

PLANNING APPEALS COMMISSION

**THE PLANNING ACT (NORTHERN IRELAND) 2011
SECTION 58**

**Appeal by
Mr Garth Belshaw
against the refusal of outline planning permission for single dwelling house
at
land adjoining 26 Windmill Avenue, Ballynahinch**

**Report
by**

Commissioner Helen Fitzsimmons

Planning Authority Reference: LA07/2021/1091/O

Procedure: Informal Hearing 7th September 2022

Report Date: 02nd November 2022

1.0 BACKGROUND

1.1 Newry, Mourne and Down District Council received a planning application on 9th June 2021. By notice dated 10th November 2021, the Council refused planning permission giving the following reason: -

1. **Under Article 3(6) of the Planning (General Development Procedure) Order (Northern Ireland) 2015, a Waste Water Impact Assessment (WWIA) is required in order to enable the Council to fully assess the development proposed in consultation with NI Water. In the absence of a WWIA and in light of the position outlined by NI Water, it has not been adequately demonstrated that waste water from the development proposed could be adequately dealt with. On this basis, the precautionary principle is applied.**

1.2 The Commission received the appeal on 9th March 2022 and advertised it in the local press on 23rd March 2022. No representations from third parties were received in respect of the appeal.

2.0 SITE AND SURROUNDINGS

2.1 The appeal site is a rectangular plot of land, which directly adjoins the dwelling at 26 Windmill Avenue. The site is grassed and slopes down from the roadside to the southwest. The boundary to the north west is open and undefined, the boundaries to the north east and south west are bounded by a footpath. The south eastern boundary is defined by a gable wall of the dwelling at 26 Windmill Avenue, a wall some 1 metre in height to the front of this dwelling, and a wall some 1.8 metres in height to the rear garden of this dwelling.

2.2 The appeal site is located within an existing housing development. The dwelling at 26 Windmill Avenue forms part of a row of three terrace dwellings. The dwellings in this row have a rendered finish with a slate roof. The dwellings are designed as split level with a mono pitched roof design, one and half storey to the front of the dwelling falling to two storey to the rear.

2.3 To the south west of the appeal site is a two storey housing development Loughside Drive. These dwellings are separated from the appeal site by a shared pathway which is located to the rear of the dwellings in Loughside Drive and to the rear of those in Windmill Avenue.

3.0 PLANNING AUTHORITY'S CASE

3.1 The site accommodates a rectangular plot which is located directly beside No 26 Windmill Avenue. The site is currently laid out in grass and slopes gradually from the roadside down towards the housing in Loughside Drive. No 26 has a small horizontal window on the gable elevation. The dwelling at No 26 is part of a row of three terrace dwellings, which have a mono pitched roof. The south east boundary of the site is defined by a staggered wall approximately 1.8 metre in height defining the rear garden of No 26. The south west boundary is undefined as are the remaining boundaries. A pathway to the rear of the properties is accessed via steps to the south west of the site.

- 3.2 Section 45(1) of the Planning Act (NI) 2011 requires that regard must be had to the Local Development Plan (LDP), so far as material to the application. Section 6(4) of the Act requires that where in making any determination under the Act, regard is to be had to the LDP, the determination must be made in accordance with the plan unless material considerations indicate otherwise. The LDP in this case is the Ards and Down Area Plan 2015 (ADAP).
- 3.3 Until such times as a Plan Strategy for the whole of the Council Area has been adopted. It sets out transitional arrangements to be followed in the event of a conflict between the SPPS and retained policy. Any conflict between the SPPS and any policy retained under the transitional arrangements must be resolved in favour of the provisions of the SPPS. The only issue with regard to the application relates to NI Water response.
- 3.4 NI Water were consulted with regard to the proposal and commented as follows:
NI Water recommend that the application for planning approval should be refused. There is a public foul sewer within 20 meters of the proposed development boundary which cannot adequately service these proposals. The receiving foul sewerage network has reached capacity. The public system cannot presently serve this development proposal without significant risk of environmental harm and public dis-amenity including pollution, flooding and detrimental impact on existing properties. NI Water plans to upgrade the sewerage system in this Drainage Area. While this remains subject to prioritisation and the availability of funding, NI Water is recommending connections to the system are curtailed. The Applicant is advised to consult directly with NI Water (InfrastructurePlanning@niwater.com) to discuss current projected timescales to upgrade the wastewater system in this drainage area. Alternatively, an Impact Assessment may be undertaken to ascertain whether an alternative drainage/treatment solution can be agreed. Upon the completion of which and subject to re-consultation, NI Water may reconsider its recommendation.
- 3.5 The agent was aware of the NI Water issue and wrote to the Planning Office on 11th August 2021, to state that he had requested a site meeting with NI Water. The agent subsequently wrote to the Planning Office and outlined the discussions he had with the NI Water which took place from August 2021 – September 2021. The agent maintains that the Wastewater Impact Assessment should only apply to a development of 2 or more houses. The design flow from a single house is insignificant and a mains foul sewer connection will become available, after NI Water conclude their internal discussions.
- 3.6 Clarification on the issue in respect of developments which proposed only a single dwelling was sought from NI Water. An email from Infrastructure Planning at NI Water was received from the Developer Services Infrastructure Planner, Team Lead on 5th October 2021. It advised the agent that NI Water are looking into how to deal with capacity issues with single units or smaller sites. This is still under discussion, and there is no timescale as to if or when this could be put in place. They therefore advised the planning agent that the only way forward for this proposal, at this time, is through the submission of the WWIA to NI Water, which has not yet been received. They advised that the response on this point would not change until the Impact Assessment is submitted and a solution agreed upon.

3.7 The Planning Office advised the agent again of the need to submit the WWIA on 14th October 2021 stipulating a timeframe for submission of 3 weeks. The agent advised by email dated 29th October 2021 that the applicant is looking at funding for the £1,540 fee for a WWIA. The agent asked the question that if the applicant submitted a Wastewater Impact Assessment, and as NI Water will aim to provide a report within 65 days, can the determination of the planning application be made after NI Water provide that report? From the agent's email, it is clear that the WWIA has not been submitted to NI Water. The agent was advised by email dated 4th November 2021 that as the requested WWIA had not been received by the Planning Office they would proceed to determine the application.

3.8 While it is appreciated that the appellant is reluctant to want to pay the associated fee, this unfortunately is outside of the control of Planning. The Council took the view that this information could not be negatively conditioned on any planning decision notice and was necessary as it had not been adequately demonstrated that waste water from the development proposed could be adequately dealt with. On this basis, the precautionary principle was applied. The agent was therefore given sufficient time to engage with NI Water and submit the WWIA. Having not provided the required information within the agreed timeframe the application was determined in line with the Council's Scheme of Delegation.

3.9 On the day of the hearing 7th September 2022 the appellant's agent provided additional evidence. This had been sent directly to the Council that morning and contained email correspondence between the appellant and NI Water dated 19th August 2022, which advised as follows;

'The solution engineering report for the development is in progress. The nature of the downstream capacity means we will be recommending a storm offsetting solution to alleviate capacity issues. Storm offsetting will remove flow from the system allowing additional capacity for the foul flow from the development to connect'.

Given the positive nature of the email, the Council are content to withdraw their previous objection to the proposal, on the basis a condition is added to the decision. Two forms of wording were put forward for conditions:

- No development shall take place on site until the method of sewage disposal has been agreed on site with NI water; or
- No development shall take place until discharge to consent has been granted by NI Water.

3.10 The Council would also request, if the Commission is so minded to approve the development the following conditions which have been summarised below should be included in its decision:

- 1) Standard time limit.
- 2) The siting, design and external appearance of the dwelling, the means of access thereto and the landscaping of the site shall be obtained from the Council, in writing.
- 3) Development should take place in strict accordance with approved plan: site location plan 20407NW3.
- 4) No development shall take place until a landscaping scheme has been submitted to and approved by the Council.

- 5) The proposed dwelling shall have a ridge height no higher than the adjacent dwelling at No 26 Windmill Avenue.
- 6) Any application for approval of reserved matters shall incorporate plans and sections indicating existing and proposed ground levels and proposed finished floor levels, all in relation to a known datum point.
- 7) A scale plan and accurate site survey at 1:500 shall be submitted as part of the reserved matters application showing the access to be constructed and other requirements in accordance with the attached form RS1 (2.4m x 33m in both directions along Windmill Avenue). The access shall be constructed in accordance with detailed approved plans prior to the commencement of the development as approved.

4.0 APPELLANT'S CASE

- 4.1 The grounds for this appeal against the decision made by the Council consists of illegality, irrationality, unfairness and fettering.

Illegality

- 4.2 The Council has no authority to take this decision using the Scheme of Delegation. The prevailing circumstances satisfy the requirements detailed in the last paragraph of Part 2 within the Scheme of Delegation. In an email dated 14th October 2021, the council issued a direction, and without explanation, the information specified was not provided by the applicant within the time allowed.

Irrationality

- 4.3 The Council allocated a 3-week period to provide the information specified in the direction, which is wholly inadequate. The WWIA Guideline Notes state that, NI Water will endeavour to provide you with a development solution engineers report within 65 days of receipt of a complete application.

Unfairness

- 4.4 In an email dated 4th November 2021, the council refused the applicant's request, made by email dated 29th October 2021, to delay the determination of the application until after NI Water had published the engineers report. Mr Harry Harvey MLA made a similar request by email on 8th November 2021.

Fettering

- 4.5 NI Water changed their procedures for making wastewater connections in April 2021, and included single units. The new 2-stage process requires fees of £238.80 and £2,520. It is clear from NI Water's discussion with Mr Harry Harvey MLA, by email dated 8th November 2021, they are aware that WWIA may not be appropriate for single units.
- 4.6 In the leading case of Barratt Homes Limited v Welsh Water [2009] UKSC 13, the Supreme Court said at paragraph 41, "While this might create no problem in the case of an individual dwelling house", when referring to the notice required for connecting premises to a public sewer.
- 4.7 The Council could have made the completion of a WWIA a requirement at reserved matter stage, and grant outline planning permission.

- 4.8 The treatment of this planning application by the Council, contrasts with a similar application reference LA01/2019/1105/F, where another Council granted full planning permission.
- 4.9 A WWIA was submitted on 19th January 2022 and no response was received within the 65 days. The appellant has chased a response and NI Water responded to an email dated 19th August 2022. This email provides a positive response to the WWIA which was submitted in January 2022. This sets out how NI Water intend to proceed by recommending a storm offsetting solution to alleviate capacity issues. This storm offsetting will remove flow from the system allowing additional capacity for the foul flow from the development to connect. This email indicates that the development will be able to connect to the existing foul sewage system. Therefore, the appellant is content to withdraw all objections within their SoC, on the premise that a condition can be attached to the decision. The appellant has no objections to the conditions proposed by the Council.

5.0 CONSIDERATION

- 5.1 The main issue in this appeal is whether an acceptable means of disposal for wastewater to serve the proposed dwelling can be obtained.
- 5.2 Section 45 (1) of the Planning Act (Northern Ireland) 2011 requires that regard must be had to the Local Development Plan (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. The Ards and Down Area Plan 2015 (ADAP) acts as the LDP for the area wherein the appeal site is located. In the ADAP, the site is located within Ballynahinch settlement limits. There are no pertinent plans or policies relevant to the proposed development.
- 5.3 The Strategic Planning Policy Statement 'Planning for Sustainable Development for Northern Ireland' (SPPS) sets out the transitional arrangements that will operate until such times as the local Council adopts a Plan Strategy for the whole of the Council area. As no Plan Strategy has been adopted for the ADAP area, the SPPS and the retained Planning Policy Statements apply.
- 5.4 The sole reason for refusal relates to wastewater disposal. At the hearing both parties withdrew all objections. I will therefore consider the conditions put forward.
- 5.5 A condition is necessary to ensure that the proposed new dwelling is in keeping with the ridge height of the adjacent dwellings in order to respect the overall character to the area.
- 5.6 The appeal site slopes in a north easterly to south westerly direction, and a condition requiring the submission of plans and sections indicating existing and proposed ground levels and proposed finished floor levels is necessary to ensure the development respects the existing levels of the appeal site and the surrounding area.
- 5.7 A condition is necessary to ensure that consent for wastewater disposal is obtained from NI Water, to facilitate the development proposed and to ensure that wastewater is disposed of satisfactorily.

5.8 To ensure that the boundary treatments respect those within the existing established residential development, the submission of a landscaping scheme providing for hard and/or soft landscaping to each of the boundaries is required.

5.9 Visibility splays of 2.0 metres x 33 metres in both directions along Windmill Avenue, are necessary in the interests of road safety and for the convenience of road users.

6.0 RECOMMENDATION

6.1 I recommend to the Commission that the appeal is allowed and that outline permission is granted, subject to the following conditions:

(1) Except as expressly provided for by Conditions 2, 3, and 4, the following reserved matters shall be as approved by the Planning Authority – the siting, design, external appearance of the dwelling and the means of access thereto.

(2) The ridge height of the dwelling shall not exceed the ridge height of 26 Windmill Avenue.

(3) Any application for approval of reserved matters shall incorporate plans and sections indicating existing and proposed ground levels and proposed finished floor levels, all in relation to a known datum point.

(4) Prior to commencement of any building works visibility splays of 2.4 metres by 33 metres shall be laid out in both directions at the point of access of the appeal site with Windmill Avenue and shall be permanently retained and kept clear thereafter.

(5) No development shall take place until consent to discharge has been granted by Northern Ireland Water.

(6) No development shall take place until a landscaping scheme showing the means by which the boundaries of the appeal site are to be defined has been submitted to and approved in writing by the Planning Authority. The scheme of landscaping shall include the location, number and sizes of any trees and shrubs to be planted, and any walls or fences to be erected. Any scheme of planting as finally approved shall be carried out during the first planting season after the commencement of the development.

(7) Application for approval of the reserved matters shall be made to the Planning Authority before the expiration of three years from the date of this decision.

(8) The development shall be begun before the expiration of five years from the date of this permission or before the expiration of two years from the date of approval of the last reserved matters to be approved, whichever is the later.

6.2 This recommendation relates to the following drawing: -

- A 1:500 Site location plan, date stamped received 09th June 2021 by Newry, Mourne and Down Council, Plan No. reference 20407NW3

List of Documents

- Planning Authority: - "A"- Statement of Case by Newry, Mourne and Down District Council.
- Appellant: - "B"- Statement of Case by Mr James Brown on behalf of Mr Garth Belshaw.
"B1" – Email evidence dated 19th August 2022 submitted at the hearing by Mr James Brown on behalf of Mr Garth Belshaw.

Hearing

- In attendance: -
- Council Representative: - Mrs Catherine Moane (Remotely)
- Appellant: - Mr James Brown (In person)
Mr Garth Belshaw (In person)

