

Aileen McGarry

From: Cathy McKeary
Sent: 25 August 2021 09:34
To: Aileen McGarry
Subject: FW: LA01/2018/0570/F - Keady Quarry
Attachments: Keady Quarry - Refusal Response.pdf

From: [REDACTED]
Sent: 20 August 2021 12:24
To: Cathy McKeary <[REDACTED]>
Cc: Shane Mathers <[REDACTED]>
Subject: RE: LA01/2018/0570/F - Keady Quarry

Hi Cathy,

As you know we are very disappointed that the Councils recommendation to the Committee on this application will be for refusal.

The source of the refusal stems from the fact that Council deem the fallback position of the existing permission no longer exist.

We contest that the fallback absolutely exists and the applicant fully intends to take up their existing development rights under B/124/78, should LA01/2018/0570/F ultimately end in refusal.

There is approximately 1.1 million tonnes of reserves within the existing permission available for extraction. Therefore, for the Council to assume the applicant after significant investment, is simply going to walk away from the site if LA01/2018/0570/F is refused is highly unrealistic.

There is no denying that the application before us is the applicants preferred scheme for the site, however the existing permission offers an alternative proposal. As stated throughout the application, we believe it is in the best interests of both the applicant and the Council if the proposal in question is worked as opposed to the existing permission.

Please see attached further information demonstrating that the fallback position exists and the very real possibility that the existing development rights will be exercised if necessary.

In light of the attached, we ask the Council to remove the application from this months' committee meeting and reconsider their position on the existence of the fallback situation and policy AMP2. We are confident that these areas would not be overlooked by the PAC.

Thanks for taking the time to consider this additional information.

Regards,

Thomas

Thomas Beattie, MSci,
Planning Consultant

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From: Cathy McKeary <[REDACTED]>
Sent: 30 July 2021 14:22
To: [REDACTED]
Subject: LA01/2018/0570/F - Keady Quarry

Thomas,

As agreed this application is being put forward for August Planning Committee on 25th August 2021. Subject to the report being finalised and agreed, it will be uploaded to the Council website on 11th August 2021. Due to Council protocol, I am unable to discuss either the report or the recommendation until this happens. Please familiarise yourself with the Council procedures for securing speaking rights if you or the applicant intends to speak at the meeting. Usually major applications such as this are heard first in the meeting, however, the agenda is subject to change or the Committee may decide to hear applications in a different order.

Regards

Cathy McKeary

Senior Planner
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 **RTPI**
Chartered Town Planner

Cathy McKeary
Causeway Coast and Glens
Local Planning Office
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Coleraine
BT51 3HS

August 20th, 2021

Dear Ms. McKeary

Reference: LA01/2018/0570/F

Location: Keady Quarry, 121 Broad Road, Limavady, BT49 OQP

Proposal: Quarry Extension and Retrospective Application for Extraction of Basalt

I am writing in response to the Councils Planning Report uploaded to the Planning Portal on the 11th of August 2021.

The Planning Department has determined that this application is unacceptable in this location because the standard of the existing road network at the Keady Road/Ringsend Road junction cannot safely accommodate the proposal due to substandard visibility.

The Planning Report notes the following as reasons for refusal:

10.1 The proposal is contrary to Planning Policy Statement 3, Access, Movement and Parking, Policy AMP 2, in that it would, if permitted, prejudice the safety and convenience of road users since it proposes to intensify the use of an existing road junction onto Ringsend Road at which visibility splays of 2.4 metres x 160 metres cannot be provided in accordance with Departmental standards.

10.2 The proposal is contrary to Planning Policy Statement 3, Access, Movement and Parking, Policy AMP 2, in that it would, if permitted, prejudice the safety and convenience of road users since adequate forward sight distance of 160 metres is not available on the public road, in accordance with Departmental standards.

Six-West on behalf of Ardstraw Quarries would like to provide the following comments.

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The main issues are:

1. Whether the site benefits from a legitimate fallback position which allows the quarry to operate within an extant approval.
2. In the event that the fallback is not accepted, that DfI Roads only have remit over the point of access onto the public road

Ground One – Is the fallback a material consideration?

In considering the grant of planning permission for development A, the decision maker must have regard to the ability of the Applicant to implement an existing or deemed planning permission for an alternative development B, which may have broadly similar planning implications. In shorthand, the Council must have regard to the Applicant's ability to implement a "fall back" planning permission

In this case, the alleged fallback position was the possibility that the existing planning permission will be fully utilized if this application was to be refused by the Planning Department at Causeway Coast and Glen Borough Council. The Council however contest that the fallback position here is not a true fallback position at all.

First off, the Council was fully aware that the Applicant was placing significant weight on the existing planning permission as a legitimate fallback position. It was therefore extremely disappointing to see the following outlined within the planning report:

'It has not been demonstrated that the 1979 approval is not exhausted nor obtainable.'

At no time across the entire three-year period that this application has been with the Council, has the Planning Department made the Applicant aware that they had concerns over the existence or accessibility of reserves within the existing consented area. It was therefore very disappointing to only learn of this on the release of the Planning Report, two weeks prior to the application being presented for discussion at the Planning Committee.

We don't accept that *'Due to Council protocol'*, the case officer cannot discuss either the report or the recommendation until the report is published. The Councils aim should be for openness and transparency throughout the entirety of the application. When possible, the Council should work with Applicants to find a solution, and this was never explored regarding this issue.

In considering this question of fall back, the Planning Report rightly outlines that *'For this approval to provide a legitimate fallback position, it would have to be capable of sustaining the quarry ie a greater than theoretical possibility that the development might take place.'*

We would highlight the case of Zurich Assurance v North Lincolnshire Council (2012), where the Judge outlined that

The prospect of the fallback position does not have to be probable or even have a high chance of occurring; it has to be only more than a merely theoretical prospect. Where the possibility of the fallback position happening is "very slight indeed", or merely "an outside chance", that is sufficient to make the position a material consideration

The Council must accept that there is significantly more than an outside chance or a mere possibility that the existing consent will be operated if this application does indeed succumb to a refusal. The Applicant fully intends to take advantage of the existing development rights. Ardstraw Quarries with over 40 years' experience in the quarrying industry clearly have the technical capabilities and the necessary infrastructure to pursue development within the existing consent.

The Planning Report continues:

'If the 1979 approval was capable of being fully implemented, it is likely that this would already have been done and would not have been left until now nor would other areas have been quarried out in preference to this part of the site.'

Regarding the above, there is no technical information to support the Councils opinion as to why they deem to existing reserves as exhausted or unobtainable. But rather a speculative statement, basing their case on the fact that reserves still remain untouched therefore they will never be obtained.

The Applicant has not been given the opportunity to provide evidence to the contrary and now wishes to take this opportunity to demonstrate that the existing permission can realistically be worked.

The evidence presented within the appendices of this report demonstrate the quantity of material available for extraction. Additionally, a proposed bench layout and cross sections through the existing consent are also demonstrated. Set at the appropriate intervals to comply with health and safety standards, this would allow this material to be successfully extracted.

The Planning Report states that *'Almost all the quarrying has taken place outside the approved site'*. The Council clearly accepts that the majority of the original material permitted in 1979 remains in situ and therefore available. It was judged to be viable at the time the application was made. Nothing has changed to discredit this judgment.

We note that the report states *'The Planning Department is mindful that a large part of the lands within the 1979 approval is now taken up by internal road arrangements.'*

Because of the access gradients, the access road does currently cover a moderate section of the existing planning permission. Within the industry, it is common for haul routes and access roads within quarries to constrain a proportion of mineral reserves. This is not an issue restricted to Keady Quarry.

However, if the application before us is to be refused then the need for this access to the existing quarry floor would be removed and would thus open the possibility for the entire existing permission to be worked.

Condition number 2 of the 1978 permission states that *'No extraction shall be permitted beneath the level of the public road'*. Levels of the public road vary from 190m AOD to 200m AOD. Road level at the site entrance is c. 200m AOD. Taking a conservative approach, the potential quarry floor within the existing permission has therefore been designed to extract to 200m AOD.

Ridge levels within the 1978 planning consent at its maximum reaches approximately 250m AOD. The drawing in appendix 1 takes into account the conditions imposed on the existing permission and the area outlined in green demonstrates the area available for extraction. Assuming a average face height of 15m - 11m over the area, calculated tonnage is an approximate 1.1 million tonnes. Appendix 2 shows this area in an isometric view.

Even if the access road to the current quarry floor was to remain, a rough calculation shows that there is approximately 2.5 hectares of land between the east of the existing access, down to road level. A planning application for a 2.5-hectare quarry in planning terms would be classified as major development. It is clear that there are still significant permitted reserves within this area regardless of whether the existing access covers a portion of the 1978 permission.

In *Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government (2009)*, Sullivan LJ noted that the materiality of the fallback position did not turn on precisely calculated nuances of probability.

In *Mansell v Tonbridge and Malling Borough Council [2017]*, Lindblom LJ stated that:

'It is in my view wholly unrealistic to imagine that were all such proposals to be turned down the owner of the site would not take advantage of the permitted developmentto the fullest extent possible.'

With the time and resources that Ardstraw Quarries have invested on this site, it is highly unrealistic to have concluded that, should application LA01/2018/0570/F be rejected, that the Applicant would simply walk away from their investment and do nothing to develop this site, considering the existing consent.

Lindblom LJ also stated that there is no rule of law that a *'firm design for an alternative scheme or on the landowner or developer having said precisely*

how he would make use of any permitted development rights available to him' was necessary to confirm that a fallback position exists.

As established by Lindblom above, such evidence is not always necessary. Nevertheless, alternative proposals to this planning proposal have been explored with an alternative bench layout and cross sections demonstrated in Appendix 3 and 4 respectfully.

There is no denying that this planning proposal is the preferred scheme by the Applicant. However, the information contained within the appendices should remove any doubt from the Council that the Applicant fully intends to take advantage of the existing planning permission for mineral extraction at this site if this proposal in question is ultimately refused.

Lindblom LJ concluded that the clear desire of the landowner to develop and maximise the value of the site is sufficient to demonstrate there is a real prospect to the fallback position.

The Council also stated that the scale of harm that would arise from this development proposal was another consideration in the assessment of the fallback position.

The report outlines at paragraph 8.72 that

'DfI Roads have identified that the access arrangements are unsatisfactory and that there would be harm to the public road network.'

Having demonstrated above that material is available and permitted, we believe the fallback position is confirmed. Within this fallback position, ie working within the existing planning consent, there are no restrictions in terms of vehicle movements or their distribution around the network. This sets the lawful baseline against which the potential impact of which this planning proposal should be assessed.

The traffic associated with Keady Quarry currently may travel to / from the quarry via both the northern junction with Broad Road, and the southern junction with Ringsend Road.

Given that the Broad Road junction is more constrained in terms of its geometry than the Ringsend Road junction, the Applicant agreed to direct all outgoing vehicles via the Ringsend Road junction.

Diverting traffic by agreement to the superior junction thereby reducing the potential for conflict, can only be considered to represent betterment / planning gain when compared with the baseline scenario.

We contend that if an unrestricted number of vehicle movements may pass through both junctions under an extant planning permission, there cannot be an adverse impact when compared with the unrestricted baseline. There is no justification for maintaining a highway objection based on harm. However, should the Council prefer, the Applicant would be content to allow vehicles to

pass through both junctions, in accordance with the current planning permission.

Ground 2: Misapplication of Policy

We also presented the Council with examples of planning appeals. These appeals contested that under PPS 3 AMP 2, Dfl Roads only have remit over the point of access onto the public road and that they cannot require upgrades beyond the point of access, when no direct access or intensification occurs.

The Planning Report states that *'The Planning Department considers that the appeals provided are not comparable as they refer to proposals for 2 and 3 dwellings and not major commercial works with heavy goods vehicles... Furthermore 2 of the appeals depend on the same interpretation of the AMP 2 policy which the Planning Department does not accept. Within the amplification of the policy AMP 2 permits Dfl Roads to consider the public road network surrounding the application site as is being required in this case.'*

Policy AMP 2 - Access to Public Roads states that

*'Planning permission will only be granted for a **development** proposal involving **direct access**, or the **intensification** of the use of an existing access, onto a public road where:*

- a) such access will not prejudice road safety or significantly inconvenience the flow of traffic; and*
- b) the proposal does not conflict with Policy AMP 3 Access to Protected Routes.'*

The finer details of policy AMP 2 which the council relies on to determine that the access to the site is unacceptable is the following: *'Consideration will also be given to the following factors... the standard of the existing road network together with the speed and volume of traffic using the adjacent public road and any expected increase.'*

However, we contest that the policy only permits Dfl Roads to consider the public road network surrounding the application site when the initial criteria of AMP 2 have been met i.e., where there is direct access onto a public road or when an intensification occurs.

This opinion was also taken by the PAC In the case of Foyle Property Services Ltd against the refusal of full planning permission.

Commissioner Beggs outlined that:

'The department believed that this particular bullet point allowed them to resist a proposal. However, it is clear to me that all the bullet points pertain to

a proposal involving the direct access or intensification of the use of an existing access'

Council note that they considered the appeals presented to them, however they declared within the Planning Report that the appeals are not comparable.

We consider that their interpretation of the policy is flawed. Policy AMP2 focuses on development and does not differentiate between a residential, commercial or an industrial application. The policy stipulations are constant regardless of what the development may entail and therefore the appeal cases remain relevant.

Whether or not the Planning Department choose to agree with the verdict of the PAC is irrelevant. The verdict of the PAC must be given substantial weight as ultimately it is the PAC would have the final say. If a similar scenario, like in this application, was brought before the PAC again, we are confident that the same conclusion would be reached.

Summary

The Planning Report acknowledges that *'The Council must give weight to any legitimate fallback position which allows the quarry to operate within an extant approval. If the quarry could continue to operate within the confines of permission B/1978/0124 - the "fall back" position, then it would be permitted to continue using the existing access and visibility arrangements with no requirement for upgrades.'*

In determining the materiality of a fallback position, the basic principle is that for a prospect to be a "real prospect", it does not have to be probable or even likely: a possibility will suffice.

As has been repeatedly pointed out, the traffic associated with Keady Quarry is already using and is permitted to use the road network and there will be no predicted increase in output from the quarry whether Ardstraw Quarries ultimately works the existing permission or this alternative proposal.

We trust the foregoing provides sufficient information to allow you to agree that the fallback does exist and therefore there can be no additional requirements for access and visibility beyond what is currently present.

With the application set to go before the Planning Committee on the 25th of August 2021, we would urge the Council to take into account the information contained within this report and reconsider their determination to the planning committee.

If ultimately the Planning Department stand by their existing recommendation and the Planning Committee agree with this refusal recommendation, the client and their legal team fully intends to submit an appeal to the Planning Appeals Commission.

Based on the other decisions we are aware of; we are confident the issues raised within this report would not be lost on a PAC Commissioner should it be necessary to determine this matter at Appeal. Any appeal will result in the Applicant seeking an order for the full award of costs against the Council for unnecessary expense because of unreasonable behaviour.

We hope however this can be resolved reasonably and amicably and look forward to your response on this basis.

Yours sincerely,

A solid black rectangular box used to redact the signature of Thomas Beattie.

Thomas Beattie, MSc,
Planning Consultant



Appendix 1

Existing Available Extraction Area



Appendix 2

Isometric View of Existing Consent



Appendix 3

Proposed Bench Layout Within Existing Consent



Appendix 4

Cross Sections Within Existing Consent



