



An  
Bord  
Pleanála

## Inspector's Report PL09.248013.

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| <b>Development</b>                  | Restoration of existing excavated gravel pit previously granted planning permission. |
| <b>Location</b>                     | Boherkill, Rathangan, Co. Kildare.   |
| <b>Planning Authority</b>           | Kildare County Council.  |
| <b>Planning Authority Reg. Ref.</b> | 16/526.  |
| <b>Applicant</b>                    | Micheal Ennis.   |
| <b>Type of Application</b>          | Permission.  |
| <b>Planning Authority Decision</b>  | Permission with conditions.  |
| <b>Type of Appeal</b>               | First Party  |
| <b>Appellants</b>                   | Michael Ennis.<br>.  |
| <b>Observers</b>                    | None.  |
| <b>Date of Site Inspection</b>      | 10 <sup>th</sup> May 2017 and 1 <sup>st</sup> June 2017.                             |
| <b>Inspector</b>                    | Derek Daly.  |

## 1.0 Site Location and Description

- 1.1. The proposed development is located in the townland of Boherkill a rural area approximately 3 kilometres south of Rathangan and 6 kilometres north of Kildare town in County Kildare. The site is located in a rising upland area with Dunmurry Hill located to the southeast and other hilltops to the north.
- 1.2. The appeal site is located off and has access to the R401 Regional Route with the regional route defining the site's western/southwestern boundary. The remaining boundaries adjoin agricultural lands to the north east and southeast with the exception of a dwelling which also has frontage onto the R401.
- 1.3. On the site is a gravel pit which has been extensively extracted resulting in a lowering of levels in particular in the northern section of the site.
- 1.4. On the site there is plant associated with the extraction process and a wheel wash and weighbridge near the site entrance.
- 1.5. The site has a stated area of 10.7 hectares.

## 2.0 Proposed Development

- 2.1. The development as submitted to the planning authority on the 26<sup>th</sup> of May 2016 as stated in the public notices was for
  - The restoration of an existing excavated gravel pit to the original ground level use and use as agricultural land.
  - The pit was the subject of previous planning permissions 01/1270, 07/188 and 15/515 and condition 2(a) of 07/188 required restoration to original ground level.
  - In order to comply with the requirement of restoration the proposal is to import c1,500,000 tonnes of inert natural material, inert recovery construction material and reinstating with a top of existing overburden.
  - A permission of 10 years is sought. Based on this it is proposed to import approximately 150,000 tonnes of material to the site.

In the cover letter accompanying the application the restoration of the site was the subject of discussion with the planning authority and it is indicated that the planning authority had determined that importation of material was permitted under the terms of 07/188.

The application is accompanied by an EIS.

2.2. Further information was submitted on the 21<sup>st</sup> of October 2016 which included;

- A landscape and visual impact assessment;
- Further drawings in relation aspects of the development including buildings and plant on the site; boundaries of extraction areas and depths of extraction.
- Further information in relation to hydrogeology.
- Additional information in relation to noise impact and additional baseline data.
- Further information in relation to the restoration works.
- Details relating to disposal of wastewater.
- A revised heritage report.
- Details relating to the haul route, and in relation to parking and on-site traffic management.

## 3.0 Planning Authority Decision

### 3.1. Decision

The decision of the planning authority was to grant permission subject to 33 conditions. Conditions of note include;

- Condition no 2 relates to a 10-year permission for the proposed development.
- Condition no 4 refers to the phasing and manner of the restoration operation. and the implementation of site plan.
- Condition no. 5 relates to submission of the annual tonnage imported to the site.
- Condition no. 8 relates to archaeology.

- Condition no. 25 relates to the haul route to be used.
- Condition no 32 relates to hours of operation.
- Condition no 33 relates to a financial contribution of €160,500.

### 3.2. Planning Authority Reports

#### 3.2.1. Planning Reports

The planning report dated the 14<sup>th</sup> of July 2016 refers to;

- Submissions and reports received.
- The site's planning history.
- Statutory policy and guidelines.
- Key planning issues and assessment.
- The merit of restoring and rehabilitating the site is accepted.
- There were issues in relation to aspects of the information submitted in relation to the assessment of visual impact.
- Further assessment of the impact on the amenities of properties in the vicinity was required in particular in relation to noise.
- Further clarification was necessary in relation to traffic in particular haul routes and traffic management on and in the vicinity of the site in relation to traffic safety.
- No significant issues were identified in relation to water.
- Further information was required in relation to habitats as outlined in the report of the heritage officer.
- Further information was recommended relating to 20 matters for clarification.

The planning report dated the 20<sup>th</sup> of January 2017 considered the further information submitted and indicates;

- Issues in relation to landscape and visual impact are addressed.
- Hydrogeological matters are addressed.

- Issues raised by the heritage officer are addressed.
- Transportation matters are addressed.
- The use of the lands for extraction of sand and gravel over an extraction area of 8.78 hectares is authorised and permitted.
- An EIS and AA screening report was also carried out.
- The report recommended permission.

### 3.2.2. Other Technical Reports

The heritage officer in a report dated the 12<sup>th</sup> of July 2016 requests further information in relation to a detailed habitat map a bird survey and details of bio security in relation to the inert material imported to the site.

The environment report requests further information in relation to hydrology, and effects of local water. Clarification required in relation to baseline noise levels. A subsequent report in relation to the further information submitted raises no objections.

The environment section report dated the 17<sup>th</sup> of October 2016 has no objections to the development and includes in the report recommended conditions.

The **roads** report dated the 20<sup>th</sup> of October 2016 and the 1<sup>st</sup> of December 2016 raise no objections.

### 3.3. Prescribed Bodies

- 3.3.1. Submission received from DAHG in relation to archaeology requesting monitoring.
- 3.3.2. EPA acknowledged receipt of application and referred to statutory requirements under the Waste Management Acts and that the development will require a licence.
- 3.3.3. An Taisce in a submission refers to unauthorised extract an issue refuted in a later submission by the applicant dated the 29<sup>th</sup> of June 2016 to the planning authority.
- 3.3.4. TII in submissions dated the 16<sup>th</sup> of June 2016 and 23<sup>rd</sup> of November 2016 raise no objection.

### 3.4. Third Party Observations

Submission was received from Environmental Action Alliance-Ireland indicating the EIS is legally flawed, there is a failure to describe a significant amount of unauthorised development, the full nature and extent of the proposed development is not identified, and the application is therefore invalid. This view is restated in relation to the response of further information.

## 4.0 Planning History

The site has a planning history.

### **ABP Ref PL09.130086/P.A. Ref. No. 01/1270**

Permission was granted for the retention of the extraction of gravel, an extension to the pit and ancillary screening and grading of material on the site subject to 21 conditions.

- Condition no 6 refers to the submission of a landscaping and restoration plan to be submitted and agreed with the planning authority.
- Condition no 17 refers to ongoing monitoring and subsection (8) of this condition required an annual payment in relation to monitoring required by subsections (1), (2) and (3) of the condition. Subsections (1), (2) and (3) relate to sound and dust recording and monitoring.
- Condition no 21 refers to payment of a development contribution.

The condition stated that;

*“the developer shall pay a sum of money to the planning authority as a contribution towards expenditure that was/or that is proposed to be incurred by the planning authority in respect of road works (including any necessary footpaths and vehicular passing bays) and public lighting facilitating the proposed development”.*

The condition as applied was subject to the operative statutory provisions pertaining section 26(h) of the Local Government (Planning and Development) Act 1963.

### **ABP Ref PL09.226737/P.A. Ref. No. 07/188**

Permission was granted for the retention of the extraction of gravel of an area of 2.17 hectares and an extension of the working area of 3.772 hectares on the appeal site subject to conditions.

The permission was granted for a period of 7 years to expire on the 27<sup>th</sup> of August 2015.

Condition no 2 is of note limiting the life of the quarry to seven years, limiting the output of the quarry and requiring restoration works to be carried out on the site.

Condition no 5 refers to restoration works on the site.

The appeal as determined by the Board under section 139(1) related to the removal of condition nos 26 and 29 relating to contribution conditions.

### **P.A. Ref. No. 15/515**

Permission was granted to extend the duration of the planning permission granted under 07/188 until the 25<sup>th</sup> of August 2020.

### **P.A. Ref. No. 15/657**

An application in relation to restoration of a similar nature to the current proposal was declared invalid.

## **5.0 Policy Context**

### **5.1. Quarries and Ancillary Activities Guidelines for Planning Authorities 2004.**

- 5.1.1. The purpose of the guidelines is to offer guidance to planning authorities on planning for the quarrying industry through the development plan and determining applications for planning permission for quarrying including restoration of sites.
- 5.1.2. Chapter 3 refers to the environmental implications and that there are a wide range of potential environmental effects caused by quarries which need to be considered when dealing with proposals for new development, or for significant expansion of existing extractive industries and such impacts may arise during the development stage or may endure throughout the life of the quarry, possibly over several decades. The impact it is indicated can be permanent, even after closure and

decommissioning, unless carefully planned rehabilitation and restoration is undertaken.

- 5.2. **The “Development Contributions Guidelines for Planning Authorities” published by the Department of the Environment, Community and Local Government in January 2013**, require planning authorities in reviewing their development contributions schemes to include waivers but in relation to the nature of development proposed no waiver is referred to.

The Guidelines however further state in section 2 under the heading double charging that *“The practice of “double charging” is inconsistent with both the primary objective of levying development contributions and with the spirit of capturing “planning gain” in an equitable manner. Authorities are reminded that any development contribution already levied and paid in respect of a given development should be deducted from the subsequent charge so as to reflect that this development had already made a contribution”*.

### 5.3. **Development Plan**

- 5.3.1. The operative plan is the Kildare County Development Plan 2017-2023.
- 5.3.2. Chapter 10 of the plan relates to rural development
- 5.3.3. Section 10.4.9 in relation to mineral resources indicates that these “resources are generally located within the rural area. The nature of the extractive industry is such that the industry must be developed where the resource occurs. The industry can have damaging environmental effects and permission will only be granted where the Council is satisfied that residential and natural amenities will be protected, pollution will be prevented and aquifers and ground water safeguarded. Section 10.7 outlines in more detail considerations in relation to the sector together with appropriate policies and objectives”.
- 5.3.4. Sections 10.7 relates to extractive industries and section 10.7.4 in particular with post closure of extractive industry and that post closure uses must have regard to the likely land-use context at the time of closure. Policies are outlined in 10.7.8 including EI10 which “require detailed landscaping and quarry restoration plans to be submitted with each application. Habitats and species surveying shall be carried out and shall influence the restoration plan for the site”.



5.3.5. Chapter 14 relates to Landscape, Recreation and Amenities. The site is within defined as the Chair of Kildare an upland area of special sensitivity (map 14.1), which are “areas with low capacity to accommodate uses without significant adverse effects on the appearance or character of the landscape having regard to special sensitivity factors”.

5.3.6. Chapter 17 outlines development standards in relation to a range of development including extractive industries (section 17.9.6).

#### 5.4. **Kildare Contribution Scheme 2015.**

5.4.1. The Kildare Contribution Scheme 2015 was adopted on the 5<sup>th</sup> of November 2015.

5.4.2. Section 7 of the scheme relates to Apportionment of Contributions and indicates “*the development contribution allocated to each class of public infrastructure was determined having regard to the contribution requirement set out in the Capital Programme*”. In relation to Roads the percentage allocation to non-residential i.e. commercial and retail was 71.8%.

5.4.3. Section 8. Refers to the level of general contributions for Kildare County Council and the following are relevant to this appeal;

- *(viii) Waste Recovery Facility including the deposition of soil / stones on Lands \*Contributions will be applied at €15,000 per hectare or part thereof.*

*(\*Classification of a recovery facility as per First Schedule of Waste Management Permit Regulations SI No. 165).*

- *(ix) Landfill Domestic Houses. Development Contributions will apply to all landfill, including landfill required for raising a site for construction of a dwelling. The rate applied for the landfill element (A) of the development shall be €15,000 per hectare or part thereof. The rate applied for the dwelling (B) shall be in addition to that for the landfill and shall be applied in accordance with this Scheme. The contribution levied (landfill + dwelling) shall be equal to (A) or (B), whichever is the greater.*
- *(xiv) Miscellaneous Developments*

*Miscellaneous developments, not listed individually above, will have the following development contribution rates applied –*

*Built Rate €27.51 per sq. metre.*

*Open Rate €15,000.00 per hectare.*

*“Built” applies to all developments involving development not specifically defined in the categories of development set out above e.g. smoking areas etc.*

*“Open” development is defined as development not included in the categories set out above which involves the carrying out of any works on, in, over or under any land or the making of any material change in the use of any land.*

5.4.4. Section 9 of the scheme relates to modification / retention applications and in this regard I would refer to

- a. Modification

An application to modify a previously permitted development, including change of house type, will be assessed on the basis of the Development Contribution Scheme rates current at the date of issue of the decision to grant permission, with a deduction for any contributions paid on any previously permitted development.

Where modifications are deemed to be minor as per the Planner’s Report, there is no additional area to that previously granted, and contributions have been received in full on the previous permission, no further contributions will be applied.

## 5.5. **Natural Heritage Designations**

5.5.1. The appeal site is not within or proximate to any Natura 2000 site. The nearest site is Pollardstown Fen approximately 6 kilometres east of the site.

## 6.0 **The Appeal**

### 6.1. **Grounds of Appeal**

6.1.1. **The appellant** c/o Kildare Architects and Design Ltd in a submission dated the 16<sup>th</sup> of February 2017 refer to;

- The appeal relates solely to condition a financial contribution of €160,500.
- The appellant’s view is that the condition is outside of the ambit of the Kildare Contribution Scheme 2015 and that the scheme has not been properly applied.

- Reference is made to a permission granted under ABP Ref PL09.130086/ PA Ref 01/1270 and to condition nos 6 and 21.
- In relation to condition no 21 on the payment of a development contribution agreement was reached with Kildare County Council in 2003 on works to be carried out in lieu of a payment.
- Reference is made to ABP Ref PL09.226737/P.A. Ref. No. 07/188 and that condition no 5 refers to restoration works.
- In relation to the levy of €160,500 there is no assessment as to whether a contribution should be sought in the circumstances of the case and the calculation is based on a rate of €15,000 per hectare and based on categories landfill development and waste recovery development.
- Reference is made to sections 8(viii), (ix) and (xiv) of the Kildare Contribution Scheme.
- In relation to the restoration of the site the appellant contends that it was clear and incontrovertible that the original permission for the site ABP Ref PL09.130086/P.A. Ref. No. 01/1270 envisaged the restoration of the site.
- It is contended therefore that condition no.21 of that permission which was ultimately satisfied the initial permission in relation to contributions and subsequent permissions also included for future restoration.
- The appellant by condition is statutory obliged to restore the site and legally compelled to do so. It is not a case of seeking permission to carry out particular works there is a requirement in this case to restore the site.
- The restoration of the site represents the continuation and completion of a longstanding and historic works operation and the principle of fairness militates against the imposition of a new levy.
- The appellant contends that notwithstanding whether permission is actually needed for the restoration works the application was lodged to ensure that the application as lodged ensured this phase of the development is undertaken in accordance with modern planning standards and practice.

- The current planning application is the vehicle to comply with previously stated conditions of planning permissions.
- Reference is made to the 2013 Department Guidance in respect of double charging.
- Previous permissions cover the restoration of 8.7 hectares and it the appellant considers reasonable that as the application site covers 10.7 hectares the maximum levy that might fall would relate to the additional 2 hectares.
- This would accord with section 9(a) of the current contribution scheme in relation to modification applications and the appellant indicates that the additional 2 hectares are not excavated lands and are used for stockpiling and are not to be restored. Given that the material in this area simply involves taking material stored and depositing it in another area of the site the appellant contends that it is non-chargeable.
- The requirement for a contribution is considered manifestly unreasonable and the Board is requested to remove condition no 33.

## 6.2. Planning Authority Response

The planning authority in a response dated the 16<sup>th</sup> of March 2017 refers to;

- The calculation of the contribution was applied on the development in accordance with sections 8(viii) and (ix) of the Kildare Contribution Scheme.
- The previous levy related to a special transportation levy and not the general levy.
- The levy was applied correctly.

## 6.3. Appellant Response

The appellant in a response dated the 25<sup>th</sup> of April 2017 refers to;

- The main issue therein comprises the context within which this application was set especially the doubt as to whether permission was needed and the wish of the landowner to ensure the process was undertaken in accordance with planning law and best practice and this was not taken in account by the county council.

- The conditions of the permission required restoration to original levels and this requires importation of material.
- It was the insistence of the planning authority that the application was made and the appellant position that an application was unnecessary. There was also an insistence on an EIS notwithstanding that EIA was carried out on a previous application.
- The current proposal arises from complying with a condition already imposed and it must be accepted that any contribution that is required to be paid must have arisen as part of a previous determination and there is no dispute that all the contributions required as part of that previous determination have been paid.
- Restoration of the site always formed part of previous applications and decisions on the site, the landowner is statutorily required and compelled to restore the to its original state.
- Lands not excavated are taken into consideration in calculating the levy.
- The restoration of the site represents a part of a continuous operation of the site and is not permission to carry out particular works but part of a process for the completion of the development.
- The Board are requested to remove the condition.

## 7.0 Assessment

- 7.1. This appeal is a first part appeal in relation to condition no 33 requiring the payment of a financial contribution of €160,500.
- 7.2. The grounds of appeal refer to an application as made for the works outlined and matters are raised as to whether the application was necessary given the site history. In relation to this matter a valid planning application was lodged and determined by the planning authority and an appeal arising from the planning authority's decision was lodged in relation to the decision of the planning authority to the Board.

7.2.1. The proposal is in effect a reversal of the permitted development with the importation of material, the infilling of voids and excavated areas and grading to restoration. The proposal is to import c1,500,000 tonnes of material to the site over a 10-year period.

**7.3. Appeal against condition 33.**

7.3.1. The appellant has outlined in the grounds of appeal and in a further response the view that the condition is outside of the ambit of the Kildare Contribution Scheme 2015 and that the scheme has not been properly applied. I have summarised the views of the appellant in sections 6.1 and 6.3 of this report but essentially the application of the levy is questioned given the site's planning history with regard to the requirements of conditions of previous planning permissions and also that the imposition of the contribution is double charging as a contribution was applied by condition in previous permissions and subsequently complied with.

The planning authority in response considers that the calculation of the contribution was applied on the development in accordance with the Kildare Contribution Scheme. The levy was applied correctly and that the previous levy related to a special transportation levy and not the general levy.

7.3.2. The principle of applying development contributions where planning permission is granted for development is acceptable and provided for in statutory provisions. In addition, there is department guidance in relation to the preparation and application of a development contributions scheme and in this regard I would refer to the "Development Contributions Guidelines for Planning Authorities" published by the Department of the Environment, Community and Local Government in January 2013 and relevant section outlined in section 5.2 of this report.

7.3.3. The planning authority have adopted and updated a contribution scheme, the Kildare Contribution Scheme 2015 which was adopted on the 5<sup>th</sup> of November 2015 and the relevant provisions in relation to this appeal are outlined in section 5.4 of this report. Essentially the planning authority applied the levy based on sections 8 (viii) Waste Recovery Facility and (ix) Landfill Domestic Houses of the scheme with the rate at €15,000 per hectare or part thereof.

7.3.4. Having reviewed the submissions, as part of the permissions granted on the site in the original permission and subsequent permissions to extend the extraction area, there was a requirement to restore the site to the original levels and details relating

to this restoration formed part of the submitted documentation and terms of granting planning permission. To comply with the requirements of the permissions given that material was extracted from the site, restoration to original levels requires the importation of material to the site.

- 7.3.5. There was a condition requiring a contribution in ABP Ref PL09.130086/P.A. Ref. No. 01/1270, number 21, the terms of which were subsequently complied with. The planning authority have indicated that the previous levy under this condition related to a special transportation levy and was not a general levy as provided for in the current development contribution scheme.

The planning authority is correct in referring to the contribution as a roads related contribution as the condition states *“a contribution towards expenditure that was/or that is proposed to be incurred by the planning authority in respect of road works (including any necessary footpaths and vehicular passing bays) and public lighting facilitating the proposed development”*.

The contribution however as applied did, I consider, comply with and was subject to the then operative statutory provisions pertaining, section 26(h) of the Local Government (Planning and Development) Act 1963.

- 7.3.6. The issue, therefore, arises as to whether the application of condition no 33 would be considered as double charging which the 2013 guidelines and I consider that this is the case. I would accept that that the contribution was limited to roads related expenditure and there were subsequent extensions to the extraction area but the works referred to in that condition facilitated improvements to the road network and the applicant/appellant carried out works in agreement with the planning authority to comply with the condition. The road improvement works in question facilitated all works including restoration of the site.
- 7.3.7. If there is a case for the application of a contribution a number of matters could be considered in determining the amount of the contribution.
- 7.3.8. Firstly, payment of at the rate at €15,000 per hectare or part thereof for the overall site is not reasonable as, I consider, this would be double charging as already referred to.
- 7.3.9. Secondly if it considered that the contribution addresses solely the roads element of the contribution scheme, consideration could be given to payment of the non-roads

element. In this regard I would refer to section 7 of the scheme which relates to apportionment of contributions and which indicates *“the development contribution allocated to each class of public infrastructure was determined having regard to the contribution requirement set out in the Capital Programme”*. In relation to roads the percentage allocation to non-residential i.e. commercial and retail was 71.8%. The non-roads apportionment would, therefore, amount to 28.2% of the overall levy of €15,000 per hectare or part thereof.

#### 7.3.10.

Thirdly if an apportionment of 28.2% is to be considered, to what site area should it apply. The applicant has contended that the overall site of 10.7 hectares should not apply as this includes lands not used for extraction and includes lands used for stockpiling material including top soil and overburden to be used in the restoration process and the overall extent of the extraction area on the site did not therefore cover the 10.7 hectares.

There was an additional 5.942 hectares of an area of extraction granted permission subsequent to ABP Ref PL09.130086/P.A. Ref. No. 01/1270 and perhaps the payment of a contribution could be considered for this area of the site. I do not consider that application of the roads contribution as reasonable as the road network was upgraded and the benefits were for all road users but an apportionment of non-roads could possibly be considered.

If this was applied the amount of the contribution would be €25,134.66.

#### 7.3.11.

Having considered the matter, I would be of the view that applying a development contribution is double charging. The works arising in the current proposal result from works required to be carried out as a result of the original and subsequent permissions and conditions of the permission requiring restoration and the manner of restoration.

The permission also provided for payment of a contribution in accordance with the statutory provisions which applied at the time of the grant of permission and the condition was complied with. The works in question benefitted all road users including those arriving and departing the site.



### 7.3.12.

Although the Kildare Contribution Scheme 2015 does not address the issue of double charging specific to the matter in question the department guidance does make specific reference to the matter. In this context I do not consider that the levy was applied correctly.

I would also note in this regard section 9 of the Kildare Contribution Scheme 2015, which relates to modification / retention applications and in this regard I would refer to subsection (a) Modification where it is indicated that *“an application to modify a previously permitted development, including change of house type, will be assessed on the basis of the Development Contribution Scheme rates current at the date of issue of the decision to grant permission, with a deduction for any contributions paid on any previously permitted development. Where modifications are deemed to be minor as per the Planner’s Report, there is no additional area to that previously granted, and contributions have been received in full on the previous permission, no further contributions will be applied”*.

The scheme provides for consideration of previous schemes and circumstances and rates then pertaining at the period of the grant of permission and payments already made. I would accept that the proposed development/application is not minor but it is consequent to previous planning permissions and compliance with those permissions and this has not been applied or addressed in relation to the calculation of the levy or whether it was required to be paid or any allowance for reduction based on payments already made.

- 7.4. Having considered the submissions received in relation to this appeal and the documentation submitted I recommend that condition no. 33 be omitted.

## 8.0 **Reasons and Considerations**

Having regard to the fact that the subject application is for the reinstatement of a gravel pit development permitted by the granting of planning permission the conditions of which required;

- (1) the restoration to the site to original levels and

(2) required the payment of a development contribution to the planning authority in accordance with the statutory provisions pertaining with the grants of permission and the payment of which was subsequently complied with;

it is considered that the payment of a further contribution would not therefore be appropriate having regard to the provisions as set out in the “Development Contributions Guidelines for Planning Authorities” published by the Department of the Environment, Community and Local Government in January 2013 in particular section 2 of the said guidance and also to section 9 of the Kildare Contribution Scheme 2015 which refer to modifications of previously permitted development and deduction for any contributions paid on any previously permitted development.

It is, therefore, considered that the terms of the Kildare County Development Contribution Scheme 2015 – 2022 have not been properly applied in this case and condition no 33 should be removed.

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Derek Daly  
Planning Inspector

1<sup>st</sup> June 2017