Appeal Decision

Park House
87/91 Great Victoria Street
BELFAST
BT2 7AG
T: 028 9024 4710
F: 028 9031 2536
E: info@pacni.gov.uk

Appeal Reference:	2020/A0111
Appeal by:	Mr Farrell / Firestone Construction Ltd
Appeal against:	The conditional grant of full planning permission
Proposed Development:	Residential development comprising 11 no 3 bedroom townhouses with associated landscaping and car parking [change of house types to that approved under application Ref LA03/2015/0601 to include amended access detail, amended boundary detail and reduced site area (conditions 2, 4 and 9)]
Location:	The Old Mill, 53 Mill Road, Crumlin
Planning Authority:	Antrim and Newtownabbey Borough Council
Application Reference:	LA03/2019/0361/F
Procedure:	Remote Informal Hearing on 26 October 2021
Decision by:	Commissioner McShane, dated 6 December 2021.

Decision

1. The appeal is allowed. The full planning permission granted under LA03/2019/0361/F is amended as set out below.

Preliminary Matter

2. The Appellant submitted a site layout plan / access detail drawing with his statement of case to replace LPA Drwg No.03/03. The drawing, date stamped received by the PAC on 10 Jun 2021, is entitled "Indicative Site Layout" and is numbered "PAC 03". However, this appeal relates to a full application; therefore the word "indicative" in the title is misplaced. In addition, it is not a PAC drawing; therefore the use of "PAC" in the drawing number is incorrect. The parties agreed that a drawing correcting these points would be submitted post hearing. Drawing No. 03/03A entitled "Site Layout" was received by the PAC on 01-Nov-2021 and date stamped accordingly.

Reasons

3. The Antrim Area Plan 1984-2001 (AAP) operates as the Local Development Plan (LDP) for the area. The appeal site is located within the designated Crumlin Settlement Development Limit (SDL), within which there is a general presumption in favour of housing development.

4. The Strategic Planning Policy Statement for Northern Ireland (SPPS) is applicable to all planning applications. Paragraph 5.65 of the SPPS advises on the use of

planning conditions and says that they should only be imposed where they are: necessary; relevant to planning; relevant to the development being permitted; precise; enforceable; and reasonable.

5. The planning history indicates that housing development, comprising 11 no. 3 bedroom townhouses with associated landscaping and car parking, has been approved on the appeal site, subject to planning conditions, since December 2010: T/2008/0345/F; LA03/2015/0601/F; and LA03/2019/0361/F.

6. The most recent planning permission (LA03/2019/0361/F) was subject to nine conditions. Conditions 2, 4 and 9 are referenced in this appeal. These read as follows:

Condition 2: The proposed landscaping works as indicated on Drawing Number 03/3 date stamped 20th November 2020 shall be carried out in accordance with the approved details and the appropriate British Standard or other recognised Codes of Practice during the first planting season after the occupation of the first dwelling unit.
Reason: To ensure the provision, establishment and maintenance of a high standard of landscape

Condition 4: None of the residential units hereby permitted shall be occupied until visibility splays of 2.4 by 90 metres and any forward sight line are provided in accordance with stamped approved drawing 03/03 date stamped 20-Nov-2020.
Reason: To ensure there is a satisfactory means of access in the interests of road safety and the convenience of road users.

Condition 9: Prior to the occupation of either unit 4 or 5 hereby permitted, whichever is first, the existing open access point to the mill race culvert shall be surrounded by a 1.5 metre high reinforced concrete wall as proposed in "Drawing No 03/3A date stamped received 20-Nov-2020.
Reason: To provide mitigation in the event of surcharging of the Mill race.

7. The Appellant confirmed that Conditions 2 and 9 were cited in this appeal only because their references to Drawing No. 03/3 require amendment to refer to the most recent drawing submitted. This is now Drawing No.03/03A date stamped received by the PAC on 01-Nov-2021. This amendment is uncontentious.

8. In addition, at the Hearing, the Appellant proposed that the text "and shall be permanently retained" should be added to Condition 9 as follows: "Prior to the occupation of either unit 4 or 5 hereby permitted, whichever is first, the existing open access point to the mill race culvert shall be surrounded by a 1.5 metre high reinforced concrete wall as proposed in "Drawing No 03/3A date stamped received by the PAC on 01-Nov-2021" and "*shall be permanently retained*". This amendment is uncontentious.

9. The issue addressed by Condition 4 is road safety and the convenience of road users. The SPPS identifies Planning Policy Statement 3: Access Movement and Parking as a retained policy document. Policy AMP 2 of PPS 3 states that planning permission will only be granted for a development proposal involving

direct access, or *the intensification of the use of an existing access* (my emphasis), onto a public road where: (a) such access will not prejudice road safety or significantly inconvenience the flow of traffic.

10. The Appellant is seeking to remove Condition 4, which requires visibility splays of 2.4 by 90 metres to be provided. It is argued that in the event that the appeal against Condition 4 is unsuccessful, the "fall back" alternative is to reuse a building on the appeal site for industrial / business use.

11. The appeal site and its buildings are part of the former "old mill complex". Historical and current images were submitted to show that buildings on the appeal site and immediately adjacent are part of a wider economic development complex. Buildings 3 and 5 have been demolished. Buildings 1, 2, 4 and 6 remain in situ. Building 1 (594m^2) is the focus of this appeal.

12. The Appellant refers to the site description in the Case Officer's Report, dated 02.09.2020, which notes "The buildings within the application site include several storage, office and warehouse buildings, most of which are unused or vacant". Similar comments are found in the Case Officers' reports, dated January 2016 and November 2010 respectively.

13. The Appellant drew my attention to *Alexander v Causeway Coast and Glens Borough Council* [2018] NIQB 10664, which references *Gambone v Secretary of State for Communities and Local Government* [2014] EWHC 952 (Admin]. In this context, it is argued that the reuse of Building 1 for industrial / business use would not require planning permission; the use has not been abandoned and its reuse would not be subject to enforcement. The Appellant pointed out that in *Alexander*, an area of concrete hardstanding was found to be sufficient to establish that a use had not been abandoned.

14. The Appellant goes on to argue that an industrial / business use within Building 1 would generate more trips than the proposed housing units. The Trip Rate Information Computer System (TRICS) transportation data submitted, indicate that Building 1 would generate 168 trips at 85th percentile levels or 98 trips using the mean flow.

15. Ten trips per day per dwelling is the recognised norm. However, TRICS has a specific category for social housing, hence a lower figure of 60 trips for the 11 town houses is presented as they are for social housing use. Ownership of the site transferred to ARK Housing Association in 2019 and the dwellings have been allocated to families currently on a social housing waiting list; one of whom appeared at the Hearing as a Third Party Supporter. Occupation and possession of the units is pending resolution of the planning issues.

16. The Council witness agrees that Building 1 has an historic employment use. Referring to *Hughes v the Secretary of State for the Environment, Transport and the Regions* [2000] 1 PLR 76, he states that there is no evidence that the use has been abandoned. He points out that as part of the approved housing development, Building 1 would be demolished and an area of open space would be created in its place; however in the event that the appeal is dismissed, Building 1 can remain and it can be reused. He points out that while it may be neater if there were a Lawful Development Certificate (LDC) in place, enforcement action

would not be taken by Council in the event that an industrial / business use were to resume in Building 1.

17. He also accepts that, given its size, an industrial / business use in Building 1 would generate a greater number of trips than would be generated by the social housing units.

18. The Council witness, based upon planning judgement, accepts the Appellant's "fall back" alternative to the development proposal and considers it to be "a game changer". He points out that Policy AMP 2 of PPS 3 refers to intensification. However, the social housing units would not approach the 168 vehicle movements per day associated with the industrial / business use, which means that there would not be intensification of the use of the existing access. If there is no intensification of the use of the existing access, Policy AMP 2 and Criterion (a) would not be engaged. Notwithstanding that the visibility splays are substandard, there would be no requirement to improve the access. As such, Condition 4 can be deleted.

19. The Third Party Objector argues that the industrial / business use has been abandoned and that there is no "fall back" alternative to the development proposal. He disputes the transportation data submitted by the Appellant and argues that Condition 4 is required to be retained.

20. The key consideration is whether the industrial / business use of the building has been abandoned. My assessment of the issue of abandonment is guided by case law. *Hughes* advocates consideration of the following factors:-
    1. the physical condition of the building;
    2. the length of time for which the building had not been used;
    3. whether it had been used for any other purposes; and
    4. the owners' intentions.

21. Factor 1: Building 1 is a three storey structure. The walls, roof and windows, including glazing, are intact. The building is secure and in good physical condition.

22. Factor 2: The Third Party Objector has detailed knowledge of the site over a 50 year period; owning it for part of that time. He indicates that the mill use ceased in the 1950s and that there were various business uses up until 1991. Food processing approved in 1991 continued up until 2004. The building was vacant for two years before he sold the site in 2006. There is no conclusive evidence about the use / non-use of the building since 2006.

23. Factor 3: The Council witness confirmed that no planning permission has been granted for a different use within the Building 1. Notwithstanding that the housing units are already in situ, residential use on the appeal site has not yet commenced. Building 1 remains in situ, the open space use, which would take its place in the event that the appeal is successful, has not commenced. There is no evidence to indicate that the building has been used for any other purpose.

24. Factor 4: The Third Party Objector sold the appeal site in 2006, 2 years after the food processing use ceased. It is his opinion that as the building had not been used for two years, the use had been abandoned. No evidence was presented with respect to ownership of the site from 2006 onwards. However, the Appellant

argues that his retention of Building 1 in good condition has been deliberate and means that if the social housing units cannot be occupied, then it will be reused.

25. I weigh the above factors as follows. Building 1 may not have been used since 2004, however its condition suggests that sufficient works of maintenance or repair were carried out since that time to enable it to remain intact and in good physical condition. Even in the event that the building has not been used since 2004, case law is clear that there is no specific time period after which a use is considered to be abandoned; there is no prescribed time limit. There is no evidence to indicate that the building has been used for any other purposes. Finally, the subjective view of the Third Party Objector, who owned the site up until 2006, is that the use was abandoned in 2004 when food processing ceased. However, case law states that while the state of mind of the owner(s) would be relevant when investigating the facts of the matter, it would not necessarily be decisive or given determining weight. Taking all the relevant considerations in the round in the evidential context of this specific case and assessing them against the four tests set out in *Hughes* in a reasoned and objective manner, I conclude that the use of the building has not been abandoned.

26. Given this conclusion, and guided by *Gambone* and *Alexander,* I consider two additional factors: is there a realistic possibility that the previously authorised land use could recommence? If the answer is yes, what weight should this factor attract?

27. *Gambone* indicates that the basic principle is that for a prospect to be a real prospect, it does not have to be probable or likely; a possibility will suffice. In my planning judgement in the particular circumstances of the case in hand, I conclude that there is a greater than theoretical possibility that the land use could recommence.

28. This, in turn leads me to assess the weight this factor should attract and requires an assessment of the effects of the industrial / business use recommencing. The transportation data submitted shows that there would be greater use of the existing access for industrial /business use than for the social housing use.

29. The Third Party Objector disputed the evidence submitted, referring me to the 1990 application for food processing, wherein it was indicated that traffic was anticipated to be less than 20 vehicles per day.

30. The transportation data submitted by the Appellant's transportation consultant are based upon TRICS; a database of trip rates for development used in the UK for transport planning purposes; specifically to quantify the trip generation of new development. I consider it reasonable to rely on the data based upon TRICS, an industry standard, rather than to rely upon evidence based upon information presented in respect of a single application.

31. The TRICS data indicates that the "fall back" alternative would have a greater impact on road safety and the convenience of road users than the proposed social housing use. In the site specific circumstances of this case and taking all material considerations in the round, I attach significant weight to the "fall back" alternative.

32. In the circumstances of this case, there would be no intensification of use of the existing access by the proposed use, therefore Policy AMP 2 of PPS 3 is not engaged and Condition 4 can be deleted from planning permission LA03/2019/0361/F.

33. The Third Party Objector raised a number of additional concerns, which fall to be considered. He initially disputed whether the Council's decision was legal.

34. The Council witness pointing out that no challenge to the legality of the decision has been lodged, referred to a delegated decision report, which he had written, that explains in detail the process followed. He also drew attention to a note on the file written by the then Head of Planning, dated 26 November 2020, which records a discussion with the Council's Legal Services and Director of Planning where it was agreed that the issuing of the decision in this case remains delegated to Officers. The note also points out that prior to issuing the decision, the Head of Planning contacted the Chair of the Planning Committee to advise that Officers intended to issue a delegated approval. It notes that the former advised that he was content for Officers to issue the approval under delegated powers. The Third Party Objector, expressed disappointment that he was unaware of the note of the then Head of Planning. The Council's decision is legal.

35. Amended documents received, during the processing of the application, were advertised and Objectors notified. Seeking to enlarge the red line of an application site raises substantive issues that requires a different approach to a reduction in the red line. The application has been processed and administered fairly.

36. The Third Party Objector argued that Condition 2 should be amended to require the landscaping to be carried out prior to the occupation of the first dwelling unit rather than during the first planting season after the occupation of the first dwelling unit. He is concerned that the area of open space, currently occupied by Building 1, which is separated by fencing from the development, will not be provided. However, in the event that the Appellant does not comply with the drawings and conditions attached to the planning permission it would be a matter for the Council. It may take enforcement action, if it considers it to be expedient to do so.

37. It is the case that the private amenity space of some of the dwellings falls below the normal standard set out in Creating Places, as pointed out by the Third Party Objector. However, the amenity areas are akin to those approved in previous planning permissions, which were considered to be acceptable. The level of private amenity space is acceptable, given the provision of communal open space and the close proximity of a park to the appeal site.

38. Concern was raised about the risk to future occupants of the demolition of Building 1, given the likely presence of asbestos in the roof. As might be expected on the site of an old mill, issues regarding contamination and environmental considerations have been to the fore. The planning permissions granted have been subject to numerous conditions in this respect; some conditions have been discharged. A Risk Assessment has been undertaken by the Appellant and an Environmental Site Report submitted to the Council who has consulted with the relevant statutory bodies. It is considered that this sets out a general appropriate course of action. Works undertaken in line with the strategy set out as well as

within the guidance of all the relevant statutory controls, which exist outside of the planning regime, will serve to minimise any risks.

39. The Third Party Objector expresses concern that conditions attached to the grants of planning permission on the appeal site, which required the provision of visibility splays prior to the commencement of development, have not been complied with, yet no enforcement action has been taken. Section 138 (1) of the Planning Act (NI) 2011 states that the Council may issue an "enforcement notice" where it appears to the Council (a) that there has been a breach of planning control in relation to any land in its district; and (b) that *it is expedient* (my emphasis) to issue the notice, having regard to the local development plan and to any other material consideration. Consequently, whether a Council takes enforcement action is a matter for it to determine.

40. The Third Party objections, when considered individually and cumulatively, are not determining in this appeal. Accordingly, Conditions 2 and 9 of planning permission LA03/2019/0361/F are amended as set out below and Condition 4 is deleted.

Conditions

Condition 2 is amended as follows:
The proposed landscaping works as indicated on Drawing Number 03/3A date stamped received by the PAC on 01-Nov-2021 shall be carried out in accordance with the approved details and the appropriate British Standard or other recognised Codes of Practice during the first planting season after the occupation of the first dwelling unit.

Condition 9 is amended as follows:
Prior to the occupation of either unit 4 or 5 hereby permitted, whichever is first, the existing open access point to the mill race culvert shall be surrounded by a 1.5 metre high reinforced concrete wall as proposed in Drawing No 03/3A date stamped received by the PAC on 01-Nov-2021 and shall be permanently retained.

Condition 4 is deleted.

Drawings

This decision is based on the following drawings approved pursuant to planning permission LA03/2019/0361/F:-

- LPA Drwg No.01/2: Floor Plans and Elevations (House Types 1-7) (Scales as shown), date stamped Granted 26-11-2020);
- LPA Drwg No.02/4: Floor Plan, Elevations (House Types 8-11) and Site Location Plan (Scales as shown), date stamped Granted 26-11-2020;

and;

- NI Planning Consultants Drawing No.03/3A: Site Layout Plan (Scale 1:250), date stamped received by the PAC on 01-Nov-2021

COMMISSIONER MCSHANE

List of Appearances

Planning Authority:-	Mr B Diamond (Planning) Mr G Lynch (DFI Roads) (Antrim and Newtownabbey Borough Council)
Appellant:-	Mr S Beattie QC - Instructed by Mr D Bell (Clyde Shanks Planning) - Ms K McShane (Kevin McShane Ltd)
Third Party Objector:-	Mr Mairs
Third Party Supporter:-	Ms L McGann

List of Documents

Planning Authority:-	"LPA 1" Statement of Case and Appendices
Appellant:-	"APP 1" Statement of Case and Annexes
Third Party Objector:-	"TPO 1" Statement of Case and Appendices
Third Party Supporter:-	"TPS1" Statement of Case

Post Hearing Evidence

NI Planning Consultants Drwg No.03/03 A: Site Layout Plan (Scale 1:250), PAC date stamped received 1 Nov 2021

Kevin McShane Ltd Drwg No.03/04: Site Access Sightlines (Scale 1:200 @ A1), PAC date stamped received 01 Nov 2021