

Development Management

Practice Note

PRACTICE NOTE

3

Meaning of Development & the Requirement for Planning Permission

May 2016

Preamble

This Development Management Practice Note is designed to guide planning officers and relevant users through the fundamental legislative provisions regarding what is development and the requirement for planning permission. It forms part of a series of 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 Note¹ primarily refers to the meaning of “development”, exclusions from the meaning of development and the requirement for planning permission for development.

2.0 Legislative Context

2.1 The **2011 Act** is the primary planning legislation for Northern Ireland which makes provision for a variety of planning functions to be exercised in the main by councils and the Department.

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 applications for regionally significant development) and planning enforcement². The Department retains responsibility for planning legislation, regional planning policy, the determination of regionally significant and called-in applications.

2.3 A council is the local planning authority for its given administrative area and is responsible for interpreting and applying relevant planning legislation and where necessary seeking its own legal advice.

2.4 Under **section 1 (1) of the 2011 Act** “The Department must formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development.”

¹ In this Practice Note, Department means the Department for Infrastructure unless otherwise specified; council means a district council unless otherwise specified and Commission means the Planning Appeals Commission unless otherwise specified.

² Refer to Practice Notes which may be accessed on the Planning Portal at www.planningni.gov.uk.

2.5 Under **section 1 (2) of the 2011 Act**, “The Department must:

- (a) ensure that any such policy is in general conformity with the regional development strategy³;
- (b) exercise its functions under subsection (1) with the objective of furthering sustainable development and promoting or improving well-being.”

2.6 The main subordinate legislation relevant to development and the requirement for planning permission includes the following:

- **The Planning (General Development Procedure) Order (Northern Ireland) 2015**, hereafter referred to as the “GDPO”.
- **The Planning (Use Classes) Order (Northern Ireland) 2015**, hereafter referred to as the “Use Classes Order”.
- **The Planning (Development Management) Regulations (Northern Ireland) 2015**, hereafter referred to as the “Development Management Regulations”.
- **The Planning (General Permitted Development) Order (Northern Ireland) 2015**, hereafter referred to as the “GPDO”.

3.0 Meaning of “development”

3.1 Under **section 23 (1) of the 2011 Act**, subject to subsections (2) to (6), “development” means:

³ The Regional Development Strategy (RDS) 2035 *Building a Better Future* was published by the former Department for Regional Development (DRD) on 15 March 2012, now the Department for Infrastructure since 8th May 2016.

"the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

3.2 Section 23 (1) can be interpreted to mean that there are two forms (or two limbs) of development as follows:

- (a) **operational** development (comprising the four elements of "building, engineering, mining or other operations"), or
- (b) the making of any **material change in the use** of any buildings or other land.

3.3 Therefore, operational development and the material change of use of any buildings or other land are subject to planning control. However, there are exclusions provided by legislation⁴.

3.4 In the court case ***Parkes v SOS [1979] 1 All E.R.211*** a distinction was made between "operations" and "use" as interpreted as follows:-

"Operations"

Operations comprises activities which result in some physical alteration to the land, which has some degree of permanence to the land itself.

"Use"

Use comprises activities which are done in, alongside or on the land but do not interfere with the actual physical characteristics of the land.

⁴ Refer to section 4.0 Exclusions from the meaning of development (of this document).

3.5 **Section 23 (2) of the 2011 Act** sets out the various terms used in the meaning of “development”. For the purposes of the Act "building operations" includes –

- a) demolition of buildings;
- b) rebuilding;
- c) structural alteration⁵ of or addition to buildings; and
- d) other operations normally undertaken by a person carrying on business as a builder.

4.0 Exclusions from the meaning of development

4.1 Notwithstanding the meaning of development, **section 23 (3) of the 2011 Act** states that the following operations or uses of land shall **not** be taken for the purposes of the Act to involve development of the land:

- (a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance of the building;
- (b) the carrying out by a council or statutory undertaker of any works for the purpose of inspecting, repairing or renewing any sewers, mains, pipes, cables or other apparatus, including the breaking open of any street or other land for that purpose;
- (c) the use of any buildings or other land within the curtilage of a dwelling-house for any purpose incidental to the enjoyment of the dwelling-house as such;

⁵ This includes partial demolition. Refer to section 5.0 Demolition - Description of Buildings Direction (of this document).

- (d) the use of any land for the purposes of agriculture or forestry and the use for any of those purposes of any building occupied together with land so used;
- (e) in the case of buildings or other land which are used for a purpose of any class specified in an order⁶ made by the Department for the purpose of this section, the use of the buildings or other land or, subject to the provisions of the order, of any part thereof for any other purpose of the same class;
- (f) the demolition of any description of building specified in a direction given by the Department to councils generally or to a particular council⁷;
- (g) a structural alteration of any description of building specified in a direction given by the Department to councils generally or to a particular council, where the alteration consists of demolishing part of the building⁸.

4.2 These exceptions remove certain operations or uses of land from the meaning of development and establish limits to planning control.

5.0 Demolition – Description of Buildings Direction

5.1 While demolition or partial demolition of a building will normally be considered to be development, the Department may direct that demolition or structural alteration involving partial demolition will not constitute development in relation to particular descriptions of buildings. These powers of direction are set out in section 23 (3) (f) and (g) of the 2011 Act.

⁶ Refer to section 12.0 Planning (Use Classes) Order (Northern Ireland) 2015 (of this document).

⁷ Refer to section 5.0 Demolition – Description of Buildings Direction (of this document).

⁸ Refer to section 5.0 Demolition – Description of Buildings Direction (of this document).

5.2 In exercise of the powers conferred by section 23 (3) (f) and (g) of the 2011 Act, the **Planning Act (Northern Ireland) 2011 Planning (Demolition – Description of Buildings) Direction 2015** came into effect on 1st April 2015 and applies to all district councils. Paragraph 1 states that “The demolition or a structural alteration consisting of the partial demolition of any building to which paragraph 2 applies shall not be taken for the purposes of the Planning Act (Northern Ireland) 2011 to involve development of land”. Paragraph 2 lists the operations as follows:-

- “(a) a building the cubic content of which, measured externally, does not exceed 115 cubic metres;
- (b) subject to paragraph (c) the whole or any part of a gate, fence, wall or other means of enclosure;
- (c) in the case of an area of townscape character or an area of village character, the whole or any part of a gate, wall, fence or other means of enclosure which –
 - (i) is adjacent to a road or open public space and is less than 1 metre high,
 - (ii) in any other case is less than 2 metres high.”

5.3 The Direction, therefore, removes from the meaning of development the demolition and structural alteration (consisting of the partial demolition of a building) of a building not exceeding 115 cubic metres and the whole or any part of any gate, wall, fence or other means of enclosure, and also in the case of an Area of Townscape Character (ATC) or Area of Village Character (AVC), the whole or any part of any gate, wall, fence or other means of enclosure which is adjacent to a road or open public space and is less than 1 metre high and in any other case is less than 2 metres high. The demolition and structural alteration (consisting of the partial demolition of a building) of

buildings not referred to in the Direction is, therefore, still regarded as development.

5.4 However, under **Part 33 Demolition of Buildings** of the **Schedule** to the GPDO, the demolition of a building is **permitted development** unless it is in an ATC or AVC (subject to specified limitations). This means that planning permission for that development is granted by the GPDO without the need to submit an application for planning permission.

5.5 The demolition of listed buildings and unlisted buildings in conservation areas are subject to their own consent regimes and consent should be sought in all cases.

6.0 Material Change of Use

6.1 Under section 23 (1) of the 2011 Act, development extends not only to building, engineering, mining or other operations (i.e. operational development) but also to the making of any material change in the use of any buildings or other land. Accordingly, planning permission is required for a material change of use in buildings or on land.

6.2 **Section 250 (1) of the 2011 Act**, the interpretation section, provides an exclusionary definition of “use” to reinforce the two separate forms of development. It states that:

“use” in relation to land, does not include the use of land for the carrying out of any building or other operations thereon.’

6.3 The term ‘material change of use’ is not defined in the 2011 Act. However, specific examples of what constitutes a material change of use are given in section 23 (5) and (6)⁹ of the 2011 Act. **Section 23 (5) of the 2011 Act**

⁹ Refer to Paragraph 8.1 (of this document) in relation to section 23 (6) of the 2011 Act.

specifies, for the purpose of clarification, two instances which involve a material change of use to a building or land and so constitute development:

- use of a previously single dwellinghouse as two or more dwellinghouses;
- the deposit of refuse or waste materials on land.

6.4 Under **section 57 (2) of the 2011 Act**, the grant of planning permission for a building may specify the purposes for which the building may be used, but where no purpose is specified the permission shall be construed as including permission to use the building for the purpose for which it is designed. For example, planning permission for a dwellinghouse includes its use as a dwellinghouse providing residential accommodation¹⁰.

6.5 The Use Classes Order¹¹ groups together uses, which are sufficiently similar, into classes so that a change from any use in a class to any other use within the same class does not involve development.

6.6 **Part 4 Changes of Use** to the **Schedule** to the GPDO permits various changes of use between certain use classes defined in the Use Classes Order i.e. it grants planning permission for certain changes from one use class to another or from certain sui generis¹² uses to a specified use class¹³.

A matter of fact and degree

6.7 Judgement of what constitutes a material change of use is regarded by the

¹⁰ Refer to Class C1 of Part C to the Schedule to the Planning (Use Classes) Order (Northern Ireland) 2015.

¹¹ Refer to section 12.0 The Planning (Use Classes) Order (Northern Ireland) 2015 (of this document).

¹² Refer to Paragraph 12.3 (of this document).

¹³ Under the GPDO, Part 4 Changes of Use, Class A, a change of use of a building from a betting shop or from a use for the sale of food or drink for consumption on the premises or of hot food for consumption off the premises (sui generis uses) to a use falling within Class A1 (Shops) or Class A2 (Financial, professional and other services) of the Schedule to the UCO is permitted development.

Courts as a matter of fact and degree to be determined on the individual merits of each case by the planning decision maker. Courts are only likely to become involved if the decision of a planning authority was made unreasonably.

Relevant Case Law

In the court cases, ***East Barnet UDC v British Transport Commission [1962] 2 QB 484 (Divisional Court)*** and ***Bendles Motors Ltd v Bristol Corporation [1963] 1 WLR 247***, in considering whether there had been a material change of use in both cases, Lord Parker CJ stated that “It is a question of fact and degree in every case and...the court is unable to interfere with a finding...on such a matter unless it must be said that they (*the planning authority*) could not have reached that conclusion”.

More recently, in the case ***Moore v Secretary of State for Communities and Local Government [2013] JPL 192***, the Court of Appeal held that a Planning Inspector had not erred in law in holding that use of an eight bedroom house occupied by a family to be then occupied by large groups of up to 18 people for short periods of time by way of commercial holiday lettings, was a material change of use. It was a matter of fact and degree in assessing whether there was a material change of use, which depended on the particular circumstances of the use for commercial holiday lettings i.e. holiday accommodation.

- 6.8 There is a large body of case law that deals with the interpretation of ‘material change of use’, which can be researched and considered in the assessment of the materiality of a change of use in any given case.
- 6.9 Two main tests for the materiality of a change of use have emerged through the courts:

- The first relates to change in the character of the use itself including the land where it is located;
- The second relates to the effects of the change upon neighbouring uses and the locality.

6.10 If both are material there is very little doubt that as a matter of fact and degree a material change of use has occurred. However, many decisions still rely solely on “character” and not “effect” grounds. As a general rule it is reasonable to conclude that for a change of use to be material, the new use must be substantially different from the preceding use.

6.11 It would be best practice to undertake an assessment of some or all of the following matters (which is a non-exhaustive list) on a case by case basis when considering and deciding whether a proposed use-change of land or buildings would constitute a material change of use:

- (a) what is the primary use / are the primary uses
- (b) what is the ancillary use / are the ancillary uses
- (c) what is the planning history
- (d) what is the planning unit
(the exact physical area of land which is the subject of assessment of the materiality of change, which may involve the whole area in the same ownership or the same occupation)
- (e) whether or not there has been an intensification of use
- (f) is there an issue of abandonment.

7.0 De Minimis

7.1 In addition to those operations and uses excluded from the meaning of

development¹⁴, there may also be cases where operations or uses may be considered to be ‘de minimis’¹⁵ and therefore do not constitute development. ‘De Minimis’ is a term used in law to describe something which is so minor as to have no legal consequence.

7.2 Whether or not an operation or use is ‘de minimis’ is a matter of fact and degree that is considered and decided upon by the planning decision maker i.e. the council or, as the case may be, the Department.

8.0 Use for the display of advertisements

8.1 **Section 23 (6) of the 2011 Act** states that a use for the display of advertisements of any external part of a building which is not normally used for that purpose shall be treated as involving a material change of use for that part of the building and hence is development. This is without prejudice to any regulations made under the 2011 Act relating to the control of advertisements¹⁶.

9.0 Requirement for planning permission to carry out development

9.1 **Section 24 (1) of the 2011 Act** provides the basis for the development management system in Northern Ireland in that **‘planning permission is required for the carrying out of any development of land.’**

9.2 Notwithstanding this requirement, the need for planning permission for development is subject to directions and development orders, which can include exceptions to the requirement to submit an application for express

¹⁴ Refer to section 3.0 Meaning of “development” and section 4.0 Exclusions from the meaning of development (of this document).

¹⁵ Refer to page 12 of Development Management Practice Note 25 Non-Material Change.

¹⁶ The Planning (Control of Advertisements) Regulations (Northern Ireland) 2015.

planning permission for development e.g. permitted development granted under the GPDO.

9.3 Section 24 also mentions instances where planning permission is not specifically required as follows:-

- (a) When returning to a former land use after planning permission which is time bound expires.
- (b) Where it is a use which has been resumed following the implementation of a permission granted by a development order subject to a limitation, such as a time limit.
- (c) Where an enforcement notice has been issued planning permission is not required for the use of the land for any purpose it could have been legally used for if the development which is being enforced against had not been carried out.

9.4 Applications for planning permission are to be submitted in accordance with the 2011 Act, the Development Management Regulations¹⁷ and the GDPO¹⁸.

9.5 Where an application for planning permission for development is, or may be, EIA development then it is subject to the requirements of the **Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015** depending upon whether it comes under Schedule 1 or 2 of the regulations respectively¹⁹.

9.6 Even though some types of development require an application for planning permission, there may also be a requirement for an application to be

¹⁷ Refer to Paragraphs 11.1 and 11.2.

¹⁸ Refer to Paragraph 10.2.

¹⁹ Refer to Development Management Practice Note 9 Environmental Impact Assessment.

submitted for other consents such as listed building consent, conservation area consent, advertisement consent and hazardous substances consent.

10.0 Development Orders

10.1 **Section 32 of the 2011 Act** requires the Department to make development orders to provide for the granting of planning permission. Such an order may either itself grant planning permission or may provide for the grant of permission by the relevant planning authority on an application made to it. The two main development orders are the GDPO and the GPDO.

Planning (General Development Procedure) Order (Northern Ireland) 2015 (GDPO)

10.2 The GDPO²⁰ sets out the procedural requirements that must be followed in connection with an application for planning permission.

The Planning (General Permitted Development) Order (Northern Ireland) 2015 (GPDO)

10.3 The main purpose of the GPDO is to grant planning permission for certain classes of development described in the Schedule to the Order and its effect is the removal of the need to apply for express planning permission for a variety of different development types.

10.4 Under Article 4 of the GPDO, directions may be issued by the Department for any area or by the council in relation to its area to remove permitted development rights. Apart from some minor exceptions relating to listed

²⁰ Note, those provisions in the former Planning (General Development) Order (Northern Ireland) 1993, revoked under Article 32 and Schedule 4 of the GDPO, that dealt with permitted development have been moved and can now be found in a separate permitted development order, the GPDO.

buildings, directions to be issued by a council require the approval of the Department.

11.0 The Planning (Development Management) Regulations (Northern Ireland) 2015

11.1 The Development Management Regulations make provision for development management processes for determining planning applications. This statutory rule put into place the regulatory framework required to implement the development management provisions in Part 3 of the 2011 Act.

11.2 Section 25 of the 2011 Act and Regulations 2 and 3 and the Schedule to the Development Management Regulations established a hierarchy of development whereby development is categorised as being either local development, major development or major development of regional significance. Applications for local and major development are submitted to the appropriate council whereas applications for major development of regional significance are submitted to the Department.

12.0 The Planning (Use Classes) Order (Northern Ireland) 2015

12.1 Under the Use Classes Order a change from any use in a class to any other use within the same class does not involve development and does not require planning permission.

12.2 However, not every use of land can be accommodated within one of the specified classes and the fact that classes are prescribed in the Use Classes Order does not mean that a change of use from one class to a use in another class is necessarily material. The fact and circumstances of each particular case must be considered. In cases of any doubt the basic tests for a material change of use may need to be applied.

12.3 The Use Classes Order provides that certain uses are not within any class of the Order, which are described as '*sui generis*', meaning in a class of their own, and always require planning permission²¹.

13.0 Extent of Planning Jurisdiction

13.1 The jurisdiction for terrestrial (land use) planning under the Planning Act (Northern Ireland) 2011 extends to the mean low water spring tide mark, which includes that part of the Northern Ireland inshore region between the high and low water spring tide marks (known as the intertidal area). Accordingly, proposed development in the intertidal area may require planning permission.

13.2 Activities such as deposits in the sea, construction works, removal of objects or aggregates from the seabed between the mean high water spring tide mark and the limit of Northern Ireland's territorial waters lies within the scope of marine licensing under the **Marine and Coastal Access Act 2009**. This includes development on the seabed of the intertidal area, which in many instances may require a marine licence. Refer to the Department's document entitled 'Planning in the Coastal Area – A developer's guide to planning considerations and environmental responsibilities (Version 1.1 / April 2015)'²².

13.3 In addition, **section 2 of the Marine Act (Northern Ireland) 2013** is also directly relevant in considering development in the intertidal area. It includes, as part of the definition of 'sea' pertaining to the Northern Ireland inshore region, "any area submerged at mean high water spring tide." All terrestrial planning authorisation and enforcement decisions that affect or might affect the marine area, including above the mean high water spring tide, must be

²¹ Refer to paragraph 6.6 (of this document).

²² This document may be viewed via the following link:

http://www.planningni.gov.uk/index/advice/northern_ireland_environment_agency_guidance/planning_in_the_coastal_area-3.pdf

taken in accordance with the UK Marine Policy Statement²³ (MPS) and the Marine Plan for Northern Ireland, once published in final form, unless relevant considerations indicate otherwise. Planning authorities must also have regard to the MPS and the Marine Plan for Northern Ireland, once published in final form, in the preparation of community and local development plans.

- 13.4 Consequently, there is an overlap of responsibility for the intertidal area involving the terrestrial planning and marine licensing systems, both of which must be considered. Therefore, any proposed development in the intertidal area may require both planning permission and a marine licence, and possibly other consents and / or licences depending upon the nature of the development.

²³ The UK Marine Policy Statement may be viewed via the following link:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69322/pb3654-marine-policy-statement-110316.pdf



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Department
for Infrastructure
www.infrastructure-ni.gov.uk

Planning Guidance Team

*Planning Policy Division
Department for Infrastructure
Causeway Exchange
1-7 Bedford Street
BELFAST
BT2 7EG*

Tel: 0300 200 7830

Email: planning@infrastructure-ni.gov.uk



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