



**Derry City & Strabane**  
District Council

Comhairle  
**Chathair Dhoire &  
Cheantar an tSraitha Báin**

**Derry Cittie & Stràbane**  
Destrìck Cooncil

Your Reference:  
Our Reference: 100092.00040/PJK/PRD

6<sup>th</sup> August 2021

Mr Gordon Duff  
73 Palmerston Road  
Belfast  
BT4 1QD

**“Respondent’s Pre-action Protocol Response”**

Dear Sir

**Re Proposed Judicial Review of Issue of a Decision of Derry City and Strabane District Council to Approve Planning Application No. LA11/2020/0507/O**

We refer to the above-named Applicant’s pre-action protocol correspondence, dated 9<sup>th</sup> July 2021. The proposed Respondent’s response is set out below.

1. The Applicant

Gordon Duff  
73 Palmerston Road  
Belfast  
BT4 1QD

2. The Proposed Respondent

Derry City and Strabane District Council  
98 Strand Road  
Derry  
BT48 7NN

3. Reference Details

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This matter is being dealt with by Philip Kingston, Lead Legal Services Officer whose reference number is 100092.00040.PJK/PRD and whose email address for correspondence is [philip.kingston@derrystabane.com](mailto:philip.kingston@derrystabane.com)

The Planning Department reference number is LA11/2020/0507/O.

4. Details of the matter being challenged

The matter being challenged is as set out in paragraph 4 of the proposed Applicant's pre-action protocol letter as follows:

*"The decision by the Proposed Respondent to grant planning permission re planning application LA11/2020/0507/O on the 14th June 2021 (The Impugned Decision). This planning permission is for Proposed site for dwelling and garage at lands approximately 80m south of 21 Bigwood Road, Ardmore, Derry"*

5. Response to the proposed Application

A. Standing

Section 18(4) of the Judicature (Northern Ireland) Act 1978 provides that "*The court shall not grant any relief on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates.*". The question of standing is a matter which can properly be considered at the leave stage.

The Applicant has already caused members of the public, public authorities and the Courts to expend considerable time and expense in dealing with a huge number of unsuccessful applications for judicial review brought by him through various incorporated bodies as recorded inter alia *in the matter of 33 Applications by Rural Integrity (Lisburn01) Limited and Related Limited Companies* (Unreported) McCloskey LJ, 6 March 2020, McC11208. This highlights the particular need for discipline in considering the Applicant's locus standi to make this application.

The Applicant is not an incorporated action group. The Applicant's stated address is in Belfast. The site for which planning permission has been granted comprises lands approximately 80m south of 21 Bigwood Road, Ardmore, Derry. The Applicant has no interest in the land in question or the grant of planning permission. He did not participate in the process preceding the grant. He did not lodge an objection. He did not participate in the Planning Committee

hearing. This is not a case which presents a serious issue of public importance. It is a case about a modest grant of planning permission and the issues that arise are specific to its grant, a grant in which the Applicant has no sufficient interest.

This is a case where the Court can comfortably conclude, even at this early stage, that the Applicant has insufficient interest to establish locus standi to challenge the impugned decision. Leave should be refused on that basis alone.

In any event there is no merit in the proposed application, and leave could also be refused on the ground of arguability, for the following reasons.

B. The inadequate instruction and information presented by the planning officer to the planning committee

- (i) *The planning officer's report erred in deciding that an EIA determination is not required. The site in question is .85ha and residential developments in excess of .5ha should, if properly assessed require an EIA determination to be carried out. To not carry out an EIA determination where it is required is unlawful.*

*The case officer's report states that "this application has been screened by Council and as the development does not fall within any of the categories of Schedule 2 10 of The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017, it is therefore considered that an EIA determination is not required."*

The Applicant appears to be of the view that this application falls within Schedule 2 10(b) Urban projects, including the construction of shopping centres and car parks. There is no further definition of what constitutes an urban style development within the 2017 regulations but it is clear that an application for a single dwelling house in the countryside would not fall within the category of an urban project.

The underlying objective of EIA is that projects likely to have significant effects on the environment due to factors such as their nature, size and location should be subject to environmental impact assessment prior to a decision whether to grant planning permission.

The applicant has not highlighted any significant environmental effects that are likely as a result of the single dwelling on this site, and Council

notes no representations were made during the processing of the application or indeed at the Planning Committee on this matter.

- (ii) *the Planning officer has not adequately examined how much hedge will require to be removed to provide adequate sightlines. The long established hedge is tight to the road and may in its entirety need to be removed. This will significantly impact rural character and increase the appearance of suburban build up in this narrow road. If the Respondent does not know the extent of hedge removal it cannot make an informed decision in relation to policy CTY8, CTY14 and the SPPS.*

The case officers report states that “*The roadside section of the site benefits from mature vegetation however roads have advised this will need to be removed and the verge lowered in order to accommodate visibility splays*”. The DFI Roads consultation response does not indicate the specific amount of hedge removal required to accommodate the recommended visibility splays of 2.4 x 85m.

At the planning committee meeting Members heard from the planning applicant Mr Mark Lusby who advised the existing hedge would be lifted out and replanted behind the necessary visibility splays. It is important to note therefore that this is an outline application and certain issues have therefore been reserved for subsequent approval by the Council at reserved matters stage. Conditions 2, 5, 7 and 8 are relevant in this respect:

*“Condition 2*

*Approval of the details of the siting, design and external appearance of the buildings, the means of access thereto and the landscaping of the site (hereinafter called "the reserved matters"), shall be obtained from the Council, in writing, before any development is commenced.*

*Reason: This is outline permission only and these matters have been reserved for the subsequent approval of the Council.*

*Condition 5*

*No development shall take place on the site until a landscaping scheme has been submitted to and approved by the Planning Authority showing*

- *details of all proposed soft and hard landscaping;*

- *details of all existing and proposed site boundary treatments*
- *all existing vegetation to be permanently retained*

*The scheme of planting as finally approved shall be carried out during the first planting season after occupation of dwelling. Trees or shrubs dying, removed or becoming seriously damaged within five years of being planted shall be replaced in the next planting season with others of a similar size and species unless the department gives written consent to any variation.*

*Reason: To ensure the provision, establishment and maintenance of a high standard of landscape in the interests of visual amenity.*

#### *Condition 7*

*A landscaping scheme shall be agreed with the Department at Reserved Matters stage and shall include a survey of all existing trees and hedgerows on the land, together with details of those to be retained and measures for their protection during the course of development. The scheme shall detail species types, siting and planting distances and a programme of planting for all additional landscaping on the site and will comply with the appropriate British Standard or other recognised Codes of Practice. The works shall be carried out during the first available planting season after the occupation of the dwelling.*

*Reason: To ensure the provision of a high standard of landscape.*

#### *Condition 8*

*A scale plan at 1:500 shall be submitted as part of the reserved matters application showing the access to be constructed generally in accordance with drawing No 01 bearing the date stamp 10th July 2020 and other requirements in accordance with the attached form RS1.*

*Reason: To ensure there is a satisfactory means of access in the interests of road safety and the convenience of road users.”*

It is clear that the Council has given detailed consideration of this matter as is appropriate at outline application stage.

Finally, the photographs of the site from along the road frontage presented to the committee both in the report and on the presentation at

planning committee clearly evidence a dwelling will be visible on the site even with the road side hedge retained. The retention of the hedge was therefore not a significant consideration in the assessment of CTY8 and CTY14 both of which were considered in the Case Officers report.

- (iii) *Thirdly the report fails to point out that the commercial building to the north-west has no frontage to Bigwood Road and whilst it may be guilty of adding to ribbon development it cannot be regarded as comprising part of a substantial and continuously built up frontage. This was not adequately pointed out in the officer report.*

To allege the non-residential building has no frontage to the road is incorrect. The building is clearly visible from the road and even though it is set back there is no intervening vegetation or features that would remove its visual connection with the existing roadside development.

The case officer has accurately considered the non-residential building in question and noted the set-back, however has considered it still reads with the existing development further north. This is a matter of planning judgment and this policy assessment could not be considered irrational.

C. The Errors of the Proposed Respondent.

- (i) *It has granted permission for a development which will create or add to ribbon development. The impugned decision will also create more opportunities for further infill development. This future development has not yet occurred but that is why adding to the existing ribbon development is prohibited outright by CTY 14 and the SPPS. CTY8 is not a self contained policy; DOE v the PAC [2014] NIQB 4*
- (ii) *It has allowed infill development that is not a small gap in a substantial and continuously built up frontage.*

These two matters are dealt with together.

As can be seen from the case officer's report this was a matter where the officer recommendation was for refusal. This was on the basis that the officer view was that the application did not meet policies CTY8 or CTY14. Members had the benefit of the detailed officers report and presentation. They also heard from the planning applicant. There were

no representations from objectors in advance of the committee meeting or at the meeting.

Council's planning committee meetings are broadcast on Youtube. The link for this meeting is <https://www.youtube.com/watch?v=LpRgH-7Ok-s>. This application commences 2 hours 40 minutes into the meeting and lasts for 47 minutes. It is apparent therefore that the matter was the subject of detailed consideration and discussion.

Ultimately, for the reasons that are apparent from the discussion, members decided not to accept the officers' recommendation in this matter but rather to grant approval for the application. As can be seen all relevant considerations, and no irrelevant matters, were taken into account.

In *Re Sands Application* [2018] NIQB 80 McCloskey J stated that "*planning decisions are the product of the exercise of a relatively wide discretion which the legislature has conferred on democratically elected councillors. The planning and environmental compartment of public law is replete with the phenomenon of evaluative judgement and its corresponding standard of review, irrationality. This is an area where the Wednesbury principle imposes an unmistakably elevated threshold.*"

Having considered the application in detail, the members were entitled to reach an evaluative judgment on the planning policies.

- (iii) *It has failed to make the required EIA determination and made proper assessment of the impact of the approved development on the site and in particular the hedgerow. It did not carry out due assessment of this priority habitat under policy NH5.*

The underlying objective of EIA is that projects likely to have significant effects on the environment due to factors such as their nature, size and location should be subject to environmental impact assessment prior to a decision whether to grant planning permission.

The application is for a single dwelling in the countryside. The application does not fall within any of the descriptions of development in Schedule 2 of The Planning (Environmental Impact Assessment) Regulations 2017 and is not within a "sensitive area" as defined in the regulations. The case officer report presented to the Planning Committee on 9th June 2021 notes the consideration in Section 2 and

provides a record in this case, of the reason the application did not require determination as to the need for environmental impact assessment under regulation 12 of the above regulations.

The applicant has not highlighted any significant environmental effects that are likely as a result of the single dwelling on this site, and Council notes no representations were made during the processing of the application or indeed at the Planning Committee on this matter.

NIEA advises all hedgerows are a priority habitat due to their significant biodiversity value which relates not only to the specific plant species within the hedgerow but to their wider value for foraging, providing shelter, and corridors for movement of large numbers of species. The roadside hedge in this case is a native species thorn hedge with ivy growth evident at the lower levels. It is approximately two metres in height and is greater than 1m in width. There are no trees interspersed along the hedgerow. The planning applicant confirmed during the planning committee meeting that the roadside hedge would be not be removed, but physically lifted and set back behind the necessary visibility splay.

Notwithstanding the statement from the planning applicant regarding the setting back of the hedge, the planning policy consideration appropriate to priority (Policy NH 5 of PPS 2) is contained within the planning report.

Policy NH5 advises planning permission will only be granted for a development proposal which is not likely to result in the unacceptable adverse impact on, or damage to know priority habitats.

Policy NH5 goes on to advise that a *“development proposal which is likely to result in an unacceptable adverse impact on, or damage to, habitats, species, or features may only be permitted where the benefits of the proposed development outweigh the value of the habitats, species or feature. In such cases, appropriate mitigation and/or compensatory measures will be required.”*

The case officer report includes the policy consideration under NH5 of PPS 2 and advises hedgerow removal is required to provide an access and visibility splays to the site. The case officer report also notes that following the site visit, it was not considered that further ecological information was required, other than to provide an informative on the



standing advice, published by NIEA. The standing advice published by NIEA allows for mitigation, whereby it is not possible to retain a hedgerow.

(6) Details of any other interested parties

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(7) Address for further correspondence and service of Court documents:-

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Yours faithfully



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**Please respond to Strand Road Office**