

Date: 17 May 2023

Your Ref: DFIPG 155/19

Alistair Beggs
Chief Planner
Department for Infrastructure

By email: [REDACTED]

Dear Mr Beggs

**UNAUTHORISED EIA DEVELOPMENT: PLANNING APPLICATION A/2014/0035/RM -
PLANNING APPEALS COMMISSION DECISION 2021/A0081**

River Faughan Anglers (RFA) first drew the above-mentioned case to the attention of the Department for Infrastructure (DFI) on 2 December 2019. Our concern at the time was over Derry City and Strabane District Council's (DCSDC) intention to approve unauthorised Environmental Impact Assessment (EIA) development that could undermine the Department's *Planning Environmental Governance Work Programme* (PEGWP).

You will be aware that the PEGWP was devised to address the European Commission's (EC) concerns set out in *Pilot Case EUP(2015)7640: Environmental Enforcement in Northern Ireland*; primarily in respect of the former Department of the Environment's systemic failure to apply the law as it relates to unauthorised EIA developments.

In response to RFA's letter, the Department expressed its aim for application A/2014/0035/RM as being *"...to seek to ensure that it is managed appropriately and cognisant of environmental obligations."*

Background

DCSDC had first recommended approval of the development on 4 December 2019. However, the application was withdrawn from the planning committee schedule following the intervention of the DFI. This was because works had already commenced on the site which represented unauthorised Environmental Impact Assessment (EIA) development, which local planners had failed to take account of.

Legal advice subsequently provided by senior counsel to DCSDC after your Department's intervention (and as I understand shared with DFI) advised that the Environmental Statement (ES) and subsequent addenda on which the recommendation to approve was based was

“seriously deficient”.¹ It pointed out that the competent authority was required (but had failed) to apply the strict legal tests regarding unauthorised EIA development and that retrospective approval of the development on 4 December 2019 would not have been lawful.

Post-December 2019, further addenda to the ES were submitted in an attempt to address the environmental concerns and matters of law belatedly raised by DCSDC. Ultimately, planning permission was refused on 8 July 2021, including because the applicant had failed to satisfy the strict legal principles that would warrant exceptional circumstances under which retrospective planning permission could be granted for unauthorised EIA development.

Updated position

The developer lodged a valid appeal in late 2021.

In December 2021, DFI issued Planning Advice Note (PAN) 9a: Unauthorised EIA Development.

It was noted that DFI officials also attended the appeal hearing as observers given that this appears to have been the first appeal where the strict legal principles relating to unauthorised EIA development, as set out in the PAN, were to be tested.

On 28 April 2023, the Planning Appeals Commission (PAC) issued its decision allowing the appeal of DCSDC’s refusal of A/2014/0035/RM for *“residential housing development comprising a mix of detached and semi-detached units (164 in total) with garages, all associated site works including amendment of levels, landscaping, waste-water pumping station and off-site road works”*, located at the former Industrial Estate, Drumahoe Road, Drumahoe, Derry.

In its promotional spin, the agent acting for the appellant acknowledge how the appeal turned on *“complex caselaw matters included in the refusal reasons”*.²

PAC decision 2021/A0081

In allowing appeal 2021/A0081, the PAC decision did not accept DCSDC’s reasons for refusal in respect of the strict legal principles regarding the retrospective regularisation of unauthorised EIA development. While DCSDC will need to consider whether it should judicially review this particular decision, given the DFI’s intervention and wider oversight and PEGWP interests, you will want to be satisfied that the appeal decision is cognisant of the environmental obligations pertaining to unauthorised EIA development.

¹ Letter from DCSDC to Gravis Planning dated 13 March 2021, Ref: 100092.00027/PJK/PRD.

² Gravis Planning, Statement published 10 May 2023. <https://www.gravisplanning.com/news/approval-for-housing-scheme-in-derry-londonderry>

This is because the High Court has made clear its legal position to your Department that PAC decisions “...must either be accepted or challenged through the Courts”.³ In effect, Departmental guidance should not countermand or conflict with decisions of the appellate body. Therefore, in light of the ABO Wind judgment, it would be incumbent upon the Department to consider if PAC decision 2021/A0081:

- accords with the strict legal principles governing unauthorised EIA development that the Department is committed to compliance with.
- countermands any aspect of the Department’s PEGWP and / or PAN 9a that could set an unacceptable precedent for future decision-making;
- provides sufficiently clear reasons that the Department is satisfied will not result in “*a recipe for administrative chaos*”⁴ in the planning system when dealing with future applications to regularise unauthorised EIA development;
- sets a precedent.

Unless the Department understands and accepts the appeal decision on the retrospective regularisation of unauthorised EIA development, DFI must give serious consideration to judicially reviewing PAC decision 2021/A0081. Therefore, it would be important that, as Chief Planner for Northern Ireland, you set out in a transparent manner whether the Department considers PAC decision 2021/A0081 impinges upon strategic matters of environmental planning law that countermand its current PEGWP and PAN 9a. In other words, the Department should be satisfied that no aspect of its PEGWP and the law regarding unauthorised EIA development is undermined as a result of this appeal decision.

Given that it was RFA’s formal infringement complaint (among others) to the EC which resulted in it opening of Pilot Case EUP(2015)7640, it would be important that the Department sets out any implications for its long-term PEGWP for Northern Ireland as a result of this appeal decision, whether it identifies any conflicts and, if so, how it intends to remedy any that this PAC decision has given rise to?

Yours sincerely

Dean Blackwood
River Faughan Anglers

³ ABO Wind-v-Department for Infrastructure [2021] NIQB 96, para.[100].

⁴ Ibid., para.[101].