

Enforcement Appeal Decision

Appeal Reference:	2022/E0059
Appeal by:	Ms Caroline Elliot
Appeal against:	An Enforcement Notice dated 20 th February 2023
Alleged Breach of Planning Control:	The unauthorised infilling and raising of land
Location:	Lands at 34 Derry Road, Strabane
Planning Authority:	Derry City and Strabane District Council
Authority's Reference:	LA11/2018/0043/CA
Procedure:	Informal hearing and Commissioner's site visit on the 15 th August 2024
Decision by:	Commissioner K S Donaghey, dated 16 th October 2024

Grounds of Appeal

1. The appeal was brought on Grounds (a), (b), (c), (d), (e), (f) and (g) as set out in Section 143(3) of the Planning Act (Northern Ireland) 2011. There is a deemed planning application by virtue of Section 145(5). At the hearing grounds (b), (d), and (e) were withdrawn by the appellant.

The Notice

2. At the hearing the Council sought to remove Part 4 (c) of the Enforcement Notice (the notice). This step required that the appellant "Reinstate the pond and reopen water course in the appropriate location shaded blue on attached map A". By the Council's own admission, the map which accompanied the notice did not contain a blue shaded area. Whilst it is not a requirement for an enforcement notice to contain a map, where a remedial measure relates directly to an area shown on a map this should be clearly and accurately shown. Consequently, this step is removed, and the notice is amended accordingly.
3. The appellant argues that the notice constitutes a nullity as it is not stated where the infilling has taken place within the site. The red line on the map attached to the notice reflects the site area of the planning application reference LA11/2021/0911/F for a housing development comprising 36 dwellings at Derry Road, Strabane. The area of infilling is restricted to the southern and western sections of this site.
4. The recipient of a notice is entitled to be told fairly what they have done wrong and what they must do to remedy it. If a notice is hopelessly ambiguous or uncertain, the notice would be bad on its face and a nullity. The notice refers specifically to infilling and gives a general location within which this activity has taken place.

From my own observations of the site, the infilling can be easily identified. The approach taken by the Council in identifying a much wider area is inconsequential as the area of infill is readily identifiable on the ground. The appearance of the infill on the site is such that applicant can be of no real doubt as to what they have done and how to rectify it. The notice does not constitute a nullity.

Ground (c) – that the matters alleged in the notice (if they have occurred) do not represent a breach of planning control

5. The onus is on an appellant who pleads ground (c) to demonstrate that the matters alleged in the notice do not constitute a breach of planning control. The appellant argues that the matters alleged in the notice do not represent a breach of planning control as the infilling of land comprises permitted development in accordance with the Planning (General Permitted Development) Order (Northern Ireland) 2015 (GPD0).
6. Part 7 of the Schedule to the GPD0 sets out conditions for agricultural buildings and operations to be considered permitted development. The appellant advised that the development falls within Part 7 (b) which allows for “the winning and working on land held or occupied with land used for the purposes of agriculture of any minerals reasonably necessary for agricultural purposes within the agricultural unit of which it forms part”. The Council argued that whilst part 7(b) allows for the winning and working of minerals upon farm land, the development subject to the notice comprises the infilling of land which is more akin to an engineering operation as set out within Part 7 (a) subsection (b).
7. Part 7 (b) allows for the winning and working of minerals upon farm land. The conditions stated in respect of this mainly deal with the condition of the lands from which they are extracted and states that these minerals must be used upon lands for the purposes of agriculture. The infilling which has taken place constitutes operational development in its own right. The level of the land has been raised by over two metres in places and rather than improve that land the infilling has created steep inclines at its fringes which has made it less accessible. Furthermore, the appellant’s own evidence indicates that “the imported inert material is required in conjunction with the proposed residential development under consideration, in terms of site levels; garden amenity areas; and, areas of proposed landscaping”. By the appellant’s own admission, the fill was not deposited on site for the purposes of agriculture at the time which the notice was served. The development subject to the notice is not permitted development under Part 7 (b).
8. Part 7 (a) of the GPD0 allows for the carrying out on agricultural land comprised in an agricultural unit of (a) works for the erection, extension or alteration of a building; or (b) any excavation or engineering operation; reasonably necessary for the purposes of agriculture within that unit. I have considered above that the infilling on the site was not undertaken for the purposes of agriculture at the time which the notice was served. As such the infilling of land, which is set out within the notice, cannot be considered permitted development under Part 7(a) of the GPD0.
9. I have not been persuaded that the development subject of the Notice constitutes permitted development. It is therefore a breach of planning control. The appeal under ground (c) must fail.

Ground (a) and the deemed planning application – that planning permission should be granted for the alleged development.

10. The deemed planning application relates to the matters stated in the notice as constituting the breach of planning control, namely the infilling and raising of land. The main issue in respect of the deemed planning application is whether the infilling and raising of land is acceptable in principle at this location.
11. Section 45 (1) of the Planning Act (Northern Ireland) 2011 requires the Commission in dealing with an appeal, to have regard to the local development plan, so far as material to the application and to any other material considerations. Section 6 (4) states that where regard is to be had to the development plan, the determination must be made in accordance with the Plan unless material considerations indicate otherwise.
12. The Strabane Area Plan 2001 (SAP) operates as the LDP for the area in which the appeal site is located. In the SAP, the appeal site is within the development limits of Strabane. The plan contains no policies relevant to the appeal development. There are no other provisions in the plan that are material to the determination of the appeal.
13. Regional planning policies of relevance to this appeal are set out in the Strategic Planning Policy Statement for Northern Ireland 'Planning for Sustainable Development' (SPPS) and other retained policies set out in Planning Policy Statements (PPSs). The SPPS sets out the transitional arrangements that will apply until a local authority has adopted a Plan Strategy for its council area. No Plan Strategy has been adopted for this Council area. The SPPS retains certain existing Planning Policy Statements (PPSs) during this period. There is no conflict between the provisions of the Strategic Planning Policy Statement (SPPS) and the retained policies on the issues raised in the appeal. In accordance with the transitional arrangements set out in the SPPS, the appeal development should be determined in accordance with the retained policies namely Planning Policy Statement 2: Natural Heritage (PPS2), and Revised Planning Policy Statement 15: Planning and Flood Risk (PPS 15).
14. The parameters of a ground (a) appeal are specifically set by the breaches outlined within the notice. The appellant stated that the areas of fill are being stored at the site in their current condition to be further levelled throughout the site in order to improve the quality of the lands for agriculture. However, this appeal must consider the planning merits of the development as it was found at the time which the notice was served. The notice states that the appellant has infilled and raised the level of the land, and it is this level of infill which must be assessed.
15. The site is accessed directly from the Derry Road. At the hearing I was advised that the site previously had a large well-established dwelling with substantial grounds and an open pond to the rear. These features have now been removed and a substantial amount of infilling has occurred throughout the site with the levels being substantially lifted and the pond infilled. There are the remains of a stone wall adjacent to the Derry Road boundary. The remaining vegetation consists of mature trees around the site boundaries. The landform falls from east to west across the entire site with a large embankment of stone on the eastern area. There is a drop of around 3 metres to the lower area on the western boundary hedgerow. There are established hedgerow boundaries on all sides with

mature and semi-mature trees, conifers and broadleaved trees of varying ages and condition.

16. The remains of the Strabane Canal lie around 300 metres west of the site. The river Mourne is located around 500 metres to the west of the site. The River Mourne is designated as a Special Area of Conservation (SAC). The River Foyle and Tributaries SAC and Area of Special Scientific Interest (ASSI) is located to the northwest of the site.
17. The Council object to the impact of the development upon natural heritage. Policy NH5 of PPS 2 is cited insofar as it relates to the impact of the development upon protected habitats. Council also refer to the impact of the proposal upon the designated sites listed above, which is considered under Policy NH1.
18. The Council's concerns in respect of natural heritage relate to the possible transmission of any material from the filled area to designated sites through identified hydrological linkages. The Council are of the view that the appellant has not demonstrated to a level of reasonable scientific certainty that the development at the appeal site would not impact upon the River Foyle and Tributaries SAC and ASSI. The appellant has taken no steps or presented any persuasive argument to demonstrate that the appeal development is not likely to have a significant effect on a European protected site. At the hearing the appellant offered no comment in this regard other than to say that any works carried out were considered permitted development. As it stands, I agree that given the nature of the deposited material on site and the lack of information as to potential impacts or otherwise on the aforementioned designations, there remains reasonable scientific doubt as to the effects of the appeal development on the designations. The objections of the Council are sustained in respect of PPS 2 Policies NH1 and NH5 in respect of the impact of the proposal on designated sites.
19. The Council have also cited Policy NH2 of PPS 2 and referred to the possible presence of newts within the waterbody which was on site prior to it being infilled. The ecological survey which was submitted with the planning application for a residential development on this site notes that the ditch adjacent to the red line boundary is considered to have "low-negligible potential for breeding amphibians", and Northern Ireland Environment Agency - Natural Environment Division (NED) advised that the dates of the survey noted (25th August 2021 and 14th September 2021) were contrary to specifications, which states that such surveys must be carried out mid-March to mid-June. No further survey was produced, and the natural features referred to were subsequently infilled. Whilst the potential for the presence of breeding amphibians was stated as low-negligible, newts are a species protected by law. The appellant has not provided sufficient information to demonstrate that the development did not harm a protected species. The Council's objections in respect of Policy NH2 are sustained.
20. Policy FLD 1 of PPS 15 considers development in fluvial and coastal flood plains. The Department for Infrastructure's Rivers Agency's (DFI Rivers) returned consultation in respect of the refused application for a housing development on this site states that "*The Flood Hazard Map (NI) indicates that a portion of the site lies within the defended fluvial flood plain of the Mourne River and as such FLD 1 defended areas applies. DFI Rivers can confirm that flood defences present provide the 1 in 100-year protection*". The appellant argues that as the site once comprised a large dwelling and its curtilage it could therefore be considered

previously developed land and would therefore be considered acceptable for development in line with paragraph 6.8 of the justification and amplification of Policy FLD 1.

21. The fact that the site previously comprised a large single house and grounds allows that part of the notice site comprises previously developed lands. Furthermore, DFI Rivers confirmed in its consultation response to the previous planning application on the site that it is protected by flood defences that are structurally adequate and provide a minimum standard of 1 in 100-year fluvial flood protection. The development is considered an exception within Policy FLD 1. Notwithstanding this, Policy FLD 1 requires the submission of a flood risk assessment for development within the 1 in 100-year fluvial flood plain regardless of whether or not the development is considered an exception. No evidence which considers the flood risk of the infilling at the site has been provided. As such the requirements of Policy FLD 1 have not been met and the Council's objection in this regard is sustained.
22. Policy FLD 3 of PPS 15 considers development and surface water flood risk outside of flood plains and sets the specific criteria under which a Drainage Assessment must be submitted to and considered by the Planning Authority. Policy FLD 3 specifically deals with sites outside of flood plains. Part of this site sits outside a flood plain. Whilst a flood risk assessment could consider drainage implications for the whole site, the fact remains that no information in respect of flood risk has been submitted for the development subject of the notice. Policy FLD 3 clearly states that where the proposed development is also located within a fluvial or coastal flood plain, then Policy FLD 1 will take precedence.
23. A Drainage Assessment was provided to the Council in support of the refused planning application at the site. This considered the drainage impacts of a residential development at the site. As I have already stated, the deemed application considers the development which is subject to the notice as it is found at the time of the notice being issued. The drainage implications of the development subject to the notice has not been considered by the appellant, either by a flood risk assessment or drainage assessment. However, as a significant element of the infilled area is sited within a 1:100-year fluvial flood plain it remains that it is Policy FLD 1 that takes precedence. The Council's objections in respect of Policy FLD 3 are not sustained.
24. As the Council's concerns in respect of PPS 2 and PPS 15 have been sustained in so far as stated above, the appeal under ground (a) must fail.

Ground (f) – that the remedial steps within the notice exceed what is necessary.

25. The main issue in respect of ground (f) is whether the steps required by the Notice exceed what is necessary to remedy the breach of planning control. The appellant argues that the removal for the fill is impractical as it would constitute agricultural permitted development and that there may be a further application for a residential development upon the site which would require infilling of land. The appellant also argues that the cost of the removal of the material would be prohibitive.
26. It has already been considered that the infilling on the land was not carried out as agricultural permitted development. The future use of the land is not a matter for this appeal. The likelihood of the site being developed further and requiring fill is

not a matter to which substantive weight can be attributed. The Council have identified a particular breach of planning control, the removal of the infill is a measure to rectify that breach. The associated cost of removing the infill from the site is also not a matter which outweighs the requirement to rectify the breach of planning control. No persuasive evidence has been presented to demonstrate that the removal of the infill from the site exceeds what is necessary to remedy the breach of planning control. Therefore, the appeal under ground (f) must fail.

Ground (g) – that the period for compliance specified in the Enforcement Notice falls short of what would reasonably be allowed.

27. The main issue to consider in respect of ground (g) is if the period for compliance with the notice falls short of what should reasonably be allowed. The Council has allowed the period of 120 days for the removal of all imported materials used for the infilling and raising of the said lands to locations with the appropriate licenses and consents to accept such material and the restoration of said land by covering with a minimum of 150mm of topsoil, levelling the topsoil to a reasonably even and level gradient and sowing the topsoiled area in grass. The appellant advised that the removal of the topsoil in winter months when weather conditions were less favourable would create a nuisance in respect of mud and silt around the site and on the haul route away from the site. At the hearing the Council advised that they would have no objection to the period of compliance being extended to 9 months in line with the appellant's request. The notice shall be amended to reflect this. The appeal under ground (g) succeeds in respect the time allowed for the removal of infill and site restoration only.

Decision

The notice is amended in that Part 4 (c) is removed.

The decision is as follows:-

- The appeal on Ground (c) fails.
- The appeal on Ground (a) fails.
- The appeal on Ground (f) fails.
- The appeal on Ground (g) succeeds to the extent stated; and
- The Notice is upheld as amended.

Part 4 of the Notice shall now read:

4. What you are required to do

- a) Permanently cease the importation of material used for the infilling and raising of said lands within 1 day of the date this notice takes effect.
- b) Remove all imported materials used for the infilling and raising from the said lands to location(s) with the appropriate licenses and consents to accept such material.
- c) Restore said land by:
 - i) Covering with a minimum of 150mm of topsoil
 - ii) Levelling the topsoil to a reasonably even and level gradient
 - iii) Sowing the topsoiled area in grass seed
- d) Steps b and c should be carried out within 9 months of the date this notice takes effect.

COMMISSIONER KENNETH DONAGHEY

List of Appearances

Planning Authority: - Mr P McCahill (Derry City and Strabane District Council)
Mr J Loughlin (Derry City and Strabane District Council)
Ms D Moore (Derry City and Strabane District Council)

Appellant: - Mr D O'Neill

List of Documents

Planning Authority:- "A" Written statement of case and appendices

Appellant:- "B" Written statement of case and appendices