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<b>Appeal Reference:</b>	2023/L0004
<b>Appeal by:</b>	Mr Christopher McCourt
<b>Appeal against:</b>	The refusal to certify a Certificate of Lawfulness of Proposed Use or Development
<b>Proposed Development:</b>	Proposed completion of dwelling approved under applications M/2004/1633/O & M/2008/0953/RM
<b>Location:</b>	60m NE of 138 Derryloughan Road, Coalisland
<b>Planning Authority:</b>	Mid Ulster District Council
<b>Application Reference:</b>	LA09/2022/1468/LDP
<b>Procedure:</b>	Written representations and Commissioner's site visit on 26 <sup>th</sup> July 2024
<b>Decision by:</b>	Commissioner Trudy Harbinson, dated 31 <sup>st</sup> July 2024

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## Decision

1. The appeal is dismissed.

## Reasons

2. The main issue in this appeal is whether the works undertaken represent an appropriate and timely commencement of permission M/2004/1633/O and M/2008/0953/RM and therefore confirm that the dwelling can be lawfully completed.
3. Section 170 of the Planning Act (Northern Ireland) 2011 (the Act) makes provision for the issue of a Certificate of Lawfulness of Proposed Use or Development (CLPUD). Section 170(1) states that 'if any person wishes to ascertain whether – (a) any proposed use of buildings or other land; or (b) any operations proposed to be carried out in, on, over or under land, would be lawful, that person may make an application for the purpose to the appropriate Council specifying the land and describing the use or operations in question. Section 170 (2) indicates that if, on an application under this section, the Council is provided with information satisfying it that the use or operations described in the application would be lawful if instituted or begun at the time of the application, it must issue a certificate to that effect, and in any other case it shall refuse the application.
4. The application for a CLPUD was received by the Council on 6<sup>th</sup> October 2022, in accordance with the Act. The application was refused on 23<sup>rd</sup> June 2023. This appeal was made under Section 173 of the Act against the Council's refusal of the application.

5. The Council refused to certify that the development was lawful citing the following reason:  
*'The Council is not satisfied that it has been demonstrated that the approved development (M/2004/1633/O and M/2008/0953/RM) has lawfully commenced on site therefore the completion of the dwelling would not be lawful'.*
6. This appeal relates to an approval under the Planning (Northern Ireland) Order 1991 (the Order), and it is therefore necessary I consider the matters in the context of the prevailing legislation at that time. Article 35 of the Order states that where outline planning permission is granted for development consisting of or including the carrying out of building or other operations it shall be granted subject to conditions *that in the case of any reserved matter application for approval must be made within three years of the date of the grant of outline planning permission; and that the development to which the permission relates must be begun by whichever is the later of the following dates - (i) the expiration of five years from the date of the grant of outline planning permission; or (ii) the expiration of two years from the final approval of the reserved matters or, in the case of approval on different dates, the final approval of the last such matter to be approved; or other such period (whether longer or shorter) as the Department considers appropriate.*
7. Outline planning permission M/2004/1633/O was granted on 21<sup>st</sup> September 2005 for 'One dormer bungalow' on lands 60m northeast of 138 Derrylaughan Road, Coalisland. A time condition required the development to be begun by the later of two dates; the expiration of five years from the date of the outline approval; or the expiration of two years from the date of approval of the last of the reserved matters. An application for reserved matters M/2008/0953/RM was made on 7<sup>th</sup> August 2008 and approved on 10<sup>th</sup> February 2009. The permission must have been commenced by 10<sup>th</sup> February 2011 to be lawful.
8. The purpose of Article 35 of the Order is to bring to an end permissions not begun within a specified period of time, to prevent an accumulation of unimplemented permissions and allow proposals to be reviewed periodically in light of changing circumstances, including updated planning policies.
9. Article 36(1) of the Order sets out how Article 35 is to be interpreted. It states that development shall be taken to be begun on the earliest date on which any of the operations specified in subsections (a) to (d) comprised in the development begins to be carried out. The approved development includes the erection of a building, therefore Article 36(1)(a) applies and it must be determined if the works undertaken by the Appellant involved any work of construction in the course of the erection of the building. Accordingly, it must be determined if, on the balance of probabilities, any works of construction in the course of the erection of the dwelling were undertaken by 10<sup>th</sup> February 2011.
10. In making an application under Section 170 of the Planning Act the onus is on the applicant to provide information to satisfy that the use or operation described in the application would be lawful if instituted or begun at the time of the application. The Appellant provided the following evidence to demonstrate that the works undertaken at the appeal site constituted a lawful commencement of the planning permission: -

- A timeline of works in which he stated that he undertook pre commencement requirements around 2005/2006 and established access and sightlines. As the site was heavily wooded trees were removed to provide a trackway into the site and a cleared apron for the proposed dwelling. That upon receipt of the granting of reserved matters (RM) in 2009 hardcore and stones were provided to the access and laneway in order to commence development and this included piping the site frontage ditch. That in late summer of 2009 he and his father set out and dug foundations. The foundations were subsequently backfilled;
  - An aerial photograph of the site dated 20/12/2010;
  - Two invoices dated 1<sup>st</sup> June 2009 and 1<sup>st</sup> July 2009. These are from Martin McCaffrey & Sons Plant Hire and are made out to Christopher McCourt, Derryloughan Road, Coalisland for a site at NE of 138 Derryloughan Road. The June invoice is for '*plant hire for the clearance of screed and trees on the site*' and for the '*supply of pipes and stones to form site entrance and sightlines*'. The July invoice is for '*plant hire to form site road to construction area and associated drainage*' and the supply of stone;
  - A letter to Mid Ulster District Council dated 16<sup>th</sup> February 2023 signed by the Appellant and his father. In it the Appellant stated that he and his father, during the late summer of 2009, in addition to the works already carried out on the site earlier that year, dug out the foundation trenches for a new dwelling as approved on 10<sup>th</sup> February that year. It goes on to state that due to the recession of 2008-2009, he was unable to gain further finance to complete the dwelling and backfilled the trenches with a view to continuing construction of the dwelling when finances became available. The Appellant refers to this as an affidavit however it does not appear to have been witnessed by a solicitor; and
  - A copy of '*Guidance on Renewing Planning Permission and Starting Development*'. This is a print off from a planningni.gov.uk website. It is entitled '*Advice and Guidance*' and sets out guidance on '*Re-applying for planning permission under draft PPS21*' and '*Starting to build where full planning permission or reserved matters has been granted*'.
11. In summation, the Appellant stated that the works which took place on the site before the critical date included the provision of sightlines, formation of access, bridging the roadside drain at the site entrance, felling and removal of vegetation to construct an access laneway from the road to the apron of the proposed dwelling, clearing a significant amount of trees for the dwelling, setting out and digging foundation trenches for the dwelling and clearing vegetation to the rear of the site in order to locate a septic tank and drainage.
12. The Appellant stated that a substantial amount of money was spent on this work and that they are material operations carried out in the course of the construction of the approved dwelling. He stated that the works were carried out in line with guidance to the legislation, '*Guidance on Renewing Planning Permission and Starting Development*' and before the expiry of the planning approval. The Council considered that those works were undertaken as site preparation and are not works of construction in the course of the erection of a building, as required by Article 36 of the Order.

13. Condition 2 of M/2004/1633/O required '*Approval of the details of the siting, design and external appearance of the buildings, the means of access thereto (hereinafter called 'the reserved matters'), shall be obtained from the Department, in writing, before any development is commenced*'. Condition 11 required '*A scale plan at 1:500 shall be submitted as part of the reserved matters application showing the access to be constructed in accordance with the attached form RS1.*'. Condition 3 of M/2008/0953/RM required '*The vehicular access, including visibility splays and any forward sight line, shall be provided in accordance with the approved plans, prior to the commencement of any works or other development hereby permitted.*'. This is a pre-commencement condition requiring those works to be provided before the development approved is commenced.
14. The access into the approved dwelling had been reserved for approval, the detailed plan being approved in the February 2009 RM. The Appellant stated that he carried out pre-commencement requirements in 2005/2006, providing the access and sightlines. The Council include orthophotography dated April 2007 which show an access and laneway at the appeal site. Notwithstanding this, the 1<sup>st</sup> July 2009 invoice details the supply of pipes and stones to form site access and sightlines. However, those works are also a pre-commencement requirement to be carried out in advance of development commencing, they have no bearing on whether construction works in the course of erecting the building had been commenced by the key date.
15. The invoices provided also include for site clearance and drainage at the site road. However, these too are preparatory site works readying the site for development and are not in themselves construction works in the course of erecting the building.
16. The Appellant stated that he and his father dug out foundation trenches in late summer 2009. In addition to the December 2010 aerial provided by the Appellant, the Council include orthophotography dated 4<sup>th</sup> April 2007 and 31<sup>st</sup> August 2010 in which I can see an access and laneway into the site. However, the images offer limited assistance in assessing the physical features on the site relating to provision of foundations and I cannot discern where they had been dug and backfilled. The Council also included aerial images dated 6<sup>th</sup> July 2013, 12<sup>th</sup> May 2016 and 9<sup>th</sup> August 2022. These show with greater clarity a clearing of trees and vegetation and a stoned area within the site in 2013 which was not apparent on the earlier images. However, these images capture the site after the key date and provide no evidence, of themselves, to indicate that development had commenced on or before 10<sup>th</sup> February 2011.
17. With the exception of the declaration of the Appellant and his father in their correspondence to the Council, there is no further evidence as to when and to what extent foundation works were undertaken. Nor when they were subsequently backfilled. The evidence consists of this letter alone with no other persuasive evidence to support these claims. The lack of clarity is such that the letter does little to assist the Appellant's case as it is not persuasive, even when taken together with the other submitted evidence, that construction works in the course of erecting the dwelling had taken place.

18. The Appellant stated that they relied on 'Guidance on Renewing Planning Permission and Starting Development' which was available on the planning portal and to which they were directed by the local planning office at that time. They considered that this guidance was in effect an amplification of Article 36 (1) of the Order and set out what constituted the commencement of '*any work of construction in the course of the erection of a building*'. However, the guidance is generic in nature and nowhere within it does it state that it is an extension of Article 36 of the Order, as inferred by the Appellant. It makes no reference at all to the Order.
19. The guidance recognises that in times of financial difficulty an applicant may not be in a position to start work to implement planning permission. It states that at an early stage of a project it is a matter of planning judgement as to whether or not development has started and gives examples of when the Department would accept that development has commenced in accordance with the approval. It sets out where an applicant has complied with conditions relating to works to be carried out before the commencement of other works and '*where an applicant has commenced any work of construction in the course of the erection of a building, such as the digging of foundations and preferably pouring of concrete, driving of piles or other substantive works; the laying of any underground main pipe to the foundations or part of the foundations of a building*' (Appellant's emphasis). The Appellant stated that the measures highlighted fall under the heading of '*Starting to Build*' and that he carried out operations contained in those measures.
20. The Council stated that when the definition of '*works in the course of erection of a building*' are not defined in the legislation, it is reasonable to consider what is a common interpretation of the statement. They refer to the Collins Dictionary definition of the word '*erection*' as '*the act of erecting or the state of being erected, something that has been erected; a building or construction*', the emphasis being on building or construction. I consider this to be a reasonable interpretation.
21. Again, the provision of the vehicular access, including visibility splays and any forward sight line is a predevelopment requirement. The roadside drain and felling and removal of vegetation are site preparation works readying the site for development. I do not consider that these amount to '*other substantive works*' of construction in the course of the erection of a building as highlighted by the Appellant. I have already concluded above that I have no persuasive evidence as to the digging of foundations. In any event the Appellant did not pour concrete to create the foundations which, to my mind would be required to represent works of construction in the course of the erection of the building. I have not been persuaded that there have been any building or construction works.
22. The guidance goes on to recommend that where a development is commenced but not completed, that any documents or records of work carried out be retained, including invoices, receipts, building control approval and dated photographs. With the exception of the two invoices which relate to necessary predevelopment access work and site preparation, the Appellant had no further documents recording works that had taken place before the key date. Critically there are no records of construction works in the course of erecting the dwelling.

23. The Appellant stated that as the guidance was issued as a result of enquiries from agents, applicants and public representatives it must be considered a material consideration and given significant weight in determining the CLPUD. Furthermore, they stated that no new guidance to contradict or supersede it had been issued. The Council pointed to Section 45 of the Act which directs that in dealing with a planning application the Council '*must have regard to the local development plan, so far as material to the application and to any other material considerations*'. They stated that the issues raised by the Appellant may well be '*other material considerations*' that can be weighed into the determination of a planning application however the application was for a CLPUD, which must be based on fact, and is a determination of the legal status of the development.
24. Whilst the guidance on the website at that time may have provided general advice to developers, it is the legislation that was in place at the time of the planning decision that I must consider. Given the precise wording of the statutory requirement in Article 36(1)(a) of the Order, only construction work carried out in the course of erecting the approved buildings count towards the commencement of development. The guidance included by the Appellant cannot diminish or outweigh the legislative requirement in considering an appeal relating to the refusal of a CLPUD. For the reasons set out above, I have been provided with no persuasive evidence that works of construction in the course of the erection of the building had begun on or before the key date.
25. The Appellant included a copy of Appeal 2012/E0043 and stated that in accordance with the Commission's approach in that case, this appeal should be considered under the Order which was prevailing legislation at that time. I have also considered the matters in the context of the prevailing legislation at that time. In that Appeal, the Commission accepted that the laying of foundations and construction of a brick course upon those foundations amounted to works of construction in the course of erection of the buildings, and that on the balance of probabilities, the construction works undertaken represented an appropriate and timely commencement of the approval. This is not the case in the appeal before me and I am not persuaded that the two cases are on all fours. In any event each appeal must be decided within its own evidential context.
26. Taking all of the above together, I am not persuaded that on the balance of probabilities work of construction in the course of the erection of the building, as required by Article 36(1)(a) of the Order, in respect of permission M/2004/1633/O and M/2008/0953/RM, had taken place before the key date of 11<sup>th</sup> February 2011. I find that the Council's refusal to certify the Certificate of Lawfulness of Proposed Use or Development is well founded. The appeal is dismissed.

This decision is based on drawing 01 Site Location date stamped received by the Council on 06 October 2022.

**COMMISSIONER TRUDY HARBINSON**

## **List of Documents**

Planning Authority:-	A	Written Statement of Case Mid Ulster District Council
	A1	Rebuttal
Appellant:-	B	Written Statement of Case Brendan Johns