

Ruling

Appeal References: 2018/E0040 (EN 1)
Appeal by: Mr Liam Kelly, Kelly Sand and Gravel Ltd
Appeals against: An Enforcement Notice dated 10 October 2018
Alleged Breach 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
Application References: EN/2018/0198; J/2012/0045/CA

Appeal References: 2018/E0052 (EN 2)
Appeal by: George Kelly
Appeals 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.
Application References: EN/2018/0288; LA11/2016/0223/CA

Appeal References: 2019/A0200
Appeal by: Mr Liam Kelly, Kelly Sand and Gravel Ltd
Appeals 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 References: LA11/2018/0226/F
Procedure: Preliminary meeting on 11 August 2022.
Ruling by: Commissioner Mandy Jones on 19 August 2022.

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
Screening and Scoping Documents issued: 4 April 2018
Environmental Statement submitted: 4 October 2018
Decision issued with 18 reasons for refusal: 3 October 2019
Planning Appeal submitted to the Commission: 13 January 2020

Previous Hearings held by the Commission

3. At a hearing on 26 February 2020 conducted by Commissioner Spiers in relation to the 2 Enforcement Notices – it was agreed by all parties that that these cases were to be deferred and conjoined with the upcoming Retrospective Planning Application (ref LA11 /2018/0226/F) appeal (2019/A0220). It was agreed that the appellant was to produce Further Environmental information (FEI) for submission to the Commission.
4. It was also agreed that the Commission would facilitate a preliminary meeting to discuss the content of the FEI; under Regulation 21 of The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017, required to update the existing ES submitted on 4 Oct 2018 by Elevate Planning Consultants.

Preliminary Meeting

5. In order to progress these three conjoined appeals, I wrote to the parties on 26 May 2022 setting out the parameters of this preliminary meeting. In preparation all parties have submitted statements of case and rebuttals in connection with the progress of cases to date; environmental scoping exercise and suggested timetabling for moving forward. The preliminary meeting was held on 11 August 2022.

Progress of the 3 cases to date.

6. Regarding the two Enforcement appeals, the appellant confirmed that ground (f) is now only being pursued for both appeals. The original remaining grounds of appeal are withdrawn. It was also confirmed that the ‘composite maps with both EN boundaries – three pages laminated ‘ which were appended to a decision (2018/E0040) by Commissioner Rue on 17 September 2019 are still relevant.

Content of Environmental Statement to accompany the planning appeal.

Scoping Information.

7. The appellant has produced a ‘route map‘ forward on how they propose to deal with the FEI. Whilst the scoping document sets out the information in Schedule 3

of the EIA Regulations the appellant's 'route map' expands on this information. This sets out the chapters proposed to comprise the ES, the baseline positions and methodological approach. In response the Council and DFI have commented.

8. From my reading of their comments, I have deduced that the Council and DFI are broadly content with the scoped impacts and approach and have asked for clarity on a few issues. These could easily be addressed by the appellant and include references to missing drawings, updates in assessments and changes in descriptions etc. I do not intend to make comments on these minor issues.
7. However, it seems to me that the main thread of concern by both the Council and DFI running throughout this 'route map' is the environmental impact of the unauthorised extraction on the site to date and the baselines assumed. This seems to relate to the proposed archaeology chapter, ecology chapter, air quality chapter, noise assessment chapter, landscape and visual assessment chapter, traffic chapter and economic impact chapter.
9. Both the Council and DFI have stated that baseline assessments are required from before the unauthorised extraction occurred and impacts assessed during the unauthorised extraction phase to date.
10. I note that since the initial Environmental Statement was produced, DFI have published PPN 9A: Unauthorised Environmental Impact Assessment Development, on December 2021. This sets out clear guidelines for such unauthorised development for developers and planning authorities. It states that case law such as *Ardagh Glass Ltd v Chester City Council* (2010) EWCA Civ 172 and subsequent court rulings, establishes the legal principles which must be applied in order for unauthorised EIA development on an application for development already carried out.
11. PPN 9A, paragraph 6.5 states that the legal principles are that a PA (Council, the Department or the PAC) has the power to grant retrospective planning application on either a planning application / subsequent application or enforcement appeal for unauthorised EIA Development only where 4 tests are met.
12. Test D requires that the Environmental Statement and the EIA is rigorously scoped to ensure its assessment is based on a reasonable estimation of the baseline environment that is likely to have existed on the site prior to the unauthorised EIA development having taking place. (At this point I make no comment on the remaining tests)
13. In order to fulfil their duty under Regulation 32 of the EIA Regulations, the Commission should ensure that they follow and apply these legal principles set out in paragraph 6.5 in determining whether to grant planning permission for unauthorised EIA development.
14. Accordingly, the starting point for any assessment should include baselines which existed prior to the unauthorised extraction and cover environmental impacts during the unauthorised extraction period. The parties were all in general agreement of this approach which should form part of the scoping.

15. I recommend that the format of the FEI to be based on the appellant's proposed 'route map' (July 2022) incorporating baselines as discussed.

Timetabling for moving forward

16. Regulation 38 sets out time periods for Further Information (FEI) and evidence respecting environmental statements for the Commission and refers to time periods set out in Regulation 21 (1) and (2).
17. Regulation 21 (3) refers to a time period of 3 months for the submission of further information from date of request, or such extended period as may be agreed. The appellant requested a period of 4 months which I accept is reasonable and accede to. The updated environmental information as Further Environmental Information should be submitted to the Commission within 4 months from the date of this letter.
18. On receipt of the Further Environmental Information to the Commission, Regulation 39 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. Given the content of the FEI and consultation process the parties requested 80 (working) days for comments which I also accede to.
19. Once all the environmental information is in place and statutory procedures followed the appeal process can then be triggered by the Commission. These dates can be confirmed with the parties at a later date.
20. DFI stated that, at the hearing on February 2020 with Commissioner Spiers the issue of nullity of the ENs was raised and requested if a pre liminary hearing could be facilitated to address these discrete issues prior to the substantive appeal cases. The Commission has taken this request into consideration and will inform the parties of dates in due course.

I recommend the following timetable

Date of preliminary meeting:	11 August 2022
Issue of Ruling (base date):	19 August 2022
Receipt of Further Environmental Information:	20 December 2022
Advertising and consultation with Council:	23 January 2023
Representations received by:	12 May 2023
Appeal process triggered:	19 May 2023
Date for preliminary hearing re Nullity issues	date to be confirmed
Date for conjoined informal hearing:	date to be confirmed

COMMISSIONER MANDY JONES

Appearances at Remote hearing

Department of Infrastructure

Mr John Litton QC, Landmark Chambers
Mr M McCrisken, Strategic Planning Division
Mr M Gault, DFI Roads
Mr S Keenan, DFI Roads

Appellant

Ms J Mawhinney, MBA Ltd
Ms M O'Loan, Cleaver Fulton Rankin
Mr M Wiseman, MCL
Mr A Bunbury, Park Hood
Mr A Wilson, MCL
Mr R Anderson, MCL
Mr B Pope, McShane Consulting
Ms O Lewis, Tughans
Mr M McHugh, MCL
Mr Kelly, Appellant
Ms L McDaid, Appellant

Council

Ms A McNee, Planning Authority
Mr C Rodgers, Planning Authority

Documents Submitted

Department of Infrastructure

A Statement
A1 Rebuttal

Appellant

C Scoping Submission
C1 Rebuttal

Planning Authority

B Statement
B1 Rebuttal