Development Management
Practice Note

The Determination of Planning Applications

April 2015
Preamble

This Development Management Practice Note is designed to guide planning officers and relevant users through the fundamental legislative requirements associated with the determination of planning applications and deals primarily with procedures as well as good practice. It forms part of a series of new practice notes stemming from the Planning Act (Northern Ireland) 2011 (the 2011 Act) and any related subordinate legislation. The emphasis is very much on advice but where explicit legislative requirements must be followed these will be made clear.

Where appropriate this practice note will therefore highlight:

- Relevant legislation;
- Procedural guidance;
- Definitions;
- Best practice examples / relevant case law

This guidance is not intended to replace the need for judgement by planning officers and those making planning applications. Nor is it intended to be a source of definitive legal advice. Reference should be made to the actual legislation referred to in this document and if any discrepancy or conflict exists between the practice note and legislation the provisions of the legislation will prevail.
1.0 Introduction

1.1 This Practice Note\(^1\) refers to the fundamental legislative requirements and powers prescribed by the 2011 Act and relevant subordinate legislation in relation to the determination of planning applications.

2.0 Legislative context

2.1 The **Planning Act (Northern Ireland) 2011** (the 2011 Act) is the primary planning legislation for Northern Ireland and provides the basis for the development planning, development management and enforcement systems as well as other planning functions.

2.2 Under the 2011 Act councils have the primary responsibility for the implementation of the key planning functions of local plan-making, development management (excluding regionally significant applications) and planning enforcement. The Department retains responsibility for regional planning policy, the determination of regionally significant and called-in applications, and planning legislation.

2.3 **Sections 45 to 57 of the 2011 Act** lays down the legislative requirements and powers in relation to the determination of planning applications.

2.4 Relevant subordinate legislation includes:

- **The Planning (General Development Procedure) Order (Northern Ireland) 2015**; (referred to hereafter as the “GDPO”); and

- **The Planning (Development Management) Regulations (Northern Ireland) 2015** (referred to hereafter as the “Development Management Regulations”); and
2.5 The planning legislation referred to in this Practice Note as well as other legislation can be accessed on the Planning Portal at www.planningni.gov.uk.

3.0 Power to grant planning permission

3.1 Section 45 of the 2011 Act empowers a council or, as the case may be, the Department to determine planning applications, subject to the provisions laid down in the legislation.

3.2 Section 51 of the 2011 Act empowers the Department to make regulations about the consideration to be given, before planning permission for development of any class specified in the regulations is granted, to the likely environmental effects of the proposed development. Regulations made under Section 51 are the EIA Regulations.

4.0 Determination of planning applications

4.1 Section 45 of the 2011 Act lays down a number of legislative requirements that must be complied with by the council or, as the case may be, the Department in relation to the determination of planning applications and they involve the following:

- Local Development Plan - Plan-led System
- Any other material consideration
- Specified period (of time) related to the notice etc. of applications for planning permission

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1In this Practice Note, Department means the Department of the Environment unless otherwise specified; council means a district council unless otherwise specified and Commission means the Planning Appeals Commission unless otherwise specified.
• Representations
• Representations from those who have a legal interest in the land.

4.2 The details of the legislative requirements are set out below and apply to all planning applications for development in accordance with the hierarchy of development as laid down under Section 25 of the 2011 Act and Regulations 2 and 3 and associated Schedule under the Development Management Regulations, i.e., applications for local and major development are determined by a council, whilst major applications for regionally significant development and called-in applications are determined by the Department.

4.3 Under Regulation 4 of the EIA Regulations consideration has to be given by a council, the Department, or the Commission, as the case may require, to the likely environmental effects of proposed EIA development before making a planning decision.

4.4 There are other process and procedural matters associated with planning applications laid down in legislation, including pre-application community consultation; design and access statements; publicity arrangements and neighbour notification; consultation; decision making; additional planning controls for listed buildings and conservation areas. These matters and others are referred to in separate Development Management Practice Notes and are available on the Planning Portal at www.planningni.gov.uk.

Local Development Plan – The Plan-Led System

4.5 Section 6 (4) of the 2011 Act gives effect to what is a plan-led system and states:

“Where, in making any determination under this Act, regard is to be had to the local development plan, the determination must be made in accordance with the plan unless material considerations indicate otherwise.”
4.6 This therefore establishes a plan-led system and framework for decision making by giving the local development plan primacy in the context of making a planning determination under the 2011 Act. This includes the determination of a planning application, in that regard has to be had to the plan and the determination must be made in accordance with it unless material considerations indicate otherwise.

4.7 **Section 45 (1) of the 2011 Act** states:

“Subject to this Part and section 91 (2), where an application is made for planning permission, the council or, as the case may be, the Department, in dealing with the application, must have regard to the local development plan, so far as material to the application, and to any other material considerations, and,

(a) subject to sections 61 and 62, may grant planning permission, either unconditionally or subject to such conditions as it thinks fit; or

(b) may refuse planning permission.”

*Furthering sustainable development*

4.8 **Section 1 of the 2011 Act** states:

“The Department must formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development”.

4.9 Furthermore, under Section 1, the Department must exercise its functions with the objective of furthering sustainable development and promoting or improving well being. Under Section 5 it states that anyone who exercises any function under Part 2 Local Development Plans of the 2011 Act must exercise that function with the objective of furthering sustainable development. Bearing in mind these provisions and the provision in Section
(6) (4), determining planning applications by the council or, as the case may be, the Department must be exercised with the objective of furthering sustainable development.

4.10 There is also a statutory duty on government departments and district councils to promote sustainable development under Section 25 of Northern Ireland (Miscellaneous Provisions) Act 2006.

4.11 The NI Executive published ‘Everyone’s Involved - A Sustainable Development Strategy’ in May 2010, which sets out a number of priority areas for action and a number of strategic objectives to achieve in the pursuit of sustainable development. The Strategy states that Sustainable Development can be defined as "development which meets the needs of the present without compromising the ability of future generations to meet their own needs" (The Brundtland Report: "Our Common Future" - the Report of the 1987 World Commission on Environment and Development). Near the same time the NI Executive published ‘Focus on the Future – The Sustainable Development Implementation Plan 2010-14’.

Any other material considerations

4.12 There is no legal definition for material considerations; however they are held to include all the fundamental factors involved in land-use planning. Essentially a material consideration is one which is relevant to making a planning decision as to whether to grant or refuse an application for planning permission. Material considerations will vary depending on the specific circumstances of each case.

4.13 In case law an often quoted definition is by Cook J (Stringer v. M.H.L.G [1971]):

“In principle, it seems to me that any consideration which relates to the use and development of land is capable of being a planning consideration.
Whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances”.

4.14 There are two main tests in deciding whether a consideration is material and relevant:

(i) it should serve or be related to the purpose of planning - it should therefore relate to the development and use of land; and

(ii) it should fairly and reasonably relate to the particular application.

4.15 Examples of material considerations include the local development plan; planning policy; planning history; need; public opinion; consultation responses; existing site uses and features; layout, design and amenity matters; precedent; alternative sites and planning gain.

4.16 Examples of matters that would not be considered to be material considerations include the protection of private interests, moral considerations, political considerations and issues covered by other legislation.

4.17 In considering relevant material considerations there are two essential matters:

(i) all relevant material considerations must be fully considered and the appropriate weight given to each. It is not sufficient to rely on any one factor to the extent that all others are displaced; and

(ii) weight is a matter for the decision maker.

4.18 In determining planning applications the decision maker is the council or, as the case may be, the Department.
Specified Period (of time) related to the notice etc of applications for planning permission

4.19 Section 45 (2) and (3) of the 2011 Act requires that the council or the Department must not determine an application for planning permission before the end of a specified period of time related to the notice etc. of applications for planning permission (publishing and serving notice of an application as per Article 8 of the GDPO).

The 14 day specified period

4.20 Under the provisions laid down in Article 8 (1) (d) of the GDPO, a planning application cannot be determined by the council or, as the case may be, the Department before the expiration of a specified period of 14 calendar days from the date,

(a) on which the notice of the application is first published in a local newspaper; or

(b) stipulated on the notice served on any affected occupier on neighbouring land; or

(c) on which the application is first published on the website for the purpose of the advertisement of applications;

whichever date is the later or latest.

The 21 day and 28 day specified period or other agreed date

4.21 Under Article 13 (1) before determining an application for planning permission the council or, as the case may be, the Department shall, unless
one of the stated exceptions is applicable, consult\textsuperscript{2} with statutory consultees i.e. in accordance with Article 13 and Schedule 3.

4.22 Notwithstanding the provisions of Article 8 (1) (d), under Article 13 (4) and subject to Article 13 (5), the council or, as the case may be, the Department shall not determine a planning application

(a) before 21 calendar days after the date on which notice of the application, which is not EIA development, is given to the statutory consultee together with information that the council or, as the case may be, the Department considers will enable the consultee to provide a substantive response, or

(b) before 28 calendar days after the date on which notice of the application, which is EIA development, is given to the statutory consultee together with information that the council or, as the case may be, the Department considers will enable the consultee to provide a substantive response, or

(c) any other agreed date in writing between the consultee and the council or, as the case may be, the Department,

whichever is the latest.

4.23 However, in accordance with Article 13 (5), the specified time periods referred to in Article 13 (4), as listed in the above paragraph, do not apply if before the end of the specified period the council or, as the case may be, the Department, has received a substantive response concerning the application from each statutory consultee from whom a response was sought. Therefore, an application may be determined before the end of the specified period on foot of receiving a substantive response from a statutory consultee (or the last substantive response received where more than one consultee is involved), but not before the expiration of the period of 14 calendar days referred to in Article 8 (1) (d).

\textsuperscript{2} Refer to Development Management Practice Note 18 The Consultation Process and the Duty to Respond.
Representations

4.24 Although there is no legal definition for a representation in planning, it is held to be a comment, objection or expression of support in relation to a planning application that has been submitted to the council or, as the case may be, the Department.

4.25 **Section 45 (3) of the 2011 Act** requires that in determining any application for planning permission the council or the Department must take into account any representations relating to that application which are received within a 14 calendar day period from the date stipulated on the notice served on any affected occupier on neighbouring land in accordance with Article 8 (1) (d) (ii) and Article 8 (2) (f) of the GDPO.

Representations from those who have a legal interest in the land

4.26 **Section 42 of the 2011 Act** requires that the council or, as the case may be, the Department must **not** entertain an application for planning permission in relation to any land unless it is accompanied by one or other of four certificates, although there are exceptions as per section 42 (2). The certificates constitute a statement of ownership in relation to the land that is the subject of a planning application, not proof of ownership. The certificates under section 42 (1) (c) and (d) inform the council or, as the case may be, the Department that the applicant (or agent acting on their behalf) has sent the requisite notice of the application to those who have a legal interest in the land and consequently have been made aware of the application and can make representations if they so choose. The minimum period of requisite notice is 21 calendar days ending with the date of the application.

4.27 Where an application for planning permission is accompanied by a certificate (as per section 42 (1) (c) or (d)), the council or, as the case may be, the Department must not determine the application before the end of the period of 14 calendar days beginning with the date appearing from the certificate to be the latest of the dates of service of notices as mentioned in the certificate.
The council or, as the case may be, the Department has to take into account any representations received from persons who have a legal interest in land and notify them of its decision.

5.0 Powers to decline to determine subsequent (repeat) applications and overlapping (twin tracking) applications

5.1 As well as laying down legislative requirements for determining planning applications, the 2011 Act also contains powers which can allow councils and the Department not to determine planning applications under certain circumstances.

5.2 Sections 46 and 47 of the 2011 Act give the council and the Department, respectively, the discretionary power to decline to determine subsequent (repeat) applications for planning permission.

5.3 Sections 48 and 49 of the 2011 Act gives the council and the Department, respectively, the discretionary power to decline to determine overlapping (twin tracking) applications.

Purpose of powers

5.4 These powers inhibit the use of “repeat applications” being submitted.

5.5 The powers are not intended to prevent the submission of a subsequent planning application which has been amended in order to address objections to a previous application.

Power of council to decline to determine subsequent application (repeat application) - section 46 of the 2011 Act

5.6 There are four conditions (scenarios) where the council may use its discretionary power to decline to determine a subsequent (repeat) planning application. The council may decline to determine an application for planning
permission if in the period of two years ending with the date on which the application is received, and where the council thinks there has been no significant change in the local development plan that is material to the application and any other material considerations:-

(a) the Department has refused a similar application, or

(b) the Commission has dismissed an appeal against the refusal of a similar application or has dismissed an appeal against the non-determination of a planning application (under section 60) in respect of a similar application, or

(c) the council has refused more than one similar application and there has been no appeal to the Commission against any such refusal or, if there has been such an appeal, it has been withdrawn, or

(d) the Commission has refused a similar deemed application (under section 145 (5)).

5.7 In each of the scenarios described above, an application for planning permission is similar to another if (and only if) the council thinks that the development and the land to which the application relate are the same or substantially the same (section 46 (10)).

5.8 Where the reason(s) for refusal has/have not been addressed in the subsequent (repeat) application, or the changes in it are merely cosmetic in nature, the subsequent application may be considered to be the same or substantially the same and the council may decline to determine the repeat application.

5.9 The two year period is calculated by counting back from the date on which the subsequent application is received and ascertaining if there were any previous refusals for planning permission within the two year period.
Power of Department to decline to determine a subsequent application (repeat application) - section 47 of the 2011 Act

5.10 Under the discretionary power conferred by section 47 the Department may decline to determine a subsequent (repeat) planning application for a major development of regional significance (under section 26) for the development of any land if, in the period of two years ending with the date on which the application is received, and where the Department thinks there has been no significant change in the local development plan so far as is material to the application and any other material considerations the Department has refused a similar application.

5.11 An application for planning permission is similar to another if (and only if) the Department thinks that the development and the land to which the application relate are the same or substantially the same (section 47 (3)).

5.12 Where the reason(s) for refusal has/have not been addressed in the subsequent (repeat) application or the changes in it are merely cosmetic in nature, the subsequent application will be considered to be the same or substantially the same and the Department may decline to determine the repeat application.

5.13 The two year period is calculated by counting back from the date on which the subsequent application is received and ascertaining if there were any previous refusals for planning permission within the two year period.

Power of council to decline to determine overlapping application (twin tracking) - section 48 of the 2011 Act

5.14 There are four conditions (scenarios) where a council may use its discretionary power to decline to determine an overlapping planning application (twin tracking). A local council may decline to determine an application for planning permission for the development of any land which is made on the same day as a similar application or where:-
(a) a similar application is under consideration by the council and the
determination period has not expired, or

(b) a similar application is under consideration by the Department, or the
Commission, on an appeal under section 58 or 60 of the 2011 Act, and
the Department or the Commission has not issued its decision, or

(c) a similar application has been granted or refused by the council or has
not been determined by the council within the determination period and
the time within which an appeal could be made to the Commission
under section 58 or 60 has not expired, or

(d) a similar application is under consideration by the Commission which is
a deemed application (under section 145 (5)) and it has not issued its
decision.

5.15 An application for planning permission is similar to another if (and only if) the
council thinks that the development and the land to which the application
relate are the same or substantially the same (section 48 (7)).

5.16 The determination period is the period specified under Article 20 of the
GDPO, which is 16 weeks for major development or in any other case, 8
weeks, or such extended period as agreed in writing between the applicant
and the council. The determination period for a planning application for EIA
development is 16 weeks under the EIA Regulations as applied by
Regulation 19. In relation to applications made under planning condition,
reference should be made Article 12 of the GDPO and Regulation 19 of the
EIA Regulations.

5.17 If a council exercises the discretionary power under section 48 to decline to
determine an application made on the same day as a similar application then
the council may not also exercise that power to decline to determine the
similar application. This ensures that one of two similar applications received
on the same day can be determined by the council (section 48 (9)).
Power of Department to decline to determine overlapping application (twin tracking) - section 49 of the 2011 Act

5.18 Under the discretionary power conferred by section 49 (1) the Department may decline to determine a planning application for a major development of regional significance (under section 26 (5)) for the development of any land which is:

(a) made on the same day as a similar application, or

(b) made at a time when a similar application is under consideration by the Department.

5.19 An application for planning permission is similar to another if (and only if) the Department thinks that the development and the land to which the application relate are the same or substantially the same (section 49 (2)).

5.20 If the Department exercises the discretionary power under section 49 to decline to determine an application made on the same day as a similar application then the Department may not also exercise that power to decline to determine the similar application. This ensures that one of two similar applications received on the same day can be determined by the Department.

Similar Applications

5.21 If the council or the Department considers that an application is a "similar application" then it is not automatically obliged to decline to determine it because the power to decline to determine is discretionary for a council under sections 46 and 48 and for the Department under sections 47 and 49 of the 2011 Act.
**Significant Change**

5.22 Each individual planning application should be assessed on its own merits and a council or the Department should decide what constitutes a “significant change” in material considerations in the individual case having regard to the overall intention of the discretionary powers.

5.23 A council or the Department should come to a view that a significant change in material considerations has or has not occurred and proceed to either determine the application or decline to do so and inform the applicant and agent.

**Notifying an applicant - by the council**

5.24 When the council declines to determine any planning application it must notify the applicant that it has exercised its discretionary powers under either section 46 or 48 to decline to determine the application and include the reason(s) for the decision.

5.25 However, if a council fails to notify the applicant of its decision within 16 weeks for a major development, or 8 weeks in any other case, or such extended period agreed in writing between the applicant and the council (in accordance with Regulation 20 of the GDPO), then the applicant has the usual right of appeal for non-determination of a planning application under section 60 of the 2011 Act.

5.26 The time periods stipulated under Regulation 20 of the GDPO also apply where a planning application is made to the council and there is a determination or referral of the application to the Department under section 29 of the 2011 Act (call in of an application). If the council fails to notify the applicant of the determination or referral of the application within 16 weeks for a major development, or 8 weeks in any other case, or such extended period agreed in writing between the applicant and the council (in accordance with Regulation 20 of the GDPO), then the applicant has the usual right of appeal.
appeal for non-determination of a planning application under section 60 of the 2011 Act.

_Notifying an applicant - by the Department_

5.27 When the Department declines to determine any planning application it should notify the applicant that it has exercised its discretionary powers under either section 47 or 49 to decline to determine the application and include the reason(s) for the decision.

5.28 There is no right of appeal for non-determination of a planning application under section 60 of the 2011 Act for major development under section 26 of the 2011 Act.

_No right of appeal against decision to decline_

5.29 Under sections 46 and 48 the judgement to decline to determine a planning application lies with the council and there is no right of appeal against the council refusing to determine an application.

5.30 Under sections 47 and 49 the judgement to decline to determine a planning application lies with the Department and there is no right of appeal against the Department refusing to determine an application.

6.0 Duty to decline to determine application where Section 27 of the 2011 Act not complied with (Section 50)

6.1 **Section 27 of the 2011 Act** places an obligation on a prospective applicant to consult the community in advance of submitting a planning application that falls within the category of “major developments” as per section 25 (except a development to which section 213 applies, that is, urgent crown development). The pre-application community consultation process was introduced by the 2011 Act and applies to major developments that the
council determines and major applications of regional significance that the Department determines.

6.2 **Section 50 of the 2011 Act** places a mandatory duty on the council or, as the case may be, the Department in that they **must** decline to determine an application for the development of any land if, in the opinion of the council or the Department, compliance with Section 27 was required as respects the development and there has not been such compliance.

6.3 However, before deciding whether an application must be declined the council or, as the case may be, the Department may request the applicant to provide specified additional information within a period of 21 calendar days beginning with the day on which it was requested in accordance with Regulation 6 of the Development Management Regulations.

6.4 Where the council or, as the case may be, the Department declines to determine an application the council or, as the case may be, the Department **must** notify the applicant of the reason for its opinion.

7.0 **Assessment of environmental effects and EIA development**

7.1 Under **Section 51 of the 2011 Act** the Department has by regulations, the EIA Regulations, made provision about the consideration to be given, before planning permission for development of any class specified in these regulations can be granted, to the likely environmental effects of the proposed development. The regulations also make provision about the assessment of the likely effects of development on the environment.

*Prohibition on the grant of planning permission or subsequent consent without the consideration of environmental information*

7.2 **Regulation 4 (2) of the EIA Regulations** states:-
‘A council, the Department or the Commission, as the case may require, shall not grant planning permission or subsequent consent pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so’.

7.3 Consideration has to be given by the council, the Department or the Commission, as the case may require, to the likely environmental effects of proposed EIA development°F before making a planning decision and shall not grant planning permission or subsequent consent pursuant to an application unless they have first taken the environmental information into consideration, and the council, the Department or the Commission, as the case may require, shall say in their decision that they have done so.

8.0 Other legislative provisions

8.1 Section 52 of the 2011 Act deals with the conditional grant of planning permission and section 53 deals with the power to impose aftercare conditions on grant of mineral planning permission.

8.2 Section 54 of the 2011 Act deals with planning permission to develop land without compliance with conditions previously attached and section 55 deals with planning permission for development already carried out. 4

8.3 Under section 56 of the 2011 Act the Department has the power make a development order to specify how applications are to be dealt with by councils and may do this by way of giving directions. Such a development order, the GDPO, contains provisions under Articles 17, 18 and 19 for the Department to give directions to councils. Such directions can vary in scope, from applying to individual applications to applying to types of development.

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3 Refer to Development Management Practice Note 9 Environmental Impact Assessment.
4 Refer to Development Management Practice Note 4 Types of Planning Applications.
9.0 Effect of planning permission

9.1 Section 57 (1) of the 2011 Act provides that planning permission, unless otherwise specifically conditioned, relates to the land which is the subject of the permission and to any persons having an interest in that land. This makes clear that planning permission goes with the land to which it relates and to those who have an estate in the land (e.g. the land owner(s)). Consequently, land can transfer from one owner to another but the planning permission for development rests with the land which is the subject of the grant of planning permission.

9.2 Section 57 (2) of the 2011 Act states the grant of planning permission may specify the purpose for which the building is to be used. If no purpose is specified the permission shall be construed as permission to use the building for the purpose for which it was designed.