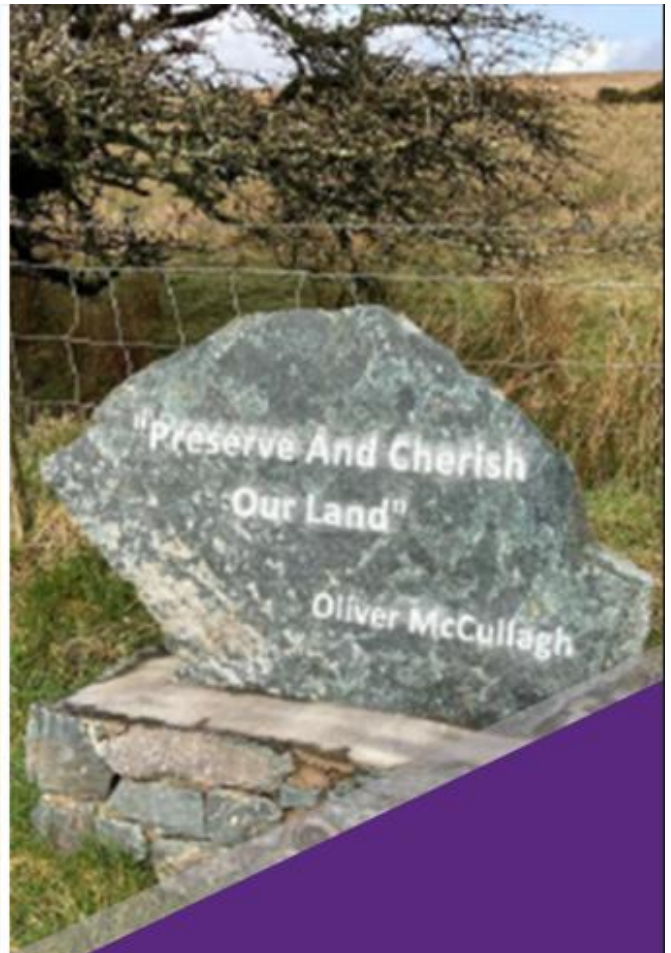




Public inquiry under article 130(1)(b) Roads (Northern Ireland) Order 1993

In the matter of the draft Crockanboy Road, Greencastle, County Tyrone (Abandonment) Order (Northern Ireland) 2021

PAC Ref: DR001

Statement of Case of Fermanagh and Omagh District Council



Fermanagh & Omagh
District Council
Comhairle Ceantair
Fhear Manach agus na hÓmaí

1. Introduction

- 1.1. This is the statement of case of Fermanagh and Omagh District Council in opposition to the draft Crockanboy Road, Greencastle, County Tyrone (Abandonment) Order (Northern Ireland) 2021 (hereinafter “the draft order”). The Council invites the Planning Appeals Commission to recommend that:
 - 1.1.1. the draft order should not be made; or
 - 1.1.2. in the alternative, that it should be modified in the terms set out below before being made.
- 1.2. The structure of this statement of case is as follows:
 - 1.2.1. description of the proposal;
 - 1.2.2. procedural history;
 - 1.2.3. legislative framework;
 - 1.2.4. objection to the making of the order;
 - 1.2.5. without prejudice modifications to the order;
 - 1.2.6. conclusion.
- 1.3. An executive summary is not necessary as this statement of case is quite brief.

2. Description of the proposal

- 2.1. The proposal is to abandon an area of 8,640 square metres of road at Crockanboy Road, Greencastle, County Tyrone, from a point 300 metres north-west of its junction with Mullydoo Road extending for a distance of 1,111.5 metres in a westerly direction. It is proposed as part of the order that a replacement road will be constructed along the southern and eastern boundary of the proposed site. It is located north of the B46 Crockanboy Road and is situated between Greencastle and Gortin.
- 2.2. Map No. IN1/21/50281 accompanies the draft order and sets this out.
- 2.3. Pictures of the road to be abandoned can be found in **Appendix 1**.
- 2.4. Drawings of the proposed replacement road have been provided with the accompanying planning application. The relevant drawings are as follows.
 - 2.4.1. Proposed road layout plan (2016021-P-CIV-100) (Rev. FEI_2);
 - 2.4.2. Proposed new road (plan and profile) (2016021-P-CIV-104) (Rev. FEI_2);
 - 2.4.3. Proposed new road (plan and profile) (2016021-P-CIV-105) (Rev. FEI_2);

2.4.4. Proposed new road (plan and profile) (2016021-P-CIV-106) (Rev. FEI_2).

3. Procedural history

- 3.1. This is a summary of the procedural history so far as it is relevant to the issues arising.
- 3.2. The application was initially made on 26 January 2016. The Department wrote to Fermanagh and Omagh District Council on 24 February 2016 informally notifying it of the draft order and inviting it to submit any comments on the draft order by 11 March 2016. Formal notification and consultation then took place in a letter dated 2 June 2016.
- 3.3. The Council wrote in objection to the draft order on 09 March 2016 (**Appendix 2**) and 07 June 2016 (**Appendix 3**).
- 3.4. Subsequent to the public consultation on the draft order, it was then amended to principally include the provision of a replacement road. The Council was formally consulted on this on 12 March 2021. It wrote again in objection to the revised draft order on 17 June 2021 (**Appendix 4**).

4. Legislative and policy framework

- 4.1. Article 68(1)(a) of the Roads (Northern Ireland) Order 1993 (**Appendix 5**) gives the Department for Infrastructure the power, exercisable by way of an order, to abandon any road. Road is defined in article 2(2) of the 1993 Order. There is no dispute in this case that the land described in the draft order is a road to which the power in article 68(1)(a) applies. The effect of an abandonment order is that the road shall cease to be maintainable by the Department and any public right of way over the road will be extinguished (article 68(2)).
- 4.2. The Department has published policy on the exercise of its article 68 powers. In its RSPGG S019 (June 2013) (**Appendix 6**) the Department summarises the legislation and its approach to it.
- 4.3. An order cannot be made unless either the Department is of the opinion that the road is not necessary for road traffic or that another road is available which provides, or is capable, if improved, of providing, alternative facilities for road traffic (article 68(4)(a)); or the order provides for the carrying out by the Department or any other person of such works as the Department considers necessary for the provision of alternative facilities for road traffic before the road is abandoned (article 68(4)(b)). It is understood that this order is promoted under article 68(4)(b). An order cannot be made unless this article is satisfied.
- 4.4. This is confirmed in RSPGG S019 at paragraph 2.1.1.4.

“Article 68(4) requires that no abandonment / stopping-up order can be made unless it meets one of the following conditions —

- *The road is not necessary for road traffic (including if another road is available which provides alternative facilities)*
- *That alternative facilities for road traffic will be provided”.*

- 4.5. But even if article 68(4)(b) is satisfied, it does not automatically follow that a road abandonment order should be made. Rather, the satisfaction of the article 68(4)(b) gateway has the effect of affording the Department a broad discretion to decide whether or not to make an order. In exercising that discretion, the Department will be required to take account of the benefits and disbenefits of making the order.
- 4.6. In the broadly analogous context of stopping up orders under section 257 of the Town and Country Planning Act 1990, *Vasiliou v Secretary of State for Transport* (1991) 61 P&CR 507, it was put like this (**Appendix 7**).

“These sections confer a discretionary power on the Minister. He cannot make the order unless he is satisfied [of the statutory pre-conditions]. But even when he is satisfied [of the statutory pre-conditions] he retains a discretion; he may still refuse to make an order. As a matter of first impression I would expect that when considering how to exercise this discretion the Minister could take into account, and, indeed, that he ought to take into account, the adverse effect his order would have on those entitled to the rights which would be extinguished by his order. The more especially is this so because the statute makes no provision for the payment of any compensation to those whose rights are being extinguished. I would not expect to find that such extinguishment, or expropriation, is to take place in the exercise of a discretionary power without the Minister in question so much as considering and taking into account the effect that such expropriation would have directly on those concerned.

Having read and re-read the sections I can see nothing in their language, or in the subject-matter, to displace my expectation. I can see nothing, on a fair reading of the sections, to suggest that, when considering the loss and inconvenience which will be suffered by members of the public as a direct consequence of closure of part of the highway, the Minister is not to be at liberty to take into account all such loss, including the loss, if any, which some members of the public such as occupiers of property adjoining the highway will sustain over and above that which will be sustained generally. The latter is as much a direct consequence of the closure order as the former. The loss flows directly from the extinguishment, by the order, of those occupiers' existing legal rights

[...]

It is on that basis that he must determine whether the disadvantages and losses, if any, flowing directly from a closure order are of such significance that he ought to refuse to make the closure order. In some instances there will be no significant disadvantages or losses, either (a) to members of the public generally or (b) to the persons whose properties adjoin the highway being stopped up or are sufficiently near to it that, in the absence of a closure order,

they could bring proceedings in respect of the proposed obstruction. In such instances the task of the Secretary of State for Transport will be comparatively straightforward. In other cases there will be significant disadvantages or losses under head (a) or under head (b) or under both heads. In those cases, the Secretary of State for Transport must decide whether, having regard to the nature of the proposed development, the disadvantages and losses are sufficiently serious for him to refuse to make the closure order sought. That is a matter for his judgment. In reaching his decision he will, of course, also take into account any advantages under heads (a) or (b) flowing directly from a closure order”.

4.7. In RSPGG S019 at paragraph 1.5.1 makes a similar point.

“This RSPPG includes a calculation of the costs of making an Abandonment / Stopping-Up Order. This must be used on a case by case basis to calculate the cost / benefits of each application for an Abandonment or Stopping-Up. Individual applications from members of the public may proceed when applicant confirms to the Department that the costs of making the Abandonment or Stopping Up Order will be met or the Department is satisfied that the benefits of making the Abandonment or Stopping-Up exceed the costs in each case”.

4.8. In deciding whether to make an order, the Department will be subject to the obligation under section 6(1) of the Human Rights Act 1998 (**Appendix 8**) to act compatibly with convention rights and the equality duty under section 75 of the Northern Ireland Act 1998 (**Appendix 9**). The Department has also produced a rural needs impact assessment pursuant to its duty under section 1(1) of the Rural Needs Act (Northern Ireland) 2016 (**Appendix 10**).

4.9. From this, the Council considers that the approach which the Planning Appeals Commission should take in reporting to the Department in this matter can be summarised as follows.

4.9.1. The burden of justifying the making of a road abandonment order should, in the usual way, rest with the applicant. It is for the applicant to convince the decision-maker that the balance falls in favour of the road abandonment order being made. If they fail to do so, then the power should not be exercised in their favour.

4.9.2. It is understood that this order is advanced on the basis that it sits within article 68(4)(b). The first question for the Commission to report on, therefore, will be whether the order sought *“provides for the carrying out by the Department or any other person of such works as the Department considers necessary for the provision of alternative facilities for road traffic before the road is stopped-up or abandoned”*. If the answer is no, then the order cannot be made and the recommendation should be to refuse the application. If the answer is yes, then the Commission should proceed to the next stage.

4.9.3. The next stage can conveniently be referred to as the merits stage. It involves the Commission hearing evidence from all interested parties

about the benefits and disbenefits of the making of the order in the terms sought and reaching an overall judgement as to where the balance falls so far as the making of the order is concerned. If the disbenefits outweigh the benefits, then the recommendation should be to refuse; and if the benefits outweigh the disbenefits, then the recommendation should be to approve.

- 4.9.4. In reporting to the Department, the Commission will also wish to comment on whether the making of an order would be consistent with the obligations under section 6(1) of the Human Rights Act 1998, section 75 of the Northern Ireland Act 1998, and section 1(1) of the Rural Needs Act (Northern Ireland) 2016. Matters concerning human rights, rural impact, and equalities issues are also likely to be relevant during the merits stage.

5. Objection to the making of the order

- 5.1. The Council resists the making of the order for the following reasons in overview:

5.1.1. the justification for the draft order is inextricably tied up with the main planning application — if the planning application fails, then the draft order should too;

5.1.2. the abandonment of this road as part of that proposal has not been justified as being necessary to facilitate the development;

5.1.3. irrespective of the above, there are good reasons not to confirm the order; and

5.1.4. the statutory impact assessment documents are deficient.

- 5.2. Each will now be addressed in turn.

6. The justification for the draft order is inextricably tied up with the main planning application — if the planning application fails, then the draft order should too;

- 6.1. The draft order and the planning application are “*inextricably linked*” (2020-12-09 Email Dfl). If the planning application is recommended for refusal, then the road abandonment order should be recommended for refusal too. Given that the proposal has been described as one to “*facilitate Dalradian Gold*” (2016-02-16 Email Dfl Roads), in the absence of the mining proposal there is no justification for the existing road to be abandoned and an entirely new road built in its place. The existing road is, as the representations show, actively used; and without good reason it should not be abandoned in favour of a new road.
- 6.2. Additionally, it is clear from the proposed road layout plan (2016021-P-CIV-100) (Rev. FEI_2) and the other drawings detailing the new road that it has been designed to tie in with the wider road infrastructure associated with the mining

proposal, particularly the new access road. It has been assessed on that basis too. It cannot stand alone from the wider proposal.

7. The abandonment of this road as part of that proposal has not been justified as being necessary to facilitate the development

- 7.1. It is not obviously the case that if the mine proposal goes ahead that this road should be abandoned. No development seems to be proposed on the stretch of the road to be abandoned. It appears, from the General Site Layout Plan (2016021-P-CIV-004 (A)) (Rev FEI_2), that it will be retained for use principally as a *“haul road”*. It is not evident why the mine could not be designed and operated so as to also retain this existing road.
- 7.2. The need for this stretch of road to be abandoned has not been justified as being necessary as part of the wider development. Whilst some of the documents describe the abandoned road as *“be[ing] incorporated into [the] Gold Mining site”* (2020-11-20 Modified Submission for Abandonment), it is not clear that this is the case; or, if it is, that there is no other alternative to this. The burden of justifying this, again, rests with the applicant.

8. Irrespective of the above, there are good reasons not to confirm the order

- 8.1. Even if the Planning Appeals Commission was to recommend approval on the planning application and was to decide that the abandonment of this road is a necessary part of the wider development, that does not automatically lead to the conclusion that a road abandonment order should be made. The Planning Appeals Commission must still go on to consider whether the abandonment of the road is justified on the merits of the case.
- 8.2. It can be seen from the representations received in objection to this order, that the current road is a popular recreational route for the local community. The loss of this recreational route must be weighed in the balance. It is necessary to understand the character of the existing route and its attraction in order to properly weigh up the impacts of its loss.
- 8.3. The road is a single carriageway track extending for a distance of 1,115 metres in a westerly direction from a location approximately 300m north west of its junction with Mullydoo Road. It is unmetalled with no road markings or signage. It is not heavily trafficked.
- 8.4. While scattered farm buildings in the surrounding landscape are visible to the south, there are no buildings or any other urbanising structures adjoining the road. As a result the road has the character of a tranquil country lane and is popular with pedestrians in particular.
- 8.5. The character of the road varies along its length. Towards the eastern end of the section proposed for abandonment, the lane is relatively enclosed and sheltered with a pleasing combination of roadside containment including mature woodland, shelter belts, roadside hedgerows, and stone walls as can be seen Plates 1 to 3

in Appendix 1. The adjoining fields are a mosaic of pasture, heath and wetland habitat around water bodies.

- 8.6. The field boundaries, many of which are shelter belts, create a series of semi-enclosed and more intimate parcels of land. A series of burns which flow off the hills to the north trickle into drains and flow in culverts under the road adding to the tranquil character of the route.
- 8.7. Approximately mid-way along the section of the route to be abandoned, there is a stark change in the character as the route emerges from a block of woodland and proceed to pass across open moorland as can be seen in Plates 4 and 5 in Appendix 1. This section of the road is open, exposed and enables outstanding middle and long distance views across the Owenreagh Valley towards Mullaghcarn and the Gortin Glen Forest Park.
- 8.8. The road forms part of the popular annual Greencastle 5 mile run held on Boxing Day each year since 1986 which regularly attracts several hundred participants. A small stone monument mid-way along the section of the route to be abandoned includes a quote in honour of the founder of the race. This can be seen in Plate 6 in Appendix 1.
- 8.9. Several of the representations also refer to the mass rock which can be seen from the route. Mass rocks were used as altars by priests to hold secret masses during the religious persecution of the Catholic Church during the 17th and 18th centuries in Ireland.
- 8.10. The road provides valuable green infrastructure for the local community away from the busier B46 Greencastle to Gortin road (Crockanboy Road). It sits within the wider Sperrin Area of Outstanding Natural Beauty where recreational tourism is being encouraged.
- 8.11. Taken as a whole, the section of the route to be abandoned is a very pleasant and peaceful route which appeals to the visual senses and has cultural, historic, and recreational values associated with it. The Council affords very substantial weight to the complete loss of the existing route as a result of the adverse impact it will have on these interests.
- 8.12. The main argument advanced in response to this appears to be that the loss of the current route will be adequately offset through the provision of the new road around the eastern and southern perimeter of the main mine site. This argument is not, however, accepted. The new road is not a like for like replacement and is less favourable than the existing road.
- 8.13. The proposed new road would run around the eastern and southern perimeter of the proposed main mine site. The character of the new road would be fundamentally different to that of the existing road and is considered to be less favourable for pedestrian use.
- 8.14. The construction of the road would be metalled with regular passing bays creating a wider road than the current single track lane. Along its entire length

there would be a utilitarian and unattractive palisade security fence on the inside to prevent access into the main mine site. It is likely that this fencing would be retained even after closure due to the proximity of the SuDs ponds immediately adjacent to the road. Along part of the diverted road on the southern side of the main mine site, there would be palisade fencing on both sides of the road (i.e. in the vicinity of the water treatment plant).

- 8.15. Immediately alongside the new road on the eastern side of the dry stack facility there would be a parallel haul road along which there would be frequent movement of HGVs and other vehicles. Along the southern side of the dry stack facility this haul road would cross over the diverted road at the junction of which there would be signage, road marking, lighting, and security gates.
- 8.16. The dry stack facility adjacent to the diverted road would tower over the new route and have a clearly engineered profile, dominating the experience of any pedestrian passing along the road. In addition, for at least twenty years there would be continuous earth movements and grading works taking place on the mound. This would involve the almost continuous movement of excavators, dumper trucks, bulldozers and water bowsers to suppress dust.
- 8.17. Towards the northern end of the diverted road, no attempt has been made to screen or soften the main operational plant site of the large area of parking immediately adjacent to the diverted road. There would therefore be open views of all the mine activities within the plant site from this section of the road and activity within the plant site would be audible when passing along the road.
- 8.18. Taken together, the visual impact of the immediately adjacent mine site would render the diverted route an unattractive route along which to travel both during the operational and post closure phases of the development. For at least 20 years during the operational phase, it would be impossible to enjoy the peace and tranquillity experienced along the existing road and even after its closure, the amenity value of the road would not compare to the existing route. In short, the amenity experienced by users of the diverted road would be significantly diminished to that which they value and enjoy at present.
- 8.19. Accordingly, the replacement road does not offset or mitigate the harms identified. The Council affords very substantial weight to these harms in light of the location of the road within the Sperrin Area of Outstanding Natural Beauty and the value which is placed on the existing route, as evidenced through the representations made in objection to the draft order.

9. The statutory impact assessment documents are deficient

- 9.1. The Department has produced a human rights impact assessment (Annex C.1) and a rural needs impact assessment (Annex C.2). These are aimed at demonstrating compliance with sections 6(1) of the Human Rights Act 1998 and section 1(1) of the Rural Needs Act (Northern Ireland) 2016 respectively.

- 9.2. No equality impact assessment has been undertaken despite the duty under section 75 of the Northern Ireland Act 1998. RSPGG S019 states that if equality issues arise, they should be dealt with before an order is made.

“However, if any equality issues are raised as a result of the statutory procedures (for individual proposals), these should be addressed before the making of an Order is finalised”.

- 9.3. Some representations, including those made at the pre-inquiry meeting, raised the need for an equality impact assessment to be undertaken for this proposal. The Council considers that it is for the Department to justify its decision not to undertake such an assessment. Equalities issues can be explored with individual objectors during the hearing sessions.
- 9.4. The rural needs impact assessment is not considered to be robust. In answer to question 2A, the Department considers that the proposal will not have an impact on people in rural areas. Given the location of this road, this is not accepted by the Council. It is highly likely that this proposal will have an impact on people in rural areas. The justification for the conclusion reached by the Department is given in these terms in response to question 3A.

“Dalradian Gold Limited have included a replacement road for the stretch to be abandoned. This replacement road is included in the modified draft Abandonment Order to be published for consultation”.

- 9.5. As explained above, however, the replacement road is not a like for like replacement of the current road is likely to be less favourable to recreational users than the current road is.
- 9.6. The same analysis is repeated in response to questions 3E and 5C. It is similarly flawed.
- 9.7. The result is a rural needs impact assessment which is deficient as it fails to appreciate the impact which the abandonment of the current road will have on rural users of the road. The Department has thus far failed to discharge the duty under section 1(1) to have *“due regard to rural needs”*.
- 9.8. The human rights impact assessment does not identify any breach of convention rights. It asserts that no convention rights are engaged at all. This is a matter which will need to be explored during the inquiry hearing sessions. It will be for individual members of the public to explain how, if at all, they consider their convention rights to be breached in this case.
- 9.9. Unless and until these matters have been addressed, the Council is concerned that any decision to approve the order could be in breach of the statutory duties set out above.

10. Without prejudice modifications to the draft order

10.1. Without prejudice to its primary case that the Planning Appeals Commission should recommend that the order not be made, the Council considers that if the order is to be made it should be modified. It is appropriate for such a recommendation to be made, as paragraph 5 of schedule 8 says that, following a public local inquiry, the Department may make an order “*subject to such modifications as it thinks fit*”. The public local inquiry is the forum for exploring potential modifications to the draft order before it is made.

10.2. The concern is, broadly speaking, how vague article 2 of the draft order is. It says this:

“The Developer shall carry out such works as the Department considers necessary and on completion of the works the area of road described in the Schedule shall be abandoned”.

10.3. This wording does not define what “*works*” need to be undertaken before the road in question is abandoned — it, instead, leaves it to the discretion of the Department for Infrastructure to decide what work it “*considers necessary*” to be undertaken before the road is abandoned. There is no reason why these matters should not be specified now instead of being left to the discretion of the Department and the developer post-order.

10.4. In substitution for the current article 2, the Council would suggest the following wording aimed at requiring the specified works on the new road to be completed before the current road is abandoned.

“Upon completion by the developer of the works described in Schedule 1, the road described in Schedule 2 shall be abandoned”.

10.5. This would then require a new schedule to be inserted into the draft order setting out the works to be undertaken by the developer in order to provide the alternative road which it is proposing to provide in place of the abandonment of the current road. Suggested text for this new schedule is set out below.

“The provision of the road shaded in red in drawing nos. 2016021-P-CIV-104 (Rev FEI_2), 2016021-P-CIV-105 (Rev FEI_2), and 2016021-P-CIV-106 (Rev FEI_2) submitted with planning application reference LA10/2017/1249/F in strict accordance with the details set out in those drawings.

Copies of these drawings have been deposited at the Department’s Headquarters, Room 301, Clarence Court, 10-18 Adelaide Street, Belfast and at its Roads and Rivers Western Division, County Hall, Drumragh Road, Omagh.”

10.6. These modifications would and ensure that the replacement road, which is integral to the acceptability of the proposed abandonment order, is delivered before the abandonment order takes effect and is delivered in a way that is

consistent with what is proposed. It is preferable to specify the works required with certainty now when the order is being made as opposed to leaving it to the discretion of the Department for Infrastructure to decide after the order is made what works are “*consider[ed] to be necessary*”.

11. Conclusion

11.1. The Planning Appeals Commission is, therefore, invited to recommend to the Department for Infrastructure that:

11.1.1. the draft order should not be made; or

11.1.2. in the alternative, that it should be modified in the terms set out above before being made.