

<b>Report on</b>	Non-Determination Planning Appeal Decision 2019/E0008.
<b>Date of Meeting</b>	3/12/19
<b>Reporting Officer</b>	Melvin Bowman
<b>Contact Officer</b>	As above.

<b>Is this report restricted for confidential business?</b>	Yes	
If 'Yes', confirm below the exempt information category relied upon	No	x

<b>1.0</b>	<b>Purpose of Report</b>
1.1	To inform members of an Appeal decision dated the 8 <sup>th</sup> Nov 2019 (2019/E0008) relating to the Non-determination of a CLUD (Certificate of Lawful use / Development) at the Jungle NI, Desertmartin Road, Moneymore.
1.2	The appeal is allowed without any costs award but with an amended description.
<b>2.0</b>	<b>Background</b>
2.1	<p>A 'CLUD' application was received by the Council on the 5<sup>th</sup> Dec 2018 and given the reference LA09/2018/1597/LDE. It proposed that the following development be determined as lawful:</p> <p><b>Development</b> : Use of the underpass by visitors and staff for access to The Jungle NI and surrounding farm lands</p> <p><b>Location</b> : Underpass opposite &amp; south east of No.60, Desertmartin Road, Moneymore, Magherafelt</p> <p><b>Appellant</b> : NI The Jungle</p> <p>As the Council had not determined the CLUD within time as prescribed by the Planning Act (NI) 2011 the applicant used his legislative entitlement to ask the PAC to make a decision on the certificate.</p> <p>A separate costs claim made by the appellant against the Council was not justified in this case.</p> <p>The reasoning for the Commissioner's decision to allow the appeal with an amended certificate and to deny any costs award is set out below.</p>

<b>3.0</b>	<b>Main Report</b>
3.1	The appeal site comprised an underpass below the main A29 road which links two parts of what the Commissioner refers to as a substantial farm holding. The underpass was constructed in or around 2000 to facilitate the safe movement of livestock.
3.4	Key to the Commissioners decision in this appeal is the notion of the extent of the 'planning unit'. Both parties to the appeal were provided the opportunity to comment on this matter. The Councils view was that the planning unit for the Jungle was entirely on the western side of the road (focussed around the existing farmyard etc). The commissioner, following his site visit, and in considering the evidence has concluded both the eastern and western parts of the holding comprise a single unit of occupation. He found that it was not persuasive that farmlands on the eastern side of the road is in a different planning unit to those farm buildings and yard on the western side. It was therefore reasonable to conclude that the entire holding comprises one planning unit with a mixed agricultural and recreation / training use.
3.5	In concluding the above position, it follows that it would not have been a breach of planning control for authorised outdoor recreational or training activities based on the holding to be carried out anywhere. The Commissioner goes on to observe chain saw courses, the maize field used with Halloween events and evidence provided about quad bike courses and llama trekking which it is referred to 'have extended into the eastern part of the holding'. Any use of the underpass to facilitate such activities would therefore have been lawful.
3.6	At Par. 20 of his decision the Commissioner is quite clear that the current unauthorised car park (subject to a current planning application) does not form part of his decision relating to the use of the underpass.
3.7	In allowing the appeal the description has also been modified to state the following:  'Use for pedestrian access ancillary to agricultural and recreational or training uses lawfully carried out on the land shown outlined in blue on the attached plan annotated PAC1 (excluding the fields marked A,D,E and F). For the avoidance of doubt, this did not include use in association with car parking on the eastern side of the A29 Desertmartin Road.
3.8	<u>Costs Award Decision</u>  No costs were awarded in the appeal on the basis of the Commissioner's reasoning as set out below:
3.9	The e-mail exchanges at application stage and the evidence provided at appeal stage indicate that both parties proceeded on the assumption that the tunnel should be prescribed a single use, that use being agricultural from the authorities point of view and the applicant argued the use had changed to recreational. From this point of view the assessment had focussed on the time frame of the use.

3.10	The Commission had taken the view that the planning unit comprised of two uses agriculture and recreational and as both uses were involved with using the underpass then this use shall be prescribed by both. The Commission was critical that both parties had not appreciated the ancillary nature of the underpass or the importance of the planning unit.
3.11	Given that neither party placed weight on the duality of use then it cannot be said that either party acted more unreasonably than the other. A costs award would therefore not be justified.
3.12	Members will be aware that a current planning application remains under consideration and indeed will recall a visit to the site. The Council in particular await DFI Roads position the use of the underpass for the car park and on access requirements onto the A29 protected route. Whilst this appeal decision will be a material consideration in the determination of the application, consideration will still have to be given to the level of intensification of pedestrian use of the underpass and extent of vehicular movements resulting from any decision to approve the car park and its access to this eastern part of the holding.
<b>4.0</b>	<b>Other Considerations</b>
<b>4.1</b>	<b>Financial, Human Resources &amp; Risk Implications</b>
	Financial:
	Human:
	Risk Management:
<b>4.2</b>	<b>Screening &amp; Impact Assessments</b>
	Equality & Good Relations Implications:
	Rural Needs Implications:
<b>5.0</b>	<b>Recommendation(s)</b>
5.1	That members note the appeal decision
<b>6.0</b>	<b>Documents Attached &amp; References</b>
6.1	Copy of PAC decision and costs decision.



Planning Appeals  
Commission

# Appeal Decision

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<b>Appeal Reference:</b>	2019/E0008
<b>Appeal by:</b>	The Jungle NI
<b>Appeal against:</b>	Failure to give a decision on an application for a certificate of lawfulness of existing use or development
<b>Development:</b>	Use of the underpass by visitors and staff for access to The Jungle NI and surrounding farm lands
<b>Location:</b>	Underpass opposite and to the south east of 60 Desertmartin Road, Moneymore, Magherafelt
<b>Planning Authority:</b>	Mid Ulster District Council
<b>Application Reference:</b>	LA09/2018/1597/LDE
<b>Procedure:</b>	Written representations and accompanied site visit on 19 <sup>th</sup> September 2019
<b>Decision by:</b>	Commissioner T A Rue, dated 8 <sup>th</sup> November 2019

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## Decision

1. The appeal is allowed, the description of development is modified, and the attached certificate of lawfulness of existing use or development (LDC) is issued.

## Claim for Costs

2. A claim for costs was made by The Jungle NI against Mid Ulster District Council. That claim is the subject of a separate decision.

## Reasons

3. The main issue in this appeal is whether it has been demonstrated on the balance of probability that the use described in the application was lawful on the date of the application, 5<sup>th</sup> December 2018.
4. A use is lawful if no enforcement action may be taken against it, for example because it did not involve development or require planning permission or because the time for enforcement action has expired.
5. An LDC is declaratory as to use rights. It is not a grant of planning permission and is not concerned with the merits of the development in question. The Commission's tasks in this appeal are to understand and properly apply the law. Matters such as traffic movements, health and safety and claustrophobia are not engaged.
6. The appeal site comprises an underpass below the A29 Desertmartin Road, which links two parts of a substantial farm holding. The underpass was constructed by the Roads Service in or around 2000 to facilitate the safe movement of livestock within



the holding. A herd of 150 cows was transferred twice daily via the underpass to a milking parlour on the western side of the road. According to the appellants' evidence, farm diversification activities have been carried on within the holding since 2005 and the milking cattle were removed in 2008.

7. An invoice dated 2010 from an electrical contractor for supplying and fitting lights in the subway was submitted in the appellants' statement of case. During my site visit, I saw strip lighting in the underpass and noted that it had a clean concrete floor.
8. The application relates only to the underpass. However, it is no more meaningful to assess the use of a pedestrian underpass in isolation from that of adjoining lands than it would be to imagine a domestic access driveway having a use distinct from that of the dwelling it serves. The use of the underpass is necessarily ancillary to that of adjoining lands in the same planning unit.
9. The planning unit is a judge-made concept which has evolved as a means of determining the most appropriate physical area against which to assess the materiality of a change of use. In *Burdle v Secretary of State for the Environment* [1972] 3 All ER 240, three broad tests were suggested:-
  - When it is possible to recognise a single main (or primary) use, the whole unit of occupation should be considered.
  - It may equally be apt to consider the whole unit of occupation even if it is in a composite (or mixed) use.
  - If within a single unit of occupation, two or more physically separate areas are used for substantially different and unrelated purposes, each area ought to be considered as a separate unit.
10. The Council carried out a land registry search to ascertain land owned by Mr Robert Carmichael, the owner and director of The Jungle NI. It submitted a plan which I have annotated PAC 1. Mr Carmichael does not own the fields marked D and E. He takes Fields A and F in conacre for the purpose of his farm business but does not own them outright.
11. The farmhouse and an adjacent group of sheds are located in the larger part of the holding, on the western side of the A29. Planning permissions have been granted for the following developments within that part of the holding:-
  - retention of farm diversification project for paintball games and ancillary activities (2009);
  - indoor paintball centre (2009);
  - retention of games zone area for zorbing and paintball (2010);
  - office/reception area and ancillary facilities for paintball business (2010);
  - log cabin for reception/office use in conjunction with The Jungle (2013);
  - shed to be used in conjunction with existing Jungle business (2017); and
  - retention of shower block, toilet block and two plant rooms (August 2018).
12. Another relevant item of planning history is that in 2017, an LDC was issued for the change of use of an agricultural shed to a training and conference centre. The reason given was that the time for enforcement action had expired.
13. The planning permissions and LDC relate to recreational and training uses in identified sites in the western part of the holding. At the time of my visit, sheep,



cows and llamas were grazing in fields outside those sites and some of the sheds adjacent to the farmhouse were still in agricultural use. A gate and fencing were in place to prevent access to those sheds by visitors to The Jungle. However, people visiting The Jungle on foot must pass through the farmyard to the south of the farmhouse which also provides a principal means of vehicular access from the farm sheds to the A29. The physical separation between the recreation/training and agricultural uses is therefore incomplete.

14. Some of the recreational activities are necessarily confined to areas where supporting equipment is located. For example, there is a tree-top adventure zip wire towards the western edge of the farm. But other activities are more free-ranging. There is undisputed evidence of quod bike courses, focus farmer visits to study farm diversification, and llama trekking. In the course of my accompanied site visit, we encountered a team building group out walking. I saw a field in the western part of the holding (outside the area covered by planning permissions) where maize was being grown. This is in itself an agricultural use but its primary purpose is recreational. It is reasonable to conclude that the western part of the holding is in a composite or mixed use comprising farming and recreation/training activities.
15. The Commission wrote to both parties with a series of questions designed to elicit information to determine the extent of the planning unit within which the underpass was located. The Council replied that the planning unit for Jungle NI was entirely on the western side of the road. The appellants, perhaps surprisingly, identified only the area in respect of which the planning permissions and the LDC were issued. However, the Commission is not bound by the views of the parties.
16. The eastern and western parts of the holding comprise a single unit of occupation. It is not a persuasive proposition that the farmland on the eastern side of the road is in a different planning unit to the farmhouse and the buildings still in agricultural use on the western side of the road. It is reasonable to conclude that the entire holding comprises one planning unit with a mixed agricultural and recreation/training use.
17. The planning history information provided contains no record of any planning permission having been granted for recreational or training activities on the eastern side of the holding. However, once it is concluded that the holding comprises a single planning unit, it follows that would not have been a breach of planning control for authorised outdoor recreational or training activities based on the holding (and not dependent on stationary equipment) to be carried out anywhere on the holding.
18. During my site visit, I saw large blocks of wood close to the eastern entrance to the underpass. That is consistent with the appellants' evidence that chain saw courses have been carried out in that general area. I also saw another maize field on the eastern side of the holding, which also has a dual agricultural and recreational purpose. It is undisputed that the maize maze is used by children attending summer schemes and for activities associated with an annual Halloween "Fright Night" event. Evidence was given that the quod bike courses, focus farmer visits and llama trekking have extended into the eastern part of the holding.
19. It is not necessary for the appellants to establish that recreation/training activities on the eastern side of the holding were immune from enforcement on the day of the LDC application. Regardless of the frequency and duration of such activities, they were consistent with the mixed use character of the overall planning unit and did not

require planning permission in their own right. Any use of the underpass to facilitate such activities would therefore have been lawful.

20. According to the appellants, until 2014 there was overflow parking for Jungle visitors in the eastern part of the holding, opposite the farm house. An enforcement notice, which is now in effect, required the use of a different area for car parking to cease by 28<sup>th</sup> November 2018. That area is an extensive hard-surfaced strip alongside the A29, to the south of the eastern entrance to the underpass. On the day of my site visit, the car park seemed still available for use. There is an undetermined planning application with the Council which seeks permission to retain the car park and the pedestrian access under the road. However, it must be concluded that on the date of the LDC application, 5<sup>th</sup> December 2018, the use of the underpass in association with car parking on the eastern side of the holding was not lawful.
21. The description of the use given on the application form will be modified to reflect the conclusions set out above. Subject to that modification, I am satisfied that if the Council had refused the application, its refusal would not have been well founded.

**COMMISSIONER TREVOR RUE**



PLANNING ACT (NORTHERN IRELAND) 2011: SECTION 169

**CERTIFICATE OF LAWFULNESS OF EXISTING USE OR DEVELOPMENT**

The Planning Appeals Commission hereby certifies that on 5<sup>th</sup> December 2018 the use described in the First Schedule to this certificate, in respect of the land specified in the Second Schedule to this certificate, was lawful within the meaning of Section 169 of the Planning Act 2011, for the reasons set out in the appeal decision to which this certificate is attached.

*Trevor A Rue*

**COMMISSIONER TREVOR RUE**

8<sup>th</sup> November 2019

**FIRST SCHEDULE**

Use for pedestrian access ancillary to agricultural and recreational or training uses lawfully carried out on the land shown outlined in blue on the attached plan annotated PAC 1 (excluding the fields marked A, D, E and F). For the avoidance of doubt, this did not include use in association with car parking on the eastern side of the A29 Desertmartin Road.

**SECOND SCHEDULE**

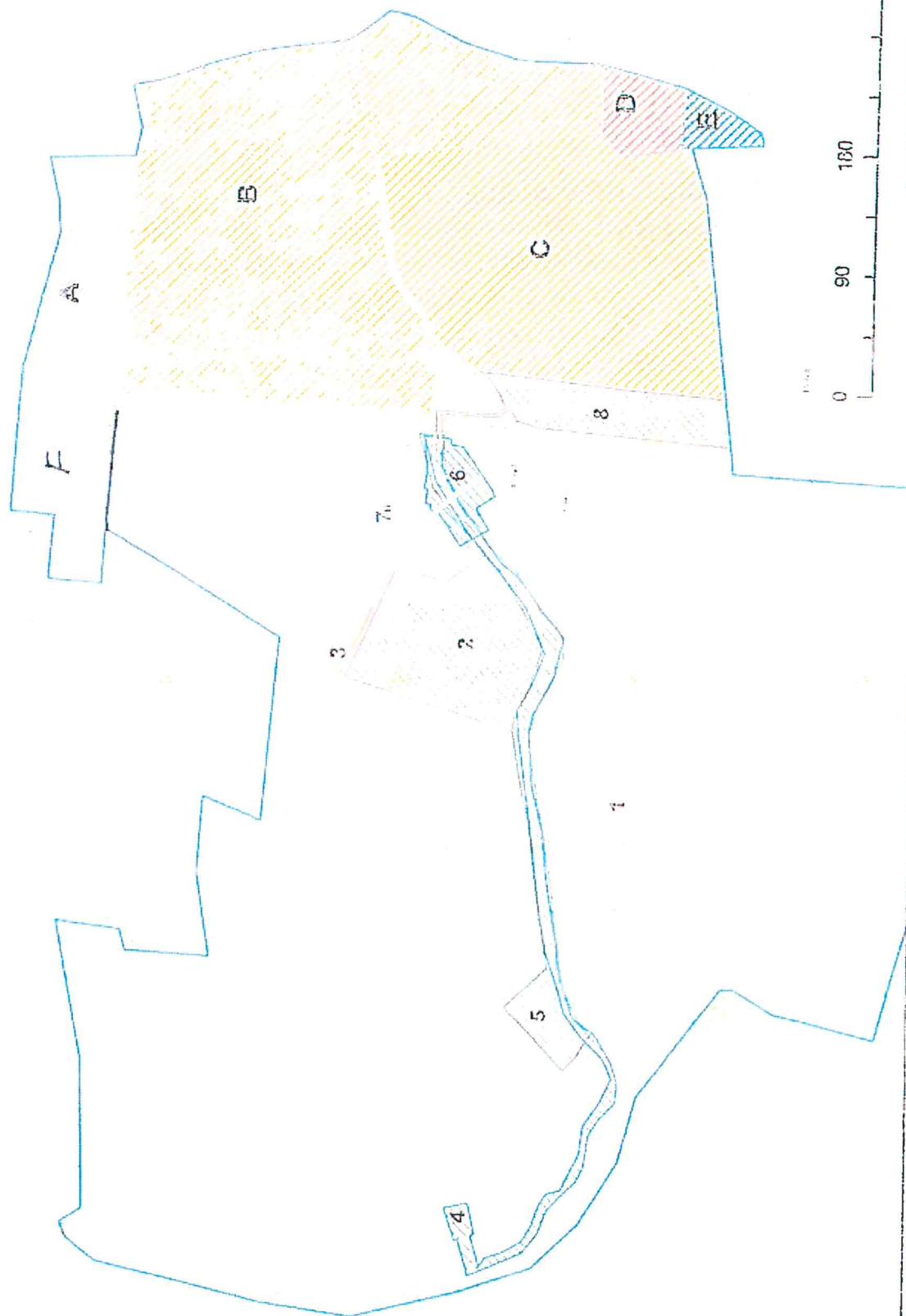
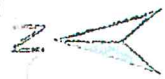
Underpass opposite and to the south east of 60 Desertmartin Road, Moneymore, Magherafelt in the location shown outlined in red on Drawing PD-01 Revision A, which was submitted to Mid Ulster District Council on 1<sup>st</sup> March 2019 and referenced 01/1.

**Notes:**

- (1) This certificate is issued solely for the purpose of Section 169 of the Planning Act 2011.
- (2) It certifies that the use described in the First Schedule taking place on the land described in the Second Schedule was lawful on the specified date and, thus, was not 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 use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described or which relates to other land may render the owner and occupier liable to enforcement action.



PAC 1



**Attendance at Site Visit**

Planning Authority:- Mr M Bowman, Mid Ulster Council  
Ms E McCullough, Mid Ulster Council

Appellants:- Mr A Ryan, Solicitor  
Ms T Cassidy, TC Town Planning  
Mr R Carmichael, owner and director

**List of Documents**

Planning Authority:- LPA 1 Statement of case with Appendices A to K  
LPA 2 Rebuttal with Appendices A to D  
LPA 3 Answers to Commission's questions

Appellants:- APP 1 Statement of case with Appendices 1 to 7  
APP 2 Rebuttal statement with Appendices 1 to 8  
APP 3 Answers to Commission's questions





# Costs Decision

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<b>Appeal Reference:</b>	2019/E0008
<b>Appeal against:</b>	Failure to give a decision on an application for a certificate of lawfulness of existing use or development
<b>Location:</b>	Underpass opposite and to the south east of 60 Desertmartin Road, Moneymore, Magherafelt
<b>Claim by:</b>	The Jungle NI
<b>Claim against:</b>	Mid Ulster District Council for a full award of costs
<b>Decision by:</b>	Commissioner T A Rue, dated 8 <sup>th</sup> November 2019

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## Decision

1. An award of costs is denied.

## Reasons

2. The appeal to which this claim relates was made by a party to an appeal under Section 173 of the Planning Act (Northern Ireland) 2011 and is eligible for consideration in accordance with Section 205.
3. The Commission's guidance on costs awards states that a costs claim should be made as soon as reasonably practicable after the behaviour that triggered it. In the case of an appeal proceeding by exchange of written representations with an accompanied site visit, any costs claim (unless related to behaviour at the site visit) must accompany the claiming party's final written submission. The present claim was submitted in timely fashion with the claimants' rebuttal evidence.
4. The claimants' consultants referred to e-mail exchanges with planning officers at application stage and to subsequent contacts. They argued that had the Council requested additional information that formed the claimants' appeal evidence at application stage, then it would not have been necessary to make a non-determination appeal and the Council may have issued a certificate on the basis of the substantial evidence now placed before the Commission. The claimants believed that the Council had no credible evidence to dispute that the underpass had been used continuously for more than five years for the purposes described.
5. Section 169(4) of the Planning Act places an onus on an applicant for an LDC to provide information to satisfy the Council of the lawfulness at the time of the application of the use described in the application. It was for the claimants to make their case and for the Council to assess that case. In the LDC context, the Council was not under a duty to advise the claimants what information to submit.

6. The e-mail exchanges at application stage and the evidence provided at appeal stage indicate that both parties proceeded on the flawed assumption that in order for an LDC to be granted, the claimants would have to demonstrate that the asserted use of the underpass was immune from enforcement, having begun more than five years before the date of the application. Neither party appreciated the ancillary nature of the underpass or grasped the importance of the planning unit.
7. Between them, the parties provided all the information necessary to determine the appeal but neither party properly understood the significance of the information. It cannot be said that either party acted more unreasonably than the other. A costs award would therefore not be justified.

**COMMISSIONER TREVOR RUE**

**Documents**

Claimants:-	"A"	Claim for costs by T C Town Planning
Planning Authority:-	"B"	Response to claim, with e-mail chain