Planning Appeals Commission

Finding

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Appeal Reference:	2018/E0040 (EN 1)
Appeal by:	Mr Liam Kelly, Kelly Sand and Gravel Ltd.
Appeal against:	An Enforcement Notice dated 10 October 2018.
Alleged Breaches of Planning Control:	Winning and working of minerals; change in use of land from agriculture to processing of materials and construction of settlement ponds.
Location:	Old Bridge Road, Victoria Bridge, Urbalreagh, Strabane, Tyrone.
Planning Authority:	Department for Infrastructure.
EN References:	EN/2018/0198; J/2012/0045/CA

Appeal Reference:	2018/E0052 (EN 2)
Appeal by:	George Kelly.
Appeal against:	An Enforcement Notice dated 26 November 2018.
Alleged Breaches of Planning Control:	Winning and working of materials; installation of drainage pipe.
Location:	Lands to the north and east of 5 Derg Road, Victoria Bridge, Strabane.
Planning Authority:	Derry City and Strabane District Council.
EN References:	EN/2018/0288; LA11/2016/0223/CA

Appeal Reference:	2019/A0200
Appeal by:	Mr Liam Kelly, Kelly Sand and Gravel Ltd.
Appeal against:	Retrospective planning application for the retention of works carried out at sand and gravel quarry, with associated works and access. Proposed western extension and southern extension to previously extracted areas. Proposed works to include new haul road and realignment of existing internal road. Works to also include settlement ponds, development of screening bunds, 2 no compounds, relocation of existing washing plant, stockpiles and the creation of a staggered crossing on the Derg Road access and full restoration of combined sites and retention of temporary buildings.
Location:	23 Old Bridge Road, Victoria Bridge, Strabane.
Planning Authority:	Derry City and Strabane District Council.
Application Reference:	LA11/2018/0226/F
Procedure:	Preliminary Hearing on 30 January 2024.
Finding by:	Commissioner Mandy Jones, dated 16 February 2024.

Background

Enforcement Notices

1. The Department for Infrastructure (DFI) and Derry City and Strabane District Council each issued Enforcement Notices (ENs). EN 1 was issued on 10 October 2018 by DFI and appealed to the Commission on 31 October 2018 and EN 2 was issued by Derry City and Strabane District Council on 26 November 2018 and appealed to the Commission on 18 December 2018.

Planning Application and Appeal.

2. Planning Application ref : LA11 /2018/0226/F submitted to Derry and Strabane District Council : 15 February 2018
Environmental Impact Assessment submitted to PAC: February 2023
Consultee Responses: 30 May 2023
Statements of Case submitted including
Further Environmental Information (FEI): 8 January 2024
FEI advertised: 1 February 2024
FEI Consultee responses by: 22 March 2024

3. At a hearing in February 2020 with Commissioner Spiers, it was agreed to conjoin these three appeals. The issue of nullity of the ENs was raised and the parties requested if a preliminary hearing could be facilitated to address these discrete issues prior to the substantive appeal case. My finding (re : EIA scoping) dated 19 August 2022 outlined that this request had been taken into consideration and given the legal arguments presented held the requested the preliminary hearing on the issue of Nullity.

Preliminary Issue

Maps attached to Enforcement Notices

4. My previous finding dated 19 August 2022 at paragraph 6 referred to ‘composite maps with both EN boundaries – three pages laminated’ which were appended to decision (2018/E0040) by Commissioner Rue on 17 September 2019. The parties agreed at the preliminary hearing on 11 August 2022 that these maps were still relevant.

5. However, now both DFI and the Council, stated that these composite maps are incorrect as the 15-30m gap in the western quarter of the quarry between the boundary on EN 1 and EN 2 is a drafting error. At the hearing the Council submitted their base map which shows the EN 2 boundary to be contiguous with EN 1 boundary with no gap. I was asked to rely on the original maps attached to the ENs and disregard the composite maps.

Consideration of Nullity

Maps

6. Notwithstanding the drafting error described above, the appellant further argued that the composite maps are unclear and hopelessly ambiguous rendering the ENs nullities. It was argued that there is overlap to the south adjoining Derg Road ; the map includes land to the north which has not been subject to operations and land to the south is excluded and pipework that runs from the

quarried area under the Derg Road is not included (EN 2 only). The Council emphasised that para 4 (c) of EN 2 only requires removal of the drainage pipe within the shaded blue area and not the pipework under the road. I do not consider there to be any ambiguities within the base maps which would render the ENs nullities. Any lands which may or may not be included are ground (f) arguments.

Timetabling of the A5 Western Transport Corridor (WTC)

7. It is clear that the proposed line of the A5 Western Transport Corridor (WTC) cuts through both Council and DFI EN lands. A significant portion of the EN lands are to be redeveloped if the A5 WTC achieves planning permission and secures funding. The Inquiry into the A5 WTC closed on 2 June 2023 and the PAC report was forward to DFI on 1 November 2023. At the hearing, DFI confirmed that no formal decision has been made regarding the A5 WTC. The appellant argued that the ENs are nullities because on their face they do not allow the appellant to know with reasonable certainty what they are meant to do and because (once the vesting order is made) it will not be possible for the appellant to comply with the ENs. It was argued that there is a mis-step between the steps for compliance which permits the appellant 5 years and 8 months for restoration under the ENs and the timetable now claimed for the A5 WTC's supposedly imminent construction.

8. EN 1 was served on 10 October 2018 and EN 2 on 26 November 2018. To date the lands subject of the notices, remain in the ownership of the appellant and no vesting of land has taken place. Section 147 (2) of the Planning Act (Northern Ireland) 2011, states that where the owner of the land is in breach of an enforcement notice that person shall be guilty of an offence. If vesting proceeds and the lands are transferred to DFI, they would be in ownership of the lands and the appellant would not be committing an offence.

9. I consider that the ENs as drafted do not raise any difficulties in land ownership from the possibility of some future event, however imminent as argued by the appellant. If the lands are vested in the future, it will have an impact on the mitigation as the steps, go beyond what is required by the appellant, which is a ground (f) argument. Any possible future vesting of lands subject of the ENs, do not render the ENs nullities.

Double Jeopardy

10. The appellant argues that if the steps specified in the ENs were followed, then they would find themselves in breach of other legislative provisions. It was argued that this is double jeopardy and as such renders the ENs nullities.

11. Section 144 (2) of the Planning Act (Northern Ireland) 2011, provides that on an appeal the Commission may correct any misdescription, defect or error in the enforcement notice, or vary its terms if the Commission is satisfied that the correction or variation can be made without injustice to the appellant, council or the Department. This provides a clear direction that not every defect or error in an EN renders it a nullity. Case law has established that Nullity is a high bar and is only applicable when the EN is 'bad on its face'.

Relevant Case – Law

12. *Miller – Mead v Minister of Housing and Local Government (1963) 2 QB 196* distinguishes between Invalidity and Nullity. Regarding Nullity it states ' supposing then upon its true construction the notice was hopelessly ambiguous and uncertain, so that the owner or occupier could not tell in what respect it was alleged that he had developed the land without permissions or in what respect it was alleged that he failed to comply with a condition, or, again, that he could not tell with reasonable certainty what steps he had to remedy the alleged breaches. The notice would be bad on its face and a nullity'. Upjohn LJ states that the test is 'does the notice tell him (the person served) fairly what he has done wrong and what he must do to remedy it ?' It was also held that the person served with the EN is 'entitled to say that he must find out from within the four corners of the document exactly what he is required to do or abstain from doing'.

13. *Graham Oats v Secretary of State for Communities and Local Government Canterbury City Council (2017) EWHC2716*, in referring to Miller - Mead held that the expression 'reasonable certainty' is to be distinguished from 'absolute certainty.' Provided that the essential steps to be taken were clear enough that would suffice even if there was some uncertainty at the margins.'

14. *Pitman v Secretary of State for the Environment (1989) JPL 831* confirmed the general trend of the courts to interpret enforcement notices in a commonsense and non-technical fashion.

15. *McKay v Secretary of State for the Environment and others (1994) JPL 806.* In this an enforcement notice was held to be a nullity because it required works giving rise to criminal liability under the Ancient Monuments and Archaeological Areas Act 1979 unless a scheduled consent was first obtained. This was because 'The recipient of a notice had to be able to understand with reasonable certainty the steps which were required of him, and that had to bear on the question of whether he could in reality carry out the requirements of the notice. If he had to do something unlawful or it was reasonable to anticipate that he had to do something unlawful then he could not reasonably be said to carry out the requirements. Furthermore, it remained true that a person should not be put in peril by ambiguity.'

16. It was agued by the Council that this case law does not establish a broad principle that steps specified in a notice which may require the recipient of a notice to act in breach of other legislative provisions or obtain a further consent to avoid such a breach renders the notice a nullity. It was argued that whilst *McKay v Secretary of State for the Environment and others (1994) JPL 806,* may have once have been good authority for that proposition, it has, since then, been held to be bad law by the Court of Appeal in *South Hams District Council v Halsey (1996) JPL 761,* and more recently in *Cash v Wokingham Borough Council (2014) EWHC 3748.*

17. *In South Hams District Council v Halsey (1996) JPL 761,* the alleged breach was the erection of guest accommodation against the walls of listed lime kilns. An EN was issued, and subsequently the kilns were added to the list of buildings of special historical interest. The dwelling was now attached to a listed building and listed building consent was required before it could be demolished. On appeal,

the Inspector concluded that the building should be demolished and extended the period for compliance so that the appellant could obtain LB consent. It was concluded that the EN was not a nullity for 5 reasons.

18. Firstly, the *Miller – Mead* rules concentrates on defects on the EN, apparent on the face of the EN, and there were no defects on the face of the notice. Second, the EN was not ambiguous, and it was made entirely clear to the recipient what they had to do to comply with it. Third, Glidewell LJ did not accept that it was necessarily correct that LB consent was necessary. Fourth, it was clear in the circumstances of the case that if LB consent were required it would be granted since the application would have been seeking to comply with the EN. Finally, if the recipient attempted to obtain listed building consent and failed, then Section 179 (3) would provide a defence to any eventual criminal prosecution, as the appellant would have done everything, he could be expected to do to secure compliance with the notice.

19. *Cash v Wokingham Borough Council (2014) EWHC 3748* *stated that* 'obtaining any third party consent which is essential to enable a person to comply with an EN is no more or less than an aspect of complying with the EN. If an EN expressly or by implication requires a person to get such a consent, it is not, for that reason, invalid. If, for any reason, despite proper attempts to get it, a necessary consent cannot be obtained, that is very likely to provide a defence under Section 179 (3) of the 1990 Act. Moreover, it is hard to see how a local planning authority, faced with such a situation, could reasonably start enforcement action.'

20. The appellant set out the legislative provisions which they considered they would find themselves in breach of, if they followed the steps specified in the ENs.

Breaches of the Conservation (Natural Habitat, etc) Regulations (Northern Ireland) 1995.

21. The appellant claims breaches of the Conservation (Natural Habitat, etc) Regulations (Northern Ireland) 1995 with reference to Regulation 43 (1). Regulation 43 (1) requires a competent authority, before deciding to undertake, or give consent, permission or other authorisation for a plan or project which is likely to have a significant effect on a European Site in Northern Ireland shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.

22. Regulation 43 (1) applies to competent authorities at consent stage and not to private parties undertaking work, as such, it is not engaged. The issuing of an EN is not itself subject to the duty in Regulation 43 (1) either; and even if it was, as argued by the Council, any alleged breach of Regulation 43 (1) when the ENs were issued should have been made by way of Judicial Review.

23. The appellant's Ecology Solutions Technical Report (January 2024) contains a preliminary HRA screening in which it is claimed that in the absence of further mitigation, the ENs give rise to the potential for significant adverse effects due to re- escape of infill from the site, sediment run – off and pollution, noise impacts of breaking works on otters (qualifying species) and the requirements for storage and treatment of fuels.

24. I note that this refers to 'potential' effects and there is no suggestion that there is going to be harm if the steps are complied with. I consider there is an absence of an evidenced inevitable breach of the legislative provisions. However, even if, the appellant was able to demonstrate an evidenced inevitable breach, the analysis in *South Hams District Council v Halsey (1996) JPL 761* and *Cash v Wokingham Borough Council (2014) EWHC 3748* addresses this point.

25. For example, in the requirements to remove any oil, fuels or chemical containers the appellant is required to comply with this in a way that would not cause any harm. If they need any third party consents, *Cash v Wokingham Borough Council (2014) EWHC 3748* underpins the principle that obtaining any third party consent which is essential to enable compliance is no more or less than an aspect of complying with the EN.

26. *Miller – Mead v Minister of Housing and Local Government (1963) 2 QB 196* refers to nullity being apparent on the face of the EN. The fact that I was asked by the appellant to assess additional detailed ecological evidence to come to a conclusion, to my mind, does not convince me that the enforcement notices on their face are nullities. Section 147 (3) of the Planning Act (Northern Ireland) 2011 states that in proceedings against any person for an offence under subsection (2), it shall be a defence to show that that person did everything that person could be expected to do to secure compliance with the notice. This provides the recipient of a EN with the means to ensure that they do not have to act in a way that conflicts with other legislative provisions which I agree with the Council is the answer to the appellant's double jeopardy argument.

Breaches of the Wildlife Order (Northern Ireland) 1985.

27. The appellant alleges breaches of the Wildlife Order (Northern Ireland) 1985. It is claimed that compliance with the ENs without further mitigation would cause adverse impacts on badgers, smooth newts and sand martins which are all protected under the Order. Within the Ecology Solutions report (January 2024), it claims that there would be disturbances to badgers by way of noise and vibration and badgers setts could be destroyed by the use of heavy machinery and the appellant will have to provide mitigation in the form of alternative setts.

28. The appellant claims that for any protected species no surveys have been undertaken and no appropriate mitigation has been specified to avoid committing a criminal offence. As such the appellant does not have reasonable certainty as to what is required.

29. How the appellant complies with the steps is a matter for him. As the appellant recognises it is possible for licences to be granted in respect to any activities undertaken which will have the potential to harm protected species. The need to obtain such consents does not render the notices as nullities given the conclusions in *Cash v Wokingham Borough Council (2014) EWHC 3748* where it was confirmed that '*obtaining any third party consent which is essential to enable a person to comply with an EN is no more or less than an aspect of complying with the EN. If an EN expressly or by implication requires a person to get such a consent, it is not, for that reason, invalid.'* As underpinned by *Cash v Wokingham Borough Council (2014) EWHC 3748*, even if licences could not be granted, Section 147 (3) of the Planning Act (Northern Ireland) 2011, again provides a fallback. I note there is an 18-month period for compliance and I was presented

with no evidence to suggest that this is an unreasonable timeframe for obtaining any licences required or for survey works to be carried out.

Breaches of the Landfill Regulations (Northern Ireland) 2003 and the Waste and Contaminated Land (Northern Ireland) Order 1997.

30. The appellant claims the compliance with the steps would cause breaches of The Landfill Regulations (Northern Ireland) 2003 and the Waste and Contaminated Land (Northern Ireland) Order 1997. The Landfill Regulations (Northern Ireland) 2003, Regulation 4 sets out cases where the regulations do not apply. Regulation 4 (b) states that the regulations do not apply for the use of suitable inert waste for redevelopment, restoration and infilling work or construction purposes. As such, it appears to me that the Landfill Regulations do not apply. The points made regarding the Waste and Contaminated Land (Northern Ireland) Order 1997, also fall away as it is dependant on the need for a permit arising as a result of the site falling within the scope of the Landfill Regulations (Northern Ireland) 2003.

31. The appellant argues that specific waste codes have not been identified in the ENs which raises the risk that they may end up using waste which gives rise to a material change of use which requires planning permission. I would concur with the Council that it is the responsibility of the appellant to ensure that the required works fall within the scope of the EN. The ENs are not bad on their face and a nullity because it leaves the appellant with some scope and leeway as to how to go about discharging the steps. I note that both ENs specify what materials should and should not be used for infilling and reinstatement. Even if, the appellant required a further planning permission this neither renders the ENs as nullities as set out in *Cash v Wokingham Borough Council (2014) EWHC 3748 and South Hams District Council v Halsey (1996) JPL 761.*

The Clean Neighbourhood and Environment Act (Northern Ireland) 2011.

32. The appellant alleges the potential for statutory nuisance action being taken under the Clean Neighbourhood and Environment Act (Northern Ireland) 2011.

33. It was argued that the steps are wholly insufficient to ensure that there are no noise nuisances caused when operating within the hours specified at residential receptors. The MCL Technical Report explains the likely noise impacts that would arise from compliance with the ENs and concludes that it is highly likely that mitigation would be required which is not set out in the ENs and further consents may be required. As such, the appellant is left in the position of not having reasonable certainty as to what works are required to ensure no noise nuisance.

34. The appellant has not demonstrated that complying with the ENs will inevitably lead to a statutory nuisance occurring and the technical reports refer to likely noise impacts. Even if, the appellant could show this, in light of Section 147 (3) of the Planning Act (Northern Ireland) 2011, *Cash v Wokingham Borough Council (2014) EWHC 3748 and South Hams District Council v Halsey (1996) JPL 761*, this does not render the ENs as nullities. Again, the fact that I was asked by the appellant to assess additional detailed information to come to a conclusion, does not persuade me that the ENs are nullities as underpinned by *Miller – Mead v Minister of Housing and Local Government (1963) 2 QB 196.*

35. *Consultation Process*
Background information demonstrated that there was an extensive consultation process undertaken in respect of the ENs. Consultees highlighted that further work was required in order to understand any mitigation works required and that further agreements (including consents and licences) would also likely be required. The appellant argued that neither DFI or the Council addressed these mitigation requests by consultees.

36. As discussed previously, if carrying out any remediation measures requires the appellant to comply with statutory provisions, then the appellant is responsible for this. The appellant's argument that where mitigation measures are not specifically included, they cannot be carried out, is not correct. If the appellant is aware of and wishes to put in place any mitigation measures which he believes or understands will avoid or reduce any impacts, the omission of that mitigation measure does not prevent the appellant from taking such steps. Notwithstanding consultees comments and recommendations, the final decision of what was appropriate and could be included within the ENs rests the Council and DFI. These arguments do not lead me to the conclusion that the ENs are nullities.

Wording of the ENs

37. The appellant maintains that the wording of the steps in the ENs is unclear to such an extent that he cannot know with reasonable certainty what is required. EN 1 (DFI) steps D,E,F,H,I and J and EN 2 (Council) Steps E, F and G contain use of the word 'any'. It was argued that the use of the word 'any' is uncertain as it leaves it up to the appellant's judgement what litter, debris, scrap, contaminated material etc is to be removed.

38. I consider that when these steps are fairly read and understood there is 'reasonable certainty' as to the steps to be taken which directly relate to the alleged breaches. I consider these steps to clear as underpinned by *Graham Oats v Secretary of State for Communities and Local Government Canterbury City Council (2017) EWHC2716.*

39. However, as agreed by all parties I consider that for the purposes of clarity the word 'any' can be replaced with the word 'all', which falls under the Commission's powers in Section 144 (2) of the Planning Act. I am satisfied that this correction can be made without injustice to the parties involved. Issues regarding the removal of the haulage roads are ground (f) arguments.

Conclusion

40. *Pitman v Secretary of State for the Environment (1989) JPL 831* confirmed the general trend of the courts to interpret enforcement notices in a commonsense and non-technical fashion. Having reviewed all the appellant's evidence, I conclude that there are no defects on the face of the ENs; the ENs are not ambiguous; other consents may or may not be necessary for compliance; in any event, obtaining any third-party consents which are essential to enable the appellant to comply with the ENs is no more or less than an aspect of compliance; and, even if the appellant attempted to obtain other consents and failed then Section 147 (3) of the Planning Act would provide a defence that the appellant

had done everything he could be expected to do to secure compliance with the notices.

As such, the ENs are not nullities.

Moving Forward

41. Paragraph 3 of both ENs rely on the maps to define the EN lands. In moving forward, it would be appreciated if the Council would liaise with DFI and prepare for distribution at the conjoined hearing four copies of an accurate composite map on a legible background which show topographical features to which all relevant enforcement notice boundaries can be related. This new composite map should also show the relationship between the planning application boundary and each of the notices.

Timetabling for moving forward of conjoined appeals.

42. Statements of Case for the three conjoined appeals were received on 8 January 2024. Within the appellant's Statement of Case was Further Environmental Information (FEI) which the Commission and parties were alerted to in December 2023.

43. On receipt of the Further Environmental Information to the Commission, Regulation 39 of The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 applies regarding Publicity and Consultation and stipulates representations to be made in writing by a date not less than 30 days from the date the notice is first published. The notice was advertised on 1 February 2024. When the consultation period is over the appeal process can continue. At the preliminary hearing it was agreed that the parties would submit an addendum to their Statements of Case addressing the FEI (which should not exceed **1500 words**). The Commission will write to the parties in due course requesting their Addendums to the Statements of Case by **17 May 2024** after which, a date will be set for an Informal Hearing for these three conjoined appeal cases.

I recommend the following timetable.

Date of preliminary hearing re Nullity Issues:	**30 January 2024**
Issue of Finding:	**16 February 2024**
Consultee responses to FEI by:	**22 March 2024**
Addendum to Statements of Case by:	**17 May 2024**
Date for conjoined Informal Hearing:	**TBC**

COMMISSIONER MANDY JONES

Appearances at Hearing

Department of Infrastructure:	Mr John Litton KC, Landmark Chambers Mr M McCrisken, Strategic Planning Division Mr M Bradley, Strategic Planning Division Mr G Noble, DFI Roads * Mr J Roulston, DFI Roads * Ms M Greer, DFI Roads * Ms C Ellison, DAERA NED * Mr K Hunter, DAERA NED * Dr J Lees, DAERA NED *
Appellant:	Mr Greg Jones KC Mr M Feeny BL, Junior Counsel Ms J Mawhinney, MBA Planning Ms M O'Loan, Tughans Mr D McLoran, MCL Consulting Mr M Wiseman, MCL Consulting Mr K Goodman * Mr L Kelly, Appellant Ms P Kelly Ms L Kelly
Council:	Mr C Fegan, Legal Counsel Mr C Rodgers, Planning Authority Ms A McNee, Planning Authority * Ms R McMenamin, Planning Authority * Mr P McSwiggan, Environmental Health * Mr M Kerney, SES * Mr R McLaughlin, Loughs Agency * Ms J Kula, NIEA * Mr E Lewis, NIEA * Ms E Logue, DfC Historic Environment Division * Mr A McAleenan, DfC Historic Environment Division * Ms D Keown, DFI Roads *
	Denotes attended remotely *

Documents Submitted

Department of Infrastructure:	'A'	Statement of Case on Nullity (January 2024)
Appellant:	'B'	Legal Submissions on Nullity Statement of Case (January 2024)
Planning Authority:	'C'	Statement of Case. 1 of 2 (January 2024)