
Appeal Reference:	2022/A0219
Appeal by:	Mr P Bradley
Appeal against:	The refusal of full planning permission
Proposed Development:	Remove Condition No.5 of planning permission LA09/2019/0944/F to retain infill dwelling and garage between 90 and 92 Iniscarn Road, Desertmartin New access laneway 130m west of the junction of Iniscarn Road/Gortahurk Road, existing access onto Iniscarn Road to be permanently closed. Condition No.5 of LA09/2019/0944/F requires the removal of culvert and ancillary works
Location:	90A Iniscarn Road, Desertmartin, BT48 9RW
Planning Authority:	Mid Ulster District Council
Application Reference:	LA09/2022/0605/F
Procedure:	Written representations and Commissioner's site visit on 18 July 2024
Decision by:	Commissioner McShane, dated 21 August 2024.

Decision

1. The appeal is dismissed.

Claim for Costs

2. A claim for costs was made by Mr P Bradley against Mid Ulster District Council. This claim is the subject of a separate finding.

Reasons

3. The main issue in this appeal is whether the removal of the culvert is required.
4. In August 2021, full planning permission subject to conditions, was granted retrospectively for an infill dwelling and garage and a new access on a site between 90 and 92 Iniscarn Road, (LA09/2019/0944/F). Hereafter, this is referred to as the "2021 planning permission".
5. The 2021 planning permission was subject to six conditions. Condition 5 is referenced in this appeal and reads as follows:

"Condition 5: The existing culvert and all ancillary works should be removed within 3 months of the date of this approval and proposed ground levels restored, and reinstatement of the watercourse to its previous level.

Reason: To remain in Compliance with Policy FLD 4 of PPS 15.”

6. Planning Policy Statement 15 is entitled Planning and Flood Risk (PPS 15). It is identified as a retained policy document in the Strategic Planning Policy Statement for NI (SPPS).
7. Condition 5 requires the works to be undertaken within 3 months of the grant of planning permission, in other words by November 2021. The culvert remains in situ. Enforcement proceedings, whether ongoing or in abeyance, are not before me in this appeal.
8. The present application, made under Section 54 of the Planning Act (NI) 2011 (the Act), seeks permission to carry out the previously approved development without complying with Condition 5. The 2021 planning permission will remain in place irrespective of the outcome of this appeal. On an appeal arising from an application of this type, the Commission can only consider the conditions subject to which the planning permission was granted. It cannot re-open matters settled by the 2021 planning permission.
9. Section 45 (1) of the Act requires the Commission, in dealing with an appeal, to have regard to the local development plan (LDP), so far as material to the application, and to any other material considerations. Section 6 (4) of the Act states that where regard is to be had to the LDP, the determination of proposals must be in accordance with the plan unless material considerations indicate otherwise.
10. The Magherafelt Area Plan 2015 (MAP), which was adopted in 2011, operates as the LDP for the area. The appeal site lies outside any identified settlement development limit in the MAP. There are no operational development plan policies material to my assessment of the appeal. Therefore, I turn to other material considerations.
11. The Appellant argues that whether the culvert is contrary to Policy FLD 4 is not a material consideration in this appeal and claims that the only function of Condition 5 is to enforce against the culvert in the guise of a planning condition. However, I agree with the Council that an assessment is essential to determine whether Condition 5 is necessary.
12. Policy FLD 4 of PPS 15: Artificial Modification of Watercourses states that the planning authority will only permit the artificial modification of a watercourse, including culverting, in either of the following *exceptional* (my emphasis) circumstances:
 - Where the culverting of a short length of a watercourse is necessary to provide access to a development site or part thereof.
 - Where it can be demonstrated that a specific length of watercourse needs to be culverted for engineering reasons and that there are no reasonable or practical alternative courses of action.
13. The culvert is notated on the Mid Ulster District Council (MUDC) stamped Drawing No.02 Rev 3 as a “recently piped Storm drain”. The drawing was submitted with a

retrospective planning application (LA09/2019/0944/F) and as such shows the development on the ground at the time, as well as the proposed new access. MUDC Drawing No.02 Rev 3 is stamped approved; however, it is clear from Condition 5 that the culvert and ancillary works are required to be removed.

14. The culvert extends for approximately 100m along the south-east boundary of the appeal site, which is significantly greater than the “less than 10m” referenced in the Justification and Amplification section of policy. Paragraph 6.54 of PPS 15 states that the culverting of short lengths of the watercourse is acceptable to enable access to and from the development as required. The access point from Gortahurk Road to the appeal site is located approximately 40m west of the culvert. There is no persuasive evidence that the 100m long culvert is necessary to facilitate access to the appeal development. There is no exception under the first bullet point of Policy FLD 4 of PPS 15.
15. The second bullet point of Policy FLD 4 of PPS 15 allows for a *specific length* [my emphasis] of watercourse to be culverted as an exception where there are engineering reasons and there are no reasonable or practical alternative courses of action.
16. The Appellant does not indicate what specific length of the watercourse needs to be culverted for engineering reasons. A passing reference is made to the stability of the bank of the watercourse. However, the Justification and Amplification Section of Policy FLD 4 states that that where there are insurmountable inherent structural problems such as slope stability and land slippage, other solutions such as bank reinforcement, gabion wall construction and underpinning should be considered as they will have lesser long term environmental / ecological impacts. There is no persuasive evidence that reasonable or practical alternative courses of action have been considered as a solution.
17. It is also argued that removal of Condition 5 is justified to ensure the health and safety of the Appellant and his family. However, the Justification and Amplification Section of Policy FLD 4 states that that where there are health and safety concerns arising from open access to watercourses, the construction of solid barriers such as fencing, or planting of ‘soft’ landscaping, should be considered as alternatives to culverting. Again, there is no persuasive evidence that any such alternatives have been considered as a solution. For the reasons given above, I have not been persuaded that the watercourse is required to be culverted for engineering and / or health and safety reasons. The requirements for an exception under the second bullet point of Policy FLD 4 of PPS 15 have not been met. Accordingly, Condition 5 is necessary.
18. The Appellant’s stated engineering and health and safety arguments for retaining the culvert and ancillary work are based upon the presence of the dwelling, garage and new access laneway approved by the 2021 planning permission. Accordingly, the condition is relevant to the development permitted.
19. Information on ground levels and the previous levels of the watercourse are available from the planning history and may be used in conjunction with other sources of information, including from the Department for Infrastructure. Accordingly, Condition 5 is precise, reasonable and enforceable. I note that a

'breach of condition notice' was issue in March 2023. However, that is not a matter before me.

20. The Appellant argues that it is a material consideration that the dwelling and garage and the new access approved under the 2021 planning permission are in situ. However, the 2021 planning permission required the culvert to be removed. As such, the development on the ground does not comply with the planning permission granted. The planning system is not punitive but nor does it give determining weight to unauthorised development on the basis that it is in situ.
21. It is argued that "no harm" would be caused by permitting the appeal development with the culvert and ancillary works remaining in place while harm could be caused by its removal. However, DFI Rivers indicate that in the absence of studies on the impact of the culvert on flooding downstream prior to its being put in place, it may cause harm. In these circumstances, a precautionary approach is necessary. I note the Third-Party Objector's fear that the retention of the culvert may cause flooding of his home and land. No persuasive evidence has been submitted to justify the claim that the removal of the culvert could cause fluvial flooding.
22. The Appellant claims that removing the culvert *might* (my emphasis) undermine the integrity of the proposed access laneway and inhibit access to the garage. However, no persuasive evidence to this effect was submitted.
23. It is argued that the impact on the Appellant of complying with Condition 5 of the 2021 planning permission has not been assessed. However, the Appellant's decision to proceed with the appeal development without planning permission, including constructing the new access laneway without removing the culvert, was at his own risk.
24. There is concern that a "dangerous" precedent would be set if planning permission were granted for the appeal development without Condition 5. While each planning application falls to be considered on its merits, it has not been demonstrated that the appeal development is distinguishable from other infill development in the open countryside. Consequently, if the appeal development were to be granted planning permission without being subject to Condition 5, it would set an unlimited, unacceptable precedent for similar development elsewhere throughout the NI countryside, which would be environmentally unsustainable.
25. I conclude that Condition 5 is necessary. Accordingly, the appeal is dismissed.

This decision is based on the following drawings:

- MUDC stamped Drwg No.01 Rev 02: Site Location Map (Scale 1:2500); and
- MUDS stamped Drwg No.02 Rev 03: Block Plan (Scale 1:500 @ A2) (Submitted in respect of planning application LA09/2019/0944/F and date stamped approved 12 August 2021).

COMMISSIONER MCSHANE

List of Documents

Planning Authority:- “LPA 1” Statement of Case
“LPA 2” Rebuttal Statement
(Mid Ulster District Council)

Appellant:- “APP 1” Statement of Case
“APP 2” Rebuttal Statement
(Oonagh Given)

Third Party Objector:- “TP 1” Statement of Case
“TP 2” Rebuttal Statement
(Mr Murray)

