

# Appeal Decision

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| <b>Appeal Reference:</b>      | 2023/L0006                                                                                                          |
| <b>Appeal by:</b>             | Mrs. Gloria Thompson                                                                                                |
| <b>Appeal against:</b>        | The refusal to certify a Certificate of Lawfulness of Proposed Use or Development                                   |
| <b>Proposed Development:</b>  | Completion of the proposed replacement house and detached garage approved under planning application D/2007/0527/RM |
| <b>Location:</b>              | 37 Burnquarter Road, Ballymoney                                                                                     |
| <b>Planning Authority:</b>    | Causeway Coast and Glens Borough Council                                                                            |
| <b>Application Reference:</b> | LA01/2023/0025/CLOPUD                                                                                               |
| <b>Procedure:</b>             | Written representations and Commissioner's site visit on 21 <sup>st</sup> May 2024                                  |
| <b>Decision by:</b>           | Commissioner Gareth Kerr, dated 22 <sup>nd</sup> May 2024                                                           |

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## Decision

1. The appeal is allowed, and a Certificate of Lawfulness of Proposed Use or Development is attached.

## Reasons

2. The main issue in this appeal is whether, on the date of the application, it would have been lawful to complete the development approved under planning permission D/2006/0239/O and D/2007/0527/RM. The application for a Certificate of Lawfulness of Proposed Use or Development (CLOPUD) was received by the Council on 4<sup>th</sup> January 2023, in accordance with Section 170 of the Planning Act (Northern Ireland) 2011 (the Act). The Council refused the application on 13<sup>th</sup> June 2023. This appeal was brought under Section 173 of the Act against the Council's refusal of the application.
3. Section 170 of the Act makes provision for the issue of a CLOPUD; 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. Outline planning permission was granted under application D/2006/0239/O on 23<sup>rd</sup> August 2006 for replacement of an existing dwelling house with a 1½ storey dwelling and detached garage on the appeal site. Condition 1 of the outline planning permission required that the development be begun before the expiration of five years from the date of the outline permission, or two years from the reserved matters approval, whichever is the later of the two. The reserved matters were approved on 25<sup>th</sup> January 2008 under application D/2007/0527/RM. Accordingly, in order to remain live, the development must have been commenced within five years of the outline approval, that is on or before 23<sup>rd</sup> August 2011.
5. One pre-commencement condition applied to the appeal development. Condition 2 of D/2007/0527/RM required the demolition of an existing building on the site before construction of the new dwelling commenced. There is no dispute that this was complied with prior to the expiry of the permission.
6. Commencement of development at the time the permissions were granted and for their duration was governed by the Planning (Northern Ireland) Order 1991. Where a development consists of or includes the erection of a building, Article 36 of the above Order states that development shall be taken to be begun on the earliest date on which any work of construction in the course of the erection of the building begins to be carried out. The onus is on the appellant to demonstrate, on the balance of probabilities, that a work of construction in the course of the erection of the building was carried out on or before 23<sup>rd</sup> August 2011.
7. The appeal site is a square plot which abuts Burnquarter Road to the south east. The land is relatively flat. A pair of field gates with wing walls define the entrance from the road. The site is somewhat overgrown with vegetation and is bound to three sides by hedges and taller trees. A rectangular foundation has been installed in the northern corner of the site in the position where the approved detached garage would be sited. A note on the block plan states that the foundation was laid on 30<sup>th</sup> October 2009. During the course of the application process, the concrete, which sat below water and vegetation, was uncovered.
8. The appellant contends that the foundations for the garage were installed on 30<sup>th</sup> October 2009 and relies primarily on a letter from the Council's Building Control Department dated 6<sup>th</sup> December 2022 which states that a foundation inspection was carried out and approved on this site on 30<sup>th</sup> October 2009. The Planning Department sought further clarification from Building Control and was told that the foundations were pegged for the required depth of foundation concrete. From this information, the Council was satisfied that the foundations for the garage were excavated while the permission remained live. However, in order to constitute a work of construction in the course of the erection of the building, concrete would have had to be poured into the trench. The Council was not satisfied that sufficient information had been provided to demonstrate that this was done before the permission expired.
9. The appellant's husband, who had arranged for the demolition of the building and installation of garage foundations, died suddenly on 10<sup>th</sup> June 2021. The appellant's evidence states that she has been unable to identify who did the work or retrieve any invoices for it as it was arranged by her husband 12 years before his death. Her agent made further contact with the Building Control Officer who did the inspection

on 30<sup>th</sup> October 2009 and he recollects being asked to carry out the inspection in the morning of that day as the foundation concrete was due to be delivered that afternoon. The Council was not satisfied that this was sufficient evidence of the concrete being poured.

10. The appellant argued that a stricter test was being applied to their application based on Section 63 of the Planning Act (Northern Ireland) 2011 and said this should not be applied retrospectively. They referred to correspondence provided by the Planning Service in 2009 in relation to commencement of development on another site where it was stated that development shall be taken to be begun on the earliest date on which any material operation commenced in the development begins to be carried out. It then gave examples of material operations including any work of construction in the course of erection of a building and the digging of a trench which is to contain the foundations, or part of the foundations of any building.
11. It appears that the above guidance was based on an incorrect legislative test. The term “material operations” comes from Section 56 of the Town and Country Planning Act 1990 which applies in England and Wales, but has never done so in Northern Ireland. The relevant legislation for Northern Ireland at the time of the development was the Planning (Northern Ireland) Order 1991, as set out above. Its wording in respect of commencement of development in cases where the development includes the erection of a building is the same as that of the 2011 Act, so the Council has not applied a stricter test retrospectively. They referred to the correct legislation in their evidence and assessment.
12. While the digging of a trench which is to contain the foundations may constitute a material operation in England and Wales, it cannot be described as a work of construction in the course of the erection of the building and is not therefore sufficient to constitute commencement of development in the relevant legislative context for Northern Ireland. As the 2009 correspondence from the Planning Service was based on incorrect legislation, no weight can be attached to it in the determination. While excavating the foundations may mark the shape of the building, the work of construction would not begin until concrete is placed in the trench. I agree with the Council that concrete would have had to be poured into the trench before the permission expired to constitute commencement of the development.
13. Both parties have correctly identified that the test for granting a Certificate of Lawfulness is the balance of probability. It is not necessary that the date the operations were undertaken is proved beyond reasonable doubt. The onus of proof falls on the appellant and while corroborating evidence is important, case law has indicated that uncorroborated evidence from the appellant may be accepted. Each case must be decided in its evidential context based on the circumstances pertaining.
14. The sudden death of the appellant’s husband has resulted in a paucity of available evidence that may not have been the case had he remained alive at the time of the application. However, there are a number of factors that indicate it is likely, on the balance of probability, that the concrete was laid the same day the foundations were dug and inspected.

15. As the foundation was dug almost two years before the planning permission would have expired, it seems highly unlikely that the work was done in some sort of panic to keep the permission alive. Since the Building Control Officer was advised that concrete was being delivered that afternoon, there is no countervailing evidence that would cause me to doubt that this would have been the case. Any significant delay in the placing of concrete within the trench into the winter months would have caused it to fill with water and the sides would have collapsed. To suggest that concrete may not have been poured until after 23<sup>rd</sup> August 2011 would have required Mr. Thompson to leave the trenches open for almost two years. By this time, further excavation and inspection by Building Control would have been required to check ground conditions, but they have confirmed that no further visits took place.
  
16. I also note that the full garage foundation was dug, not a small section, and that it was pegged for the correct depth of concrete when the Building Control officer inspected it. There would have been no reason for the developer to go to this length if he had no intention of pouring the concrete once the ground conditions had been checked. The purpose of the Building Control inspection at foundation stage is to check the condition of the ground in the trench before the concrete is poured. An Officer would have no need to see the concrete going into the trench at this visit. Therefore, the fact that the Officer did not see the concrete being poured during his visit is not fatal to the application as he would not have been expected to. Based on the totality of the evidence before me, I consider it likely, on the balance of probability, that the concrete was poured on or very soon after 30<sup>th</sup> October 2009. On the contrary, the logical conclusion of the Council's position that it could have been poured into the trench excavated on 30<sup>th</sup> October 2009 after 23<sup>rd</sup> August 2011 is highly implausible.
  
17. From my own observations on site and the evidence before me, I am satisfied, on the balance of probability, that the garage foundation was installed before 23<sup>rd</sup> August 2011 and that it constitutes a work of construction in the course of the erection of the approved building. This complies with condition 1 of the outline planning approval D/2006/0239/O and ensures that the permission as a whole (comprising the outline and reserved matters approvals) remains live and the development approved under planning application D/2007/0527/RM can lawfully be completed. For these reasons, I consider that the Council's refusal to certify the operation was not well founded. The appeal succeeds and a CLOPUD is attached.

This decision is based on the following drawings:-

| <b>Drawing No.</b> | <b>Rev.</b> | <b>Title</b>        | <b>Scale</b> | <b>Received by Council</b> |
|--------------------|-------------|---------------------|--------------|----------------------------|
| PP01A              | A           | Location Map        | 1:2500       | 04 Jan 2023                |
| PP03               | -           | Existing Block Plan | 1:500        | 04 Jan 2023                |

**COMMISSIONER GARETH KERR**

## **List of Documents**

- |                      |   |                                                                |
|----------------------|---|----------------------------------------------------------------|
| Planning Authority:- | A | Statement of Case<br>Causeway Coast and Glens Borough Council  |
|                      | B | Rebuttal Statement<br>Causeway Coast and Glens Borough Council |
| Appellant:-          | C | Statement of Case<br>Jeff Wilson Chartered Architect           |

**PLANNING ACT (NORTHERN IRELAND) 2011: SECTION 170**

**CERTIFICATE OF LAWFULNESS OF PROPOSED USE OR DEVELOPMENT**

The Planning Appeals Commission hereby certifies that on 4<sup>th</sup> January 2023 the operations described in the First Schedule to this certificate in respect of the land specified in the Second Schedule to this certificate and edged red on the attached drawing No. PP01A would have been lawful within the meaning of Section 170 of the Planning Act 2011, for the following reason:

Development had commenced before the date specified in the time-limiting condition attached to planning approval D/2006/0239/O and D/2007/0527/RM and the completion of the development, in accordance with the approved plans, is therefore lawful.

Signed:



**COMMISSIONER GARETH KERR**

22<sup>nd</sup> May 2024

**FIRST SCHEDULE**

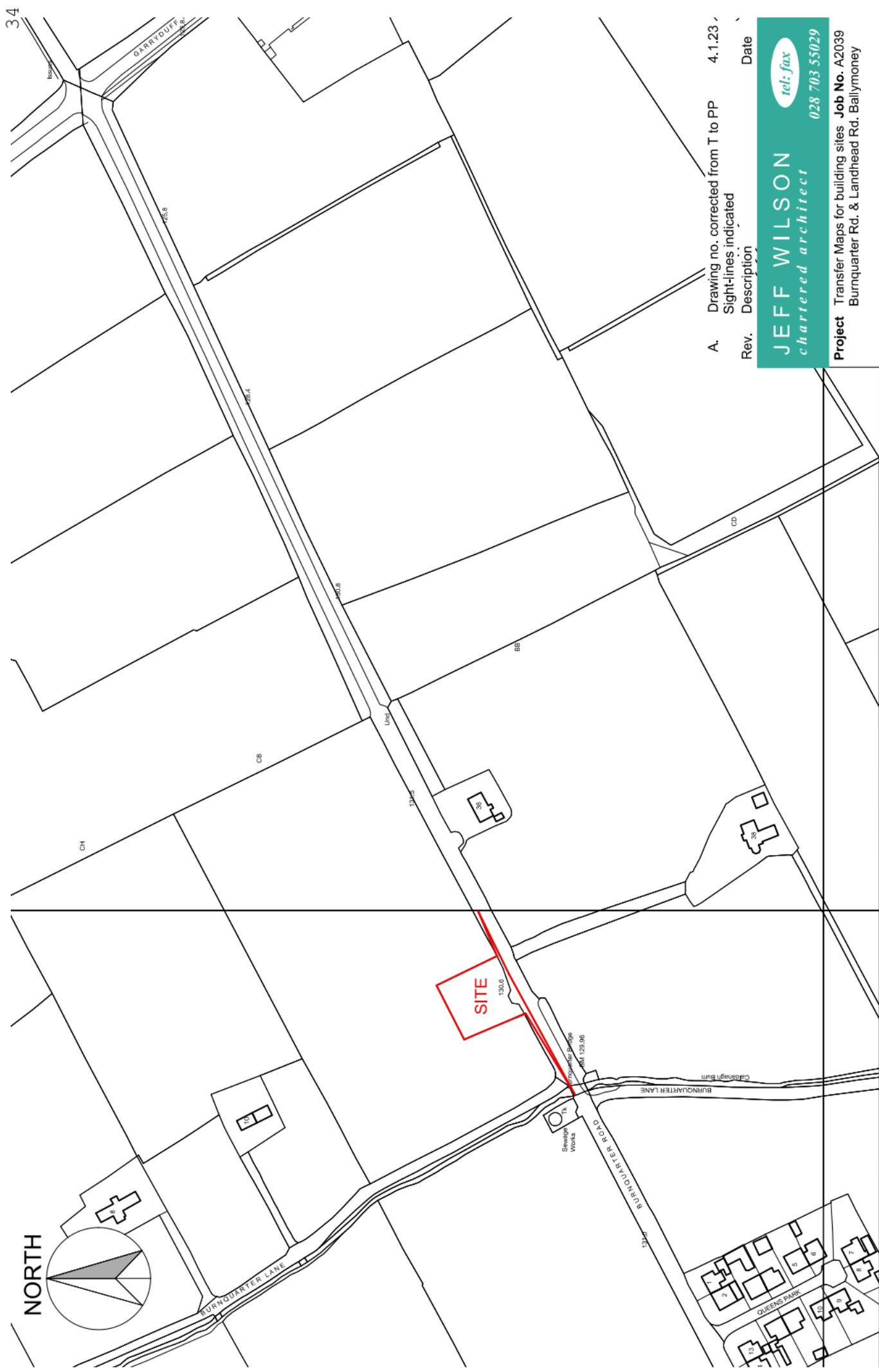
Completion of the proposed replacement house and detached garage approved under planning application D/2007/0527/RM

**SECOND SCHEDULE**

37 Burnquarter Road, Ballymoney

**Notes:**

- (1) This certificate is issued solely for the purpose of Section 170 of the Planning Act 2011.
- (2) It certifies that the operations specified in the First Schedule taking place on the land described in the Second Schedule would have been lawful on the specified date and, thus, would not have been liable to enforcement action under Section 138 or 139 of the Planning Act (Northern Ireland) 2011 on that date.
- (3) This certificate applies only to the extent of the operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plans. Any operations which are materially different from those described or which relate to other land may render the owner or occupier liable to enforcement action.
- (4) The effect of the certificate is also qualified by the proviso in Section 170(4) of the Planning Act (Northern Ireland) 2011, which states that the lawfulness of a described use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters relevant to determining such lawfulness.



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| Rev. | Description                                                 | Date   |
|------|-------------------------------------------------------------|--------|
| A.   | Drawing no. corrected from T to PP<br>Sight-lines indicated | 4.1.23 |

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**Project** Transfer Maps for building sites  
 Burnquarter Rd. & Landhead Rd. Ballymoney

**Title** Location Map for site opp. 38 Burnquarter Road

**Drwg. no.** PP01A **Scale** 1:2500 @ A4 **Date** Nov. 22

**Location Map 1:2500**

CC11