrying commenced on the land in 1990, that the current operator (i.e. the applicant) commenced quarrying in 1996 and also added that the quarry "*operated for road construction in 1990s, closed for a short period and opened again by the present owner in 1996*". (The 1996 date also appears to have been in error in light of later submissions).

28. The applicant was told in response to its s.261 registration letter, by a letter from the Council of 26 October 2007, "*that the registration procedure is simply the registration of information submitted and does not confer a planning consent/permission for the continued operation of the quarry. That can only be achieved by successfully applying for planning permission in accordance with the normal planning process*." The letter also noted the Council's entitlement to take enforcement action in appropriate cases, including where there was evidence of intensification of previous use such as of itself to require a separate planning permission and where there was no current planning permission authorising the quarry operation and the time limit for enforcement action had not passed.

29. This correspondence confirms as misplaced the applicant's later contention that it assumed all was in order as regards the planning status of its quarry because the Council had not done anything following the registration of the quarry.

30. In late 2011, the Council issued a notice pursuant to s.261A(1) that it intended to examine every quarry in its administrative area to determine whether an EIA, EIA screening or AA was required but was not carried out and, *inter alia*, where it decided in such a case that the quarry commenced operation after 1 October 1964 and did not have the benefit of planning that the quarry owner or operator would be notified of the Council's intention to issue an enforcement notice under s.154 requiring the cessation of

the operation of the quarry. It will be seen from this that the applicant was on full notice of the potential consequences of the s.261A process for its quarrying operations, particularly in circumstances where it did not have the benefit of an existing permission and where, on its own case on registration under s.261, it did not have the benefit of pre-1964 user.

31. The applicant made a submission to the Council on 26 January 2012 in response to this notice, within the 6 week period for making such submissions set out in s.261A(1)(e). This submission stated:-

> *"Upon introduction of section 261 of 2004 [sic] of the Planning and Development Act 2000, the quarry was registered in error in 2005 as having commenced operation after 1963 when in fact it was already a quarry by this time with to prove this [sic]. It is known beyond doubt that there was quarries operating on the site in the 50s and 60s suppling stone to private contractors. We have made huge investment into this quarry in the last 15 years and it is now the main source of our material supply. Without this quarry the company would be forced to close with substantial loss [of] revenue for the local economy and of loss of employment in Mountcharles and Glencolmcille areas. At this point in time, the site comprises of established pre-63 development lands partially or completely excavated, and undisturbed ground."*

32. The submission then requested "*on the basis of the s.261A legislation and the DECLG guidance*" that "*the disturbed areas of the quarry be adjudged on the basis of being a pre-63 site with unauthorised extension, having registered in accordance with s.261 and complied with all directions of Donegal County Council in that regard, and that the offending areas be subject to a determination under s.261A(2) and decision under s.261A(3) with the consequent requirement to submit an application for substitute consent to An Bord Pleanála with remedial EIS under s.177E*". (s.261A(3) involves the planning authority directing that a quarry apply for substitute consent as a pre-1964 quarry).

33. The Council appointed an inspector who prepared a detailed assessment report on the quarry which was signed off on 13 August 2012. The inspector's report found (in section 1) that the quarry had not commenced operation prior to 1 October 1964 based on: the statements made by the operator on its 2005 quarry registration form (where the applicant that indicated that there was no pre-1964 use and that quarrying began in 1990); an assessment of maps (including OSI maps) for 1840, 1904 and the 1930s which showed no evidence of a quarry at the location; and aerial photographs of 1995, 2000,

2004 and 2010. The inspector noted that the 1995 aerial photography showed no evidence of a quarry at the location; that the 2000 aerial photography showed that a quarry occupied the central portion of the current quarry site; that the 2004 aerial photography showed that the quarry had expanded significantly to the east and north and that the 2010 aerial photography showed that the quarry had expanded to the south, southwest and northeast.

34. The inspector recommended that the Council determine, pursuant to s.261A(2)(a), that an EIA and AA were required in relation to the development and that the Council issue a s.261A(4)(a) notice to the owner/operator of the quarry informing it that the Council intended to issue an enforcement notice requiring the cessation of the operation of the quarry.

35. In its decision of 22 August 2012, these recommendations of the inspector were accepted by the Council. The Council's decision involved a determination under s.261A(2)(a) that development was carried out after 1 February 1990 which was not authorised by a permission under the 1963 Act or 2000 Act, which would have required an EIA and also that development was carried out after 26 February 1997 which was not authorised by a permission under the 1963 Act and which would have required an AA. The Council also determined under s.261A(4) in its decision that the quarry commenced operations on or after 1 October 1964 and that no permission was granted in respect of the quarry under the 2000 Act or the 1963 Act. The Council also notified the applicant, as a consequence of those findings, that it intended to issue an enforcement notice in relation to the quarry under s.154 of the 2000 Act requiring the cessation of the operation of the quarry (and the taking of such steps as the Council considered appropriate). (Enforcement notices were subsequently issued and withdrawn for reasons not relevant to these proceedings).

36. The applicant applied for a review of the Council's determination and decision to the Board. Under s.261A(6) of the 2000 Act, the applicant had three weeks in which to lodge this review. A submission was lodged on behalf of the applicant by Patrick O'Donnell of Earth Science Partnership, consulting engineers, to the Board on 10 September 2012 in support of the review.

37. This submission asserted that the quarry "*was originally authorised by way of being a pre-1963 development prior to the transposition of the EIA Directive in 1990, authorised for the extraction and production of building stone, pavement setts and decorative stone*". It noted that the quarry was acquired by the applicant as a working quarry around 2000 and that the applicant "*entered into agreements with the local authority to fund the*

upgrading of the road network in the area to facilitate the quarry activity". It was submitted, on the basis that the planning authority failed to impose conditions or hand down a decision on the quarry, that "*the owners presumed the quarry planning status was normalised and the quarry was in compliance with planning law at that time*". The submission noted that the site had been erroneously registered as a post-1964 development when, in fact, it was a pre-1963 quarry. The submission asserted that there had been no material intensification of the site beyond what was envisaged in 1964 but did state that the area of the site had expanded since 1997, thereby accepting that the EIA and Habitats Directives applied. The submission was made that the continued operation of the quarry was authorised but it did require a consent decision under s. 261A(3)(a) i.e. that the quarry be directed to apply for substitute consent as a pre-1964 quarry, where the registration requirements had been satisfied (at which point appropriate EIA and AA reports would need to be filed).

38. An inspector of the Board prepared a detailed report for the Board in respect of the review application. She considered the principal issues to be "*the planning status of the quarry, in particular whether or not the quarry commenced operations prior to the appointed date* [i.e. 1 October 1964]" and whether or not works carried out after 2 February 1990 were of the scale and nature for which either an EIA or EIA screening was required.

39. The Board's inspector addressed the pre-1964 user issue as follows. Under the heading "*Extent of quarry development*", the inspector noted that "*The agent for the quarry operator states that the s.261 commencement date of 1990 was an error and that the quarry is pre-63 in origin*". The inspector then said as follows:

> *"9.2.2 The OSI historic mapping for the area shows no evidence of a quarry on the 6" or the 25" map at the location of the current quarry. The area's aerial imagery available for the site is an OSI aerial photograph from 1995. In that image the site of the current quarry is clearly heavily vegetated, with only a narrow track leading south from the public road. By 2000, the OSI aerial photograph clearly shows that the area has been subject to ground clearance and excavation, with a new track leading from the road and opening into cleared ground. The 2005 OSI aerial image is very clear and shows an expanded area of excavation surrounded by dense forestry. Google Earth images from 2009 and 2012 show a slightly increased area from 2005.*
>
> *9.2.3 The quarry owner's agent has not submitted any evidence to support the claim of a pre-63 commencement, nor any details to undermine the very clear visual evidence*

that nothing existed on the site in 1995. I am satisfied that no evidence has been submitted to the Board that definitively proves a pre-64 authorisation and that the quarry does not benefit from a pre-63 authorisation. I am satisfied that quarry operations commenced on site at some point between 1995 and 2000."

40. It is clear from her report that the Board's inspector in arriving at this conclusion relied, *inter alia*, on the documentation on the planning file, including the Council inspector's quarry assessment report, the site's planning history and maps and aerial photography (included the 1995 photograph).

41. The inspector recommended that the Board confirm the Council's determination under s.261A(2)(a)(i) (in relation to the need for an EIA) and under s.261A(2)(a)(ii) (in relation to the need for an AA) and its decision under s.261A(4)(a) that the quarry commenced post-1 October 1964 and did not have a permission.

42. In its review decision, the Board, having had regard to, *inter alia*, "*the documentation on the review file (Planning Authority Register Reference Number EUQY174) and aerial photography*" (in addition to the nature, scale and intensity of the quarrying activity and the size of the quarry), and having regard to its inspector's report, considered that "*development was carried out after 1st February 1990 which development would have required having regard to the Environmental Impact Assessment Directive, an Environmental Impact Assessment, but that such an assessment was not carried out*". The Board also considered "*that the development carried on this site after 26 February 1997 would have required an appropriate assessment under the Habitats Directive, but that such an assessment was not carried out*".

43. The Board also determined in its review decision that the quarry did not commence operation before 1 October 1964 and that no permission had been granted in respect of the quarry.

44. Enforcement notices were issued by the Council on 10 January 2014, following the Board's decision. Leave to apply for judicial review was granted in the 2013 proceedings on 13 January 2014. The High Court granted a stay preventing the taking of any steps on foot of the enforcement notices pending determination of the proceedings. By agreement with the Council, the enforcement notices in question were ultimately withdrawn. However, the applicant remains exposed to the taking of enforcement action by the

Council in the event that the 2013 proceedings are unsuccessful and the Board's review decision stands.

45. I was told at the hearing that the length of time which it took to bring the 2013 proceedings to hearing was explicable by the fact that the proceedings have been adjourned on consent on a number of occasions to await the outcome of various other planning cases related to quarries.

The 2020 proceedings

46. The relevant factual background to the decision in issue in the 2020 proceedings is as follows.

47. On 10 October 2018, the applicant made an application seeking leave to apply for substitute consent in respect of the quarry. This was an application made directly to the Board pursuant to s.177C of the 2000 Act. Leave to apply for substitute consent to regularise the development was sought under the "exceptional circumstances" criteria. These criteria are found in s.177D(2) of the 2000 Act (as set out at para. 24 above).

48. The applicant's application for substitute consent was contained in a detailed submission dated 10 October 2018 made on its behalf by Patrick O'Donnell, engineer.

49. The submission addressed the circumstances in which the applicant's consultant had been engaged very late in the day in respect of the s.261A review process and acknowledged that the claim made at that time of pre-1963 user was "*not backed with evidential proof of the pre-63 existence*". This submission noted that, in the course of preparing the application for leave to apply for judicial review in the 2013 proceedings, "*the requisite evidence at pre-63 which was lacking prior to that date was properly researched and elicited from various sources*" and appended statements from various local people as to the use of the quarry pre-1963. The submission stated that "*There is an abundance of testimony as to the established nature of the site over many decades and, at a minimum, clearly in operation in 1961 and onwards during the construction of the Glencolmcille folk village. Indeed, flags were supplied in 1913/14 during the construction on the Glencolmcille Church Tower, which was built by Henry Musgrave with the flags used on the floor, and indeed in many properties in the Musgrave Estate*".

50. The submission was made that the applicant had been continuing the same development and that the current quarry constituted the same quarry as was there pre-1963. On the question of intensification, it was submitted that "*the nature and scale of the existing quarry is broadly similar to that which would have existed pre-63 or otherwise incrementally increased since then except for modest mechanisation so that while still very labour-intensive, it is not as much so as 60 years ago*". It was further that "*As the nature and scale of the operation post-2012 is virtually identical to that in 2012 such that no EIA or NIA offence has occurred since that date, An Bord may reasonably find that the pre-63 authorisation for the site remains intact to this day*".

51. The submission concluded with a summary of its key points as follows:

(i) "The site was undoubtedly in operation pre-63, regardless of a lack of evidentiary proof until 2014 (Leave Stage for Judicial Review);

(ii) The evidentiary proof is submitted here under Section 177C for a de novo assessment of the true state of the site's planning;

(iii) The site was never abandoned in line with caselaw;

(iv) The only act of development of concern was in 2001 and associated with ensuring that no burden fell on the local authority and was a proportionate response to the required roadworks;

(v) The 2001 development did not affect the nature and scale of the normal use of the site, and merely had the effect of clearly overburden [sic] for the subsequent two decades but did not impact on the position of the quarry faces or direction of normal development;

(vi) The 2001 development fails the Lackagh Test for intensification;

(vii) The limited mechanisation of the site falls well within established caselaw;

(viii) The current development is almost identical to that of 2012;

(ix) If any EIA or NIA offence has occurred, it arose in 'good faith' as a result of the 2001 development as all other development was associated with flagstone production and consistent with pre-63 caselaw."

52. The Council also made a submission to the Board in respect of the s.177C application.

53. The Board appointed an inspector to conduct a site inspection (which was conducted on 10 April 2019) and prepare a report in respect of the substitute consent application. The inspector prepared a detailed 25-page report dated 20 April 2019. He concluded that, "*notwithstanding that EIA and AA are required for the development, in light of the scale and nature of the quarrying that has been carried out, the applicant has not demonstrated that exceptional circumstances exist in this case, so as to permit the regularisation of the development in question*" (inspector's report, para. 6.5.1).

54. In his report, the Board's inspector considered that both an EIA and AA were required. He found that there was publicly available evidence *via* aerial photography that the area of the quarry had actually expanded between 2012 and 2019 as part of ongoing extraction activities, that this extraction was substantial and the applicant had not specifically sought leave to apply for substitute consent for this additional extraction area.

55. The inspector did not accept that the material submitted as evidence of pre-1963 user substantiated the case sought to be made as to pre-1963 user. He further found (at para. 6.4.7) that the quarrying activity since at least 2000 "*could not reasonably be considered to be within the scope of any asserted established rights relating to the continuation of quarrying activity that took place prior to 1 October 1964*". He referenced the fact that the applicant was warned by the Council as to the unauthorised status of the quarry as far back as 2003.

56. On the application of the exceptional circumstances criteria in s.177D(2) (a) to (g), the inspector concluded (taking each such criteria in turn) that:

    (a) that regularisation of the development would circumvent the purposes and objectives of the EIA Directive or the Habitats Directive on the basis that, relying on "*publicly available evidence via aerial photography dating from 2012 and 2019, the disturbed area of the quarry has actually expanded in recent years, as part of the extraction activities*" (para. 6.4.2). He found (at para. 6.4.3) that "*the additional extraction area dating from the 2012 to 2019 period is substantial*."

    (b) that the applicant could not reasonably have had a belief that the development was not unauthorised. On this issue, the inspector did not accept that the pre-63 use claim was properly substantiated. The inspector also found that, contrary to the

applicant's assertions, a material intensification of the site beyond what was envisaged in 1964 had occurred (para. 6.4.7). The inspector concluded, on this issue, that "*Given the scale and nature of the quarrying operations that have been undertaken on the subject site since at least the year 2000, the applicant could not reasonably have had a belief that the subject quarry development was not unauthorised*".

(c) On the question of "*whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired*", the inspector held (at para. 6.4.9) that the restriction of the quarry area included in the application for substitute consent to the area of the quarry in 2012 "*would substantially impair the ability to carry out a remedial EIA report and a remedial Natura Impact Statement (NIS) to assess the environmental impacts of the development that has been carried out on the remainder of the existing quarry and the effects on European sites*".

(d) In the context of assessing the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development, the inspector noted (at para. 6.4.10) that "*the area that would potentially be covered by the substitute consent application is part of a larger development that this application has not demonstrated is authorised*." Having regard to the restricted part of the overall quarry to which the application for leave applied, he considered that the application for substitute consent could not demonstrate the extent to which significant effects on the environment or adverse effects on European sites would be remedied (para. 6.4.11).

(e) As regards "*the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated*" the inspector in deciding that this criterion was not satisfied again referred to the restricted part of the overall quarry to which the application for leave applied.

(f) The inspector concluded (at para. 6.4.12) on the question of "*whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development" that "There is no authorisation for any quarrying on the site and the scale and extent of quarrying, and the intensity and methods of*

extraction utilised could not reasonably be the same as that asserted to be envisaged prior to 1 October 1964".

57. On 16 April 2020, the Board gave its decision refusing leave to apply for substitute consent under s.177D. The Board in this decision effectively adopted the inspector's analysis and recommendations. As part of its reasons and considerations, it said that it:

- *"considered that regularisation of the development to the open disturbed areas of the quarry as of 2012 and not the current overall quarry context, would circumvent the purpose and objectives of the Environmental Impact Assessment Directive and the Habitats Directive*

- *considered that, notwithstanding the documentation submitted, the applicant could not reasonably have had a belief that development was not unauthorised, having regard to the scale and nature of the quarrying operations that had been undertaken on the subject site since at least the year 2000, and the planning and enforcement history of the subject lands*

- *considered that the development would not allow for adequate consideration of the actual or likely significant effects on the environment or the adverse effects on the integrity of European sites resulting from the carrying out or continuation of the development*

- *considered that the extent to which significant effects on the environment or adverse effects on European sites could be remedied would be limited by virtue of the additional and ongoing quarrying activity since 2012*

- *considered that there is no authorisation for the quarry in light of the scale and extent of quarrying, and the intensity and methods of extraction utilized could not reasonably be the same as that asserted to be envisaged prior to the first day of October 1964 and that, on the basis of the documentation and submissions on file, including enforcement files and documentation supplied to the planning authority, considered that the applicant previously carried out unauthorized development on this site"*

58. The Board concluded that "*exceptional circumstances do not exist such that it would be appropriate to permit the regularization of the development by permitting leave to apply for substitute consent in relation to the site outlined in this application, and decided to refuse leave to make an application for substitute consent*."

59. The applicant was granted leave to apply for judicial review of the Board's s.177D decision in the 2020 proceedings on 19 October 2020 with the Court granting a stay on any enforcement notices pursuant to the s.177D decision pending determination of the proceedings.

Fair procedures – standard to be applied

60. Before addressing the specific issues arising in each of the proceedings, it is useful to address at this point the question of the standard of fair procedures to be applied in the processes under review and the extent to which the Council or Board may have been under an obligation to invite further submissions.

61. A helpful starting point is the *dictum* of Tucker L.J. in *Russell v. Duke of Norfolk* [1949] 1 All ER 109 at 118 (as cited with approval by Henchy J. in *Kiely v. Minister for Social Welfare* [1977] IR 267 at 281), where he said:

> *"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."*

62. It is common case that a right to make submissions is expressly provided for both under the s.261A process and the s.177C process. Pursuant to s.261A(1)(e), a party has 6 weeks to make submissions to the Council following the Council's s.261A(1) notice and also, pursuant to s.261A(6)(b), had 3 weeks to make submissions in support of a review by the Board of the Council's decision. Likewise, under s.177C(3) a party had an opportunity to make submissions in support of its application for leave to apply for substitute consent.

63. The applicant accepts that the relevant statutory procedures here provide for an express right to make submissions. However, it says on the facts of each case that it should have been given a further opportunity to make submissions, particularly on the question of the photographs relied on by the Council and Board in both the s.261A and s.177C processes, once the Council or Board was minded to rely on such photographs against the applicant. In making that argument, the applicant says that it should be entitled to heightened fair procedures given the draconian consequences of the impugned decisions. In particular, the applicant lays emphasis on the fact that the combination of the adverse s.261A determination and the decision to refuse application for leave for substitute consent renders the site in an unauthorised condition indefinitely. It contends there is no other mechanism by which the site can be regularised, which leaves the site permanently sterilised from any continued or future development. It says that this will also have the effect of a loss of employment and damage to the applicant's business. The applicant submits that, given these draconian consequences of the impugned decisions, a higher onus was placed on the Board to afford fair procedures in arriving at the impugned decisions. In particular, it submitted that there was on obligation on the Board to inform the applicant where the Board was minded to rely on material which had not been furnished by the applicant and to give the applicant an opportunity to make submissions on such material before a final decision was made. The applicant also contends that the principle of proportionality comes into play.

64. There was a dispute before me at the hearing as to whether it was correct to regard the quarry land as being sterilised as a result of the impugned decisions. Counsel for the Board relied on the decision in *Hayes v. An Bord Pleanála & ors* [2018] IEHC 338 ("*Hayes*"), where Ní Raifeartaigh J. stated (at para. 85) that "*EU law does not always and necessarily require that developments which have failed to submit environmental impact assessments in the past must be permanently sterilised into the future (i.e. a particular outcome); rather, it seems to me that EU law requires that information about past adverse environmental effects (if any) be made available to the decision-maker and a decision made by the decision-maker about the future in light of all relevant information (i.e. a particular process)*". Ní Raifeartaigh J. (at para. 87) expressed the view that she was "*not entirely convinced that a developer in the position of the Developer in the present case is definitively precluded from making an application under s.177D*" (i.e. for an application for leave to apply for substitute consent), while noting that she was not expressing a concluded view on the matter given that the question did not arise for determination before her as the developer had not made a s.177C application.

65. It is important to put those comments in context; at para. 2 of her judgment, Ní Raifeartaigh J. described how "*a very specific and net legal issue*" was presented to the Court for decision in that case and summarised the particular circumstances as follows:

"A very specific and net legal issue is presented to the Court for decision. This issue is whether an application for planning permission under s.34 of the Planning and Development Act 2000, as amended, (hereinafter "the Act of 2000") may be made, and granted, in the particular configuration of circumstances presenting in the present case: these being (a) that the quarry fell into a category which would have required environmental or habitat assessment; (b) that the quarry owner had previously failed to register the quarry with the local planning authority in accordance with his obligation under s.261 of the Act of 2000, as a result of which, by operation of law, it became an "unauthorised development"; (c) that this resulted in service by the planning authority of an enforcement order in accordance with the regime established by s.261A of the Act of 2000 as amended; (d) that the quarry complied with the enforcement notice and ceased its quarrying operations for six months; (e) that subsequent to this cessation, the quarry owner applied for planning permission in respect of future development by means of an application pursuant to s.34 of the Act of 2000, which application was accompanied by an environmental impact assessment; and (f) where no application for substitute consent was (or apparently could have been) made by the quarry owner or operator under the statutory provisions governing these matters. The question is whether, in these circumstances, such an application for planning permission amounted in effect to a grant of prohibited "retention permission" contrary to s.34(12) of the Act of 2000 as amended and/or constituted a breach of the requirements of the European Environmental Impact Assessment and the Habitats Directives."

66. It will be seen that the circumstances there described are quite different to the circumstances in which the applicant finds itself in the cases before me; in particular Hayes involved a conventional forward-looking application for permission under s.34(1) and not an application for leave to apply for substitute consent.

67. Ní Raifeartaigh J.'s comments were cited with approval in a judgment of Faherty J. (when in the High Court) in *Redrock* (already referenced at para. 21 above). *Redrock* concerned a challenge to a decision of the Board on a substitute consent application (i.e. it did not concern an application for leave to apply for substitute consent). There was also a prospective application for permission under s. 37L of the 2000 Act for "further development" of the quarry in issue in that case. It was contended by the applicant there that the Board's decision to refuse substitute consent was a disproportionate response on behalf of the Board on the basis that the effect of the refusal to provide substitute consent was to render the applicant's quarry sterilised. The Board submitted that it remained open to the applicant to apply for planning permission under s.34 of the 2000 Act as long as any such application equipped the Board with information regarding past

development defects and the Board relied in that regard on the passage of Ní Raifeartaigh J. from para. 85 of *Hayes* as set out at para. 64 above.

68. Faherty J. held as follows (at para. 199):

> *"199. I am not persuaded by the argument that Redrock has been left without a way forward. The pathway identified by Ní Raifeartaigh J. remains open to the applicants and, to my mind, is not affected by the coming into effect of s. 37L of the 2000 Act* [s.37L was a provision allowing for prospective permission in addition to substitute consent]*. There is nothing in s.37L which states that s.37L is the only mechanism for prospective planning permission available to the applicants. The s.34 route is available to the applicants as long as they provide the Board with information regarding past adverse environmental effects. Moreover, there also remains open to the applicants the exceptional circumstances gateway for substitute consent and the mechanism by which they can apply for leave for substitute consent. Accordingly, the applicants' sterilisation argument has not been made out".*

69. It seems clear in context that the reference to "the s.34 route" by Faherty J. in this passage is to s. 34(1) i.e. a conventional prospective application for the development of land.

70. Again, the circumstances in *Redock* were different to those applying here; Redrock did not involve an application for leave to apply for substitute consent under s.177C and a refusal of same.

71. I was told at the hearing before me that a decision is awaited from Faherty J. on an application to certify leave for an appeal to the Court of Appeal against her decision in Redrock. While the sterilisation question was not the subject of any specific questions for which certification was sought, I was fairly informed by counsel for the Board (who was also in that matter) that the sterilisation issue did subtend a number of the arguments underpinning those questions which were the subject of the application for certification.

72. Counsel for the applicant submitted that the applicant's circumstances were not comparable to those of the developers in *Hayes* or *Redrock* and that it could not be the case that a simple s. 34(1) application for future planning permission could circumvent

the effect of adverse decisions under s. 261A(2) and (4) and a refusal by the Board to grant leave to apply for substitute consent under s.177D; if such was the case, the statutory scheme and the objectives of the EIA and Habitats regimes stood to be readily circumvented.

73. I am reluctant to express any definitive views on the potential scope of the comments of Ní Raifeartaigh J. in *Hayes* as cited with approval by Faherty J. in *Redrock*, given that a decision on an application for leave to appeal in the latter case is pending and given that the circumstances applying in both *Hayes* and *Redrock* were different to those applying to the applicant as neither involved a s.177D refusal of leave to apply for substitute consent. One has to be careful of reading across *dicta* of ostensibly general application to facts that arise in an arguably distinguishable context.

74. That said, it does seem to me that the question of fair procedures in the cases before me must be approached on the basis that serious matters are at stake in both the s.261A and s.177C/177D processes (in terms of a quarry owner's business operation and the extent to which quarry land use is lawfully authorised) and that it is important that quarry owners and operators such as the applicant here are afforded all appropriate opportunity to make their case as fully as reasonably possible and to have that case fairly considered by the relevant decision makers. This is recognised in principle by the statutory processes in issue which, in both s.261A and s.177C, provide express opportunity to an applicant to make submissions in support of its case.

75. However, there are also other important matters of context which, in my view, also need to be taken into account when assessing a contention that fair procedures have not been properly afforded in a s.261A or ss.177C/177D process. The relevant statutory provisions make clear that the Board is entitled to have regard to "relevant information" (see s.261A(4)(b) and (6)(c) and the provisions of s.177C). As fairly accepted by the applicant at the hearing, such information in a quarry context is likely to include maps and photos from the various OSI series and from Google Earth, particularly when the scale of the site at various points in time and its historical user are likely to be issues relevant to the decision in question. Such maps and photos are publicly available (on payment of the requisite fees in the case of the OSI). Such information will also include the Council's files where the Board is reviewing the decision of the Council; an applicant can also readily obtain such a file. Accordingly, an applicant must be taken to be on notice of the fact that the Council and Board may (indeed, are likely) to have regard to such material in assessing questions relating to quarry use. The onus is on an applicant making an application under the relevant statutory processes to collate all relevant material and anticipate the issues which might reasonably arise from that material in light of the applicant's particular circumstances and the relevant criteria under the statutory scheme.

A quarry owner or operator must be taken to be aware of the potentially very significant consequences for it of decisions under the statutory processes and it cannot present itself as some form of passive entity waiting to be informed as to what the decision-maker regards as weak points in its application so that it can then make submissions or further submissions on those points. Any assessment of a contention that there has been a failure to afford fair procedures under a s.261A or ss.177C/177D process needs to have appropriate regard to those matters of context.

Right to a second opportunity to make submissions?

76. As already noted, the applicant accepts that the relevant statutory procedures here provide for an express right to make submissions. However, it says on the facts of the two decision-making processes in issue here that it should have been given a further opportunity to make submissions (particularly on the question of the photographs relied on by the Council and Board in both the s.261A and s.177C processes), once the Council or Board was minded to rely on such photographs against the applicant and where the Council and Board would have known that the applicant had not submitted that material and therefore the material constituted new material relevant to the applicant's case. The applicant relies in support of this argument on Irish case law such as *Dellway Investment v. NAMA* [2011] 4 IR 1 ("*Dellway*") and *An Taisce v. An Bord Pleanála* [2021] 1 IR 119 ("*An Taisce*"), and EU case law including *M.M.* C277/11 (EU:C:2012:744) ("*MM*") and *Sopropré* C349/07 (EU:C:2008:746) ("*Sopropré*").

77. A principal focus of the applicant's oral (and supplemental written) submissions was the CJEU decision in *MM. MM* was a case decided in the specific context of procedures for determining whether an individual qualified for refugee status in a member state or, if not, whether that individual could qualify for subsidiary protection. At issue were the provisions of directive 2004/83 ("the standards directive"), article 4(1) of which provided that "*Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.*"

78. Accepting that the context was different, the applicant nonetheless submitted that the CJEU in its judgment in *MM* articulated statements of more general application in the context of the right to be heard as a matter of EU law. The applicant, in particular, relied on the following statements of general principle at paras. 85 to 87 of the *MM* judgment:

> "85. Thus the Court has always affirmed the importance of the right to be heard and its very broad scope in the EU legal order, considering that that right must apply in all

proceedings which are liable to culminate in a measure adversely affecting a person (see, *inter alia*, Case 17/74 *Transocean Marine Paint Association v. Commission* [1974] ECR 1063, paragraph 15; *Krombach*, paragraph 42; and *Sopropé*, paragraph 36).

86. In accordance with the Court's case law, observance of that right is required even where the applicable legislation does not expressly provide for such a procedural requirement (see *Sopropé*, paragraph 38).

87. The right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely (see, *inter alia*, Case C 287/02 *Spain v. Commission* [2005] ECR I 5093, paragraph 37 and case law cited; *Sopropé*, paragraph 37; Case C 141/08 *Foshan Shunde Yongjian Housewares & Hardware v. Council* [2009]ECR I 9147, paragraph 83; and Case C 27/09 P *France v. People's Mojahedin Organization of Iran* [2011] ECR I 13427, paragraphs 64 and 65)."

79. The applicant submitted that, per *MM*, its right "to make known [its] views effectively" before the adoption of an adverse decision must extend to the right to make further submissions where a decision-maker, when addressing an applicant's original submissions, seeks to rely on material not submitted by an applicant and therefore not known to him. However, as pointed out by counsel for the Board, the CJEU expressly rejected an argument advanced in MM that a party applying for refugee status and subsidiary protection had an entitlement (stemming from the duty of co-operation imposed by article 4(1) of the standards directive, as set out above) to see a draft adverse decision before it was finalised so that he or she could address those matters in the draft decision which suggested a negative result. The applicant's argument in that regard was summarised by the CJEU (at para. 50) as follows:

"Mr M. submits that, read in the light of those principles, the cooperation requirement laid down in the second sentence of Article 4(1) of Directive 2004/83 means that the Minister is obliged to supply the applicant for asylum with the results of his assessment before a decision is finally made so as to enable the applicant to address those matters which suggest a negative result by putting forward all documents which are then available or any argument capable of challenging the position of the competent national authority and to enable him to draw the authority's attention to any relevant matters of which due account has not, in the applicant's view, been taken."

80. This argument was expressly rejected by the CJEU where it held (at para. 74) that:

> *"the conclusion on this point must be that the requirement that the Member State concerned cooperate with an applicant for asylum, as stated in the second sentence of Article 4(1) of* [the standards directive]*, cannot be interpreted as meaning that, where a foreign national requests subsidiary protection status after he has been refused refugee status and the competent national authority is minded to reject that second application as well, the authority is on that basis obliged – before adopting its decision – to inform the applicant that it proposes to reject his application and notify him of the arguments on which it intends to base its rejection, so as to enable him to make known his views in that regard."*

81. It seems to be that the applicant's case comes very close to arguing for a draft adverse decision under s.261A(2) and (4) or s.177D, with a right to make submissions on such draft, notwithstanding that an earlier opportunity to make submissions in the relevant statutory process has been afforded to the applicant. As seen above, this was a case expressly rejected in *MM* in the more heightened rights context of those seeking international protection. It is also a proposition for which no Irish authority on point was identified.

82. The applicant also relied on the CJEU decision in the *Sopropré* case (referenced by the CJEU at paras 85 and 86 of *MM* as set out above) as authority for the proposition that, even in the absence of an express entitlement to make submissions under the relevant procedure, the right to be heard may nonetheless require to be afforded in order to give effect to an affected party's rights to fair procedures. This, of course, is a principle already long established in Irish law as a result of the seminal decision in *East Donegal Co Op Livestock Mart v. AG* [1970] IR 317, *Dellway* being a good example of its application in a recent Irish statutory context.

83. *Sopropré* considered the rights of a defendant in the context of provisions of the Portuguese customs code applying to clearance recovery of customs import duties and held that such rights were not breached in principle where a party was given between 8 and 15 days to make submissions on a proposed customs recovery penalty. *Dellway* addressed a situation where no right to make representations at all was expressly afforded under the statute in issue (the National Asset Management Agency Act 2009) to a borrower whose loans were proposed to be acquired by NAMA. The Supreme Court held that the relevant provisions of that Act properly construed in light of the Constitution required NAMA to afford borrowers the right to make representations concerning any acquisition decision which it proposed to make pursuant to s 84 of the Act, given the potential impact on the borrower's interests of a decision to effect such an acquisition. In

marked contrast here, express rights to make representations are built into both the Council's s.261A initial determination stage (through s.261A(1)(e)) and the Board review stage (at s.261A(6)), and in the s.177C application for leave to apply for substitute consent process. Neither *Sopropré* nor *Dellway* involved a situation where a further round of submissions was said to be required in advance of a final decision but after the decision-maker had considered the applicant's original submissions. Accordingly, I do not see that either *Sopropré* or *Dellway* materially advance the applicant's case.

84. The applicant also relied on the Supreme Court judgment in *An Taisce*. The relevant part of that case concerned a failure by the State, in the leave to apply for substitute consent provisions of ss.177C and 177D as originally enacted, to provide for the public's right as a matter of EU law to participate in decision-making processes that concern environmental effects. The Supreme Court held that ss.177C(2)(a) and 177D(1)(a) of the 2000 Act (as they were then) were inconsistent with Directive 2011/92/EU (the EIA directive in force at the relevant time) in that the failure to make provision for public participation at the application for leave to apply for substitute constitute stage was inconsistent with the public participation rights provided for by the directive. The applicant sought to rely on dicta in the judgment of McKechnie J. in *An Taisce* (including his observation at para.130 that "*that the underlying purpose of public participation in environmental matters is to facilitate good, fully informed decision-making*") to submit that its right to a fully informed decision necessitated a further invitation to it to make submissions where the Board was minded to rely on material which had not been furnished by the applicant.

85. I do not see that *An Taisce* at all advances matters for the applicant. It was a case based squarely on the public's right to participate in a process which was addressing issues of environmental impact in the context of substitute consent. *An Taisce* dealt with a preclusion from participation where EU law entitled participation; in stark contrast here, the applicant was expressly entitled to participate and make submissions in the processes in issue and did so participate. *An Taisce* did not address the question of whether, notwithstanding that an express right to make submissions has been afforded by a statutory scheme, there can be a right to make further submissions or an obligation on a decision-maker to invite such further submissions. Accordingly, *An Tasice* does not support the applicant's argument that it was entitled to a further opportunity to make submissions in the s.261A or s.177C processes in issue here.

86. As noted earlier, part of the relevant context in which the fair procedures questions fall to be assessed is that an applicant must be taken to know that the Council and Board are likely to have regard to publicly-available maps and photos when assessing issues of quarry use in a s.261A or ss.177C/177D process. At the level of principle, one could envisage situations where, notwithstanding that submissions had already been received, a

planning authority or Board in arriving at a decision adverse to an applicant proposed to decisively rely on information or material which could not have been obtained or provided by an applicant or which could not otherwise have been reasonably envisaged as likely to be relied upon by the Council or Board in the decision-making process. In such circumstances, one could see a more compelling argument for notifying an applicant of same to allow the applicant comment on same before arriving at a final decision. However, we are very far removed from such a scenario on the facts of the cases before me. As I shall come to shortly, all of the material relied upon by the Council and the Board in the s.261A and s.177C processes was material which could have been obtained by the applicant and, further, was material which could reasonably be envisaged as potentially being relied upon by the Council or Board in those decision-making processes.

87. I will now turn to apply the applicable principles to the case sought to be made by the applicant in each of the proceedings.

The 2013 proceedings

88. In the 2013 proceedings, the applicant seeks orders of *certiorari* against the Council's 2012 decision and the Board's 2013 decision. It also seeks a declaration as to the unconstitutionality of s.261A which I will address separately later in this judgment.

89. Before addressing the judicial review case arising in the 2013 proceedings, it is necessary firstly to consider the question of whether the applicant can legitimately continue to seek to challenge the Council's decision in circumstances where that decision was the subject of a review by the Board and where the applicant also seeks to challenge the Board's decision in the same proceedings.

Can the applicant seek to challenge the Council's decision in the 2013 proceedings?

90. The Council objects to it having been joined in the 2013 proceedings. It submits that, as a matter of law, its decision became moot once the applicant applied for a review of its decision to the Board and the Board delivered its decision on that review.

91. Counsel for the applicant submitted that, as the effect of the Board's decision was either to confirm or set aside the Council's decision, the Council's decision necessarily legitimately remained in play where the Board confirmed the Council's decision and the

applicant was therefore entitled to challenge that decision by judicial review notwithstanding the Board's review decision. The applicant's essential contention is that, as it says the Council's decision was fundamentally flawed (having, on its case, being arrived at in breach of fair procedures), it is entitled to an order quashing the Council's decision, in addition to an order quashing the Board's decision, and to a fresh decision-making process before the Council. Counsel for the applicant relied in this regard on *dicta* of Clarke J. (as he then was) in *Harding v. Cork County Council* [2006] IEHC 295 ("*Harding*"). In *Harding*, Clarke J. having surveyed the relevant authorities on the question of when an appeal as opposed to a judicial review was an adequate remedy for an allegedly flawed first instance decision, concluded that "*an appeal will be regarded as an adequate remedy in a two-stage statutory or administrative process unless…the process at the first stage is so flawed that it can reasonably be said that the person concerned had not been afforded their entitlements to a proper first stage of the process in any meaningful sense*" (at paragraph 4.12).

92. The applicant says it is entitled to challenge the Council's decision once the Board's review of the decision is finalised. It is not disputed that, in principle, the time for challenging the Council's decision by way of judicial review did not run for the purposes of s.50 of the 2000 Act until the Board had handed down its decision on its review of the Council's decision: see *McGrath Limestone* (at para. 9.2). However, counsel for the Council submitted that the Board's decision on review as a matter of law replaces the Council's decision and that once the Board hands down its review decision, the Council's decision no longer remains amenable to judicial review. She submitted that this view had been reached by two other High Court judges recently (in *J.J. Flood* and *Fursey Maguire*) and that, on the application of the principles in *Worldport* [2005] IEHC 189, there was no good reason for me to depart from those decisions.

93. In *J.J. Flood*, Ní Raifeartaigh J. having referenced the approach of Charleton J. in *McGrath Limestone*, held (at para. 5) that "*the final decision in the process, that of the Board on review, is the primary decision with which the Court should be concerned*" in that case where the planning authority had also been joined along with the Board in respect of a judicial review challenge to the decisions of both the planning authority and the Board decision under s.261A.

94. A similar issue arose in *Fursey Maguire*. Hyland J. took the view (at para. 18) that the Board's decision on a s.216A review replaced that of the planning authority. She therefore refrained from adjudicating upon the legality of the planning authority's decision although she did note that any arguments made in respect of the alleged illegality of the planning authority's decision were dealt with by her in the context of her consideration of the challenges there to the Board's review decision.

95. Neither *J.J. Flood* nor *Fursey Maguire* involved an analysis of the relevant statutory provisions *per se* and I think it is instructive to look at the relevant statutory provisions themselves. Section 261A(6)(e) provides that the Board "*shall make a decision as soon as may be whether to confirm or set aside the determination or decision of the planning authority to which the application for a review refers*". Section 261A(6)(f) provides that notice of the Board's decision on the review "*shall, for the purposes of this section be considered to be the disposal, by the Board, of the review*". Under s. 261A(6)(h), where the decision of the Board is to set aside a determination under s.261A(2)(a), a direction to apply for substitute consent contained in a notice under s.261A(3)(a) shall cease to have effect.

96. I accept the submission made on behalf of the Board that the Board's review is effectively a *de novo* process. The applicant for the review (as borne out by the facts here) is not confined on the review to the submissions or information relied upon in its case before the planning authority; it will be recalled here that the applicant sought to make a pre-1964 user case to the Board on review which it did not make to the Council at first instance. Furthermore, s.261A(6)(b) provides that "any person" may make submissions or observations in the review process i.e. the right to make submissions is not confined to the party who was the subject of the planning authority's decision or who participated in the process before the planning authority.

97. It is obvious that the Board's decision on review replaces the planning authority's decision when the Board on review sets aside the planning authority's decision. But it seems to me it is equally the case that the Board's review decision replaces the planning authority's decision where the Board confirms the planning authority's decision as the basis of such confirmation might well be materially different to the basis for the planning authority's decision, given that the applicant may have made submissions to the Board not made to the planning authority and/or that third parties may have participated in the review who did not participate at first instance. The Board's decision on review is therefore a fresh decision grounded on its own terms and reasons.

98. It follows, in my view, that the Board's decision on review, as a matter of law, replaces the decision of the Council. It is, therefore, not open to the applicant to seek to challenge both the Council's decision and the Board's decision by judicial review once the Council's decision is replaced by that of the Board following review. Of course, the Council's decision will invariably be a necessary part of the context in which the lawfulness of the Board's review falls to be determined. It is, however, a separate decision and does not

remain "live" for the purposes of a judicial review challenge when it has been replaced by the Board's decision following review.

99. It further follows that, in the event the Board's decision on review under s.261A is quashed on judicial review, the appropriate order will, ordinarily, be to remit the matter to the Board for a fresh review determination and not to the planning authority. In that regard, I accept the submission of counsel for the Council that the position presenting here is analogous to the situation which happens in respect of a challenge to a review by the Board of a planning authority decision on a declaration under s.5 of the 2000 Act, a situation I considered in the case of *PKB Partnership v. An Bord Pleanála* [2022] IEHC 542, where I quashed a s.5 declaration review decision of the Board and remitted the matter to the Board for a fresh decision.

100. I should say for completeness, as is clear from *Harding*, that if a party believes a planning authority decision under s.261A is fundamentally defective, it can seek to have that decision challenged by way of judicial review without seeking a review from the Board. If it is successful in such a judicial review, it should be entitled (all other things being equal) to a fresh process and decision from the planning authority.

101. I should also point out that it is only the planning authority who can issue enforcement notices under s.154 and, therefore, the planning authority would be an appropriate respondent if a challenge is made to the lawfulness of enforcement notices issued by a planning authority following a decision by the Board on review.

102. I therefore propose to adopt the same approach which Hyland J. adopted *in Fursey Maguire* (at paras. 18 and 68), namely not to consider the case made in judicial review against the Council's decision on the basis that, as a matter of law, that decision was replaced by the Board's decision on review and the only operative decision/determination on the s.261A(2)(a) and (4)(a) questions is that of the Board as contained in its review decision.

Challenge to Board's 2013 decision

103. The applicant bases its challenge to the Board's 2013 decision on the fair procedures contention that the Board should have given the applicant an opportunity to make submissions on the fact that it was intending to base its decision that the quarry had not commenced operation before 1 October 1964 on a 1995 aerial photograph. The applicant

says it had no notice that this photograph was to be relied upon. If it had been given an opportunity to comment on it, it would have been in a position to point out that the photograph was not in any way determinative of the question of whether or not there had been pre-1964 use and, as it subsequently sought to do in the context of this judicial review, it could have tendered evidence to show that, in fact, there was pre-1964 use of the site as a quarry.

104. (I should note in passing that the evidence sought to be tendered in the 2013 proceedings as to pre-1964 user, which consisted of statements from local people as to the quarrying activity in Largybrack prior to 1964, is of course not admissible in the context of a challenge to the Board's 2013 decision given that it was not material before the Board at the time of its decision).

105. The applicant also contends that it was constrained in marshalling its case as to pre-1963 user in the context of the s.261A review application as it only had three weeks to lodge a review i.e. three weeks from the Council's decision of 22 August 2012. I will address this point briefly before dealing with the 1995 photograph point.

106. Viewed in context, it is simply not correct to say that the applicant only had three weeks to establish pre-1964 use in the context of a review. Quarry owners such as the applicant were on notice with the enactment of 261A, that issues as to the extent of pre-1964 user and post-1963 intensification and/or compliance with EIA and AA requirements were going to have to be addressed. The s.261A process did not commence until late 2011. By then, the applicant knew that it had made a mistake on its registration form in 2005 when it had said there was no pre-1964 user. The onus was on the applicant to get its house in order and to marshal such evidence and submissions as were going to be required to address the various issues it was facing, including the important question of pre-1963 user. Under s.261A(1)(a), any person (including, obviously, a quarry owner) could make submissions or observations in writing to the planning authority in relation to a quarry within six weeks of the publication of the s.261A notice. The relevant s.261A notice here was published by the Council in late 2011 and, as we have seen, the applicant then made a submission, within the 6 week period, on 26 January 2012 which asserted (without evidence to substantiate it) a pre-1964 user, indicating that the applicant was well aware of this issue from at least that point. It had every opportunity to research matters and put in such submissions as it wished to do. No explanation is provided as to why the information subsequently obtained in the context of these judicial review proceedings was not sought to be obtained at the point of the January 2012 submission or at an earlier point i.e. at some point well prior to its review application to the Board in September 2012.

107. Accordingly, it is not the case in fact that the applicant only had three weeks to marshal its case in relation to the issue of pre-1964 user of the quarry.

108. I turn now to the issue of the Board's reliance on the 1995 photograph.

109. In my view, the applicant has not made out any case as to lack of fair procedures in the Board's reliance (amongst other material) on an aerial photograph from 1995 in arriving at the conclusion that the quarry was a post-1964 quarry. That photograph was contained in the Council file and the Council inspector's quarry assessment report. The photograph was precisely the type of material which the Council would have been expected to have regard to in assessing the likely use of the quarry. The Board was inevitably going to have regard to it where the Council had regard to it. The applicant can only have itself to blame insofar as it was not aware of this photograph. It could readily have obtained the Council's file when applying for a review by the Board of the Council's decision; it did not do so. In any event, there is an air of unreality more generally to this point given that the applicant had not put any evidence at all before the Board on the review to substantiate its case as to pre-1964 use of the quarry; it is difficult to see how the Board can be faulted for having regard to relevant material on that issue, readily available to it (and the applicant), when the applicant itself did not seek to access such available material and, indeed, tendered no relevant material at all in support its case on that issue.

110. No explanation is provided by the applicant as to why, when it came to lodging its review against the Council's August 2012 decision in early September 2012, it did not seek to access the Council's files which would show in detail the material relied upon by the Council in arriving at its decision. The applicant would clearly have been entitled to access the planning authority's file on its quarry. It could have come as no surprise to the applicant (particularly when it had the benefit of expert advice) that the planning authority would likely consult maps and aerial photography when assessing the history of use of the site. If it had consulted the Council's file it would readily have seen the reliance by the Council's inspector on aerial photography including the 1995 photograph.

111. Furthermore, it is simply not correct, as a matter of fact, to assert, as the applicant has pleaded, that the Board relied on a single photograph in arriving at its decision. As noted earlier (at para. 40 above) it is clear from the Board inspector's report that he had regard to the Council file, including the Council inspector's quarry assessment report which relied on a series of OSI maps and a series of photographs from different dates, including but not confined to, the 1995 photograph.

112. The conclusions I have arrived at on this issue are fortified by the terms of s.261A itself. Section 261A(6)(d) provides that the Board in making a decision on the review application "*shall consider any documents or evidence submitted by the person… who applied for the review, any submissions… received… and any information furnished by the planning authority*". Section 261A(6)(c) provides that the Board shall request the planning authority "*to furnish to it such information as the Board considers necessary to make a decision in relation to the review*". Relevant information in this context would clearly potentially include information from OSI maps and aerial photography as to the presence or extent of a quarry site at the quarry location and areas of extraction evident from such maps or photographs, particularly where that information was on the Council file. The applicant could readily have obtained the Council file and made such submissions as it wished on the material on that file and must be taken to have known that the Board would look at that file.

113. In my view, all of the material relied upon in the s.261A process including the 1995 photograph was material which could have been obtained by the applicant and was material which could reasonably be envisaged as likely to be relied upon by Board in its decision-making process as it had been relied upon by the Council in its s.261A decision-making. There was no fair procedures obligation on the Board to put the 1995 photograph to the applicant and invite submissions on it. There was no obligation on the Board to revert to the applicant to invite the applicant's further views on information which was on the Council file and which the Council had relied on in arriving at its own decision.

114. In my view, the issues arising under fair procedures in the 2013 proceedings are not materially distinguishable from those arising in the *Fursey Maguire* case. Indeed, there are remarkable similarities between the cases. There, it was contended that the Board based its decision on a single aerial photograph which it had not given the applicant an opportunity to comment on. Hyland J. rejected that case both as against the Council and the Board. She stated "*if the* [applicant] *had wished to make submissions on the evidence subtending the Council's decision that the quarry was not a pre-1964 operation, it was incumbent upon him to seek that evidence so that he could put forward contrary evidence to the Board*" (at para. 77); if he had taken that step, "*he would likely have seen the aerial photography and maps relied upon by the Council and had an opportunity to state his views on the same*." Those comments could apply with equal force to the case before me.

115. In conclusion, in my view, the applicant has not made out its case in breach of fair procedures against the Board in the 2013 proceedings and is not entitled to challenge the Council's 2012 decision.

2020 proceedings

116. In the 2020 proceedings, the applicant seeks an order of *certiorari* quashing the Board's decision of 16 April 2020 refusing the applicant leave to apply for substitute consent. The applicant also seeks a declaration that the provisions of ss. 177C, 177D and 177O of the 2000 Act are unconstitutional and/or contrary to EU law. I will deal with this separately later in the judgment.

2020 proceedings – grounds of challenge

117. The applicant's key fair procedures contention in the 2020 proceedings is that the Board (through its inspector) relied on aerial photography not put to the applicant in making the critical finding that the area of the quarry had enlarged between 2012 and 2019, as a result of which many of the exceptional circumstances criteria in s.177D(2) were held not to be satisfied. It also maintains a fair procedures argument in relation to the manner in which the Board's inspector addressed the applicant's evidence as to pre-1963 user of the quarry.

118. I will deal with each of those contentions in turn.

Reliance on aerial photography to conclude expansion of quarry site between 2012 and 2019

119. The essential fair procedures point made under this heading is that the inspector relied on aerial photography dating between 2012 and 2019 to reject the factual assertion on behalf of the applicant that the area of the quarry had not changed between those dates. The applicant says that the relevant photography should have been circulated to it for comment given the far-reaching ramifications of that adverse finding.

120. When assessing the criterion at s.177D(2)(a) (set out at para. 56 above), the inspector found that relying on "*publicly available evidence via aerial photography dating from 2012*

and 2019" that, contrary to the statements of the applicant (that the quarry area remained the same at the date of the substitute consent application as the area of the quarry in 2012, and that no new ground had been disturbed for the ongoing extraction activities), "*the disturbed area of the quarry has actually expanded in recent years, as part of the extraction activities*" (para. 6.4.2). He found (at para. 6.4.3) that:

> *"The additional extraction area dating from the 2012 to 2019 period is substantial, there is no grant of planning permission for this extension and the applicant has not specifically sought leave to apply for substitute consent for this additional extraction area. A grant of leave to apply for substitute consent for the disturbed quarry area, up to and including 2012, would restrict the proper consideration of the likely significant effects of the development on the environment and the adverse effects on European sites in a manner which would circumvent the purpose and objectives of both the EIA Directive and the Habitats Directive."*

121. As we have seen earlier (see para. 56 above) the inspector also relied on the finding of an enlarged extraction area between 2012 and 2019 in arriving at other adverse views as to the applicant's satisfaction of the exceptional circumstances criteria in s.177D(2)(c), (d) and (e).

122. The applicant pleaded in relation to the inspector's findings on this issue that the inspector:

> *"appears to be relying on a conclusion that the area of extraction (based on more recent photography not circulated to the applicant for comment) is substantially greater than that for which substitute consent is sought. In particular, it appears to be suggested that the area the subject matter of the application extracted into 2012 is less than that in fact extracted in 2019. Without seeing the aerial photographs in question it is impossible to comment on this issue. In fact, no additional extraction occurred. The application as submitted is entirely correct. The inspector's conclusion to the contrary is an error."*

123. The statement of grounds went on to state that "*It <u>may</u> be that the inspector is looking at clear-felling carried out by a neighbour on his own lands on whatever photograph the inspector is considering, however, the footprint of the quarry works has not changed between 2012 and 2019*" [emphasis added]. The applicant further pleaded that "*Had the applicant been given the opportunity to comment on this issue, the inspector's misapprehension could have been corrected*". The applicant's grounding affidavit makes an averment in equivalent terms (at para. 26).

124. In my view, the applicant's submission on this issue is not well founded. As noted earlier, it is well known that one of the means open to a planning authority or the Board to verify the extent of a quarry site, and potential quarrying activity within such a site, is that of aerial photography and mapping. The OSI has a series of aerial photography covering the country at various points in time and aerial photographs are also available from Google Earth. The applicant itself was aware of the fact that both the Council and the Board had regard to such photography in the context of the 2012/2013 s.261A determination procedure. The applicant had an expert retained. The applicant had the wherewithal to seek to access such photography itself if it wished to support the position maintained in its submission that the quarry area had not changed since 2012.

125. I do not see how, as a matter of fair procedures, the inspector had an obligation to revert to the applicant with some preliminary view on this issue. The inspector engaged with the very case made by the applicant in its submission, i.e. that the area of the quarry had remained unchanged since 2012. The inspector conducted a site inspection. The inspector consulted publicly available material relevant to an assessment of that factual contention and reached a conclusion which it was manifestly open to him to reach i.e. that the quarry had in fact changed in size after 2012. He considered the applicant's submission, had regard to relevant material and reached a different view to that contended for by the applicant. As earlier discussed, the Board has no legal obligation to revert to the applicant with a draft decision on this issue for comment nor, in my view, did it have any obligation to invite further submissions on this issue from the applicant. The Board was not relying on information or material which could not have been obtained by the applicant when making its case or which could not have been envisaged as potentially being relied upon by the Board in the decision-making process.

126. I should also say that, even in the context of the judicial review proceedings before me, there was no evidence that the Board's inspector was in fact wrong on the conclusion which he reached on the enlargement issue. While, as we have seen, there was reference in the statement of grounds (and grounding affidavit) to a surmise that the inspector may have taken into account areas owned by an adjoining landowner which had been the subject of tree-felling and which were not part of the quarry, no substantiation of that contention was made out in these proceedings. The Board when filing its opposition papers included as exhibits to its grounding affidavit the report of its inspector to which were appended the photographs from 2012 and 2019 relied upon by the inspector (and thereafter the Board) in arriving at the enlargement conclusion. While counsel for the applicant submitted at the hearing before me that the Board had not challenged the applicant's averments that the inspector's findings on the enlargement issue were incorrect, I do not believe that is a fair reading of the Board's opposition papers. The Board inspector's report and the material relied upon in arriving at his factual findings and

conclusions were squarely put up in refutation of the applicant's case. The applicant did not file any further affidavit, following receipt of the Board's opposition papers, seeking to substantiate its earlier surmise that the inspector wrongly relied on tree felling activity by a third party on neighbouring, non-quarry lands and to do so by reference to the material in fact relied upon by the Board's inspector. It seems clear from the photography appended to the inspector's report that, on the face of it, there was an expansion of the quarry area between 2012 and 2019. The applicant did not engage with the photography in question in a further affidavit to point out where the alleged error in fact lay, if there was any such error. The premise of its whole case on this issue was simply never made out.

127. Accordingly, in my view, the applicant has not made out its case on this ground.

Inspector's view re pre-1964 user

128. In order to put the second fair procedures argument in the 2020 proceedings in context, it is necessary to set out the views of the inspector in his report on the material submitted by the applicant in support of its pre-1964 user case. It will be recalled that as part of its s.177C submission the applicant tendered statements from a series of local people seeking to substantiate its case that quarrying activity had taken place on the site pre-1964.

129. At para. 6.4.6, the inspector (in that section of his report dealing with the exceptional circumstances criterion as to "whether the applicant has or could reasonably have had a belief that development was not unauthorised") said as follows:

> *"To attempt to verify the pre-1963 status of the quarry the applicant has submitted a host of material, including their own statements and photographs, as well as written statements stated to be from a previous site owner, former local authority employees, local representatives, patrons and residents of the wider area. While a sizeable quantum of documentation has been submitted the evidence is not convincing or in any way definitive in substantiating that it is the subject quarry that existed prior to 1963, particularly in light of the historical OSI aerial photographs of the area appended to this report, and the fact that there are other quarries (DCC reps EUQI 12 & 156) in the same townland, one of which the applicant has stated to own, while there is also a quarry identified in the vicinity of these neighbouring quarries on the OSI first edition maps dating from 1829-1841."*

130. This finding is not challenged on irrationality grounds (i.e. that there was no evidence to support it); rather, the applicant submitted that this intended view should have been put to it so that it could have made submissions on it before any final decision.

131. In my view, the Board is correct in its submission that it was open to the inspector to reach the conclusion which he did at para. 6.4.6. and that it did not have an obligation to put this intended conclusion to the applicant and invite submissions on it before making a final decision.

132. The applicant, in particular took issue with the inspector's apparent conclusion that the material submitted did not substantiate that there was quarrying activity in the subject quarry. However it was perfectly open to the inspector to reach the conclusion he did on the contents of the material before him, in light of the undisputed fact that there were other quarries in the same townland (one of which is owned by the applicant). The evidence submitted, while being consistent with there being some form of stone extraction from quarrying in the Largybrack townland prior to 1 October 1964, did not set any evidence as to the precise quarry in the townland; none of the statements, for example, sought to delineate the alleged pre-1964 quarrying activity to the applicant's site or any part of it.

133. I do not see how fair procedures required the Board to provide the inspector's findings on the pre-1964 user issue to the applicant for its views. The inspector's findings were based on a direct engagement with the applicant's case and the material submitted in support of the applicant's case. The inspector was not relying on any material not submitted to him or otherwise generally available. The impugned part of the inspector's report represents his analysis of the relevant part of the applicant's submission and no want of fair procedures can be made out.

134. It should also be noted that the impugned passage was only one part of the relevant analysis which was ultimately directed towards a different issue from that of pre-1964 user *per se* i.e. whether it could be reasonably believed that the quarrying was not unauthorised in circumstances where the scale and nature of the quarrying operations had materially intensified since 2000 such that the development could not have been authorised in any event.

135. In my view, the point is well made on behalf of the Board that the testimony from local people as to the use of the site as a quarry, quite apart from not actually identifying a precise envelope for the quarrying pre-1963, did not and could substantiate a contention that the level of quarrying at that point was consistent with the scale of quarrying which took place on the site from 2001 onwards and it was accordingly perfectly open to the Board to reach the conclusions it did on this issue. The evidence showed, at its height, that a quarry in the townland was used as a form of community resource. There was no evidence of a business, the amount of rock quarried, the scale of the operation, the hours of operation let alone the precise area of operation or which quarry in the townland was used at that time. It was perfectly open to the inspector and the Board to reject the case that the development, since 2001, constituted a proportionate continuation of what was envisaged or reasonably envisaged pre-1963 given the evidence that some 140,000 tonnes of stone were extracted from the quarry for use in local road improvement in 2001. It was also perfectly open to the inspector and to the Board to take the view that this level of use involved intensification such that the applicant could not reasonably have had a belief that the quarry development was not unauthorised.

136. In my view, the material conclusion reached by the inspector on this issue (and adopted by the Board), as set out at para. 6.4.8 of his report (i.e. "*In conclusion, I am satisfied that given the scale and nature of the quarrying operations that had been undertaken on the subject site since at least the year 2000, the applicant could not reasonably have had a belief that the subject quarry development was not unauthorised*") is unimpeachable as a matter of law and process.

137. Accordingly, in my view, no breach of fair procedures is made out in respect of the pre-1963 user issue either.

Conclusion on JR grounds of challenge in 2020 proceedings

138. For the reasons outlined above, I conclude that the applicant has not made out any entitlement to relief by way of judicial review against the Board's substitute consent decision in issue in the 2020 proceedings.

139. The Board engaged fully with the applicant's precise case. It analysed the material submitted to it. It had regard to publicly available information which could come as no surprise to the applicant. The Board had no obligation to go back to the applicant with its draft findings to invite further comment or submission.

Constitutionality

Introduction

140. In the 2013 proceedings, the applicant seeks a declaration that the provisions of s. 261A of the 2000 Act are unconstitutional and are contrary to the European Convention on Human Rights ("*ECHR*"). No ECHR case was made at the hearing. The applicant also sought a declaration that s.157(aa) and (ab) of the 2000 Act (as inserted by the Environment (Miscellaneous Provisions) Act 2011) are unconstitutional. This latter claim was dropped at the hearing.

141. In the 2020 proceedings, the applicant also seeks a declaration that the provisions of ss. 177C, 177D and 177O of the 2000 Act are unconstitutional and/or contrary to EU law. The EU law case was dropped at the hearing.

142. Accordingly, what remained of the constitutional case at hearing were applications for declarations that s.261A and ss.177C, 177D and 177O of the 2000 Act were unconstitutional.

Locus standi

143. The State respondents challenge the locus standi of the applicant to mount its constitutional challenges in both proceedings. In my view, the applicant has made out *locus standi*, as a matter of principle, in respect of its constitutional challenges as it was a party who was on the receiving end of an adverse determination under s.261A and an adverse decision under the process set out in ss.177C and 177D. Different issues as to standing might well have arisen in respect of the EU case as originally pleaded, but as that case was dropped at the hearing, questions as to standing to make that case do not now arise.

Pleading

144. The State respondents contend that the applications for declarations as to unconstitutionality as against them in both proceedings are impermissibly vague and should be struck out for failing to comply with the requirements of Order 84, rule 20(3) of the Rules of the Superior Courts, which provides that:

> *"It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground".*

145. This rule was inserted into the Rules following the judgment of the Supreme Court in *A.P v. DPP* [2011] 1 IR 729 where it was held that: "*In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review set out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought*."

146. The State respondents point to *Liscannor Stone Ltd v. Clare County Council* [2020] IEHC 651 as an analogous situation where the High Court struck out impermissibly vague and unparticularised allegations of lack of constitutionality of s.261A(4)(a) of the 2000 Act as amended.

147. In the 2013 proceedings, the material pleading relating to the case as to unconstitutionality made at the hearing is found at paragraphs 11, 12 and 14 of the statement of grounds where the applicants pleaded that "*the procedures under section 261A are unfair and unconstitutional. The applicant has had no meaningful opportunity to address the issue of the historical user of the site. Instead, the applicant's constitutional property rights have been determined without a proper hearing or fair procedures. The effect of* [the Council's] *determination is that an enforcement notice will now be served closing the applicant's business. This is occurring without the applicant having had any or any proper notice or warning that its submission in respect of the historical use of the site had not been accepted by* [the Board] *and without any proper opportunity to conduct investigations into the historical user of the site and present evidence of same… The manner in which this section operates is contrary to fair procedures and natural justice… If the decisions made by the Council and Board are in accordance with this section, then the section is contrary to the Constitution*."

148. While the pleading in the 2013 proceedings of the constitutional case is sparse, it is at least possible to discern the main point sought to be advanced and the alleged factual basis for that point.

149. In relation to the 2020 proceedings, there was one short paragraph in the statement of grounds pleading an allegation that the procedures by which the application for leave to apply for substitute consent was determined were contrary to EU law in failing to allow public participation and/or consider exceptional circumstances; as noted earlier, this case was not maintained at the hearing. There was no pleading whatsoever in support of the claim for a declaration that the provisions of ss.177C, 177D and 177O are unconstitutional. An allegation that a particular statutory provision breaches the constitution is a grave allegation that needs to be specifically and precisely pleaded, with an articulation of the precise facts or matters relied upon as supporting the breach alleged. That obligation was not remotely complied with in respect of the 2020 proceedings.

150. In the circumstances, in my view the case as to unconstitutionality in the 2020 proceedings must be struck out as not having been the subject of any valid pleading.

151. On balance, I do not believe the pleading as to unconstitutionality in the 2013 proceedings suffer from the same infirmity and I will accordingly proceed to deal with the substantive case as to the alleged unconstitutionality of s.261A advanced in those proceedings.

The substantive case as to alleged unconstitutionality of s.261A

152. While the arguments as to lack of constitutionality of s.261A were not particularly pressed in oral argument, they were not altogether dropped. In discussion with counsel for the applicant at the hearing, counsel accepted that his essential case on unconstitutionality was that insofar as the provisions of s.261A in issue precluded the Board from reverting to an applicant to invite further submissions on material which the Board was minded to act on and which the applicant had not seen, then s.261A was unconstitutional.

153. It flows from my analysis of the applicable fair procedures principles (at paras. 74 to 86 above) that there is nothing in the s.261A statutory process to preclude the Board from

so reverting *in an appropriate case* where fair procedures might warrant such reversion. Accordingly, the premise of the applicant's argument as to the unconstitutionality of s.261A does not get off the ground.

154. In any event, the High Court has already twice upheld the constitutionality of s.261A – firstly in *McGrath Limestone* and secondly in *J.J. Flood*. Nothing presented in argument in this case would lead me to differ from the conclusions reached in those cases.

155. In *J.J. Flood*, Ní Raifeartaigh J. had to consider a case made on behalf of the applicants that s.261A was unconstitutional in failing to provide for adequate procedures in a process which, the applicant maintained, wrongly and unfairly removed rights which were vested in them pre-1964. The arguments made in *J.J. Flood* have very similar echoes to the arguments made here. As noted there by Ní Raifeartaigh J. (at para. 44)"*the applicants submit that the Council breached fair procedures because it failed to invite submissions on the issue of whether the quarry was within its pre-1964 user and/or constituted unauthorised development prior to reaching its decision thereon*."

156. Ní Raifeartaigh J. noted (at para. 123) as follows:

> *"In McGrath Limestone, Charleton J. also referred to the procedures set out in respect of the s.261A process and approved them, setting out that it was not necessary to apply the East Donegal Co-operative principles because they were, in their own terms, in conformity with constitutional requirements. He also examined, and rejected, challenges to the constitutionality of s.261A based on Article 15.5.1° of the Constitution (retrospectivity) and an argument founded upon alleged deprivation of property rights and unjust attack under Article 40.3 and Article 43 of the Constitution. In this regard, he referred to and quoted extensively from the decision of O'Neill J. in M & F Quirke & Ors v. An Bord Pleanála & Ors [2009] IEHC 426, in which case one of the arguments centred on the contention that restrictions on blasting imposed under s.261 were unconstitutional and this had been rejected. The emphasis in the case before me, however, was not so much on the substantive rights but on procedural justice."*

157. As in *J.J. Flood*, the case sought to be made before me is one based on procedural justice as opposed to substantive rights. As Ní Raifeartaigh J. explains in *J.J. Flood* (paras. 127-130), the applicants there (as with the applicant here) had full rights of participation, both

before the determinations made by the Council and again before the Board (para. 127) in the s.261A process. Again, as Ní Raifeartaigh J. noted in *J.J. Flood* (at para. 129):

> *"The question of whether the quarry had been commenced prior to 1964 only arose for consideration after the threshold issue, i.e. whether an assessment under the [EIA and Habitats] Directives had been triggered and had been determined. Again, the applicants were on notice that this was one of the issues which was going to be determined by the Board, and in respect of which it could make submissions."*

158. In my view, the substance of the conclusions of Ní Raifeartaigh J. in *J.J. Flood* (at para. 130) are equally applicable to the facts of this case. There, she held:

> *"The bottom line, in any event, is that the planning authority published notice of its intention to do what it was required to do under s.261A. The parameters of what was to be examined were explicit. None of this is in dispute. The applicants therefore had notice of what was going to be carried out and had an opportunity to make submissions at that point but chose not to do so. They could have put in any information they wished to at that stage, concerning the facts. They would not have been constrained in any way. The applicants also had, and exercised, the right to make submissions to the Board in the reviews conducted by the Board (on the applicants' request as well as that of An Taisce). The procedures under the section seem entirely acceptable to me, and the problem (if any) seems to be caused by the applicants' failure to submit evidence and make observations after the planning authority published notice of its intention to examine all quarries in its area together with the precise parameters of that exercise."*

159. Here, the applicant had all reasonable opportunity to marshal and make its case as to pre-1963 user both before the Council and the Board in the s.261A process. It was unsuccessful on the substance of the case made by it. It cannot lay the blame for that outcome on any want of fair procedures or on any constitutional infirmity in the terms of s.261A. Accordingly, I dismiss the applicant's constitutional case in the 2013 proceedings in so far as that case was made before me.

Conclusion

160. In the circumstances, I am satisfied that the applicant has not made out any case for relief by way of judicial review against the Council's 2012 decision, the Board's 2013 decision, the Board's 2020 substitute consent decision or in respect of its case as to unconstitutionality and I accordingly dismiss all of the claims in both the 2013 proceedings and the 2020 proceedings.