

Enforcement Appeal Decision Legal Grounds

Appeal Reference:	2021/E0007
Appeal by:	FP McCann Ltd
Appeal against:	An Enforcement Notice dated 18 th March 2021
Alleged Breach of Control:	Alleged unauthorised extension of quarry, unauthorised erection of sheds; alleged unauthorised access lane; alleged unauthorised hard standing; alleged unauthorised stationing of plant, machinery, vehicles and stockpiles of aggregates, overburden soil and any other materials
Location:	Land at Craigall Quarry, 84 Cullyrammer Road, Garvagh
Planning Authority:	Causeway Coast and Glens Borough Council
Application Reference:	LA01/2020/0012/CA & EN/2021/0068
Procedure:	Informal hearing 18 th April 2023
Decision by:	Commissioner Kenneth Donaghey, dated 15 th August 2024

Grounds of Appeal

1. The appeal was brought on Grounds (a), (b), (c), (d) and (f) as set out in Section 143(3) of the Planning Act (Northern Ireland) 2011.
2. The Enforcement Notice (the notice) was accompanied by a separate Notice issued under Regulation 34 of the Planning (Environmental Impact Assessment) Regulations 2017 which has also been appealed. As the legal grounds of appeal have a significant impact upon the further assessment of the appeal development insofar as it could be EIA development, they are considered in advance of any further matters. Therefore, this decision considers the legal grounds of appeal, namely Grounds (b), (c) and (d).

The Notice

3. The Council indicated that the breach set out at Part 3 (2) of the notice, which refers to the “unauthorised erection of sheds” is no longer being pursued. The notice is amended accordingly. To clarify this amendment the Council provided an updated maps to accompany the notice, this map is referred to as PAC 1 and excludes the area upon which the sheds and elements of the hardstanding are located. It was agreed at the hearing that no significant prejudice is caused to the appellant through the amendment of this map and as such it is accepted. The notice shall be amended accordingly.

4. The notice identifies the matters that appear to constitute the breach of planning control as: "Alleged unauthorised extension of quarry; unauthorised erection of sheds; alleged unauthorised access lane; alleged unauthorised hard standing; alleged unauthorised stationing of plant machinery, vehicles and stockpiles of aggregates, overburden soil and any other materials. The notice cites Section 131(1)(a) of the 2011 Act and alleges a breach of planning control consisting of carrying out development without the planning permission required. "Development" means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land (Section 23(1)).
5. Section 138 of the Act provides for the issuing of an enforcement notice where it appears to the Council that there has been a breach of planning control. Planning Control is considered in Part 3 of the Act and Section 23 thereof defines development as including the making of any material change in use of any buildings or other land. Section 140 of the Act requires that an EN must identify the breach of planning control. It follows that in the case of a material change of use of land, the unauthorised use must be stated. If a notice fails to identify the breach of planning control, either adequately or at all, it is defective to the extent that it is a nullity.
6. Section 250 (1) of the Act states that a "use" in relation to land, does not include the use of land for the carrying out of any building or other operations thereon. Mining operations are further defined as (a) the winning and working of minerals in, on, or under land whether by surface or underground working; and (b) the management of waste resulting from the winning, working, treatment and storage of minerals.
7. The appellant submitted an argument that the wording and construction of the notice renders it a nullity. The appellant alleges that the use of the term "unauthorised extension of quarry" creates ambiguity within the notice as it is not clear if it refers to a material change of use. The appellant alleges that the term "alleged unauthorised extension to quarry" at part 3 of the notice and the requirement within part 4 (a) of the notice for the appellant to "permanently cease all quarrying activities on lands outlined in red on the attached site location map" reflects that a change of use has taken place. There is no statutory definition of what constitutes a material change in the use of land; it is a matter of fact and degree for the decision maker.
8. The appellant has provided the Oxford English Dictionary definition of the word quarry as "a place, typically a large, deep pit from which stone or other materials are or have been extracted". The appellant alleges that the term extension of quarry is ambiguous in that it is not clear if it relates solely to the area required for the winning and working of minerals. The term "extension of quarry" is used by the Council as a generic overview of the activities which are ongoing at this part of the site. The notice site itself is immediately adjacent to a working quarry. The Council have stated within its written evidence that the alleged breaches constitute a material change of use in the lands. However, a material change of use is not directly specified at part 3 of the notice.
9. The notice then sets out a list of other elements, at Part 3, which are clearly operational development. At the hearing the Council elaborated that the term "extension of quarry" in isolation may be misconstrued, particularly as they accepted that there is no winning or working of material taking place within the area which is subject to the notice. The Council further suggested that the notice

may be more accurate if the term was amended to state “extension of ancillary lands to quarry”. The appellant objected to any such amendment as it was argued that this amendment would fundamentally alter the nature of the breach and cause undue prejudice. It must be considered if referring to the notice site as an extension of a quarry is accurate and if it has left the appellant in any doubt as to what they have allegedly done wrong and how to rectify it.

10. Whilst the term ‘quarry’ refers specifically to the actual winning and working of material, it also acts as a broad description of the site itself. Whilst the term extension of quarry within the notice is not entirely precise it nevertheless conveys that there is an extension to the activities on site. The stated breach may be considered under another ground of appeal to determine if this term is accurate in capturing the nature of the alleged breach of planning control. The remainder of the notice unequivocally articulates the operational development which has allegedly been carried out at the notice site. Therefore, I consider that the notice is not defective on its face and does not constitute a nullity.

Ground (b) – that the matters alleged in the Notice have not occurred.

11. Under this ground of appeal, the onus is on the appellant to demonstrate that the matters alleged in the notice had not occurred when it was issued. Ground (b) of appeal is argued on the basis that the alleged ‘unauthorised extension to quarry’ as set out at part 3 of the notice has not occurred.
12. Further to the consideration above, it is evident that there is no winning or working of material taking place within the notice site. This has been accepted by the Council. To refer to the entire site as a quarry may be acceptable in everyday parlance, however the language used in an enforcement notice must be precise. The notice site is not an extension to a quarry but rather an extension to the ancillary lands around a quarry as no material is being won or worked at the notice site. The Council’s suggestion that the term is generic and then infers that a material change of use has taken place to the notice site goes beyond what is actually stated within the notice itself. The term ‘quarry’ relates specifically to the area within where material is being won or worked, which the Council agree is not taking place at the notice site. This ground of appeal is sustained in respect of the reference to the extension of quarry only. The notice is amended in that the term “unauthorised extension to quarry” contained within part 3 is removed. The accompanying remedial action set out at part 4 (a) which reads “Permanently cease all quarrying activities on the lands outlined in red in the approximate position on the attached site location map” is also removed.

Ground (c) –that those matters (if they occurred) do not constitute a breach of planning control.

13. Ground (c) relates to whether the alleged breach of control is ‘development’ and if so, is planning permission required. Ground (c) is argued in respect of a small triangular area shaded in green on the site plan referred to as RA2 which accompanied the appellant’s written evidence. It is the appellant’s view that this area overlaps with the historic approval for mineral extraction at the site.
14. Quarrying operations at Craigall Quarry have taken place prior to the grant of planning permission 1704/8000 for the “reopening of quarry” granted by

Londonderry County Council under the Planning Acts (Northern Ireland) 1931 and 1944 and the Roads Act (Northern Ireland) 1964 on 5th September 1964 (the 1964 permission). The decision notice and a reproduced copy of the site plan pertinent to this permission have been provided by the appellant. Third parties have questioned the legitimacy of this plan particularly as they consider that it has been annotated to include a red line.

15. The historic nature of the 1964 approval is such that limited information is held in respect of it by the statutory authorities. The Council advised that they were not in possession of the original site plan which accompanied the approval. Nonetheless, it was a legitimate approval which allowed for the extraction of minerals at the site. The third-party objector has dissected this plan in forensic detail and has presented the view that it is a reproduction and that the red line is not an original feature of the drawing. The Council advised that they have come to accept that the red line on the reproduced site plan constitutes the approved area for the winning and working of material. The Council have relied upon this annotated version of the site plan in order to guide its enforcement actions at the site, similarly the appellant has used it as a basis for its mining operations at the site.
16. The submitted copy of the site plan is not to scale but has been reproduced in colour and clearly shows the approval stamp and signature. The red line which annotates the quarry area on the site plan follows a solid and dashed line around the quarry area but is incomplete at the north western corner of the site. It does appear that the red line has been added at some point to the document prior to being reproduced, but it has not been established by whom or when.
17. The fact that the original site plan cannot be produced to this appeal is inconvenient. However, this of itself does not allow that the 1964 approval is significantly undermined or of limited value. The validity of the 1964 approval is not subject to this appeal. This permission forms the basis for most of the appellant's activities at the site. It has been relied upon by both the appellant and the planning authorities to guide their activities at the site and must be considered. The planning authority have had this plan in their possession for some time and have not questioned its legitimacy. In the absence of the original documentation and despite the third parties' submitted analysis, I consider on the balance of probabilities, that the submitted site location plan is a fair reflection of the area which constitutes the 1964 approval.
18. At the hearing, the Council accepted that the small area shaded in green upon the site plan referred to as RA2 lies within the bounds of the 1964 approval. As such it has the benefit of planning permission. The appeal under ground (c) is upheld in respect of this area only.

Ground (d)- that, at the date when the Notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters.

19. At the hearing, the Council advised that two Certificates of Lawfulness of Existing Use or Development (CLUD's) had been recently approved for areas within the notice site. Application reference LA01/2022/0880/LDE certified that, on the 10th August 2022, no enforcement action could be taken against an area of hard standing used in relation to stockpiling of mineral and aggregate at lands west of Craigall Quarry. Similarly, application reference LA01/2022/0865/LDE certified

that, on the 10th August 2022, no enforcement action could be taken against a site managers office, laboratory building, welfare building (canteen), 3 No. aggregate storage bay sheds, 4 No. aggregate storage bay sheds, associated hard standing and ancillary mineral and aggregate processing and stockpiling areas.

20. The appellant provided a site plan referred to as RA 2, which overlays the areas certified by the CLUD applications against the amended map which was submitted with the Council's statement of case. The appellant also advised that an argument under ground (d) is not being made for any lands outside of these areas. The Council accepted that this overlay was an accurate depiction of the areas which have been certified as being immune from enforcement action.
21. In context of the consideration above, it is evident that no enforcement action may be taken against the matters which have been subsequently certified by the Council as being immune from enforcement action. Therefore, the appeal on ground (d) succeeds in relation to the areas shaded orange on the site plan titled RA2.

Decision

The Notice is amended as follows:-

- Part 3 (1) of the notice is removed;
- Part 3 (2) of the notice is removed; and
- Part 3 of the notice is amended to include reference to attached site location map PAC1.

The decision is as follows:-

- The appeal on Ground (b) succeeds in relation to Part 3 (1) of the Notice;
- The appeal on Ground (c) succeeds in relation to the area shaded green on site plan titled RA2;
- The appeal on Ground (d) succeeds in relation to the areas shaded orange on site plan titled RA2;
- Consequently, parts 4 (a) & (b) of the Notice are removed; and
- The Notice as so varied in respect of the legal grounds of appeal is upheld.

COMMISSIONER KENNETH DONAGHEY

Corrections and Variations to Enforcement Notice

Paragraphs 3 and 4 of the Notice are deleted and replaced with the following:-

3. The matters which appear to constitute the Breach of Planning Control

Unauthorised access lane, unauthorised hard standing, unauthorised stationing of plant, machinery, vehicles and stockpiles of aggregates, overburden, soil and any other materials on lands outlined in red on site plan PAC 1, excluding the green and orange shaded areas on site plan RA2.

4. What you are required to do

- (a) Permanently remove unauthorised access lane in the approximate position shown shaded yellow on site plan PAC1.
- (b) Permanently remove all hard standing from the lands outlined in red on plan PAC 1, excluding the green and orange shaded areas on site plan RA2.
- (c) Permanently remove all plant, machinery, vehicles and stockpiles of aggregates, overburden, soil and any other materials on lands outlined in red on site plan PAC 1, excluding the green and orange shaded areas on site plan RA2.
- (d) Permanently remove all rubble from the lands outlined in red on site plan PAC 1, excluding the green and orange shaded areas on site plan RA2.
- (e) Comply with steps (a), (b), (c) & (d) above within 84 days from the date on which the notice takes effect.

List of Appearances

Planning Authority:- Mr S Mathers – Causeway Coast and Glens BC
Mr G Doherty - Causeway Coast and Glens BC
Mr G McClelland - Causeway Coast and Glens BC

Appellants:- Mr W Orbinson KC – instructed by Carson McDowell LLP
Mr G McBurney – Carson McDowell LLP
Mr G McCallion – Quarry Plan
Mr P Hamill – FP McCann

Third Party Objectors Mr G Duff
Mr J Rainey

List of Documents

Planning Authority - Statement of Case and appendices (PA 1)
Rebuttal statement and appendices (PA2)

Appellant - Statement of Case and appendices (A1)
Rebuttal Statement and appendices (A2)

Third Parties - Mr G Duff - Statement of Case and appendices (GD1)
Mr G Duff – Rebuttal statement and appendices (GD2)
Mr J Rainey – Statement of case and appendices (JR1)
Mr J Rainey – Rebuttal statement and appendices(JR2)