Enforcement Appeal Decisions

Planning Appeals Commission
4th Floor
92 Ann Street
BELFAST
BT1 3HH
T: 028 9024 4710
E: info@pacni.gov.uk

Appeal References:	(1) 2022/E0060 and (2) 2023/E0002
Appeals by:	(1) Caroline Elliot and (2) Northern Ireland Co-Ownership Housing Association
Appeals against:	An enforcement notice dated 23rd February 2023
Alleged Breach of Planning Control:	A. The unauthorised erection of dwellings and garages B. Unauthorised roads, footways and other hard standing.
Location:	Buildings and lands at Bracken Hill, Strabane, BT82 8FH
Planning Authority:	Derry City and Strabane District Council
Authority's Reference:	LA11/2019/0010/CA
Procedure:	Informal Hearing on 23rd May 2024
Decisions by:	Commissioner Carrie McDonagh, dated 26th September 2024

Grounds of Appeal

1. The two appeals are conjoined as they relate to one enforcement notice (the EN). Copies of the EN were served on the developer, Caroline Elliot, who retains control of the roads and footways within the housing development to which the EN relates and on Northern Ireland Co-Ownership Housing Association, who have an equity share in two dwellings at 4 and 9 Bracken Hill (along with their respective owners). The owners of all seventeen dwellings to which the EN relates did not appeal the EN.

2. The first appeal, hereafter referred to as the Elliot 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 (the Act). Grounds b), c), d) and e) were withdrawn in their Statement of Case (SoC). Under the Planning Fees (Deemed Planning Applications and Appeals) Regulations (NI) 2015 each deemed planning application must be accompanied by the appropriate fee (unless exempted) for the recipient to have a valid deemed planning application. Whilst this appellant sought to avail of an exemption from the deemed planning application fee, there was no pending, undetermined planning application for which the appropriate fee was paid before the EN was issued. As no deemed fee was submitted within the requested time-period, their deemed planning application lapsed. As such, the remaining grounds for the Elliot appeal are f) and g).

3. The second appeal by Northern Ireland Co-Ownership Housing Association was brought on Grounds a), b), c), d), e), f) and g). They have a deemed application by virtue of Section 145 (5) of the Act. At the hearing, this appellant withdrew grounds b) and d).

4. As a result of the above, these decisions consider grounds e), c), a), f) and g).

The Notice

5. On the 26th June 2024, the Council informed the Commission that a planning permission had been granted for the "*Proposed retention of 10 no. semi-detached two storey dwellings, 6 no. detached two storey dwellings, 1 no. single storey dwelling, 3 no. garages and existing access road and residential gardens and proposed relaying, modification of the existing road radius/ kerb line footpath at Road 8 and the Road 7 / 8 junction and the relocation of two car parking spaces at site 2*" (LA11/2023/1474/F, hereafter referred to as the 2024 permission).

6. Section 148 of the Act makes provision for the effect of planning permission on enforcement notices. Section 148 (1) (a) states where, after the service of a copy of an enforcement notice planning permission is granted for any development carried out before the grant of that permission, the notice shall cease to have effect, so far as inconsistent with that permission. The Explanatory Notes for Section 148 state that "if planning permission is subsequently granted for development mentioned in an enforcement notice, the notice ceases to have effect in relation to the part or parts of the development which has permission".

7. Despite the grant of planning permission, neither appellant sought to withdraw their appeal. Both advised this was because the Council did not withdraw the EN, nor did they confirm it had been discharged by the grant of the planning permission or indeed that no further enforcement action would be taken. The EN therefore remains before me.

8. The matters which appear to constitute the breach of planning control are set out at Paragraph 3 of the EN. Breach a) specifies the unauthorised erection of dwellings and garages. 17 dwellings and three garages are identified within the accompanying map. The 2024 permission relates to the retention of the same buildings contained within the EN and as per Section 148 of the Act, ceases to have effect in respect of these elements. Accordingly, the 2024 permission lawfully overrides the alleged breach of control stated at 3 (a) and associated remedy at 4 (a) of the EN. This means the Commission has no further jurisdiction to consider the matters in respect of the erection of seventeen dwellings and garages. The EN ceases to have effect in so far as this part of the development is concerned.

9. The alleged breach at Part 3 (b) of the EN relates to unauthorised roads, footways and other hardstanding. The existing roads are finished in tarmac and comprise of a dual cul-de-sac arrangement, with two turning heads at the end of Roads 4 and 8. The naming of the roads are as per the approved private streets determination (PSD) drawing in the 2024 application for identification purposes. The layout at the time the EN was issued differs from the original approved road layout in application LA11/2016/0786/F which granted approval for *"Retention of*

Housing development comprising of 10 semi-detached dwellings, 6 No. detached two storey dwellings and one single storey dwelling" (the 2018 permission).

10. Whilst the recent 2024 permission authorises the existing access road and residential gardens, it also permits further additional development beyond that which exists involving the relaying and modification of the existing road radius/ kerb line footpath at Roads 8 and the Road 7 / 8 junction and the relocation of two car parking spaces at site 2. Condition 1 mandates the works to be carried out in accordance with the approved drawings within 3 months of that decision. That permission authorises the retention of "existing access road". This is taken to be Road 4, which is identified in the drawings as the main access from Bracken Hill and as the only road not referred to in the description of development as requiring further works. The dwellings at Nos. 10, 12, 14, 16 and 19 are accessed from that road and no further works are required to that part of the development. However, the aspects of the alleged breach involving Roads 7 and 8 do not fall within the circumstances provided for within Section 148 of the Act and remain to be considered as part of these appeals.

11. Considering the above, the EN is varied to remove the reference to the dwellings and garages. In the interest of clarity Part 3 is varied to read "*Unauthorised roads, footways and other hardstanding (within Roads 7 and 8)*." The associated removal of the rubble and materials at Part 4 (c) and the restoring of land to its original level at 4 (d) should be incorporated into 4 (b) to read:
4 (b) - *Permanently remove roads, footways, other hard standing (within Roads 7 and 8) and all rubble and associated materials from said lands and restore to their original level*.

Nullity

12. As the EN ceases to have effect in respect of the erection of the dwellings and garages, there is no requirement to consider the argument's relating to matters of title, interest or control of the lands or properties within the EN. Northern Ireland Co-Ownership Housing Association are a registered charity, with responsibilities to the NI Charity Commission. It would be a statutory defence against prosecution within Section 147 (3) of the Act if an owner can show that they have done everything they could be expected to do to secure compliance with the EN. Their lack of ownership of either of the roads identified as the breach could be such a defence as acknowledged by the Council.

13. Having considered the caselaw provided in *Warrington Borough Council V Garvey (1988) JPL 752*, I do not accept the Northern Ireland Co-Ownership Housing Association's argument that the EN is a nullity is borne out. They also relied on *Miller – Mead v Minister of Housing and Local Government (1963) 2 QB 196* to support their argument that the EN is substantially defective at its heart. At the hearing, both appellants confirmed that they understand what was alleged, what land was affected and what steps they had to undertake to remedy the alleged breaches. On this basis, I do not consider the EN falls foul of this case law as it is neither hopelessly ambiguous nor uncertain. The EN is not a nullity.

14. The power to issue an EN is discretionary, and it is for the Council to decide if it is expedient to issue an EN. While noting the argument around the alleged insensitive approach of the Council, this is not a matter for the Commission.

Ground (e) That copies of the Notice were not served as required

15. The purpose of serving an EN under Section 138 of the Act is to alert the owner, occupier and any person with an estate in the land to which the EN relates, of its requirements and their right to appeal. Whilst I was referred to the legislative provisions within other parts of the UK, which, I am advised would enable a copy of the EN to be issued to the developer only, with an accompanying letter issued on individual owners advising of the need to fulfil statutory requirements, in Northern Ireland, this legislation is not applicable. In this jurisdiction, Section 138 (2) of the Act requires that a copy of a notice must be served on the owner and on the occupier of the land to which it relates. Following the discussion at the hearing, the appellant was satisfied that the service of the EN met the requirements of the legislation. Accordingly, the ground e) appeal fails.

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

16. Northern Ireland Co-Ownership Housing Association do not dispute that the 'roads, footways and other hardstanding' are not currently constructed in accordance with the 2018 permission (and by default the 2024 permission). At the hearing, they acknowledged that there is a need for consultation with the Department for Infrastructure, Roads (DFI) on the layout as constructed. Accordingly, the constructed road layout would not constitute a Non-Material Change (NMC) to the 2018 permission. The matters have occurred so there has been a breach of planning control and the ground c) appeal fails.

Ground (a) and the Deemed Planning Application

17. The main issue for consideration under this ground is whether the in-situ roads numbered as 7 and 8, footways and hard-standing provide a safe internal road arrangement and parking layout.

18. Section 45(1) of the Act indicates that in dealing with an application, regard must be had to the Local Development Plan (LDP), so far as material to the application, and to any other material considerations. Section 6(4) requires that regard must be had to the LDP unless material considerations indicate otherwise. The Strabane Area Plan 1986-2001 (SAP) operates as the LDP for the area in which the notice site is located. The notice site is zoned for housing at paragraph 28.7.4. of the SAP. As the notice site has been developed as housing there is no conflict with the SAP.

19. Regional planning policy and transitional arrangements are set out in the Strategic Planning Policy Statement for Northern Ireland 'Planning for Sustainable Development' (SPPS). In the absence of an adopted Plan Strategy for the area, the transitional arrangements of the SPPS apply. Under those arrangements, certain policies are retained namely Planning Policy Statement 3 'Access, Movement and Parking' (PPS3) and Planning Policy Statement 7 'Quality Residential Environments' (PPS7). As no conflict arises between the SPPS and the above retained policies, in accordance with the transitional arrangements, the latter provide the relevant policy context for assessing the appeal development.

20. Policy AMP 2 of PPS 3 relates to 'Access to Public Roads'. It states that planning permission will only be granted for a development involving direct access, or the intensification of the use of an existing access, onto a public road where such an access will not prejudice road safety or significantly inconvenience the flow of traffic. The acceptability of access arrangements will also be assessed against the Department's published guidance, set out within Development Control Advice Note 15 'Vehicular Access Standards' (DCAN15).

21. Policy QD 1 of PPS 7, titled 'Quality in New Residential Development' provides for the creation of a quality and sustainable residential environment. Criterion (f) requires that adequate and appropriate provision is made for parking whilst criterion (h) requires that the design and layout does not create conflict with adjacent land uses. At paragraphs 4.33 and 4.34 of the supporting text, roads are referred to as public space and an important element in the design of a development. Road layouts need to pay due regard to the quality of the residential development and need to foster sustainable movement patterns. The relevant design guidance is set out in 'Creating Places – Achieving Quality in Residential Developments'.

22. The notice site comprises of 17 occupied dwellings, finished in red brick and in a mix of semi-detached and detached two storey and single storey dwellings. Their access is via the same distributer road that serves older housing in Bracken Hill to the south (Road 4). Road 8 provides a second access and Road 7 links the two together. The area is characterised by residential development, including Mount Carmel Heights to the north.

23. There is an extensive planning history for the wider housing development covering over a twenty-year period. The 2018 permission, referred to previously, contained a PSD thus the developer entered a bond in accordance with Article 32 of The Private Streets Order. At the hearing, DFI highlighted their key concerns with the on-site deviations from the internal road layout approved in the 2018 permission on the basis that they do not constitute a safe internal road and parking layout and prejudice the safety and convenience of road users. They argued:
    - The visibility splays for dwelling Nos. 12, 14, 16, 18, 20 and 11 must be retained free from obstructions;
    - The in-curtilage driveways for the dwellings at Nos. 2 and 19 are below the 5.3m x 6m standard, leading to the rear of cars projecting over the pavement when parked, including the potential for overhang of gates; and
    - At Road 8 the carriageway width reduces to 5.2m along the front of Nos. 1, 3 and 5, which is below the 5.5m minimum standard. The visibility splay at the junction with Road 7 (to the left of No. 2) is below the 2.4m x33m standard required.

24. Whilst the erection of boundary treatments to the front of driveways could prejudice the achievement of the required visibility splays at the dwellings listed above, each are currently free of any obstructions. Notwithstanding, this matter is controlled by condition 5 of the 2024 permission. Also Nos. 18 and 20 Bracken Hill are not within the notice site and Nos 12, 14 and 16 are accessed from Road 4 so they are not part of the breach as varied. Accordingly, their related access arrangements are not considered further. The requirement to keep the area to the front of the driveway at No 11 clear (which accesses from Road 8) is also

covered by condition 5 of the 2024 permission and in any event, the driveway and associated spays to the front of No. 11 was clear of development when the EN was issued so this is not a breach to consider under the deemed application.

25. The changes which are required to prevent cars overhanging the driveway of No. 19 requires reconfiguration works to create the in-curtilage parking space for two cars. The works are self-contained within that property. However, whilst this dwelling fronts onto Road 7, its driveway takes access from Road 4 and it is therefore not covered by the EN as varied. A third-party objection in respect of the boundary treatment, including the alleged removal of a stone wall and the incorporation of ground to the rear of the dwellings on Bracken Hill is also outside of the remit of these appeals as it relates to matters other than the roads, footpaths and hardstanding.

26. DFI confirmed that of the seventeen properties, seven are not directly affected by the works they consider to be necessary to bring the road to an adoptable standard (Nos. 4, 6, 8, 9, 10, 15 and 17). Notwithstanding, as DFI advise, it is not possible to proceed to adoption for parts of the road or footway as all properties are affected by the consequential effects of the road remaining unadopted, including the inconvenient bin collection points and maintenance arrangements. All future works which DFI consider necessary to bring the internal road arrangement to an adoptable standard are set out within the PSD drawing by Sheehy consulting Ref. C-500 Rev. D, dated 24th May 2024 and described as "proposed" within the 2024 permission.

27. Section 145 (5) of the Act states "where an appeal against an enforcement notice is brought under Section 143, the appellant shall be deemed to have made an application for planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control". Both the Ground (a) appeal and the deemed application are therefore limited to granting permission in relation to the whole or any part of those matters. There is no power to grant permission for development different from the breach that was in place at the time the EN was issued. The Ground (a) appeal and the deemed application can therefore only deal with the existing layout and cannot be extended or amended to include the alternative works, as set out above in paragraph 10, as in my judgement, the extent of those proposed works entail matters of detailed design related to the internal road geometry including footpaths, kerblines, driveways and visibility splays which go beyond being part of the breach.

28. The existing width of Road 8 is 5.2m in part and I agree with DFI that this is a traffic hazard and works would be required to the carriageway to achieve the necessary width of 5.5m along its full length. The existing layout of the junction of Roads 7 and 8 results in drivers turning right onto Road 8 having obstructed visibility and pulling out at an unsafe angle as, instead of coming up square to turn safely, the junction is angled in the wrong direction. This results in vehicles having to pull further out across the incoming lane potentially requiring drivers to delay or stop and causing inconvenience and associated safety implications for users. The radii outside No. 2 also requires reconfiguration to create the minimum visibility splay of 2.4m x 33m to the left on exit from Road 7 to ensure safety for vehicles travelling from the junction towards Nos. 1, 2 and 3 Bracken Hill. The current arrangement prejudices road safety and significantly

inconveniences the flow of traffic on Roads 7 and 8 and offends Policy AMP 2 of PPS 3.

29. The current parking spaces for No. 2 are at the rear side of the dwelling and are of a depth below standard (5.3m x 6m). This leads to parked cars overhanging the carriageway, causing obstructions to pedestrians and drivers manoeuvring into nearby dwellings. This existing parking layout does not therefore constitute a safe internal parking layout and creates conflict within the overall development thereby offending Policy AMP 2 of PPS 3 and Policy QD1 of PPS 7 criterion (f) and Creating Places, Achieving Quality in Residential Developments.

30. Consequently, for the reasons identified above, whilst the appeal development accords with the SAP, the current carriageway, footpath and hard standing within Roads 7 and 8 offends Policy AMP 2 of PPS 3 and Policy QD1 of PPS 7. The Council's deemed refusal reason is therefore sustained. For the reasons given above, ground (a) of the appeal fails and the deemed application is refused.

Ground (f) That the steps required by the notice exceed what is necessary to remedy the breach of planning control.

31. The appellants' argument under this ground is that it is excessive to remove the appeal development, given it could be modified in line with an agreed road layout which resolves any road safety concerns. They further argue the covering of the ground with minimum of 150mm of topsoil and sowing in grass seed exceeds what is necessary as the urban site is zoned for housing in the LDP and thus the principle of development is acceptable. The Council argue that no action other than complete removal of the works constituting the breach will suffice.

32. The question for consideration under this ground of appeal is whether the breach of planning control could be remedied by steps less onerous than those specified in the EN. That question can be answered in the positive as the road safety concern is focused on specific areas. The breach of planning control does not have to be remedied in total when something less will suffice to remedy the harm done (to road safety in this case). However, it is essential that the remedial steps should be clear and unambiguous given that criminal liability is involved. To that end, the remedy should be amended to confine it to what is necessary to remedy the breach of planning control. By the end of the hearing, both appellants were agreeable to the substitution of the original remedy with a requirement which would allow for the road layout to be reconfigured to comply with the arrangement of the street as shown on the PSD drawing 10 (rev 3a) Sheehy consulting C-500 Rev D dated 24th May 2024. The owner of No. 2 confirmed at the hearing that they would facilitate the required changes within their property, including the relocation of their parking to the front of the dwelling. The changes have also been subject to re-advertisement in line with the Council's public consultation obligations prior to the issue of the 2024 permission.

33. The remedy at Part 4 (d) of the EN is unduly onerous as it refers to restoring the lands to their original levels and covering with topsoil etc. This is unnecessary in a developed site zoned for housing and should be removed. As set out above wholescale removal of Roads 7 and 8 is not necessary to control the breach and the EN is therefore varied to require the modification of the existing road radius/ footway/kerb line at Road 8 and the junction of Roads 7 & 8 and the parking

layout for site No.2 in line with approved PSD layout. Consequently, the ground (f) appeal succeeds to that extent.

Ground (g) - that any period for compliance specified in the notice falls short of what should reasonably be allowed.

34. Northern Ireland Co-Ownership seek to extend the compliance period specified from 180 days to two years. An unquantifiable but longer period is sought in the Elliot appeal. At the hearing, the Council were agreeable to extending the compliance period specified to one year.

35. Notwithstanding the Council's concession, additional time is no longer required to undertake due process within the 2024 permission. The required remedial works have also been reduced through the variation of the EN and I am advised by the appellant in the Elliot appeal that this will involve a short construction process. For these reasons, I consider that 180 days from the date of this decision is a reasonable period for compliance. On this basis, the ground (g) appeal fails.

Decisions

These decisions are as follows: -

- The notice is varied to define the breach as "Unauthorised road, footways and other hardstanding (within Roads 7 and 8)".
- The appeal on Ground (e) fails.
- The appeal on Ground (c) fails.
- The appeal on Ground (a) fails.
- The notice is varied at Part 4 as set out below and the appeal on ground (f) succeeds to that extent:

  "4. What you are required to do

  Carry out alterations to roads, footways, and hard standing at Road 8 and the radius and kerb lines at the junction of Roads 7 and 8 and relocate two parking spaces to the front of the dwelling at Site 2 to conform to the works shown in Sheehy Consulting Drawing C-500 Rev D, dated 24th May 2024 (Dwg. 10 Rev 03a) and stamped granted by Derry City and Strabane District Council on 19th June 2024 in respect of application LA11/2023/1474/F. All works shall be carried out within 180 days of the notice taking effect and all extraneous rubble and associated materials shall be removed from the site within the same period."

- The appeal on Ground (g) fails.
- The Notice, as so varied, is upheld.

COMMISSIONER CARRIE MCDONAGH

List of Appearances

Planning Authority:- Mr Paul McCahill, Derry City and Strabane District Council
Ms Rosemarie McMenamin, Derry City and Strabane District Council
Mr John McLoughlin, Derry City and Strabane District Council
Mr Johnny Roulston, Department for Infrastructure, Roads

Appellant (1):- On behalf of Ms Caroline Elliot
Mr Des O'Neill, Agent
Mr Ronan Sheehy. Sheehy Consulting

Appellant (2):- On behalf of Northern Ireland Co-Ownership Association
Mr Richard Shields K.C Instructed by A&L Goodbody
Gavin McGill, Clyde Shanks
Andrew Shott, Co-Ownership
Paula Dillon, Co-Ownership
Micaela Diver, A&L Goodbody
Maise O'Sullivan, A&L Goodbody

Third Parties:- Mr Gavin Friel
Mr Aidan Watters
Ms Niamh McMenamin

List of Documents

Planning Authority: Derry City and Strabane District Council
"A1" Statement of Case
"A2" Post hearing information dated 24th May and 28th May 2024 including letter issued to residents on 1st March 2023, bond detail and agreed PSD drawing and clarification of 30th May 2024
"A3" Email dated 26th June 2024 advising of approval of LA11/2023/1474/F
"A4" Post hearing copy of Decision Notice and Drawings

Appellant (1): - Ms Caroline Elliot
"C1" Statement of Case by D O'Neill
"C2" Email dated 11th July 2024 confirming pursuit of appeal

Appellant (2): - Northern Ireland Co-Ownership Housing Association Limited
"B1" Statement of Case by Clyde Shanks
"B2" Letter dated 19th April 2024 requested adjournment due to pending application
"B3" Email dated 11th July 2024 confirming pursuit of appeal

Third Parties:- "D1" Statement of Case, Claire McCrory
"E1" Statement of Case, Gavin Friel