

# Appeal Decision

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<b>Appeal Reference:</b>	2021/A0163
<b>Appeal by:</b>	Mr Gerard Murphy
<b>Appeal against:</b>	The refusal of full planning permission
<b>Proposed Development:</b>	Erection of an agricultural storage building and associated site works
<b>Location:</b>	Approximately 84m north east of 2 Milltown Road, Lislea, Newry
<b>Planning Authority:</b>	Newry, Mourne and Down District Council
<b>Application Reference:</b>	LA07/2021/0361/F
<b>Procedure:</b>	Written representations and Commissioner's site visit on 3 <sup>rd</sup> November 2022
<b>Decision by:</b>	Commissioner Gareth Kerr, dated 14 <sup>th</sup> November 2022

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## Decision

1. The appeal is dismissed.

## Preliminary Matters

2. The appeal site is located to the south eastern side of Hall Road, just to the east of its junction with Milltown Road. It comprises part of a larger agricultural field to the rear of some older sheds at the roadside. It was originally submitted that these buildings were associated with and used by the appellant's farm business. A third party who lives opposite the appeal site on Hall Road objected to the proposal at both application and appeal stage and challenged the land ownership information submitted. Title deeds were submitted to show that the existing buildings and a portion of the site originally outlined in red are in fact owned by the third party and that they have not been used by the appellant in connection with his farm business.
3. I do not accept the appellant's contention that these buildings are not fit for purpose. However, as the final position of the appellant, as set out in his rebuttal statement, is to accept that he does not own the existing buildings, their condition is not a determining factor in the appeal. In the appellant's rebuttal, he apologises for some aspects of the planning application submission as he was unaware of the registered status of some of the lands following the death of his father. He provided an amended drawing No. PL-01 A with his rebuttal statement with a reduction in the red line to exclude the portion of land adjacent to the sheds which is owned by the third party and a slight increase along the access lane which is owned by the appellant. It is poor practice to submit such information at appeal stage, and especially with rebuttal evidence when there is no further opportunity for other parties to comment on it. It raises a number of issues in respect of the land

ownership certificate, admissibility of information and potential prejudice. Therefore, the other parties were invited to comment on the revised drawing. No further comments were received from the third party.

4. Under Section 42 of the Planning Act (Northern Ireland) 2011 (the Act), a planning authority must not entertain an application for planning permission in relation to any land unless it is accompanied by one or other of four certificates. The application was accompanied by Certificate A which stated that the appellant was in actual possession of every part of the land to which the application relates. When the land ownership was challenged by the third party, the Council sought further information about the farm business and land ownership from the appellant, but states that none was received. The appellant states that a response to the Council's queries was provided on 13<sup>th</sup> July 2021. The Council states that no such information was received. I note that the above date was a public holiday in Northern Ireland. In any case, the effect was that the information was not before the Council and when refusing planning permission, it cited failure to provide information as one of the refusal reasons.
5. The appellant provided copies of the information he claimed to have submitted on 13<sup>th</sup> July 2021 as an appendix to his Statement of Case in the appeal. The Council argued that this information should be ruled inadmissible under Section 59 of the Act. Section 59 states that a party to the proceedings is not to raise any matter which was not before the Council at the time the decision appealed against was made unless that party can demonstrate that the matter could not have been raised before that time, or that its not being raised before that time was a consequence of exceptional circumstances.
6. Land ownership and the particulars of the farm business were evidently matters which were before the Council during the processing of the application since it requested further information on them. Therefore, I am not persuaded that they constitute a new matter as set out under Section 59. It is in the interest of all parties to the appeal that the land ownership situation be clarified and the evidence now provided helps to do so. Furthermore, as it was received with the appellant's statement of case, the Council had the opportunity, if it so wished, to comment on it at rebuttal stage. Therefore, the Council has not been prejudiced by receipt of the information which it chose not to comment on. As the information requested by the Council has now been provided and is admissible in the appeal, this overcomes the Council's sixth refusal reason based on lack of information.
7. In considering whether the amended red line is admissible, it appears to me that the reduction accords with the Land Registry information submitted by both the appellant and the third party. The reduced site no longer includes land owned by the third party. The small increase in the red line along the existing laneway, which is owned by the appellant, is not material. With the exception of the northern part of the laneway which is in the ownership of the road authority, all of the site is within the control of the appellant. This addresses the challenge made to the land ownership certificate by the third party.
8. The purpose of the provisions set out in Section 42 of the Act is to ensure that the interests of landowners are protected. The fact that the red line has been changed in response to concerns raised by the third party indicates that his interests have

been taken account of. It is in his interest to proceed based on the amended drawing which no longer claims ownership of any land belonging to him. Notwithstanding that he chose not to comment on this specific drawing, as he has been able to comment on the issue during both the application and the appeal, I consider that he would not be prejudiced by the acceptance of this drawing in the appeal. As the issue has been aired and the red line reduced in response to the concerns raised, I consider that the purpose of the provisions of Section 42 is not impaired and the drawing is admissible. I will consider the other matters raised by the third party including the impact on his septic tank later in this decision.

## Reasons

9. The main issues in this appeal are:
  - the principle of the development in the countryside;
  - whether the farm business is active and established;
  - whether the proposal is necessary for the efficient use of the holding;
  - whether the siting of the proposed building is acceptable;
  - whether the development is appropriate in terms of character and scale; and
  - whether it would visually integrate into the local landscape.
10. Section 45 (1) of the Planning Act (Northern Ireland) 2011 states that regard must be had to the local development plan (LDP), so far as material to the application, and to any other material considerations. Where regard is to be had to the LDP, Section 6 (4) of the Act requires that the determination must be made in accordance with the plan unless material considerations indicate otherwise. The Banbridge, Newry and Mourne Area Plan (BNMAP) 2015 operates as the LDP for this area. In it, the site is located in the countryside, approximately 350m north east of the small settlement of Lislea. It is also within the Ring of Gullion Area of Outstanding Natural Beauty. BNMAP provides no specific policies for agricultural development within the plan area.
11. Regional planning policies of relevance to this appeal are set out in the Strategic Planning Policy Statement for Northern Ireland (SPPS) and retained policies within Planning Policy Statement 21 – Sustainable Development in the Countryside (PPS 21). There is no conflict or change in policy direction between the provisions of the SPPS and the retained policies insofar as they relate to this appeal. Therefore the retained policies take precedence in decision making in accordance with the transitional arrangements outlined in the SPPS.
12. Policy CTY1 of PPS 21 states that there are a range of types of development which in principle are considered to be acceptable in the countryside and that will contribute to the aims of sustainable development. These include agricultural and forestry development in accordance with Policy CTY12. Other types of development will only be permitted where there are overriding reasons why that development is essential and could not be located in a settlement. Policy CTY12 states that planning permission will be granted for development on an active and established agricultural holding where certain criteria are met. The Council disputed whether the holding is active and established. Furthermore, they raised concerns under the first three of the five criteria which require that:
  - (a) it is necessary for the efficient use of the agricultural holding;
  - (b) in terms of character and scale it is appropriate to its location; and

- (c) it visually integrates into the local landscape and additional landscaping is provided as necessary;
13. Policy CTY12 goes on to state 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, that the design is sympathetic and that the proposal is sited beside existing farm buildings. Exceptionally, consideration may be given to an alternative site away from existing farm buildings, provided there are no other sites available at another group of buildings on the holding, and where it is essential for the efficient functioning of the business or there are demonstrable health and safety reasons.
  14. Policy CTY13 of PPS 21 relates to Integration and Design of Buildings in the Countryside. It 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. It cites seven instances where a new building will be unacceptable, of which the Council have raised three in the appeal:
    - (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
    - (f) it fails to blend with the landform, existing trees, buildings, slopes and other natural features which provide a backdrop.
  15. Policy CTY14 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 an area. The Council has raised criterion (a) which states that a new building will be unacceptable where it is unduly prominent in the landscape.
  16. The appeal site comprises a section cut out of the northern end of a larger agricultural field which is relatively flat, and part of a laneway connecting it to Hall Road. The appeal proposal is a portal framed agricultural store measuring 15.25m by 13.7m and 6.5m to the ridge. It would have a roller shutter door and pedestrian access door in the north western gable facing the road and a covered lean-to livestock pen with an open front running for half its length on the south western elevation. Within the shed there would be space for livestock pens, bale storage and machine storage and maintenance. The lower portion of the walls would be shuttered concrete finished with grey plaster. The upper portion of the walls and the roof would be clad with green metal sheeting. The area between the existing sheds at the roadside and the new shed would be hard surfaced and separated from the remainder of the field by a post and wire fence.
  17. Paragraph 5.56 of the Justification and Amplification to Policy CTY12 states that for the purposes of this policy the determining criteria for an active and established business will be that set out under Policy CTY10. Policy CTY10 relates to dwellings on farms and requires that the farm business is currently active and has been established for at least six years.
  18. The appellant has a registered farm business ID number (648373) which was allocated to his father Mr Terence Murphy on 5<sup>th</sup> April 2006. The farm map which dates from October 2011 indicates that the business comprises a total land area of

2.61 hectares. The Department of Agriculture, Environment and Rural Affairs (DAERA) consultation response indicates that it is a category 3 farm business ID which is unable to claim subsidy and that no payments were claimed in the last 6 years. However, it does indicate that the business has been established for over six years.

19. While the receipt of subsidies is often accepted as evidence that a farm business is active, it is not the only means of demonstrating this. Paragraph 5.39 of PPS 21 states that 'agricultural activity' refers to the production, rearing or growing of agricultural products including harvesting, milking, breeding animals and keeping animals for farming purposes, or maintaining the land in good agricultural and environmental condition.
20. The appellant has provided evidence that the farm's flock number (781955) was reactivated by DAERA in November 2014 and provided a copy of the Sheep Flock Register. This indicates a number of flock movements between 2014 and 2020. The appellant's father, Mr Terence Murphy passed away in 2020. The appellant and his family lived in Australia prior to his father's death. He was not involved in the farm business at this time. Following his father's death, the appellant on return from Australia was added to the farm business number and flock number for succession purposes.
21. Information in the Flock Register suggests that sheep numbers on the holding reached a peak in 2018 after which most movements have been off the holding. This is likely to coincide with the declining health of the appellant's father. The decline in livestock numbers suggests that the business was being wound down at that stage. There have been no flock movements recorded in the period since 2020 when the appellant's father is stated to have passed away. There is no evidence of any flock movements since the appellant joined the farm business. The appellant's evidence does not state the extent of the current flock.
22. During my site visit, I noted around eight sheep in the field, but the absence of any actions relating to sheep in the flock register (e.g. dipping) since 2020 means I cannot be sure that the sheep on the holding are part of the appellant's flock. While the evidence provided shows that agricultural activity took place between 2014 and 2020, I have not been presented with sufficient evidence on the appellant's agricultural activity to persuade me that the farm business is currently active as required by the policy. The Council's objections on this matter are sustained.
23. With regard to the need for the proposal, the appellant's supporting statement, submitted with the application, refers in general terms to welfare standards for livestock, but gives no detail as to the appellant's agricultural operations or flock size. The appellant's letter dated 13<sup>th</sup> July 2021 states that he urgently requires the proposed building to house existing stock for 2021 or he will have to find alternative rental accommodation which is not considered efficient for the existing farm holding. No information is given on where sheep were overwintered or lambed in previous seasons (when there were over 100 in the flock) and why the same accommodation is not available to the appellant now. No information is provided of any farm machinery owned by the farm business which would need to be stored inside. No information is given on other existing buildings at the disposal of the farm business and why they are not suitable for agricultural storage.

24. The appellant's evidence states that there are no existing agricultural buildings associated with this agricultural holding and that the farm map associated with the enterprise confirms this status. However, they argue elsewhere in the same submission that buildings and laneways are removed from DAERA farm maps for claim and payment purposes. It appears from the site location map that there are outbuildings around the appellant's home address, which is approximately 200m south west of the appeal site and that there is a large existing shed approximately 80m south west of the appeal site on land which is outlined in blue as belonging to the appellant. Given the paucity of information on existing buildings, flocks and machinery, I have not been persuaded that the proposed shed is necessary for the efficient use of the agricultural holding, or that there are no suitable existing buildings on the holding that can be used. The Council's objections under criterion (a) of Policy CTY12 are sustained.
25. Policy CTY12 requires that where a new building is proposed, it must be sited beside existing farm buildings. Paragraph 6.73 of the SPPS confirms that this means existing buildings on the holding. As the appellant has now accepted that he does not own the existing sheds at the roadside, he seeks permission for the appeal development on the basis of the exception test, as set out in paragraph 13 above. The appellant's original health and safety argument concerned the risk of animals escaping from the existing sheds onto the public road, but no weight can be attributed to this argument since the existing roadside sheds are not owned or used by the business. No other health and safety reasons have been advanced. The appellant has failed to provide any analysis of the existing buildings on his holding, has not demonstrated that the proposal is essential for the efficient functioning of the business and has not offered any demonstrable health and safety reasons. As it appears that there are other buildings on the holding, the erection of the appeal proposal on an alternative site would be contrary to the exception test. The Council's objections on this point are sustained. The Council has sustained its second reason for refusal.
26. With regard to the visual impact of the proposed shed, the Council has not provided any critical viewpoints to demonstrate their concerns. While the site itself would be cut out of a larger agricultural field and has no established natural boundaries, it benefits from being set back slightly from the roadside. On approach from the north east on Hall Road, the proposal would be screened by a 2-3m high existing hedge along the roadside. The existing buildings would also limit views from the north. The site is more open to views from the west around the junction of Hall Road and Milltown Road. While the development would be partly tucked behind some roadside trees and the existing buildings, much of it would sit within an open part of the field. However, from this viewpoint, the proposed building would have a backdrop of mature trees and rising land to the rear. These factors in combination mean the proposed building would integrate satisfactorily and would not appear as a prominent feature in the landscape. The Council's concerns under Policy CTY13 and criterion (c) of Policy CTY12 have not been sustained. The Council has not sustained its fourth reason for refusal.
27. The appellant referred to a DAERA publication entitled "Farm Buildings in the Countryside". This document was not provided in evidence and in any case is not planning policy or supplementary guidance, so I cannot consider it in the appeal. Agricultural buildings are a common feature of the local area and contribute to its

rural character. There is a larger complex of farm buildings associated with 40 Hall Road opposite the appeal site. There are also smaller groups of buildings and individual sheds dotted across the local landscape. The scale of the appeal proposal is relatively modest and given its local context, it would not appear out of character with its surroundings, or unduly prominent in the landscape. Therefore, it would not cause a detrimental change to the rural character of the area. The Council's concerns under Policy CTY14 and criterion (b) of Policy CTY12 have not been sustained. The Council has not sustained its third and fifth reasons for refusal.

28. The appellant raised appeal decision 2017/E0005 – an appeal against the refusal of a certificate of lawfulness for a proposed agricultural shed. The Appellant stated that the decision supported his position regarding farm buildings on farm maps, however, having read the decision, I do not agree that it addresses this matter. In any case, as the appeal was determined under a different legislative context and was concerned with whether the proposal complied with permitted development rights, it is not comparable to the present appeal which is subject to PPS 21.
29. The third party's septic tank is located within the appeal site in an area proposed as hard standing. While this land is owned by the appellant, the third party has an easement regarding the septic tank and is concerned that the development, if approved, would interfere with it. I consider that this is a legal matter between the parties and that even if the appeal were to be allowed, the planning permission would not extinguish any pre-existing legal rights or easements pertaining to the land. I accept the appellant's position that in the event of approval, the legal easement would be a matter that could be negotiated between the parties outside of the planning process. It is not, therefore, a reason to refuse planning permission.
30. As I have not been persuaded that the farm business is currently active, that the proposal is necessary for the efficient use of the holding, that there are no suitable existing buildings on the holding that can be used and that the alternative site away from existing buildings meets the exception test, the proposal is contrary to Policy CTY12 and unacceptable in principle. As no other overriding reasons why the development is essential in this location have been put forward, it is also contrary to Policy CTY1. The Council has therefore sustained its first reason for refusal. The Council's first and second reasons for refusal are determining. Accordingly, the appeal must fail.

This decision is based on the following drawings:-

- PL-01 A – Site Location Map at scale 1:2500, Location Overview Map and Existing Site Topographical Survey at scale 1:1000 which was received by the Commission on 18<sup>th</sup> March 2022;
- PL-02 – Plans, Elevations and Specification at scale 1:100 which was received by the Council on 22<sup>nd</sup> February 2021; and
- PL-03 – Site Layout Plan at scale 1:500 which was received by the Council on 22<sup>nd</sup> February 2021.

**COMMISSIONER GARETH KERR**

### **List of Documents**

Planning Authority:-	A	Statement of Case Newry, Mourne and Down District Council
	B	Rebuttal Statement Newry, Mourne and Down District Council
	C	Comments on Revised Drawing Newry, Mourne and Down District Council
Appellant:-	D	Statement of Case and Appendices Blackgate Property Services Ltd.
	E	Rebuttal Statement Blackgate Property Services Ltd.
	F	Comments on Revised Drawing EnviroFarm Ltd.
Third Parties:-	G	Statement of Case Mr Terry Murphy
	H	Statement of Case McNamee McDonnell Solicitors
	I	Rebuttal Statement McNamee McDonnell Solicitors