



| | |
|--|------------------------------------|
| Title of Report: | Commencement of Development |
| Committee Report Submitted To: | Planning Committee |
| Date of Meeting: | 27 September 2023 |
| For Decision or For Information | For Information |
| To be discussed In Committee YES/NO | No |

| Linkage to Council Strategy (2021-25) | |
|--|--|
| Strategic Theme | Cohesive Leadership Improvement and Innovation |
| Outcome | Note position on commencement of development |
| Lead Officer | Head of Planning |

| Budgetary Considerations | |
|------------------------------------|-----------------|
| Cost of Proposal | Planning Budget |
| Included in Current Year Estimates | YES |
| Capital/Revenue | As per budget |
| Code | 5301 |
| Staffing Costs | As per budget |

| Legal Considerations | |
|----------------------------------|-----------|
| Input of Legal Services Required | NO |
| Legal Opinion Obtained | NO |

| Screening Requirements | Required for new or revised Policies, Plans, Strategies or Service Delivery Proposals. | | |
|--|--|----|-------|
| Section 75 Screening | Screening Completed: | No | Date: |
| | EQIA Required and Completed: | No | Date: |
| Rural Needs Assessment (RNA) | Screening Completed | No | Date: |
| | RNA Required and Completed: | No | Date: |
| Data Protection Impact Assessment (DPIA) | Screening Completed: | No | Date: |
| | DPIA Required and Completed: | No | Date: |

1.0 Purpose of Report

- 1.1 This Report is to provide Members with an update as to what is required by legislation to commence approved development (authorised by a planning permission).

2.0 Background

- 2.1 The requirements for commencement of development in Northern Ireland legislation is set out in Section 63 of the Planning Act (Northern Ireland) 2011, which became operational in 2015. Where the development consists of or includes the erection of a building, to constitute development to have been begun, either section of legislation requires “any work of construction in the course of the erection of the building.”
- 2.2 On the Planning section of the Council’s website, until recently, guidance was given on the commencement of development based on English caselaw in the absence of case law in Northern Ireland at that time. This referred to examples of where the Council would consider development to have commenced in accordance with the permission granted. The examples provided were: *“commenced any work of construction in the course of erection of a building such as the digging of foundations and preferably pouring of concrete, driving piles or other substantive works or; the laying of any underground main pipe to the foundations or part of the foundations of a building.”*
- 2.3 However, recent landmark appeal decisions in Northern Ireland by the Planning Appeals Commission (PAC) Ref: 2017/E0010 against refusal of a certificate of lawful use or development (CLUD) for completion of a dwelling at Tirkeeran Road, Garvagh in October 2017, considered this issue. This decision was undertaken by the Commission rather than a single commissioner. The decision underscores that in determining the commencement of development, where the development consists of or includes the erection of a building, the focus is on the buildings and that the work carried out must be work of construction in the course of erection of the buildings. The same appeal decision sets out that while Section 56 of the Town and Country Planning Act 1990 (applicable in England and Wales) provides a more liberal definition of material operations, this is not directly relevant to the more prescriptive requirements in Northern Ireland legislation. The appeal was dismissed.
- 2.4 In addition, Northern Ireland High Court judgement River Faughan Anglers Ltd v Derry City and Strabane District Council (2018) NIQB 87, delivered in

October 2018, considered the matter of whether development had begun of a manager's dwelling and six cottage style apartments in the countryside near Londonderry. The judgement cites the relevant test being Section 63 (2) of the Planning Act (Northern Ireland) 2011. Paragraph 25 of the judgement states that as the vehicular access was installed along with the excavation and construction of certain foundations, the Court was satisfied development had begun. This case clarified that work of construction was required to constitute a lawful start.

- 2.5** More recently, appeal decision Ref: 2022/L001 in July 2023 by the PAC against refusal of a certificate of lawful use or development (CLUD) for a dwelling and double garage at Carrowclare Road, Limavady, dealt directly with the issue as to whether excavation of foundations without further work constituted a lawful start. This decision considers the Oxford Dictionary definition of "construction" as "*the process or method of building or making something, especially roads, buildings, bridges etc.*". The decision resolves that the digging of a trench cannot reasonably be described as building or making something and that can only occur when concrete is poured to create the foundations of a building. The decision considers trench digging as site preparatory works, readying a site for development. The decision clarifies that the act of pouring the concrete represents work of construction in the course of the erection of the building. The appeal was dismissed.

3.0 Proposals

- 3.1** To update the content of the Council's website regarding the commencement of development and publish a Development Management Information Note on the commencement of development (See Appendix 1).

4.0 Recommendation

It is recommended that the Committee notes the Northern Ireland case law and agrees to the updating of Council's website accordingly and the publication of Development Management Information Note 03 Commencement of Development.

Commencement of Development

Purpose

The purpose of this guidance is to set out what is required by legislation, case law and appeal decisions to commence approved development (authorised by a planning permission).

Legislative Background

The requirements in Northern Ireland legislation were set out in Article 36 of the Planning (Northern Ireland) Order 1991. These have been carried forward into the current legislation, Section 63 of the Planning Act (Northern Ireland) 2011, which became operational in 2015. Where the development consists of or includes the erection of a building, to constitute development to have been begun, either section of legislation requires “any work of construction in the course of the erection of the building.”

Where the development consists of or includes alterations to a building, the legislation requires “any work involved in the alterations.”

Where the development consists of or includes any change of use of any building or other land, the legislation requires “that change of use”.

Where the development consists of or includes mining operations, the legislation requires “any of those operations”.

Appeal Decisions

Landmark appeal decision Ref: 2017/E0010 against refusal of a certificate of lawful use or development (CLUD) for completion of a dwelling at Tirkeeran Road, Garvagh by the Planning Appeals Commission (PAC) in October 2017, considered what work was required to constitute a lawful start. This decision was undertaken by the Commission rather than a single commissioner. The decision underscores that in determining the commencement of development, where the development consists of or includes the erection of a building, the focus is on the buildings and that the work carried out must be work of construction in the course of erection of the buildings. The same appeal decision sets out that while Section 56 of the Town and Country Planning Act 1990 (applicable in England and Wales) provides a more liberal

definition of material operations, this is not directly relevant to the more prescriptive requirements in Northern Ireland legislation. The appeal was dismissed.

More recently, appeal decision Ref: 2022/L001 in July 2023 by the PAC against refusal of a certificate of lawful use or development (CLUD) for a dwelling and double garage at Carrowclare Road, Limavady, dealt directly with the issue as to whether excavation of foundations without further work constituted a lawful start. This decision considers the Oxford Dictionary definition of “construction” as *“the process or method of building or making something, especially roads, buildings, bridges etc.”*. The decision resolves that the digging of a trench cannot reasonably be described as building or making something and that can only occur when concrete is poured to create the foundations of a building. The decision considers trench digging as site preparatory works, readying a site for development. The decision clarifies that the act of pouring the concrete represents work of construction in the course of the erection of the building. The appeal was dismissed.

High Court Judgement

Northern Ireland High Court judgement *River Faughan Anglers Ltd v Derry City and Strabane District Council* (2018) NIQB 87, delivered in October 2018, considered the matter of whether development had begun of a manager’s dwelling and six cottage style apartments in the countryside near Londonderry. The judgement cites the relevant test being Section 63 (2) of the Planning Act (Northern Ireland) 2011. Paragraph 25 of the judgement states that as the vehicular access was installed along with the excavation and construction of certain foundations, the Court was satisfied development had begun. This case clarified that work of construction was required to constitute a lawful start.

Negative Conditions

Do I have to do anything before I start work on my development?

Often planning permissions are subject to planning conditions requiring matters to be undertaken before development starts. These are known as “negative” planning conditions. While provision of the access and visibility splays are the most common form of negative condition, such conditions relate to a variety of planning matters including undertaking archaeological mitigation and submission of specific reports or details. Submission of specific reports or details are processed by the Planning Department through a Discharge of Condition application. It is imperative

to comply with these requirements before starting development. Not to do so may result in an unlawful start which could forfeit the planning permission.

Planning permissions are subject to a timeframe condition in which work must be started if the planning permission is to be taken up. Ordinarily, this is five years. Developers should be mindful of this timeframe as the requirements of negative conditions must be addressed before development is started.

Determining whether a Planning Permission has been Commenced

How do I know whether a planning permission has been lawfully commenced?

If you require confirmation as to whether development has lawfully commenced, the appropriate mechanism is submission of a Certificate of Lawful Use or Development (CLUD) application. Details of such applications are set out in Information Note 01.

On some occasions, the principle of development hinges on whether development has lawfully commenced on a previous planning permission. Planning case law, specifically *Saxby v Secretary of State for the Environment and Another (1998) JPL 1132*, established that the appropriate means of establishing such matters is through submission of a CLUD application. Therefore, where this issue is relevant to assessment of an application, the Planning Department may recommend submission of a CLUD application. Where it is not readily identifiable whether a lawful start has been made, it is normally inappropriate for the Planning Department to resolve a position in the absence of a CLUD application.