Planning Appeals Commission

Appeal Decision

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Appeal Reference:	2021/A0154
Appeal by:	Castlehinch Ltd.
Appeal against:	The refusal of full planning permission to develop land without compliance with conditions previously attached
Proposed Development:	Vary condition 10 of planning approval R/2011/0648/F (regarding the timing of road improvement works associated with a housing development of 42 dwellings)
Location:	North of 7 and 9 Saintfield Road, Ballynahinch
Planning Authority:	Newry, Mourne and Down District Council
Application Reference:	LA07/2019/1490/F
Procedure:	Informal Hearing on 2nd August 2022
Decision by:	Commissioner Gareth Kerr, dated 23rd September 2022

Decision

1. The appeal is allowed and full planning permission is granted, subject to the conditions set out below.

Preliminary Matter

2. Both of the Council's two reasons for refusal refer to condition 8 of planning approval R/2011/0648/F. The Council's evidence stated that this was "a typo mistake" and that both reasons should refer to condition 10 as stated in the proposal. The appellant accepted the acknowledgement of this error at the hearing. I am satisfied that the error does not result in any prejudice to the appellant and the appeal will be determined on the basis of condition 10.

Reasons

3. The main issue in this appeal is whether the proposal to vary the timing of road improvement works would prejudice road safety or significantly inconvenience the flow of traffic.

4. The appeal site is located at the northern edge of Ballynahinch on relatively flat land. Although located to the north of dwellings at 7 and 9 Saintfield Road, the site is adjacent to the A24 Belfast Road, from which it is accessed. Planning permission R/2011/0648/F for a housing development of 42 dwellings was granted by the Department of the Environment on 30th October 2014, subject to 24 conditions. Since the approval was granted, one condition has been varied and four other conditions have been discharged. Works undertaken on site include the laying out of the access and visibility splays at the entrance from Belfast Road, the clearing of

topsoil from the site and the installation of foundations for one dwelling unit. This appeal proposes a variation to condition 10 of the 2014 approval which reads:

> 10. *The Private Streets (Northern Ireland) Order 1980 as amended by the Private Streets (Amendment) (Northern Ireland) Order 1992.*
> *No other development hereby permitted shall be commenced until the works necessary for the improvement of a public road have been completed in accordance with the details outlined in blue on drawing SR11-02 E bearing the date stamp 5 September 2014. The Department hereby attaches to the determination a requirement under Article 3 (4A) of the above Order that such works shall be carried out in accordance with an agreement under Article 3 (4C).*

The variation sought would require the completion of the road improvements (provision of a right turning lane on the Belfast Road through realignment of the running lanes and removal of the hard shoulder) prior to commencement of the second unit rather than before any development takes place.

5. Section 45 (1) of the Planning Act (Northern Ireland) 2011 (the Act) states that regard must be had to the local development plan (LDP), so far as material to the application, and to any other material considerations. Where regard is to be had to the LDP, Section 6 (4) of the Act requires that the determination must be made in accordance with the plan unless material considerations indicate otherwise.

6. The Ards and Down Area Plan 2015 (ADAP) operates as the LDP for this area. In it, the appeal site is located within the settlement limit of Ballynahinch and is part of a wider area zoned for housing development (zoning BH13). The ADAP indicates that the A24 Belfast Road, from which the site would be accessed, is a protected route and that the road line for the proposed Ballynahinch Bypass would pass close to the eastern edge of the site. The line of the proposed bypass is to be protected against any development proposals which would prejudice its implementation. I am satisfied that the proposal does not impinge on the road line. One of the key design considerations under zoning BH13 which is relevant to this appeal is "the provision of an access road from the Belfast Road to acceptable standards to provide access to this site." It is not disputed that the said access should have visibility splays of 6m x 215m and should include the provision of a right turning lane on the Belfast Road. The appeal proposal for housing on this zoned site with the stated road improvements would accord with the ADAP in principle. This appeal relates to the timing of the road improvements.

7. Section 54 of the Act applies to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted. On an appeal arising from a Section 54 application, the Commission can consider only the conditions subject to which permission should be granted. Section 54 does not apply where the application is made after the previous planning permission has become time-expired. The application to vary this condition was received by the Council on 8th October 2019, three weeks before the original permission would have become time-expired. The Council was mistaken in its original assessment of these dates and stated in its first refusal reason that the permission could not be varied as the permission was expired. As the permission had not expired when the application was lodged, the

application was a valid Section 54 application and the Council's first reason for refusal is misplaced. Accordingly, the evidence from both parties regarding whether the development was commenced in time is not central to the consideration of this appeal. Condition 10 is capable of being varied as the application was made in time, so the Council has not sustained its first reason for refusal.

8. The Strategic Planning Policy Statement for Northern Ireland (SPPS) sets out transitional arrangements that will operate until a local authority has adopted a Plan Strategy for their council area. It also indicates that certain existing Planning Policy Statements (PPSs) including PPS 3 – Access, Movement and Parking and supplementary planning guidance including Development Control Advice Note 15 – Vehicular Access Standards (DCAN 15) are retained during the transitional period. DCAN 15 also refers to related guidance in the Design Manual for Roads and Bridges (DMRB). The SPPS is no more prescriptive than the retained policies in respect of the issues raised in the appeal, so the appeal will be determined in accordance with the retained policies as set out in paragraph 1.12 of the SPPS.

9. Policy AMP2 of PPS 3 states that planning permission will only be granted for a development proposal involving direct access onto a public road where such access will not prejudice road safety or significantly inconvenience the flow of traffic. DCAN 15 provides guidelines for when a right turning lane is required at an access onto a main traffic route such as the A24 Belfast Road. Paragraph 5.3 states that the volume of right turning traffic requires particular consideration when total flow on the minor road exceeds 500 vehicles per day (i.e. serving more than 50 dwellings). The latest version of the DMRB takes a more cautious approach requiring a central treatment on the major road when the minor road flow exceeds 300 vehicles per day. This would equate to around 30 dwellings.

10. The appellant argues that the need for the right turning lane associated with the appeal proposal would be triggered when 30 dwellings are occupied. Therefore, requiring the provision of the right turning lane before any other works could be undertaken was overly onerous and unreasonable. They also argued that the number of construction vehicle movements that would have been required to install the foundation of dwelling 42 were minimal and point out that under condition 21, provision of road markings is not required until the dwellings are to be occupied. Any inconsistencies in the planning permission, read as a whole, should be construed in favour of the appellant.

11. At my site visit, I observed that the visibility splays of 6m x 215m at the new entrance give generous visibility of oncoming traffic on the Belfast Road, that if a vehicle was waiting to turn right, it would be possible to see it for some 200m on approach and, if desired, to pass it using the hard shoulder, and that it would also have been possible to access the development site via the cut-off section of the Saintfield Road / Old Belfast Road from the junction of the A21 Saintfield Road to the north. The Council agreed at the hearing that the need for the right turning lane would arise from the occupation of the houses rather than their construction. There is no evidence that there was any road safety issue arising from the construction of one foundation in advance of the provision of the right turning lane. The current access arrangements are more than adequate to accommodate construction vehicles. If the condition were to be varied as suggested, it would still require the works specified in the condition to be designed and agreed with the Department for Infrastructure –

Roads (DFI Roads) and implemented before any further development is undertaken. I am not persuaded that this change in timing would cause any harm to road safety or the public interest.

12. The DFI Roads representative at the hearing indicated that their main concern was not so much the wording of the condition, but the way the site entrance had been left following the initial works. They were concerned that the original section of the Old Belfast Road remained in place and is crossed by the site entrance without adequate visibility splays. The approved Private Streets Determination includes the realignment of this old road to meet the new access at a staggered junction with part of the original road becoming open space. I note that the works to this section of the road are not within the area governed by condition 10 as outlined in blue on the approved drawing SR11-02 E. As the works to the old road do not fall within the area controlled by condition 10, they are not part of the necessary road improvements it refers to and the appeal proposal to vary condition 10 cannot be used as a vehicle to require this part of the development to be implemented.

13. I was advised at the hearing that the appellant had received a letter from DFI Roads the previous day stating that the access would be reinstated to its previous condition at cost to the developer. This document is not before me and in any case is not relevant to the key consideration in the appeal which is the timing of works on the main Belfast Road. During my site visit, I observed no other traffic using the cut off section of the Old Belfast Road and I note that it serves only six houses, only two of which are beyond the site itself. The low level of traffic using this part of the old road suggests to me that the temporary layout does not pose a significant safety risk. After almost three years since the works were carried out, there is no evidence that there have been any accidents or near misses as a result of the way the entrance has been left while the proposed variation of condition 10 makes its way through the planning process. DFI Roads has its own powers to address the matter if it sees fit. DFI Roads accepted at the hearing that the requisite visibility splays had been provided at the new entrance. Their concern that the developer did not go through the proper process with DFI is not a breach of the planning permission. As the works to the old road are not within the area governed by condition 10, the concerns on this matter raised by DFI Roads are not determining in the appeal.

14. The Council has already permitted a similar variation to condition 8 of the 2014 approval (which related to drainage works) under application LA07/2019/0701/F. The Council attempted to distinguish that variation from the appeal proposal because the application was received before the expiry date and there were no public safety issues. However, as I have found that the variation now subject to appeal was also received before the expiry date and that there is no evidence of harm to public safety, I consider that the Council's previous approval LA07/2019/0701/F sets a site-specific precedent that this type of variation is acceptable. I am not persuaded that another example of a similar change approved by Armagh, Banbridge and Craigavon Borough Council at Mullinure, Armagh is binding on Newry, Mourne and Down, District Council, or that the circumstances pertaining to it are comparable. However, the approval of a very similar request on the appeal site by this Council is significant and weighs in favour of the appeal proposal.

15. In light of the evidence presented, it appears to me that the original condition 10 was unduly onerous by requiring implementation of the right turning lane prior to any other development. It is significant that the effect of allowing the appeal will be simply to keep the permission live on the basis of the works that have already been undertaken to commence development and to require the right turning lane to be provided before any other development takes place. By amending the condition to allow no development, other than the laying of foundations of one dwelling unit (as suggested by the appellant), before the right turning lane is provided, the road improvements will still be implemented next, before construction of further dwellings takes place, and will be well in advance of the time it would actually be required under supplementary planning guidance (when 30 dwellings are occupied). The proposal is not detrimental to road safety and the Council has not sustained its second reason for refusal.

16. The granting of an appeal in respect of a Section 54 application results in a new planning permission for the same description of development previously approved but with different conditions attached. It is necessary, therefore, to repeat those conditions of the previous permission that remain relevant. All of the original conditions were reviewed with the parties at the hearing and it was agreed that some of the conditions could be altered or clarified to reflect the stage the development is now at, or the outcome of subsequent applications. I consider that the conditions should remain broadly as stated in the original permission with the following exceptions:

- Section 54 prohibits an extension to the deadline for starting development beyond the date set by condition 1 of the 2019 permission. Although the issue of whether the development was commenced in time was not central to the consideration of condition 10, it is relevant to condition 1. I note that following discussion at the hearing of legal principles established in *F. G. Whitley & Sons Co. Ltd. v The Secretary of State for Wales & Clwyd County Council* [1992] EWCA Civ J0324-7, *R. (on the application of Hart Aggregates Ltd.) v Hartlepool Borough Council* [2005] EWHC 840 and *Hammerton v. London Underground Ltd.* [2002] EWHC 2307 (Admin), the Council's final position was to accept that the works to the access and the laying of foundations for plot 42, though technically in breach of condition 10, were effective to commence the development in time. As it is now accepted that the development has commenced, it is not necessary to impose a time limit. Therefore condition 1 is deleted.
- Conditions 6 and 7 duplicate similar requirements in relation to the provision of sewage disposal and drainage. Implementation of drainage works is also covered in condition 8. To avoid unnecessary duplication, conditions 6 and 7 will be combined into a single condition dealing only with sewerage. Condition 8 was varied by application LA07/2019/0701/F and will be in accordance with that decision.
- Condition 10 will be varied as discussed above.
- It was agreed at the hearing that the visibility splays had been provided as required under condition 11, however, it was pointed out that as the condition did not require their permanent retention, they could subsequently be removed. This would be harmful to road safety and would not be in the public interest. Both parties were content that the condition be amended to require permanent retention of the visibility splays in order to make it enforceable.

- Conditions 13 and 14 both remove permitted development rights for building or planting within adopted verges and service strips. It is necessary to refer to the most recent permitted development legislation published in 2015 rather than the 1993 Order. The requirements can be combined into a single condition to avoid unnecessary duplication. As there are no adopted service strips shown on the PSD drawing, the condition should refer only to adopted verges.
- Conditions 16 (approval of highway structures), 18 (discharge of storm water), 19, (street lighting design) and 24 (relocation of road signage) have already been discharged by the planning authority and can therefore be removed from this decision.
- Condition 17 required any telegraph poles or street furniture within the visibility splays to be re-sited. As the requisite splays have now been provided and are to be kept clear under condition 11, it was agreed at the hearing that condition 17 is unnecessary and can be removed.
- As this is a planning decision, conditions 20 and 21 should refer to the planning authority rather than various sections of the DFI or its predecessor departments.
- Condition 22 regulates the gradient of private accesses. As the site is relatively flat, it appears to me that there is little prospect of any private access within the development exceeding the specified gradient. As the condition is not relevant to the development being permitted, it should be removed.
- Condition 23 required the submission of traffic management proposals for the road works. The appellant submitted the required information on 24th June 2019. The Council refused to discharge the condition under application LA07/2019/0976/DC because it considered that the 2014 permission had expired (which was not the case). The Council representative confirmed at the hearing that they had no issue with the actual information submitted. They also accepted the appellant's point that the condition was not enforceable as it neither required that the documents be agreed by the planning authority nor prohibited development until they were. Notwithstanding the Council's previous refusal to discharge the condition, as it would not meet all of the legal tests for a planning condition, the Council representative agreed that it should now be removed.

17. As it has been demonstrated that the Section 54 application was submitted in time and the proposed variation of condition 10 would not prejudice road safety, the Council has not sustained either of its reasons for refusal. Therefore, the appeal is allowed and planning permission is granted subject to the conditions set out below. Given the number of original conditions and the necessary changes set out above, I consider it expedient to adopt the original numbering system so that all parties charged with interpreting the planning permission are clear on the original conditions and any amendments.

Conditions (numbered in accordance with decision R/2011/0648/F)

(2) All hard and soft landscape works shall be carried out in accordance with the approved details and the appropriate British Standard or other recognised Codes of Practice. The works shall be carried out prior to the occupation of any part of the development in accordance with the approved drawing No. 15 which was received on 13th October 2014 and the Landscape Management Plan and Maintenance Specifications which were received on 13th September 2011. The landscaped areas

shall be maintained in accordance with the Landscape Management Plan and Maintenance Specifications.

(3) If within a period of 5 years from the date of the planting of any tree, shrub or hedge, that tree, shrub or hedge is removed, uprooted or destroyed or dies, or becomes seriously damaged or defective, another tree, shrub or hedge of the same species and size as that originally planted shall be planted at the same place, unless the planning authority gives its written consent to any variation.

(4) No construction to be made, trees planted or other obstruction made within 3m (or 1.5 times the depth, whichever is greater) of sewers, or 4m (or 1.5 times the depth, whichever is greater) of watermains.

(5) All services within the development should be laid underground.

(6) None of the dwellings shall be occupied until provision has been made for sewage disposal.

(8) Prior to the commencement of the second unit of the 42 residential units hereby approved, no other development shall take place until drainage works have been carried out in accordance with details submitted to and approved in writing by the planning authority.

(9) *The Private Streets (Northern Ireland) Order 1980 as amended by the Private Streets (Amendment) (Northern Ireland) Order 1992.*
The width, position and arrangement of the streets, and the land to be regarded as being comprised in the streets, shall be as indicated on drawing SR11-02 E which was received on 5th September 2014.

(10) No development hereby permitted, other than the laying of foundations of one dwelling unit, shall be carried out until the works necessary for the improvement of a public road have been completed in accordance with the details outlined in blue on drawing SR11-02 E which was received on 5th September 2014. The works shall be carried out in accordance with an agreement under Article 3 (4) (c) of the Private Streets (Northern Ireland) Order 1980 as amended by the Private Streets (Amendment) (Northern Ireland) Order 1992.

(11) The visibility splays of 6.0 metres by 215 metres at the junction of the proposed access with the Belfast Road, as shown on drawing SR11-02 E which was received on 5th September 2014, shall be permanently retained and kept clear.

(12) No dwelling unit shall be occupied until that part of the service road which provides access to it has been constructed to base course. The final wearing course shall be applied on the completion of the development.

(13) Notwithstanding the provisions of Article 3 and Parts 1 and 3 of the Schedule to the Planning (General Permitted Development) Order (Northern Ireland) 2015 (or any legislation revoking that Order and re-enacting those provisions), no buildings, walls or fences shall be erected, nor planting other than grass, flowers or shrubs with a shallow root system and a mature height of less than 500mm shall be carried out in verges determined for adoption.

(15) No dwelling shall be occupied until provision has been made and permanently retained within the curtilage of the site for the parking of private cars at the rate of 2 spaces per dwelling unless otherwise specified on the approved plans.

(20) The street lighting scheme, including the provision of all plant and materials and installation of same, will be implemented at the developer's expense as directed by the planning authority.

(21) All appropriate road markings and associated signage within the development and on the public road shall be provided by the developer in accordance with the Design Manual for Roads and Bridges and as directed by the planning authority prior to the development becoming occupied by residents.

This decision is based on the following drawings from the original permission R/2011/0648/F:-

Drawing No.	Title	Scale	Received by Council
01	Red Line Drawing	1:1250	23 Jun 2014
02	Site Layout	1:500	09 Jun 2014
03	House Type A-B	1:50	13 Sep 2011
04	House Type D	1:50	13 Sep 2011
05	House Type E	1:50	13 Sep 2011
06	House Type F	1:50	13 Sep 2011
07	House Type D2 det.	1:50	13 Sep 2011
08	House Type R	1:50	13 Sep 2011
09	House Type F2 semi det.	1:50	13 Sep 2011
10	House Type H	1:50	13 Sep 2011
11	House Type P	1:50	13 Sep 2011
12	House Type S	1:50	13 Sep 2011
13	Garage	1:50	13 Sep 2011
14	Footpath link	1:500	23 Jan 2014
15	Landscape proposals	1:500	13 Oct 2014
16	Landscape Management Plan	N/A	13 Sep 2011
16 Appendix A	Maintenance Specification	N/A	13 Sep 2011
17 Appendix B	Long Term Maintenance Specification	N/A	13 Sep 2011
SR11-02 E	Private Streets Determination	1:500	05 Sep 2014
13-025-P-101 Rev. A	Proposed Access (taper lengths for RTL)	1:500	18 Jun 2013 (DFI date stamp)
SR11-RS	Road Sections	1:500	12 Aug 2014
13-025-P-104 Rev. 01	PSD Drawing (Footway)	1:1250	19 Aug 2014

COMMISSIONER GARETH KERR

List of Appearances

Planning Authority:-	Catherine Moane (Newry, Mourne and Down District Council) Jason Killen (Department for Infrastructure – Roads)
Appellant:-	Stewart Beattie QC Dermot Monaghan (MBA Planning) Diana Thompson (MBA Planning) – observing Karen McShane (Kevin McShane Ltd.) Declan Diamond (Kevin McShane Ltd.) – observing John Kearney (Newton Ground Engineering Ltd.)

List of Documents

Planning Authority:-	A	Statement of Case & Appendices Newry, Mourne and Down District Council
Appellant:-	B	Statement of Case & Appendices MBA Planning