Enforcement Appeal Decision

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Appeal Reference:	2014/E0046
Appeal by:	Malachy Hughes
Subject of Appeal:	An enforcement notice dated 5th February 2015.
Alleged Breach of Planning Control:	1) The unauthorised erection of a building and underground slurry tank 2) The unauthorised erection of a storage silo 3)The unauthorised erection of a retaining wall topped with a metal fence
Location:	Land adjacent to 55 Cabragh Road, Armagh.
Planning Authority:	Department of the Environment.
Planning Authority Reference:	EN/2015/0010
Procedure:	Hearing on 24th July 2015.
Decision by:	Commissioner Mandy Jones, dated 12 February 2016.

Grounds of Appeal

1. The appeal was brought on Grounds (a),(b),(c),(d),(f) and (g) as set out in Section 143 (3) of the Planning Act (Northern Ireland) 2011. Grounds (b), (c), (d) were withdrawn prior to the submission of the statements of case. There is a deemed planning application by virtue of Section 145 (5).

The Notice

2. The appellant argued that corrections should be made to the allegation under the Commission's powers as set out in Section 144 (2) of the Planning Act (NI) 2011. It was argued that the allegation as set out in the enforcement notice is incorrect and this should be corrected as it describes the deemed proposal. The appellant is applying for a 'replacement agricultural shed' as opposed to just a 'building' and for the 'expansion of an existing underground slurry tank'. It was argued that this corrected allegation would further acknowledge the previously existing section of slurry tank, prior to its expansion which benefits from established use rights and protection under the 'Mansi principle'

3. Photographic evidence (Google images) from both the Department and the appellant indicated that there was previously 2 sheds on the site which have since been demolished and replaced by the building subject of the enforcement

notice. I was told by the appellant at the hearing that one of the previous sheds was used by cattle and had an underground slurry tank which measured approximately 30 ft x 6-7 ft.

4. At the hearing the planning authority submitted an email from NIEA. This stated that the appellant had constructed a below ground slurry tank (20.8m x 3.05m x2.4m) and had subsequently notified NIEA on a completed SSAFO notification form on 5th October 2012. This was completed and signed by an approved Chartered Structural/ Civil Engineer to confirm it was constructed to approved British Standards to satisfy the requirements of the regulations. The engineer selected the *'new'* box to indicate that it is not a '*Substantially Enlarged or Substantially reconstructed tank.'* However, it went on to say that NIEA carry out a random inspection of new tanks but NIEA did not inspect this tank or farm at any stage. NIEA confirmed that there are no records to suggest that there was an existing tank which was substantially enlarged or substantially reconstructed to create the new tank. However, it was acknowledged that slurry tanks constructed before December 2003 did not need to be notified to NIEA and are exempt from the regulations.

5. I note that the invalid application refers to the *Retention of a new agricultural building with below ground slurry storage tank and retention of new boundary wall.* The present use of the land *refers to a farm yard and livestock buildings.* In this previous application although invalid, there is no reference to the extension of an existing slurry tank.

6. The planning authority and the objectors dispute that there was an existing slurry tank. On an inspection of the present slurry tank, there was no indication that it had been had been enlarged.

7. I find the evidence on whether or not there was a previous slurry tank to be inconclusive. If indeed, there was a previous tank it is now gone and has been subsumed by the slurry tank subject of the notice which has a footprint almost 3 times larger. I consider that the allegation which refers to a slurry tank is correct. The Mansi principle relates to uses as opposed to operational development and therefore is irrelevant in this appeal.

8. The 2 previous buildings on the site have been demolished and are no longer a factor. Their previous existence is irrelevant and there is no fall back position. I do not agree with the appellant that the allegation should refer to a replacement agricultural shed. It is for the Council to decide how to describe an allegation on an enforcement notice. I consider that the description 'building' is adequate to describe what is on the ground and is factually correct. If this building were approved, its use could be specified by condition. Accordingly, the allegations as set out in the notice are correct and do not require any amendments.

Ground (a) the deemed planning application

9. The deemed application is defined by the breach, as set out in the Notice which is :

1) The unauthorised erection of a building and underground slurry tank
2) The unauthorised erection of a storage silo

3)The unauthorised erection of a retaining wall topped with a metal fence.

10. The storage silo is located on the northern boundary of the site, close to the north-western corner of the approved shed. The Council's deemed reasons for refusal and evidence focused on the building and the perimeter wall. The objector raised no issues with the presence of the storage silo. As it is set back from the public road at the rear of the yard, against the gable of the approved shed, I do not consider it to have an unacceptable visual impact. Consequently, as there are no objections in relation to the retention of the storage silo from any of the parties, it will be approved and the appeal underground (a) will succeed in relation to this storage silo.

11. The boundary wall including the steel fence which surrounds the site is between 1.4m at the lowest point and 4.26m at the highest point given the sloping nature of the ground levels. The wall sits directly adjacent to the road and is approximately 52m in length. It consists of concrete slabs with steel fencing on top. Travelling the Lisdonwilly Road and the Cabragh Road on approach to the site, given the direct roadside location of the wall and fencing and its scale and design, I consider it to be visually intrusive and dominant and inappropriate in a rural location.

12. Adjacent to the notice building is a large agricultural shed approved 21st June 2010, reference O/2009/0769/F. It has a footprint of 20.43m x 14.03 m with a 6.3m ridge height from the FFL and a below ground slurry tank 23.48 x 4.26m. This ridge line of this shed is parallel to the Cabragh Road and its southern elevation is adjacent to the Cabragh Road. Whilst the objector has argued that the appellant obtained this planning approval with a fraudulent misrepresentation by stating that no 55 Cabragh Road was owned by the appellant, this planning approval stands until quashed by the Courts. I am only able to deal with the appeal before me.

13. Approval O/2009/0796/F indicates spot levels on the site layout. The levels along the eastern boundary adjacent to the Cabragh Road fall from 49.580 to 48.215 leaving a difference of 1.365 and 49.515 to 48.270 leaving a difference of 1.245 and 49.645 to 48.575 leaving a difference of 1.07. Levels along the southern boundary adjacent to the road fall from 49.775 to 49.350 leaving a difference of 0.425 and 49.850 to 49.350 leaving a difference of 0.5.

14. Although these levels indicate that the outside yard area around the shed is higher than the adjacent roads, no retaining structure was shown on the plans and there are no cross sections through the site which would have indicated the need for some sort of retaining structure. The only new retaining wall shown is a limited extent along the northern boundary. I find it surprising that neither the appellants' architect nor the Department flagged up the need for a retaining structure along the perimeter of the site given the obvious and substantial level changes.

15. The appellant stated that the wall replaced an existing roadside hedge. The raised levels at the rear of the site provide a level circulation space for cattle and farm vehicles. This raised yard area is also used for the storage of bales and the wall and fence provide a good safety barrier to keep in cattle. It was argued that it provides safety for vehicles and pedestrians on the public road.

16. Given the levels of the approved shed and yard, a perimeter retaining wall was required along the southern and eastern boundary of the site. In my opinion, the surrounding yard area would collapse if the retaining structure was removed and given the approval of the shed I consider that the only reasonable course of action is to approve it. The appellant has suggested that perimeter planting between the outside face of the wall and the edge of the road would mitigate and soften the substantial visual impact of the wall when viewed from the road. I note that the invalid application for the retention of the notice shed and wall indicates a hedge to be provided in front of the boundary wall to comprise of 75 % Hawthorne and 25 % mix of other native species. Conditions can be attached to secure this perimeter landscaping. The appeal on ground (a) will succeed in relation to the perimeter retaining wall.

17. The main issues relative to the building and slurry tank are :

- Whether they are acceptable in principle in the countryside,
- Whether the building has an adverse impact on visual amenity of the countryside; and
- Whether the development has an adverse impact on residential amenity by reason of noise and smell.

18. Section 6 (4) of the Planning Act states that determination under this Act must be made in accordance with the plan, unless material considerations dictate otherwise. As set out in the Banbridge, Newry and Mourne Area Plan 2015, the site is located in the open countryside. There is no specific policy in the LDP material to this appeal.

19. Since the date of the hearing, the Strategic Planning Policy Statement for Northern Ireland (SPPS) was published in September 2015. The parties were afforded an opportunity to comment on the relevance of the SSPS to the deemed proposal.

20. Para 1.10 of the SPPS, states that a transitional period will operate until such times as a Plan strategy for the whole of the Council area has been adopted. During the transitional period planning authorities will apply existing policy documents identified together with the SPPS. Para 1.13 states that the policy provisions of Planning Policy Statement 21 (PPS 21) are retained.

21. Policy CTY 1 of PPS 21 states that there is a range of types of development which are considered to be acceptable in principle in the countryside and that will contribute to the aims of sustainable development. One of these is agricultural and forestry development in accordance with Policy CTY 12. Policy CTY 12 – Agricultural and Forestry Development states that planning permission will be granted for development on an active and established agricultural or forestry holding where a number of criteria are demonstrated.

22. Although the appellant states that the SPPS policy in relation to agriculture and forestry development is very similar to the requirements of policy CTY 12 of PPS 21, I consider that in fact the SPPS is less prescriptive than PPS 21 CTY 12.

23. Para 1.12 states that where the SPPS is silent or less prescriptive on a particular planning policy matter than retained policies this should not be judged to lessen the weight to be afforded to the retained policy. Accordingly, the correct policy for the assessment of the deemed proposal is policy CTY 12 of PPS 21.

24. The appellant highlights that para 6.69 of the SPPS states that the policy approach must be to cluster, consolidate and group new development with existing established buildings and promote the re – use of previously used buildings. This is under the general heading of regional strategic policy for sustainable development in the countryside. This approach is consistent with the policies set out in Policy CTY 12.

25. Criterion (a) of Policy CTY 12 requires that the proposal is necessary for the efficient use of the agricultural holding or forestry enterprise. At the hearing, the Planning Authority accepted that the deemed proposal met this criterion based on the appellant's livestock. The planning authority argued that the deemed proposal is contrary to criteria (b), (c) and (e).

26. Criterion (b) requires that in terms of character and scale it is appropriate to its location. Criterion (c) requires that it visually integrates into the local landscape and additional landscaping is provided as necessary. It was argued by the planning authority that the building and boundary wall is not appropriate and do not visually integrate into the local landscape.

27. The ridge height of the building is approximately 6.0m from the FFL. It has a footprint of approximately 23m x 9m / 11.2m and a floorspace of approximately 220 sq m. The gable of the building sits directly unto the Cabragh Road and extends the full depth of the yard. The rear of the building directly abuts the curtilage of no 55 Cabragh Road – the objector's dwelling. The eastern elevation addressing the yard is open and there is an underground slurry tank (approximately 3m x 20 m). The upper walls and the roof are finished in profiled cladding and the lower walls are concrete slabs. Ground levels rise up towards no 55. The building is used to house animals.

28. Evidence was presented that the notice building replaced 2 sheds which were smaller in scale and footprint. One of the buildings abutted the curtilage of no 55, however it was smaller in scale and lower in height with a mono pitched roof which sloped away from no 55 – it measured approximately 52 m sq. The other building was a Nissen hut and of a smaller scale and height with a footprint of 52 sq m. Both of these buildings are now gone. Their former presence on the site is irrelevant in the determination of the deemed proposal – they do not present a realistic fall back position.

29. The yard area is quite restrictive on the junction of Cabragh Road and Lisdonwilly Road. When viewed from the Cabragh Road, given the immediate roadside location of the building and its height and massing, I would agree with the planning authority that notwithstanding the presence of the approved shed, the notice shed is out of character and scale within this rural context. I would agree with the objectors that, given the juxtaposition, scale and massing of the shed against no. 55, it has an unacceptable impact on the occupants of no 55.

30. I consider that given their prominent roadside location the building and perimeter wall do not visually integrate into the local landscape. The building and wall are

contrary to criteria (b) and (c). However, given my previous conclusions on the perimeter wall, it is approved subject to conditions.

31. Criterion (e) requires that the agricultural development will not result in detrimental impact on the amenity of residential dwellings outside the holding or enterprise including potential problems arising from noise, smell and pollution.

32. It was argued by the planning authority that the deemed proposal has a detrimental impact to the amenity of no 55 Cabragh Road which is a dwelling outside the holding, due to noise and odour.

33. I was told by Environmental Health that it is generally accepted that the minimum separation distance between agricultural developments (such as cattle housing with a slurry tank) and non associated dwellings is 75m. This distance originates from the Planning (General Development) Order (NI) 1993 where, subject to certain restrictions, new agricultural development will not require planning permission if it is more than 75m from the nearest non – residential dwelling.

34. There is effectively no separation distance between the objectors property no. 55 and the deemed proposal – the west elevation of the deemed shed is directly adjacent to the curtilage of no 55 and approximately 10m from the dwelling. Environmental Health confirmed that they had received 4 complaints since December 2014 in relation to odour and concerns about vermin generated from the site. To date, Environmental Health has not established that a statutory nuisance exists in accordance with the Clean Neighbourhood and Environment Act (NI) 2011.

35. The objector at no 55 Cabragh Road stated that the effect of the odour from the approved building has had a significant detrimental impact on his family, resulting in members of the family suffering continuous headaches which have intensified during periods of slurry mixing. The deemed proposal with its large underground slurry tank has further impacted upon their amenity including odour, noise pollution, attraction of vermin and damage to the objectors property. They cannot use their clothesline as the smell emanating contaminates their clothes. I was told that the objector's daughter who is pregnant has to leave her family home when slurry mixing is in progress.

36. I consider that the lack of sufficient separation distance between 55 Cabragh Road and the approved shed and slurry tank would already have a negative impact on the residential amenity at no 55 in terms of odour. The deemed proposal for the housing of cattle including the underground slurry tank would only further exacerbate the loss of amenity due to the combined impact of both sheds and the fact that it will be located even closer than the approved shed. I consider that the deemed proposal (shed and underground slurry tank) would have a detrimental impact on the amenity of no. 55 which is a dwelling outside of the holding by reason of odour.

37. In terms of odour the appellants' evidence accepted that at times there may be some odour arising from the cattle in the deemed shed. It was anticipated however that this would be occasional and strongest only when empting the slurry tanks – which would be only once a year.

38. I accept that living in the countryside brings with it odours from adjoining fields. Notwithstanding the Farm Quality Assurance Certificates showing that he adheres to good farming practices as submitted by the appellant and arguments in relation to the good management of the farm and the building offering improvements in reducing odours, I consider that the size of the underground slurry tank and the close proximity to the objectors' property would cause significant levels of smell, which would harm the living conditions of the close neighbouring residents.

39. Although I acknowledge that no 55 Cabragh Road is upwind with predominant winds blowing from the south, given the close proximity of the shed and the underground slurry tank with no 55, I am not persuaded that this would make a significant reduction in the odour experienced at the objector's property. I am not persuaded that the appellant cannot manage the building in a manner that would control rodents. Measures to control rodents were apparent throughout the building at my site visit.

40. Although the deemed refusal reasons referred to potential problems relating to noise, no persuasive evidence was presented. The objector claims that noise is created by retaining round barriers seated in square channels causing relentless banging throughout the day and night and the loud shrieking from a bird scarer. Whilst I acknowledge that this would present a noise nuisance, it seems to me that it is a matter which could be resolved between the parties and through good management of the premises and would not justify the withholding of planning permission.

41. The issue of damage to the objector's property by the appellant is not a planning matter. As I have concluded that the appeal development has a detrimental impact on the amenity of no 55 it is bound to have some effect on the value of that property.

42. Accordingly, I conclude that the shed and underground slurry tank are contrary to criterion (e).

43. Policy CTY 12 goes on to say that in cases where a new building is proposed applicants will also need to provide sufficient information to confirm that there are no suitable existing buildings on the holding or enterprise that can be used. The appellant's farm maps where submitted as post hearing evidence which indicated that the farm dwelling is at 93 Moy Road and the total area of the holding is 22.70 hectares. The appellant states that the existing buildings are fully utilised as animal housing, storage for dry feed and cover for farm vehicles and machinery. The appellant claims that there are no other suitable buildings on the holding and that the new building replaced substandard buildings. I was provided with no details of where on the holding these existing buildings which are fully utilised are located.

44. I was told by the objector that there is a large shed at the farmhouse which could have been used and the appellant stated that it is a haulage shed used for the transport business and is not a suitable building. I was not provided with any details of planning approvals for this building or the haulage business. I find the evidence presented regarding any other buildings on the holding to be sketchy and inconclusive.

45. In any case, even if there were no other suitable buildings on the holding that could be used, I have already concluded that the deemed building and underground slurry tank are unacceptable given the detrimental impact that they have on the residential amenity of no 55 Cabragh Road and the unacceptable scale of the building in this location. Accordingly, the deemed proposal is contrary to Policy CTY 12.

46. Policy CTY 1 goes on to state that other types of development will only be permitted where there are overriding reasons why that development is essential. No justification has been submitted to say that the deemed proposal is essential on this particular site within the 22.70 hectare holding. As such, the development is contrary to Policy CTY 1 of PPS 21 and is not development which in principle is acceptable in the countryside. The Planning Authority's 1st and 2nd deemed reasons for refusal have been sustained.

47. Policy CTY 13 – Integration and Design of Buildings in the Countryside states that planning permission will be granted for a building in the countryside where it can be visually integrated into the surrounding landscape and it is of an appropriate design and lists a number of criteria in which a new building will be unacceptable. The planning authority argue that the building is unacceptable as (a) it is a prominent feature in the landscape, (b) the site lacks long established natural boundaries or is unable to provide a suitable degree of enclosure for the building to integrate into the landscape and (d) the ancillary works do not integrate with their surroundings.

48. Policy CTY 14 – Rural Character states that planning permission will be granted for a building in the countryside where it does not cause a detrimental change to, or further erode the rural character of the area and lists a number of criteria in which a new building will be unacceptable. The planning authority argue that the building is unduly prominent in the landscape.

49. I have previously concluded that the building is a prominent feature in the landscape due to its prominent roadside location and massing and scale within this restricted site. The site has no long established boundaries and it is not possible to provide landscaping to assist with integration given the close proximity of no 55 and the roadside location of the building. The building is contrary to policy CTY 13 and CTY 14 and the third and fourth deemed reasons for reason for refusal have been sustained.

50. At the hearing, the appellant raised the possibility of a different use of the building – for the storage of machinery and dry feeds – which could remedy the breach if it was found that there is an unacceptable impact on residential amenity. Reference was made to a previous appeal decision 2010/A0228 for the Retention of building for use for storage of machinery and dry feed, and infilling and capping over of slurry tank. This case is distinguishable as the Commissioner concluded that there were no issues in relation to scale and prominence. I have found the notice shed to be unacceptable due to its scale, massing and prominence and the impact on amenity of residents due to odour. Whilst a change of use to storage would go some way to address issues regarding odour it would not address issues regarding scale, massing and

prominence. An alternative location for the cattle in the notice shed was not suggested.

51. Arguments where advanced that stock will have to be sold off - if the building is demolished. I am not persuaded that there are no alternatives to this position.

52. As the building and slurry tank are not acceptable in principle in the countryside the appeal under ground (a) must fail in so far as it relates to those structures.

Ground (f) – that the steps required by the notice exceed what is necessary to remedy the breach of planning control.

53. The steps required by the notice in paragraph 4 as they relate to the building and slurry tank are to :

54. Permanently remove the building and the underground slurry tank annotated A coloured purple and remove any resultant rubble from the site;

55. Arguments in relation to the former presence of 2 sheds on the site have been addressed under the deemed application. Both of these buildings are now gone. Their former presence on the site is irrelevant and they do not present a realistic fall back position.

56. At the hearing, the appellant raised the possibility of a different use of the building – for the storage of machinery and dry feeds – which could remedy the breach if it was found that there is an unacceptable impact on residential amenity. Although this was raised under ground (f) it is a ground (a) argument and has been addressed.

57. The steps required are necessary to remedy the breach. I agree that in the absence of planning permission the only remedy is the removal of the shed and slurry pit. Accordingly, the appeal on ground (f) fails.

Ground (g) – that the period specified in the notice in accordance with Section 140 (9) falls short of what should be reasonably be allowed.

58. The time period set out in the notice is 60 days. The appellant suggested that 12 months is a more reasonable time to comply with the steps in the notice. The planning authority and objector suggested that due to issues of relocation of the cattle 120 days was more appropriate. The steps required only now relate to the building and the slurry tank. I consider that due to the significant levels of odour experienced by the neighbouring property, 120 days is an appropriate timescale. Accordingly, the appeal on ground (f) succeeds in so far as the timescale is amended to120 days.

Decision

The decision is as follows:-

- The appeal on Ground (a) succeeds in relation to the storage silo and planning permission is granted unconditionally.

- The appeal on Ground (a) succeeds in relation to the retaining wall, subject to the following condition ;

(1) A hedge is to be planted in front of the roadside perimeter boundary wall to comprise of 75% Hawthorne and 25 % mix of other native species. Planting shall be carried out within the current planting season, to be completed by 31st March 2016 and allowed to grow on to the full height of the wall and permanently retained. Shrubs dying, removed or becoming seriously damaged within 5 years of being planted shall be replaced in the next planting season with others of a similar size and species unless the planning authority gives written consent to any variation.

- The appeal on ground (a) fails in respect to the building and underground slurry tank and the deemed planning application in respect of these structures is refused.
- The appeal on Ground (f) fails.
- The appeal on ground (g) succeeds in relation to the time period which is extended to 120 days.
- Subject to the time period variation the enforcement notice as it relates to the building and slurry tank is upheld.

COMMISSIONER MANDY JONES

2014/E0046

List of Appearances

Planning Authority

Oonagh Stars	Armagh, Banbridge and Craigavon District Council
Paul Swift	Environmental Health
Ciara McRory	Environmental Health

Appellant

Jim Morgan	Planning Consultant
Lindsay Shaw	Environmental Health Consultant (Ulster University)
Malachy Hughes	
Brian Hughes	

Objectors

Tracy Overing BL	instructed by Jariath Fields Solicitors
Martin Dougan	
Anna Marie Dougan	

List of Documents

'A'	Planning Authority's Statement of Case.
'B'	Appellants Statement of Case.
'C' and 'D'	Appellants Post hearing submissions
E	Objectors Statement of Case.