
Appeal Reference: 2023/A0012
Appeal by: Calbro Construction
Appeal against: The refusal of full planning permission
Proposed Development: Removal or variation of Condition 4 of planning approval LA10/2017/0450/F - proposed housing development of 31 dwellings, including pedestrian link to Killyclogher Burn walk and retention completion of footpath along St Mary's Road on land to the west of Richmond Park, N.E of St Mary's Court and south of St Mary's Road, Killyclogher, Omagh
Location: St. Mary's Road, Killyclogher, Omagh
Planning Authority: Fermanagh & Omagh District Council
Application Reference: LA10/2022/1071/F
Finding by: Commissioner Cathy McKeary, dated 6th August 2024.

Finding

1. There is no valid appeal.

Reasoning

2. The appeal submitted to the Commission seeks the removal or variation of condition 4 of planning approval LA10/2017/0450/F which was granted on 26th September 2018. Condition 4 states, *"Prior to the occupation of any dwelling hereby permitted, the footpath along St Mary's Road as indicated on Drawing no. 23 Rev 4 date stamped 14th June 2018 shall be fully completed in accordance with the approved plans."*
3. S58(7) states that certain sections of the Planning Act (NI) 2011 (the Act), including s54, shall apply with any necessary modifications, in relation to an appeal to the planning appeals commission under this section as they apply to an application for planning permission. S54(4) of the Act, which relates to permission to develop land without compliance with conditions previously attached, states that, *"This section does not apply where the application is made after the previous planning permission has become time expired, that is to say, the previous permission having been granted subject to a condition as to the time within which the development to which it related was to be begun, that time has expired without the development having begun."* It is noted that no commencement condition was imposed in that permission, but nevertheless s61(2) of the Act, indicates that if planning permission is granted without such a condition the development to which it relates must be begun within 5 years of the grant. Consequently, the date on which development must have begun before the permission expired is 26th

September 2023. Accordingly, comments were sought from all parties regarding the status of the application.

4. The Council and third party both assert that it has not been demonstrated that any construction works have been carried out within the requisite period and the precommencement conditions have not been complied with. The Council states that no application for a Certificate of Lawfulness of Existing Use or Development (CLEUD) has been submitted to them for this site. Both parties consider that a CLEUD is required to demonstrate that development has lawfully commenced on planning approval LA10/2017/0450/F. Consequently, the Council considers that whilst the Commission can determine the appeal, any decision would be meaningless, and these powers do not permit the extension of the time period for commencement of works. The third party considers that the appeal should be dismissed.
5. The appellant considers that the development has “substantially commenced” and includes the construction of the foundations of one dwelling, alterations to the existing site access, construction of significant sections of the public footpaths, and alterations and re-surfacing of the public road. They state that pre-commencement conditions 1, 2 and 3 of planning permission LA10/2017/0450/F which relate only to road works and visibility splays have been carried out (excluding the works to the footway), and therefore the permission remains live.
6. This appeal is not the appropriate means by which to determine whether the permission has commenced. Having regard to s54(4) of the Act, the appeal cannot be determined without first establishing whether planning approval LA10/2017/0450/F remains live. Whilst the appellant states that no works on the section of the footpath in question have been commenced, they nevertheless assert that they carried out works of construction, complied with the pre-commencement conditions, and therefore lawfully commenced development. Notwithstanding this, a CLEUD is required to demonstrate whether development has lawfully commenced. In the absence of such, it cannot be determined whether planning permission LA10/2017/0450/F remains live and has not expired. In accordance with s58(7) and s54(4) of the Act, where the planning permission granted is time expired, s54 does not apply and there can be no valid appeal.

This finding is based on the following drawing stamped received by the Council:-

Drawing No.	Title	Scale	Date
01	Location Map	Not to scale	29 th September 2022

COMMISSIONER CATHY MCKEARY

List of Documents

Planning Authority:-	Statement of Case by Omagh and Fermanagh District Council Rebuttal by Omagh and Fermanagh District Council Further comment by Omagh and Fermanagh District Council
Appellant:-	Statement of case by Corrigan Building Design on behalf of Calbro Construction Rebuttal by Corrigan Building Design on behalf of Calbro Construction Further comment by Corrigan Building Design on behalf of Calbro Construction
Third Party:-	Statement of Case by St Mary's Road Residents Group Further comment by St Mary's Road Residents Group