Appeal Decision

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Appeal Reference:	2021/A0081
Appeal by:	Mr David Gilmore Lagmore Developments Ltd
Appeal against:	The refusal of Reserved Matters.
Proposed Development:	Residential housing development comprising a mix of detached and semi detached units (164 in total) with garages. All associated site works including amendment levels, landscaping, water water pumping station and off site works.
Location:	Drumahoe Industrial Estate Drumahoe Road Drumahoe
Planning Authority:	Derry and Strabane City Council .
Application Reference:	A2014/0035RM
Procedure:	Informal Hearings on 15th December 2022 and 13th February 2023
Decision by:	Commissioner Helen Fitzsimons 28th April 2023

Decision

1. The proposed development is Environmental Impact Assessment Development (EIA) under the Planning Environmental Impact Assessment Regulations (Northern Ireland) 2017(the Regs). An Environmental Statement has been submitted and I have taken account of in in reaching my decision.

2. The appeal is allowed subject to the conditions set out below.

Background

3. The previous use of the appeal site was for industrial purposes and a number of buildings were contained on the site. On 31st January 2011 Outline Planning Permission (OPP) was granted on appeal (2008/A0228) for residential development. The issues dealt with in that appeal focused upon the loss of industrial land; the quality of the residential development proposed; the provision of a safe access to the site; and the provision of a Transport Assessment that evaluates and mitigates against the impacts of development. It was noted by the Commissioner that the appeal site was clear of any buildings.

4. This Reserved Matters Submission (RM) was made on 23rd January 2014. On 28th January the Council (formerly the Department of the Environment NI) carried out a determination under the Regs to the effect that the proposal was not Environmental Impact Assessment (EIA) development and that an Environmental

Statement (ES) would not be required. On page 5 of the Council's EA Determination Sheet at 3 (d) the probability of the impact it states' likely to be low and controlled through mitigation'. At 3 (e) the duration, frequency and reversibility of the impact it states ' only impact would be limited to the construction phase'.

5. Between June 2017 and February 2018 the appellant undertook site preparation works including breaking up and crushing of floorplates. There is agreement between the parties that this is Unauthorised Development (UD) In August 2017 an unexpected and significant flood event that took place in and around Drumahoe and the appeal site was flooded. Although flood defences are in place on the northern boundary of the appeal site they were insufficient to contain all of the waters. The floodwater topped the defences and flowed into the River Faughan. The River Faughan and Tributaries is designated Special Area of Conservation (SAC) and Area of Special Scientific Interest (ASSI) because of its population of Atlantic Salmon.

6. On 17th November 2017 the Council reviewed the EIA status of the appeal proposal and concluded that it was EIA development requiring an ES for the reason that :- there is potential for degradation of the aquatic environment from contaminated run - off through demolition works on site i.e the breaking of surfaces. On page 5 of the Council's EA Determination Sheet at 3 (d) the probability of the impact it states potentially could impact the integrity of the designated site from contamination run off as a result of operational works and also taking account of recent significant flooding event on 22/8/2017. At (e) the duration, frequency and reversibility of the impact it states the impact of the works remains unclear. From this I must infer that any EIA concerns related to the impact of the UD, in combination with the flood event, on the integrity of the River Faughan.

7. On 19th June 2019 the Council served an Enforcement Notice (EN) on the appeal site in respect of the site works alleging the unauthorised use of land for the deposition of controlled waste (as defined in the Waste and Contaminated Land (Northern Ireland) Order 1997 causing infilling and raising of land making a material change of use in the said lands being development carried out without the grant of permission required. This was also accompanied by a positive EIA determination The EN was quashed on appeal and consequently its associated EIA determination fell away. No further enforcement action has been taken by the Council to date in respect of any alleged breach of planning control.

8. In its rebuttal evidence the Council withdrew its first reason for refusal.

Reasons

9. The main issues in this appeal are-:
   - whether the proposed development is likely to have a significant impact on a protected site;
   - what bearing the UD if any can have on the future development of the appeal site;

10. Section 45 (1) of the Planning Act (Northern Ireland) 2011 (the Act) requires the Commission, in dealing with an appeal, to have regard to the local development plan (LDP), so far as it is material to the application, and to any other material considerations. Section 6(4) of the Act requires that where in making any determination, regard is to be had to the LDP, the determination must be made in accordance with the plan unless material considerations indicate otherwise.

11. The Derry Area Plan 2011 (DAP) operates as the Local Development Plan (LDP) for the area the appeal site lies within. The appeal site is located within the settlement limits of Derry on land not zoned for any particular purpose. Given the proximity of the appeal site to the River Faughan Policy ENV 8 The Water Environment is pertinent to the appeal proposal. The policy states that ' Development which is likely to introduce or increase water pollution to an unacceptable extent or adversely alter the water levels in any body of water, watercourse or groundwater will not be permitted.'

12. The Strategic Planning Policy Statement for Northern Ireland 'Planning for Sustainable Development' (SPPS) sets out the transitional arrangements that will operate until a Plan Strategy for the Council area is adopted. During the transitional period the SPPS retains certain existing Planning Policy Statements including Planning Policy Statement 2 'Natural Heritage' (PPS 2).

13. Policy NH 1 'European and Ramsar Nature Conservation Sites – International' of PPS 2 says that planning permission will not normally be granted for a development proposal that, either individually or in combination with existing and /or proposed plans or projects, is likely to have a significant affect on SAC. Policy NH 3 'Sites of Nature Conservation Importance – National' of PPS 2 says that planning permission will not normally be granted for a development proposal that is likely to have an adverse effect on the integrity, including the value of the site to the habitat network or special interest of an ASSI.

14. The River Faughan and Tributaries was accepted as a Natura 2000 Site (a Site of Community Importance) on 22nd December 2009. It was designated as a SAC on 29th January 2013. The conservation objective of the River Faughan and Tributaries SAC is to maintain and if possible enhance the extent and quality of suitable salmon habitat , particularly the chemical and biological quality of the water and condition of the river channel and substrate … clean gravels should dominate channels … elevated levels of fines can interfere with good and fry survival through suffocation of eggs and loss of interstitial refuges for fry.

15. Paragraph 2.6 and 2.7 of the preamble to PPS 2 says that European Directive 92/43/EEC 'on the conservation of natural habitats and of wild flora and fauna' known as the Habitats Directive is transposed into Northern Ireland law by the Conservation (Natural Habitats, etc) Regulations (Northern Ireland) 1995 (as amended) (Habitat Regs). Under the provisions of the Directive and the Regulations, plan-making authorities are required to undertake an Appropriate Assessment for any development plan, which either individually or in combination with other plans or projects, is likely to significantly affect, a European Site

16. Regulation 49 (3) of the Conservation Regs says where regulations 43 and 44 apply, outline planning permission shall not be granted unless the Department, or, as the case may be, the planning appeals commission, is satisfied (whether by

reason of the conditions and limitations to which the outline planning permission is to be made subject or otherwise) that no development likely to adversely affect the integrity of a European site could be carried out under the permission, whether before or after obtaining approval of any reserved matters. In other words the decision maker must be satisfied that the result of granting an outline planning permission for future development would not have a likely significant impact on the integrity of a European site.

17. It was argued by a 3rd Party that the Commission did not take into account the conservation objectives of the SAC at the time outline planning permission was granted. Upon reading the appeal decision I can see no suggestion either in the analysis of the case or by the imposition of planning conditions regarding mitigation measures that the development was considered to be likely to have an adverse impact on the integrity of the SAC. I was given no supporting evidence by the 3rd party that such an assessment should have been made but that this was ignored by the appointed Commissioner. In such circumstances it must be inferred that the proposal was not considered to have a likely significant adverse impact on the SAC. I am reinforced in this as initially at RM submission stage a negative EIA determination was carried out . This to me is sufficient affirmation on the status of the outline permission and would fulfil requirements of Regulation 45 of the Conservation Regs, had that assessment never been carried out in the first place. As it is only after the 2017 flood event that this matter of likely significant impact has come to the fore Regulation 49 (3) of the Conservation Regs is met in respect of the outline planning permission. In any event it must be noted that this decision was not challenged at that time and therefore must be accepted.

18. The Council's fourth reason for refusal states that the proposal is contrary to the Derry Area Plan ENV 8 and PPS 2 Natural Heritage in that it has not been demonstrated that the works that have taken place on the site have not had an adverse impact on the River Faughan SAC/ASSI.

19. In a consultation response dated 21 October 2020 Shared Environmental Services(SES) advised that subject to mitigation in the form of a Construction Environmental Management Plan (CEMP) the proposal will not have an adverse effect on the integrity of a European Site. Northern Ireland Environment Agency advised it considered that the works during the construction and operation stages would be unlikely to be significant on the SAC. These are the Council's expert consultees and I have no arguments from the Council contrary to that advice. Given this I am satisfied that there would be no likely significant adverse impact on the designated site by virtue of the further site clearance works and the construction of houses.

20. The proposal before me is a RM proposal for future development to which there is no objection. The Council has not sustained its fourth reason for refusal based on Natural Heritage and the 3rd Partys' concerns are not upheld.

21. The remaining two reasons for refusal are based on alleged unauthorised development having occurred within the appeal site. As stated above I am satisfied that the development can go ahead without detriment to matters of conservation. Part and parcel of the RM is the breaking up surfaces and changing ground levels and that is what I am granting planning permission for.

22. The matter of the impact of the combination of a freak flood event and the alleged unauthorised development is not for this appeal but rather is a matter to be taken up between the Council and any other relevant Statutory Bodies. The Council has not sustained its remaining reasons for refusal based on the alleged unauthorised development.

23. Other 3rd party concerns were raised. Those relating to transport and traffic and loss of industrial land which were dealt with at consideration of the outline planning permission. No new issues have been put before me in those respects.

24. The matter of flood risk to existing homes was raised. A freeboard applied to the 100 year level is designed to protect the development from flooding of a higher return. A maintenance strip will be located between the flood wall and the raised development. The appellant also proposes to employ a method to pump out flood water in the maintenance strip between the flood wall and the raised development in case of exceedance. As DfI Rivers a statutory consultee is satisfied with those arrangement I am content that there is no increased flood risk to existing homes by allowing the appeal.

25. Amendments to the proposed layout now ensure that no dwellings would be sited on the boundary of the appeal site with the existing dwellings at Ardlough Road. Planted amenity space is now proposed between the development and the existing dwellings. The new dwellings have been designed to provide supervision onto this area. Regarding the walkway I accept that it is necessary for pedestrian access into and out of the appeal site. None of the 3rd party other concerns are determining in this appeal.

26. Landscaping conditions are required to facilitate the integration of the proposed development into its surrounding area and to provide a quality residential environment for the occupiers of the dwellings. A Landscape Management Plan is necessary to ensure that the proposed open space is managed in perpetuity in accordance with the requirements of Planning Policy Statement 8 ‘Open Space Sport and Outdoor Recreation.

27. Although there is no evidence of contamination on the site given its past uses conditions are necessary to manage any such potential contamination should it arise in the interests of protecting the health of future residents and other environmental receptors.

28. Conditions are required to ensure that any unacceptable noise arising from any piling and general construction activities are managed in the interests of protecting the residential amenities of nearby occupiers. Conditions are also required to ensure that there is no adverse noise impact from the proposed Waste Water Pumping Station.

29. Conditions are required to ensure that streets are laid out in accordance with the Private Streets Determination, that all visibility splays are laid out and there are no obstructions within the verges to footways to provide for the safety and convenience of road users. A condition is also required to provide for the orderly laying out of streets to facilitate the satisfactory and safe occupation of dwellings.

30. A maintenance strip is required on a permanent basis to facilitate the maintenance of the flood defences in place on the appeal site.

Conditions

1. No development shall take place until a Final Construction Environmental Management Plan (CEMP) has been submitted to and approved in writing by the Planning Authority. The CEMP shall be based on the outline CEMP previously submitted to and agreed in writing with the Planning Authority. The CEMP shall also include details of a silt fence to be erected and maintained between the site and the River Faughan throughout the duration of the construction phase. Means of the disposal of surface water shall also be provided. The CEMP shall be fully implemented and adhered to at all times during the construction phase.

2. No development shall take place until detailed proposals for the disposal of storm water and foul sewage have been submitted to and approved by the Planning Authority. The dwellings shall not be occupied until the agreed proposals are in place.

3. All existing trees shrubs and hedges shown on the drawing 13-112 D-20 Revision C ' Landscape Drawings' date stamped by the Planning Authority 3rd December 2019 shall be retained and augmented with new planting as indicated unless otherwise agreed in writing with the Planning Authority.

4. If within a period of 5 years from the date of planting any tree, shrub, hedge is removed or uprooted, destroyed or dies or becomes in the opinion of the Planning Authority seriously damaged or defective another tree, shrub or hedge of the same species shall be planted in its place, unless the Planning Authority gives consent to any variation.

5. The boundary treatments to each hereby approved dwellings shown on drawings numbered 13-112 D-01.1 Revision J, 13-112 D-01.2 Revision I, 13-112 D-06 and 13-112 D.21 shall be provided prior to the occupation of each of those dwellings.

6. Prior to the occupation of the hereby approved 82nd dwelling the area of public open space, equipped play area, pedestrian link and open space planting shall be laid out in accordance with drawings numbered 13-112 D-01.1 Revision J, 13-112 D01.2 Revision I and 13-112 D-20 Revision C. Details of the equipped play area shall been agreed in writhing with the Planning Authority prior to occupation of the first dwelling.

7. The hereby approved open space referred to in Condition 5 shall be managed and maintained in accordance with the Landscape Management plan received by the Planning Authority and date stamped 18th May 2015.

8. No hereby approved dwelling shall be occupied until a Landscape Management Agreement for all areas of communal open space has been entered into and agreed with an appointed Open Space Manager, the details of which shall be agreed in writing with the Planning Authority and permanently managed as agreed.

9. If during development of the hereby approved development, new contamination or risks to the water environment are encountered that have not been previously identified the Planning Authority shall be notified immediately. The new contamination shall be fully investigated in accordance with the Land Contamination Risk Management (LCRM) guidance available form the Department of Agriculture, Environment and Rural Affairs. In the event of unacceptable risks being identified, a remediation strategy shall be agreed with the Planning Authority in writing and implemented and verified to the Planning Authority's satisfaction.

10. After the completion of any remediation works required under condition 9 and prior to occupation of any dwelling, a verification report completed by a competent person in accordance with the LCRM guidance shall be submitted to and agreed in writing with the Planning Authority . The verification report shall present all the remediation works, waste management and monitoring works undertaken and demonstrate the effectiveness of the works in managing all the risks and wastes in achieving the remedial objectives.

11. The Waste Water Pumping Station (WWPS) hereby approved shall be designed constructed and maintained as set out in appendix 2 of the Environmental Statement 2nd addendum date stamped 2nd September 2019. The noise level generated by the WWPS shall not exceed the background sound level L_{A90} at the nearest hereby approved dwellings.

12. Should piling of foundations be required no development shall take place until a noise/vibration impact assessment is carried out and submitted to and agreed in writing with the Planning Authority. Any mitigation measures identified shall be put in place during construction.

13. The maintenance strip shown on drawings numbered 13-112 D-01.1 Revision J and 13-112 D-01.2 Revision I shall be permanently retained.

14. The width, position and arrangement of the streets and the land to be regarded as being comprised in the streets shall be laid out in accordance with drawing numbered 13-111-A10c .

15. No building work shall take place until the improvement of public road works shown in blue on drawing numbered 13-111-A10c have been completed. Such works shall be carried out in accordance with an Agreement under Article 3 (4C) of the Private Streets (Northern Ireland) 1980 as amended by the Private Streets (Amendment) (Northern Ireland) Order 1992.

16. Prior to the commencement of building works the vehicular access, visibility splays and any forward sight distance shall be laid out in accordance with drawing number 13-111-A10c and permanently retained.

17. Notwithstanding the provision of the Planning (General Permitted Development) Order (Northern Ireland) 2015 no garages shall be sited closer than 6 metres from the back of the footway or the near edge of a shared surface carriageway and no other buildings walls or fences shall be erected in verges or service strips determined for adoption.

18. Only planting with a shallow root system and a mature height of no more than 500mm shall be carried out within areas determined as service strips or verges for adoption.

19. The areas hatched green at sites 24-29, 89-92, 104 – 107, and 123 – 26 on drawing numbered 13-111-A10c shall be permanently kept clear of walls, fences, hedges or formal rows of trees.

20. If the finished ground level of a property within 1m of the footway or verge is greater than 150mm of the finished level of the adjoining footway or verge a fence of wall shall be constructed at this location to a minimum height of 1.1 m above the footway or verge level and permanently retained.

21. The access gradients to the hereby approved dwellings shall not exceed 98% (1 in 12.5) over the first 5m from its boundary with the road. Where the vehicular access crosses a footway the access gradient shall be between 4% (1 in 25) m and 2.5% (1 in 40) minimum.

22. No dwellings shall be occupied until that part of the service road which provides access to it has been completed to base course. The final wearing course shall be laid out after each phase of development is completed.

23. Demolition and construction on the site shall only occur between the hours of 7.30 – 18.00 Monday to Friday and 8.00 – 13.00 hours on a Saturday unless otherwise agreed by the Planning Authority.

24. The development shall be begun before the expiration of two years from the date of this approval.

This decision relates to the following drawings:-

The 1:2500 scale Location Map numbered 13-112 B-01 Revision A
The 1:1000 scale Landscape Drawing numbered D-20 Revision C
The 1:500 scale Site Layout (Part 1) numbered D-01.1 Revision J
The 1:500 scale Site Layout (Part 2) numbered D-01.2 Revision I
The 1:500 scale Longitudinal Sections of Access Roads numbered 13-111-A2a
The 1:500 scale Longitudinal Sections of Access Roads numbered 13-111-A3a
The 1:500 scale Longitudinal Sections of Access Roads numbered 13-111-A4
The 1:500 scale Longitudinal Sections of Access Roads numbered 13-111-A5
The 1:500 scale Private Streets Layout numbered 13-111-A10c
The 1:500 scale Proposed Site Sections numbered D-10 13-112 Revision L
The 1:100 scale House Type A Plans and Elevations numbered 13-112 D-02
The 1:500 scale House Type A1 Plans and Elevations numbered D-11
The 1:500 scale HTB – Plans numbered 13-112 D-03
The 1:500 scale HTB Elevations numbered 13-112 D- 03.5
The 1:500 scale HTC Plans and Elevations numbered 13-112 D- 04
The 1:500 scale House Type D Plans and Elevations numbered 13-112 D-05
The 1:10 & 1:50 scale Proposed Boundary Treatments numbered 13-112 D-06
The 1:50 scale Boundary Detail 2 numbered 13-1112 D-21
The 1:200 scale Cycleway Transitions numbered 13-111-A20a
The 1:200 scale Cycleway Transitions numbered 13-111-A21a
The 1:50 scale Pumping Station Plan of Compound 13-111-PS1

The 1:350 scale Proposed Section AA(Part) numbered 13-112 D-100
The 1:350 scale Proposed Section AA(Part) 13-112 D101

COMMISSIONER HELEN FITZSIMONS

Attendances

Planning Authority: - Mr C Fegan (FTB Chambers)
Miss S Barrett (Derry and Strabane Council)
Mrs A Mc Nee (Derry and Strabane Council)
Mr M Kearney (Shared Environmental Services)
Mrs A Jamieson (Shared Environmental Services)
Mr N Jenkinson (Rivers Agency)
Miss C Lavery (DEARA NED)
Mr P Kingston (Derry and Strabane) (15/12/22 only.)

Appellant: - Mr W Orbinson KC
Mr C Bryson (Gravis Planning)
Mr A Ryan (TLT Solicitors)
Mr C Loughran (Blackstaff Ecology)
Dr P Hull (Flood Risk Consulting)
Mr D Gilmore (Appellant)

Objectors: - Mr D Blackwood (River Faughan Anglers)

List of Documents

Planning Authority: -	C1	Written Statement and Appendices
	C2	Rebuttal
	C2	Post Hearing Evidence
Appellant: -	A1	Written Statement and Appendices
	A2	Rebuttal
	A3	Post Hearing Evidence
3rd Party: -	3rd P1	Written Statement
	3rd P2	Rebuttal
	3rd P3	Post Hearing Evidence