Planning Appeals Commission

Appeal Decision

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Appeal Reference:	2020/A0149
Appeal by:	Mr Peter Grenville
Appeal against:	The refusal of full planning permission
Proposed Development:	Proposed Housing Development for 15 dwellings (mix of detached and semi-detached) and all associated works (Renewal of current approval D/2008/0460/F)
Location:	231 Castlecat Road, Dervock, Ballymoney
Planning Authority:	Causeway Coast and Glens Borough Council
Application Reference:	LA01/2019/0272/F
Procedure:	Written representations and Commissioner's site visit on 3rd August 2022
Decision by:	Commissioner Gareth Kerr, dated 24th August 2022

Decision

1. The appeal is dismissed.

Claim for Costs

2. A claim for costs was made by the appellant against Causeway Coast and Glens Borough Council. This claim is the subject of a separate decision.

Preliminary Matter

3. The appeal proposal was previously approved under application D/2008/0460/F on 30th June 2014. The application now subject to appeal was made to the Council on 14th March 2019 and sought renewal of the previous permission which remained live at the date of submission. The description of the development accepted at validation stage was as stated above with "renewal of current approval D/2008/0460/F" in brackets. However, the Council deleted the reference to "renewal of current approval D/2008/0460/F". It advertised the application and carried out consultations with no reference to "renewal" in the description of the application. The reasons for this are unclear and they offered no explanation for it in their evidence at appeal stage. The Council maintains that the application was nevertheless treated as a renewal from their perspective.

4. The appellant expected that in line with the 75% reduction in the planning fee payable for a renewal, the process would be streamlined. However, the Council raised a number of issues which were not considered during the previous application which ultimately led to the three reasons for refusal. In summary, these are:

(i) proximity to a working farm leading to potential adverse effects on residential amenity;
(ii) lack of sewerage capacity at Dervock Wastewater Treatment Works (WwTW); and
(iii) the potential impact of the development on protected species (bats).

5. The specifics of the three issues are addressed later in this decision. However, as a preliminary point, the appellant argues that the Council's removal of the "renewal" element from the proposal description was misleading for those consulted during the processing of the application and that it was not properly advertised.

6. The detailed requirements for publicising and giving notice of applications for planning permission are set out in Article 8 of the Planning (General Development Procedure) Order (Northern Ireland) 2015 (GDPO). The notice to be given must include a description of the development to which the application relates. These provisions are aimed more at the general public than consultees.

7. The purpose of publicising a planning application is to inform people of the substance of what is proposed and to give them an opportunity, if they so desire, of following the matter up and making representations. Failure to publish a proper notice would defeat the purpose of publication and render any decision on the application invalid.

8. The fact that the appeal proposal was for the renewal of a previous planning approval for a housing development of 15 dwellings is helpful to understanding the proposal. It conveys to interested parties that there is a history of previous planning approval for the same or similar development. While not a guarantee that a new application would ultimately be approved or expedited quickly, as it must still go through the standard application process and assessment, it would not be unreasonable for the appellant to expect that the process may prove more straightforward than for a brand-new application with no extant approval in place. The Council's deletion of the "renewal" aspect of the proposal is somewhat strange and its inclusion would have been more comprehensive for interested parties and consultees alike.

9. Notwithstanding the above comment, the test established by the courts is whether the description of the development is "seriously misleading". This is a high threshold. The Council's amended description incorporates the nature of the development proposal (housing), the number of units (15), that there is a mix of house types and that "associated works" are included. I consider that although information regarding the planning history was inexplicably omitted, the published description meets the legislative requirement as it would adequately inform people of the substance of what is proposed and give them an opportunity of following the matter up. The "renewal" aspect of the application is not part of the substance of the development proposed. Accordingly, the published description is not seriously misleading and it does not call into question the validity of the Council's planning decision. Therefore, the appellant's concerns regarding the proper advertisement of the application by the Council have not been sustained. As the Council's decision is lawful, the appeal is valid and must be determined.

Reasons

10. The main issues in this appeal are whether an adjacent farm would harm the residential amenity of future residents of the appeal development, whether there is available sewerage capacity to serve the appeal development and whether the proposal would harm protected species including bats.

Policy Context

11. The Northern Area Plan 2016 (NAP) operates as the local development plan (LDP) for this area. Section 45 (1) of the Planning Act (Northern Ireland) 2011 states that regard must be had to the LDP, so far as material to the application, and to any other material considerations. Where regard is to be had to the LDP, Section 6 (4) of the Act requires that the determination must be made in accordance with the plan unless material considerations indicate otherwise. In the NAP, the site is located within the settlement development limit of Dervock. It is also within the DVL 01 Dervock River Local Landscape Policy Area (LLPA) due to the visually significant tree groups within the site.

12. Policy ENV 1 of the plan states, "Planning permission will not be granted for development proposals that would be liable to affect adversely those features, or combination of features, that contribute to the environmental quality, integrity or character of a designated LLPA". The appeal proposal would be a low density housing development that has been designed to respect the tree groups on the site, most of which are located towards the site boundaries. They are also protected by a Tree Preservation Order. Although an objector to the planning application alleged that there would be damage to the trees, I am satisfied that they have been suitably taken account of in the development of the scheme and the proposal will not harm the overall LLPA designation. The proposal would accord with Policy ENV 1 and thus the LDP. The objector's concerns regarding loss of trees have not been sustained.

13. The Strategic Planning Policy Statement for Northern Ireland (SPPS) sets out transitional arrangements that will operate until a local authority has adopted a Plan Strategy for their council area. It also retains certain existing planning policy statements (PPSs). These include PPS 2 – Natural Heritage and PPS 7 – Quality Residential Environments, which are of relevance in the appeal. The SPPS is no more prescriptive than the abovementioned retained policies and thus the retained policies take precedence in decision making in accordance with the transitional arrangements outlined in the SPPS.

14. The appeal site comprises the grounds of a former Rectory which is now in a state of dereliction and disrepair. The relatively flat site extends to some 1.3 hectares and is broadly rectangular beyond a narrower entrance from Castlecat Road to the east. The former Rectory is an imposing two-storey building with a U-shaped plan-form and a separate two-storey outbuilding to the rear. Significant parts of the roofs, floors and windows are missing and there is evidence of graffiti and anti-social behaviour. The entire site is overgrown with trees and other vegetation. The largest trees are towards the boundaries of the site and provide screening from Castlewood Park housing development to the north, Moorfield Farm to the west, the new Rectory and church hall to the east and public open space at Dervock Recreation Grounds to the south.

Residential Amenity

15. Policy QD1 states that planning permission will only be granted for new residential development where it is demonstrated that the proposal will create a quality and sustainable residential environment. The policy sets out nine criteria that proposals for residential development should conform to. The Council has raised only criterion (h) which requires that the design and layout will not create conflict with adjacent land uses and there is no unacceptable adverse effect on existing or proposed properties in terms of overlooking, loss of light, overshadowing, noise or other disturbance. This concern arises from the proximity of a farm complex to the west of the site and the potential for complaints from the occupiers of the proposed houses in relation to noise and smells from the farm.

16. The issue regarding the farm was raised following receipt of an objection to the application from the owner of the farm. The Council sought changes to the positioning of the three houses along the western edge of the site to reduce any adverse amenity impacts.

17. The appellant refers to Development Management Practice Note 4 which provides guidance on different types of planning applications. With respect to applications for renewal of planning permission, it states, "As a general rule, such applications should be considered and refused only where:
    (a) there has been some material change in planning circumstances since the original permission was granted (e.g. a change in some relevant planning policy for the area, or in relevant highway considerations, or the publication of new planning policy guidance, material to the renewal application);
    (b) continued failure to begin the development will contribute unacceptably to uncertainty about the future pattern of development in the area; or
    (c) the application is premature because the permission still has a reasonable time to run.

    This is not an exhaustive list and each application must be considered on a case by case basis."

18. When the application was made, there was just over three months of the original permission left to run, so the application could not be said to be premature. The Council has not raised any issue regarding uncertainty about the future pattern of development. They consider that the objection received from the owner of the farm is a new material consideration that must be given weight in the determination. In this instance, they accorded it greater weight than the planning history given the potential detriment to amenity through noise and odour. The appellant argues that there has been no material change in planning circumstances since the 2014 approval was granted. The farm complex is where it has always been in relation to the appeal site. Housing has been progressively developed to the east of the farm since 2003 and an earth bund was employed in the Castlewood Park development (to the north of the appeal site) to address concerns that were raised at that time.

19. The Council's Environmental Health Department was consulted regarding the comments made by the owner of the farm. They referred to draft guidance for planning consultations involving agricultural and residential premises which recommends a separation distance of 75m between these uses. Importantly, they did not recommend a re-design of the layout, but simply recommended that an

informative be attached to the decision stating that future occupants of the development may suffer intermittent disturbance and loss of amenity as a result of noise, odour and light arising from activities associated with the agricultural business. They suggested the use of acoustic design measures to mitigate potential noise problems and advised that consideration be given to the prevailing wind direction and local topography (since woodlands and shelter belts may act as barriers and help to disperse odours). There is no evidence that these factors were considered by the Planning Department prior to the request to change the position of three of the housing units. The statement in the Council's rebuttal that "vegetation doesn't act as a barrier to alleviate noise and odour issues" is contrary to the above advice provided by their Environmental Health Department.

20. Moorfield Farm is accessed via a laneway from Knock Road to the south. The appeal site adjoins the laneway to the east and the farm complex sits immediately to the west of the laneway. It comprises a dwelling house, a number of traditional and modern outbuildings and an above ground slurry store. The slurry store is 100m north west of the nearest proposed dwelling. This exceeds the guideline distance of 75m and could only affect the appeal site if the wind was in the north west (which is not the prevailing direction). The Council's evidence states that the nearest dwelling would be sited approximately 26m from a disused midden used for bale storage and 38m from existing cattle sheds. Again, these are to the north west of the proposed dwellings whereas the prevailing wind is from the south west. Furthermore, the 10 to 20m deep buffer of mature woodland around the perimeter of the appeal site would act as a barrier to odour and artificial light from the farm.

21. The owner of the farm referred to the potential for complaints from the occupiers of the development and refers to previous complaints from residents in the development to the north. However, the Environmental Health Department only have a record of a single enquiry relating to noise and this was not lodged as a formal complaint, so the existence of any nuisance was not substantiated. The location of Castlewood Park in relation to the farm is materially different from the appeal site. The dwellings are closer to the cattle sheds, they sit downwind of the prevailing wind passing over the farm and their only protection is a low earth bund. Despite these factors, no formal complaints regarding harm to amenity have been recorded. Considering the greater distance to the proposed dwellings, that they are not in the direction of the prevailing wind and that they will benefit from the shelter provided by the mature woodland, I am not persuaded that there is likely to be such harm to amenity that refusal on these grounds would be warranted.

22. Whether or not objections on amenity grounds were received to the original application, it is a consideration that ought to have been assessed under Policy QD1 when the 2014 approval was granted. I assume it was and there does not appear to have been a significant change in planning circumstances since that time. The Council refers to guidance in the SPPS as confirming that noise and air quality are material considerations in the determination of planning applications, however, this was also the case in 2014 (prior to the publication of the SPPS) when the original approval was granted.

23. The location of the appeal site at the interface between village and countryside is such that occasional odour or noise from agricultural activities should not be unexpected by residents. The fact that housing has coexisted with the farm (closer

than the appeal proposal would be and with less screening) for a number of years with no recorded complaints indicates that there are not likely to be unacceptable adverse effects on the proposed properties through noise, odour or artificial light disturbance. The woodland buffer is a better screen than the earth bund suggested by the objector and the provision of an earth bund at the appeal site would require the removal of the protected trees along the western boundary causing greater overall harm. In light of the above factors and given that there was an extant approval in place, the Council's request that the layout should be changed to take account of the proximity of the farm complex was not justified and the Council has not sustained its first reason for refusal in respect of residential amenity.

Sewerage Capacity

24. Consultation with NI Water during the planning application process revealed that Dervock WwTW is overloaded based on the actual flows within the local sewer network. There is no current proposal to upgrade it. There was no objection on these grounds during the previous application. An email on the file indicates that weight was given to a previous outline approval for housing on the site (D/2005/1001/O) when considering sewerage capacity. It is not clear where the sewerage capacity previously allocated to the appeal site has gone.

25. The Council engaged in correspondence with NI Water regarding the sewerage capacity issues, but did not make clear to the consultee that this was a renewal of a previously committed scheme. An email from the NI Water Developers Services Adoptions Manager dated 30 December 2020 states that if planning permission D/2008/0460/F is deemed to be extant and if the developer chooses to build out under this application, then NI Water will honour commitments given in relation to this planning. Despite receipt of this information, the Council treated the proposal as a new application for which there was no available sewerage capacity and refused the application on this basis. The Council did not disclose this email to the developer during the planning application process and they only became aware of it through the appeal papers.

26. Although the Council maintains that it treated the application as a renewal, it seems that no weight was given to the extant approval when assessing the sewerage issue. The sewerage capacity previously allocated to this site was taken into account in the 2014 approval and it would have been reasonable for the appellant to expect the same approach to be taken in the renewal application. The Council failed to adequately inform their consultee that this application was a renewal and this would not have been immediately apparent from the planning history listed on the consultation letter given it had an older (2008) reference number. When they received correspondence indicating that NI Water would honour its previous commitment if planning permission D/2008/0460/F was deemed to be extant, this important information should have been shared with the developer and should have addressed the concerns that had been raised in respect of sewerage capacity.

27. The Council's evidence states that D/2008/0460/F has now lapsed, but this was not the case when the renewal application was submitted and the appellant was entitled to benefit from the commitment of sewerage capacity therein. The comments provided by the consultee were clear, but relied on the planning authority correctly interpreting the status of approval D/2008/0460/F. I consider that the Council did not give appropriate weight to the previous approval and that they treated it as if it had

lapsed when it had not. The appellant should not have to provide an alternative solution for wastewater treatment when sewerage capacity had been allocated for this site and NI Water indicated that they would stand over it. Accordingly, the Council has not sustained its second reason for refusal.

Impact on Protected Species

28. During the planning application process, the appellant completed a Biodiversity Checklist and then a Preliminary Ecological Appraisal in respect of the site which revealed that the existing building has a high potential for hosting bat roosts and that the trees within the site are likely to provide a foraging habitat for bats. The ecologist recommended the commissioning of a bat activity (emergence / re-entry) survey. Having observed the existing buildings and trees surrounding them during my site visit, I agree that the many openings in the structures could provide numerous potential ingress/egress points for bats. The appellant accepts that bats should be protected, but did not submit a bat activity survey, arguing instead that the matter could be addressed by a negative planning condition since the issue does not appear to have been raised in the previous planning application.

29. The Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 (as amended) make it an offence to capture, injure, kill or disturb a wild animal of a European protected species, which includes all species of bat. The same Regulations place a statutory duty on competent authorities to <u>have regard</u> to the impact of development on European protected species before granting planning approval (my emphasis).

30. Policy NH2 of PPS 2 affords additional protection to European protected species including bats. It states that planning permission will only be granted for a development proposal that is not likely to harm a European protected species. Planning permission can only be granted under Policy NH5 if the proposal is not likely to result in unacceptable adverse impacts on or damage to known priority habitats or species. The presence of species protected by legislation is a material consideration when a planning authority is considering a development proposal that if carried out, would be likely to result in harm to the species or its habitats.

31. Overarching regional policy in the SPPS strikes a similar tone. It states in paragraph 6.179, the presence <u>or potential presence</u> of a legally protected species is an important consideration in decision-making (my emphasis). If there is evidence to suggest that a protected species is present on site or may be affected by a proposed development, steps must be taken to establish whether it is present, the requirements of the species must be factored into the planning and design of the development, and any likely impact on the species must be fully considered prior to any determination.

32. There is no evidence that the issue of bats on the site was considered during the processing of the previous application D/2008/0460/F. Although the building is likely to have deteriorated during the intervening period, potentially increasing its suitability for bats, it appears to me that the matter should have been considered before the previous approval was granted. As no detailed bat survey of the site has been undertaken, I cannot set the matter aside simply because the appeal seeks renewal of an extant permission. A detailed survey is necessary to ensure that the development will not result in harm to bats and to enable the planning authority to

meet its legal obligation of having regard to the impact on European protected species. Where the potential effects of a proposed development are unknown, permission cannot be granted subject to a negative condition requiring further information to be provided.

33. The Council referred me to case law concerning the consideration that must be given to European protected species in the planning process. *R (on the application of Woolley) v Cheshire East Borough Council* [2009] EWHC 1227 relates to the impact of development on bats and highlights the duties of planning authorities under the Habitats Directive (to "have regard" to the impact of development on European protected species). This supports the Council's position that a bat survey of the appeal site is required prior to determination where there is a reasonable likelihood of European protected species on the site.

34. The appellant claims to have a valid fallback position whereby they could have demolished the building under planning approval LA01/2015/0006/F which granted permission for a bed and breakfast unit on the site. I note that this permission has now lapsed. While the existing house could still be demolished or renovated without planning permission, it remains an offence under the Habitats Regulations to disturb bats while they are occupying a structure or place used for shelter or protection. The appellant has been made aware of the potential of the existing dwelling to accommodate bats and would be ill advised to undertake any works without first investigating, by means of a survey, whether bats are present and may be impacted. Therefore, while demolition of the former Rectory may be lawful, I am not persuaded that the stated fallback position would overcome the need for a bat survey and accordingly, I cannot attach determining weight to it in this appeal.

35. The appellant gave an example of a negative condition applied to an approval (LA08/2019/0248/F) by Armagh, Banbridge and Craigavon Borough Council which permitted no works to a building until an NIEA Wildlife Licence had been obtained. Notwithstanding that the application referred to is in a different Council area and is not binding on Causeway Coast and Glens Borough Council, the condition referred to was imposed following receipt of a bat survey. As a survey confirming the presence or absence of bats has not been provided in respect of the appeal proposal, it is not comparable to the above application and it would not be appropriate to impose a similar negative condition.

36. I cannot attach weight to the appellant's argument that a bat survey undertaken closer to the point of demolition would be of more value than one during the planning process as a survey is required to assess the likely impact on the species prior to any determination. In the absence of a bat survey of the appeal site, I find that the proposal is contrary to the SPPS and policies NH2 and NH5 of PPS 2 and the Council has sustained its third reason for refusal.

Other Matters and Conclusion

37. The appellant raised a number of concerns regarding how the planning application now subject to appeal was dealt with by the Council. They raised specific concerns that the proposal was not subject to a more streamlined assessment given it was a renewal of an extant permission and referred to practices in other Councils where less scrutiny was employed for renewals. The practices of other Councils are not binding on Causeway Coast and Glens Borough Council. The appellant referred to

the level of scrutiny given to other planning applications for renewal by Causeway Coast and Glens Borough Council, but no specific examples were given.

38. While an application for renewal of planning permission is subject to a reduced fee, it is nonetheless a planning application that has to go through the standard process of consultation and assessment. The weight to be attributed to the planning history in relation to other material considerations is a matter for the planning authority. Fundamentally in this appeal, the previous approval does not overcome the need for a bat survey of the site. I am unable to adjudicate on the specifics of the Council's process during the planning application, including how the Scheme of Delegation was interpreted, in the context of this appeal. Neither can I comment on the Council complaints procedure. The level of resources required to process the application and the aforementioned matters are issues for the appellant to address with the Council. For the reasons given above, the third refusal reason is sustained and is determining. The appeal must therefore fail.

This decision is based on the following drawings:-

Drawing No.	**Title**	**Scale**	**Received by Council**	**Received by PAC**
01	Site Location Map	1:1250	14 Mar 2019	15 Mar 2021
02	Housetype A	1:100	14 Mar 2019	15 Mar 2021
03	Housetype BB	1:100	14 Mar 2019	15 Mar 2021
04	Housetype CC	1:100	14 Mar 2019	15 Mar 2021
05	Site Layout	1:500	14 Mar 2019	15 Mar 2021
06A	Landscape Management Plan	1:500	03 Jun 2020	15 Mar 2021
07A	Site Layout (for PSD)	1:500	06 Jun 2019	15 Mar 2021
08A	Road Longitudinal Sections	1:500	06 Jun 2019	15 Mar 2021
09	Private Streets – Standard Details	Various	06 Jun 2019	15 Mar 2021

COMMISSIONER GARETH KERR

List of Documents

Planning Authority:-	A	Statement of Case and Appendices Causeway Coast and Glens Borough Council
	B	Rebuttal Statement Causeway Coast and Glens Borough Council
Appellant:-	C	Statement of Case and Appendices Bell Architects Ltd.
	D	Rebuttal Statement Bell Architects Ltd.