



**The Planning (NI) Order 1991 (as amended)**

**Appeal under Article 69 by**

**W & J Chambers Ltd**

**Statement of Evidence  
By**

**John Loughlin B.A.(hons) Dip T&CP MRTPI**

**Area Planning Office  
Derry**

Planning Service Case Reference: A/2006/0043CA

PAC RefNo: 2011/E017 & E018

Enclosures.

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## **1.0 BACKGROUND**

- 1.1 On 8 December 1995 the Department received a complaint about noise, dust and vibrations from heavy plant and machinery and the removal of a hedgerow at the W and J Chambers site at Drumahoe.
- 1.2 An Enforcement Officer of the Department visited the site on 1 February 1996 and took photographs. He observed that clearance and infilling of land had taken place thus providing an extension to the site for the storage of fertilizer.
- 1.3 On 5 February 1996 a warning letter was sent to Mr W Chambers requiring the immediate cessation of use on any part of the site that was extended and reinstatement of the land.
- 1.4 An Enforcement Officer of the Department visited the site on 23 May 2000 and took photographs.
- 1.5 On 28 November 2002 the Department received a complaint about land filling, encroachment into the green belt, the potential effect on water quality and other environmental issues. The Divisional Planning Office referred the file to Planning Service Headquarters Special Studies Section who carried out site inspections and served a Planning Contravention Notice on the owner on 26 July 2005.
- 1.6 The case reverted to the Divisional Planning Office in 2006. An Enforcement Officer of the Department visited the site on 27 February 2006.
- 1.7 On 29 June 2006 representatives of the Department met with the agent for W and J Chambers Ltd to discuss the planning status of the site and the planning considerations and policies that applied.
- 1.8 The agent wrote to the Department on 25 July 2006 stating that their client had instructed them to make a planning application.
- 1.9 On 28 December 2006 the Department sent a warning letter to Chambers and their agent seeking an immediate written assurance that there would be a cessation of the unauthorized change of use and infilling of land and removal of the infilled material.
- 1.10 Mr Gordon Chambers telephoned the local area Planning Office on 8 January 2007. He said his firm had ceased all infilling on the site and said that the only earthworks were the periodic clearing out of lagoons and the piling of material on the levees of same to satisfy EHS (now NIEA).
- 1.11 On 5 February 2007 the Department sent a warning letter to Mr Gordon Chambers advising him that a planning application had not yet been submitted and the Department was considering taking formal enforcement action.

- 1.12 On 9 February 2007 the Department received a letter from Mr Gordon Chambers stating that he had contacted his agent to arrange a meeting with the local Planning Office.
- 1.13 On 27 February 2006 an Enforcement Officer of the Department visited the site on the same day that representatives of the Department met with the agent for W and J Chambers Ltd to discuss the planning status of the site, planning considerations and policies that applied. The agent stated that his clients intended regularising the existing infill via an application to the Planning Office and there would be no more expansion of the site.
- 1.14 On 23 May 2007 an Enforcement Officer of the Department visited the site and noticed that there had been some piling up of white material in the vicinity of the lagoons. It appeared that material had been piled up on the banks of the lagoons.
- 1.15 On 19 July 2007 representatives of the Department met with the agent for W and J Chambers Ltd at which he stated his intention to submit an application for a Certificate of Lawfulness and a planning application.
- 1.16 On 13 August 2007 the Department sent a letter to the agent advising that as a Certificate of Lawfulness and planning application had not yet been submitted the Department was considering taking formal enforcement action.
- 1.17 A Certificate of Lawfulness application was received by the Department on 14 September 2007.
- 1.18 A valid planning application for settlement lagoons inter alia was submitted on 21 May 2008.
- 1.19 On 10 March 2011 an Enforcement Officer of the Department visited the site and took photographs. The Officer met with Mr Gordon Chambers who said that work had been carried out to the waste water lagoons at the request of NIEA and a horse shoe shaped bund was formed adjacent to the vehicle washing area.
- 1.20 The Operational Development and Material Change of Use enforcement notices were issued on 13 May 2011.

## **2.0 ENFORCEMENT NOTICES; DEEMED APPLICATION**

- 2.1 The enforcement notices were served by Royal Mail Special Delivery on 14 May 2011 to take effect on 30 June 2011. The date for compliance was 20 October 2011. The appeals were lodged on 21 June 2011.
- 2.2 The deemed application is for the retention of lagoons and for continuation of use of lagoons.

### **3.0 THE SITE AND ENVIRONS**

3.1 The site that is the subject of this appeal lies to the south of W and J Chambers Ltd concrete batching and concrete block production plant. It is adjacent to and within the floodplain of the River Faughan. The site contains 3 lagoons.

3.2 The site lies outside the development limits of the city of Londonderry and within an area considered countryside as described in Planning Policy Statement 21 : Sustainable Development in the Countryside. The site is within an Area of High Scenic Value and an Area of Constraint on Mineral Development as designated in the Derry Area Plan 2011.

### **4.0 POLICY CONTEXT**

The main policy considerations in the assessment of this application are;

4.1 Development Plans – The site is located outside of the development limit of the City of Londonderry as defined by the Derry Area Plan 2011 (DAP) within an Area of High Scenic Value (DAP 4.8) and an Area of Constraint on Mineral Development (DAP 12.3)

PPS 1 – General Principles is a general policy that the Department observes in carrying out its planning functions, including exercising control of development.

PPS 2 – Planning and Nature Conservation

PPS 3 – Access, Movement and Parking

PPS 4 – Planning and Economic Development

PPS 9 – The Enforcement of Planning Control

PPS 15 – Planning and Flood Risk: the development is within the flood plain of the River Faughan.

PPS21 - Sustainable Development in the Countryside: the development is within an area considered countryside as defined by PPS 21.

### **5.0 PLANNING HISTORY**

5.1 The history of the site is as shown in the table (Appendix 1) and map (Appendix 2).

## **6.0 CONSIDERATION**

### **6.1 Appeal ground (d)**

- 6.1.1 This ground of appeal asserts that the breach was immune from enforcement action when the notice was issued. The Department can demonstrate that this is not the case. The lagoons were not in continuous use more than 10 years before the date of issue of the material change of use enforcement notice.
- 6.1.2 The Operational Development and Material Change of Use enforcement notices were issued on 13 May 2011.
- 6.1.3 A photograph (Photograph 1 of Appendix 3) taken by an Officer of the Department on 23 May 2000 shows what appears to be one single lagoon within the River Faughan Flood Plain adjacent to and at a much lower level than the infilled area.
- 6.1.4 Photographs (Photographs 2 and 3 of Appendix 4) taken by an Officer of the Department on 23 May 2007 show that the first lagoon that was constructed on the site has been infilled. The level of the land has been raised substantially and a new lagoon created at a higher level and closer to the level of the adjacent infilled area. Photo 3 clearly shows the existence of 3 lagoons (with recent works done to them).
- 6.1.5 Photograph 4 (of Appendix 4) taken by an Officer of the Department on 10 March 2011 shows the 3 lagoons in situ and their levels in relation to each other and to the infilled area adjacent.
- 6.1.6 It is the Department's contention that the original lagoon was infilled, the level of the land was substantially raised and a new lagoon built at this higher level. The original lagoon was not in continuous use for a period of more than 10 years prior to the issue of the Material Change of Use enforcement notice and therefore cannot be immune.
- 6.1.7 NIEA Aerial Photographs (Appendix 6) dated 19/04/03 show the above mentioned one lagoon in situ, the other two lagoons have not been constructed yet.
- 6.1.8 It is the Department's contention that the other two lagoons further south were not in situ and were not in continuous use for a period of more than 10 years prior to the issue of the Material Change of Use enforcement notice and therefore cannot be immune.
- 6.1.9 Furthermore it is the Department's contention that the lagoons were never substantially complete. There was constant work being carried out to them. They were continually being remodelled by material being dredged from the lagoons being piled up on their banks. In a previously mentioned telephone conversation with an Officer of the Department on 8 January 2007 Mr Gordon Chambers said that the lagoons were periodically cleared out and the material was piled up on the levees. On 23 May 2007 an Enforcement Officer of the Department visited the site and noticed that there had been some piling up of white material in the vicinity of



the lagoons. This material had been piled up on the banks of the lagoons.

- 6.1.10 On 10 March 2011 an Enforcement Officer of the Department visited the site and took photographs. The Officer met with Mr Gordon Chambers who said that work had been carried out to the waste water lagoons at the request of NIEA and a horse shoe shaped bund was formed adjacent to the vehicle washing area. These works can clearly be seen in Photographs 4 and 5 (of Appendix 4) where fresh workings can clearly be seen devoid of grass cover.
- 6.1.11 The Court of Appeal has ruled (*Murfitt v Secretary of State for Environment* (1980) 40p +CR254) that the limitation appropriate to the primary breach is applicable and immunity is not available to ancillary works. In the *Murfitt* case hard standing was put down at an agricultural holding on which lorries were parked to operate a haulage business without the benefit of planning permission. Enforcement action required the cessation of the use of the business and removal of the hard standing. *Murfitt* complained to the Courts that the hard standing was operational development and as it was in existence more than the 4 year period it was immune from enforcement. However the Court of appeal found that the primary breach of planning control was the material change of use, that everything else including the putting down of the hard standing parking compound was ancillary to that breach and that immunity did not apply to ancillary works. In this case the Department contends that the primary breach is the use of land as lagoons for waste water storage and that immunity does not apply to the infilling of land and provision of bunds/levees to provide lagoons which are ancillary to this use. The Department contends that this unauthorised use does not enjoy immunity.

## 6.2 **Appeal ground (a)**

This ground of appeal asserts that planning permission ought to be granted. The Department is of the opinion that planning permission should not be granted for the following reasons.

### 6.2.1 ***Reason for Refusal 01***

### 6.2.2 *The proposal is contrary to Planning Policy Statement 15 : Planning and Flood Risk.*

6.2.3 Rivers Agency has identified that the lagoons are situated within the flood plain of the River Faughan. (See statement of evidence from Rivers Agency). The use of the land as lagoons for waste water storage is contrary to Policy FLD 1 (Development in Flood Plains) of PPS 15 : Planning and Flood Risk as the development does not fall within one of the exceptions stated in the policy and it can not be demonstrated that the development is of overriding regional importance.

6.2.4 ***Reason for Refusal 02***

6.2.5 *The proposal is contrary to Planning Policy Statement 2 : Planning and Nature Conservation.*

6.2.6 The development is adjacent to and within the floodplain of the River Faughan which is designated an Area of Special Scientific Interest. PPS 2 applies, specifically paragraphs 53 to 57. The matter of particular concern to the Department is (para 55) : the potential damage to habitats or species from pollution from the lagoons. (See statement of evidence from NIEA – Natural Heritage).

6.2.7 ***Reason for Refusal 03***

6.2.8 *“The proposal is contrary to Planning Policy Statement 4 : Planning and Economic Development”*

6.2.9 The physical provision of lagoons and the use of the land as lagoons for waste water storage is contrary to PPS4 Policy PED 3. The scale and nature of this expansion of the established use harms the rural character and appearance of this local area in terms of the visual impact of the lagoons. The development does not meet two out of three of the exceptional circumstances outlined in Policy PED 3:

- relocation of the enterprise is possible as there is sufficient land available within nearby industrial estates;
- the development of its very nature relating to the manufacture of concrete products undermines rural character.

6.3 **Appeal ground (f)**

6.3.1 This ground of appeal asserts that the Department required remedial works that could be considered excessive to remedy the breach. This is not the case. There is no planning permission for the provision of lagoons or for the change of use of the land to a waste water facility.

6.3.2 The development is situated within the flood plain of the River Faughan. The physical provision of lagoons and the use of the land as lagoons for waste water storage is contrary to Policy FLD 1 (Development in Flood Plains) of PPS 15 : Planning and Flood Risk.

6.3.3 The physical provision of lagoons and the use of the land as lagoons for waste water storage is contrary to PPS4 Policy PED3.

6.3.4 Whilst there may not be any other facility on site to store and settle water there is scope for using new technology to deal with runoff water instead of using lagoons. Also as part of planning application Ref A/2008/0408/F the appellant submitted a revised proposal to relocate the lagoons to the east and outside of the floodplain. This is indeed a feasible alternative to the existing lagoons.

6.4 The Department contends that there is no remedial action possible. The lagoons have to be removed and the use has to cease.



6.4.1 **Appeal ground (g)**

6.4.2 This ground of appeal asserts that the period specified in the notice falls short of what should reasonably be allowed.

The Department considers that 112 days (16 weeks) is a reasonable period within which to remove the operational development elements of the unauthorised development, cover in topsoil and sow in grass.

**7.0 CONCLUSION**

7.1 The Department exists to regulate the development and use of land in the public interest. In light of the policy context and other material considerations, the Department is of the opinion that the development is unacceptable as it is contrary to Policy FLD 1 (Development in Flood Plains) of PPS 15 : Planning and Flood Risk. The development is contrary to Planning Policy Statement 2 : Planning and Nature Conservation. Furthermore, the development is contrary to Planning Policy Statement 4 : Planning and Economic Development. Therefore it is the Department's opinion that the proposal cannot be accommodated within the criteria laid down in the above policies and as such the Department would ask the Planning Appeals Commission to refuse the deemed application and dismiss the appeal.

056.214.11

**Appendix 1 – Planning History**

Site no.	Application Number	Applicant	Location	Development	Decision
1	A/1980/0183	W & J Chambers	Glenshane Road Drumahoe	Filling of Land to Provide Extension to Existing Brickworks	Approval 19 June 1981
2	A/1983/0516	W & J Chambers	Glenshane Road Drumahoe	Continued Use of Agricultural Land for Extensions to Brickworks	Approval 15 December 1983
3	A/1984/0451	Mr William Chambers	Glenshane Road Lismacrol.	Change of use of part of agricultural field to yard for stocking agricultural products	Refusal 11 September 1984
4	A/2007/1061/LDE <i>CLUD!</i>	W J Chambers Ltd	Lands to the South of 91 Glenshane Road Drumahoe	Retention of existing works <i>Made lawful because immune from enforcement</i>	Granted 5 March 2008 <i>action!</i>
5	A/2008/0408/F	W & J Chambers Ltd	91 Glenshane Road Drumahoe (including lands to the South)	Retention of extension to site office, extension to vehicle maintenance shed and improved washout facilities. Relocation of settlement lagoons, site drainage works. Associated landscape and environmental improvements (Amended description).	Current application
6	A/2006/0043CA	W & J Chambers Ltd	91 Glenshane Road Drumahoe	Unauthorised change of use, infilling and lagoons	Enforcement Case