Planning Appeals Commission

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Appeal Decision

Appeal Reference:	2023/L0005
Appeal by:	Mr. Roy McCrea
Appeal against:	The refusal to certify a Certificate of Lawfulness of Proposed Use or Development
Proposed Development:	Erection of an on-farm agricultural building (containing a Nutrient Recovery System with an annual input capacity limitation of 29,000 tonnes)
Location:	Lands approximately 75m south east of No. 334 Longland Road, Binn, Claudy, Co. Londonderry
Planning Authority:	Derry City and Strabane District Council
Application Reference:	LA11/2022/0538/LDP
Procedure:	Written representations and Commissioner's site visit on 12th June 2024
Decision by:	Commissioner Gareth Kerr, dated 25th June 2024

Decision

1. The appeal is dismissed.

Reasons

2. The main issue in this appeal is whether the erection of the proposed agricultural building containing a Nutrient Recovery System (NRS) would be permitted development.

3. The application for a Certificate of Lawfulness of Proposed Use or Development (CLOPUD) was received by the Council on 6th May 2022, in accordance with Section 170 of the Planning Act (Northern Ireland) 2011 (the Act). The Council refused the application on 27th April 2023, citing three reasons. This appeal was brought under Section 173 of the Act against the Council's refusal of the application.

4. 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.

5. The Planning (General Permitted Development) Order (Northern Ireland) 2015 (GPDO) grants permission for certain classes of development described in the Schedule to the Order. Part 7 of the Schedule refers to agricultural buildings and operations. Permitted development under Class A thereof includes the carrying out on agricultural land comprised in an agricultural unit of—
(a) works for the erection, extension or alteration of a building; or
(b) any excavation or engineering operation;
reasonably necessary for the purposes of agriculture within that unit. A number of conditions are specified, which I will return to later.

6. Article 3 (1) of the GPDO introduces the proviso that any permission granted by the Order is also subject to regulations 55 and 56 of the Conservation (Natural Habitats, etc) Regulations (Northern Ireland) 1995. Regulation 55 (1) states that it shall be a condition of any planning permission granted by a general development order, whether made before or after the commencement of these Regulations, that development which—
(a) is likely to have a significant effect on a European site (either alone or in combination with other plans or projects), and
(b) is not directly connected with or necessary to the management of the site,
shall not be begun unless the developer has received a written determination from the Department under Regulation 56 that it will not adversely affect the integrity of the site.

7. Article 3 (8) of the GPDO states that the Schedule does not grant planning permission for—
(a) development within the meaning of Schedule 1 to the EIA (Environmental Impact Assessment) Regulations; or
(b) development of a description mentioned in column 1 of the table in Schedule 2 to the EIA Regulations; where—
   (i) any part of the development is to be carried out in a sensitive area; or
   (ii) any threshold or criterion mentioned in column 2 of the table in Schedule 2 to the EIA Regulations as applicable to development of that description is respectively exceeded or met in relation to that development,
unless the council has given a determination pursuant to regulation 5 of the EIA Regulations that the proposed development is not EIA development.

8. The appeal site is located towards the eastern edge of a large farm complex run by the appellant. The farm extends to some 473 hectares and includes dairy and arable enterprises. The site of the proposed development is an existing rectangular concrete walled structure which retains slurry and farmyard manure. It is marked on the plans as an open slurry pit, but the slurry tank is in fact enclosed. The appellant describes it as a slurry separation area. There is existing pumping equipment located in the southern corner of the site. Manure is stored within the walled area above ground level on a concrete floor. There is a slurry tank below the concrete floor with a mixing or pumping point at the southeastern end. From the levels given on the plans, it appears that a new floor would be installed approximately 1m higher than the existing concrete floor and a new shed erected above. It would contain a NRS which would utilise technology including a screw press separator and reverse osmosis membrane technology to remove ammonia from existing farm slurry. When water is removed from the raw slurry, the resulting product is a thickened slurry. The

appellant has entered into a contract for the supply of 5,800 tonnes per annum of thickened slurry from the proposed plant to Crowley Bio-Energy Ltd. which is based at Gilford in Co. Down.

9. The appellant highlights several benefits of the proposal including cost-efficiencies for the farm business, a reduced volume of material for land spreading, minimising environmental impacts by processing nutrients with high ammonia concentrations into a less harmful material, advancing environmental sustainability within the agriculture sector and alignment with strategic objectives for mitigating ammonia emissions at a Northern Ireland level. While these benefits are laudable and would be matters to be weighed if the exercise of planning judgement was required, the basic question before me is a matter of law as to whether the proposal constitutes permitted development.

10. Article 2 of the GPDO sets out the interpretation of various terms for the purpose of the Order. It states that unless the context otherwise requires, “building” does not include plant or machinery or a structure or erection of the nature of plant or machinery. The Council argued that the proposed development would not fall within Class A of Part 7 of the Schedule as it relates only to buildings and engineering operations on an agricultural unit whereas the proposed NRS is plant and machinery.

11. The appellant cited several previous Council and Commission decisions in relation to agricultural buildings which contained NRSs or other plant and machinery. Causeway Coast and Glens Borough Council certified that an agricultural building (containing a NRS) would be lawful under Part 7 Class A of the GPDO under application LA01/2019/1336/LDP on 2nd July 2021. Armagh City, Banbridge and Craigavon Borough Council certified that two agricultural buildings (including a NRS) were lawful under Part 7 in application LA08/2019/1637/LDE on 9th November 2023. Appeal decision 2022/E0002 found an agricultural building (with a NRS) to be lawful under Part 7 Class A of the GPDO on 6th September 2023. While decisions of other Councils are not binding on Derry City and Strabane District Council, I note that none of the proposals were refused because they contained plant and machinery. The appellant also cited decision LA11/2020/0498/LDP by this Council in respect of an agricultural building which would contain a large generator plant, which they certified to be permitted development under Part 7 Class A of the GPDO on 18th September 2020. It is inconsistent of the Council to certify that a farm building containing a generator plant is permitted development while holding that a farm building containing a NRS is not permitted development under the same Class.

12. The development proposal is an agricultural building which would contain plant and machinery. Many agricultural buildings contain plant and machinery such as milking equipment, grain drying and transport equipment, livestock feed storage and augurs and slurry or manure handling equipment, which is becoming increasingly automated. A farmer who wishes to install a milking parlour or a robotic scraping system does not need permission specifically in relation to the plant and machinery, but for any new buildings in which they are located. Likewise with a NRS, the plant would be placed in the newly constructed shed, but does not comprise part of the building for the purposes of assessment under the GPDO. I do not agree with the Council’s position that the shed could not be permitted development under Part 7 Class A of the Schedule because it would contain plant and machinery. This would

rule out consideration of every agricultural sched which may potentially contain plant or machinery.

13. I also note that paragraph A.2 (b) of Part 7 specifically includes plant or machinery as being capable of being provided under Class A. Therefore the definition within Article 2 cannot mean that plant or machinery is excluded from this Class. It simply means that it does not comprise part of the "building". Notwithstanding the fact that the proposed agricultural building would contain plant and machinery, I conclude that this does not bar it from consideration under Part 7 Class A of the Schedule to the GPDO. The Council has not sustained its third reason for refusal.

14. Part 7 Class A.1 sets out nine conditions where development of agricultural buildings is not permitted, including (g) that the ground area to be covered by any building erected or any building as extended or altered exceeds 500 square metres, calculated as described in paragraph A.2 (b). A.2 (b) sets out that the ground area includes any building provided under Class A within the preceding two years. Although not raised when the application was refused, the Council's evidence asserted that the ground area of the development was 510 square metres which would exceed the threshold of criterion (g). The appellant responded to this point in rebuttal evidence, so they have not been prejudiced by this late addition to the Council's case. The appellant argued that existing walls to the northeast and northwest sides are being utilised, so the proposed ground area should be calculated from inside these walls. If the area of the existing walls is excluded, the area of the development would be 499.2 square metres (including a new wall to the southeast side) which is below the threshold.

15. At my site visit, I observed that the existing slurry pit is bound to the northeast and northwest by a rendered concrete block wall that rises approximately 1.4m above the existing floor level. The plans show that the wall to the northeast side would remain and the shed structure would sit on top of it (though the elevations and sections do not appear to account for the proposed floor level being around 1m higher than the existing). A further 4.55m of wall would be erected on top of the block wall to support the roof. It could be argued that this new development, three times the height of the existing wall, means the area comprised in the existing wall is within the ground area of the new building. However, this is a moot point for the reasons set out below. To the northwest and southeast gables and also to the southwest side, new concrete walls are shown on the plans. I judge that these walls would comprise part of the ground area of the building. Even if I were to exclude the area of the existing wall to the northeast side of the building from the calculation, the ground area of the development would exceed the 500 square metres threshold set by criterion (g). Accordingly, the development would exceed what is permitted by Part 7 Class A of the GPDO. The Council's concerns in respect of the ground area to be covered by the development are sustained.

16. While I have found that the proposal would not constitute permitted development as set out in the Schedule to the GPDO because of its size, the other objections raised by the Council will be considered for completeness. The appeal site lies in proximity to the River Faughan Special Area of Conservation (SAC), a European designated site. The Council variously stated that the distance from the appeal site to the SAC was 400m and 100m, neither of which are correct. The development would be

approximately 275m from the SAC at its closest point. The land farmed by the appellant extends to the banks of the River Faughan.

17. The Council's Shared Environmental Service (SES) undertakes Habitats Regulations Assessments on behalf of the competent authority. When consulted on the proposal, SES requested further details on all outputs/by-products from the NRS, how these will be utilised and where their final destination would be. They stated that any associated land spreading within 7.5km of an international site will require an Air Quality Impact Assessment (AQIA) and that comments should be requested from the Northern Ireland Environment Agency Water Management Unit and Natural Environment Division. As no such information was submitted by the appellant, the Council, as competent authority, could not be satisfied that the proposal would not adversely affect the integrity of any European site.

18. The appellant pointed out that the Council did not solicit any further information on foot of the SES consultation response and argued that the nutrient recovered material (thickened slurry) would be retailed (sold-off) from the farm holding, therefore removing the necessity of any land spreading of the material, so a nutrient management plan would not be required. They argued that the reduced volume of slurry on the farm would mitigate the environmental impacts, so the proposal complied with Regulation 55 of the Habitats Regulations and thus Article 3 (1) of the GPDO.

19. Whilst I accept that the NRS has the potential to mitigate the environmental impacts of the farm business, I consider that the limited information before me leaves some questions unanswered. Some 5,800 tonnes per annum of thickened slurry from the proposed plant is to be transferred to an anaerobic digester at Gilford, but I cannot be certain that this would represent the full volume of concentrated output from the NRS, nor that it would be the only output. The Supporting Statement discusses the sale of excess nutrients into the local market and it may be a possibility that some of the concentrate would be spread on land elsewhere, if not on the appellant's holding. Any such spreading would either need to be ruled out or its impacts on nearby European sites assessed through an AQIA. Any discharge of water from the system would also need to be regulated given its proximity to the River Faughan SAC. Although the proposed NRS would appear beneficial for the environment in principle, I agree with the Council that further information is required in order to make a determination that it would not adversely affect the integrity of European sites. The Council's first reason for refusal is well founded.

20. As to the question of whether an EIA determination is required, the development would not fall within the meaning of Schedule 1 to the EIA Regulations. Concerning Schedule 2, the Council considered that the proposal would fall within Column 1 1(c) – Intensive livestock installations. The appellant argues that the intensive livestock installation already exists and that the proposed nutrient recovery building and its internal processes are not inherently linked to the keeping of livestock. They state that the NRS would be distinct from the direct management or housing of livestock and that it is simply to manage and utilise agricultural by-products.

21. The Council pointed out that the Commission has previously found the farm to comprise an intensive livestock installation in an appeal against a positive EIA determination made under application LA11/2019/0382/F. They state that it was

concluded that there was a requirement to collectively assess the appellant's operation in full. That report is not before me in this appeal, but I consider that the proposed NRS arises solely from the existing intensive livestock installation and is inherently linked to that installation. It cannot be assessed in isolation from the existing livestock operation which will supply it, though it may be a means of mitigating the environmental effects of that operation. Having regard to the information before me and the wide scope and broad purpose of the EIA regime, I consider the farm to be an intensive livestock installation as described in Column 1 1(c). I am not persuaded that the proposal would also fall within Category 11(b) – Installations for the disposal of waste, as suggested by the Council, because the output from the NRS would be a processed agricultural product which is of use as an organic fertiliser or feedstock, not a waste product.

22. The appeal site is located within the Sperrins Area of Outstanding Natural Beauty (AONB) which is a sensitive area for the purpose of the EIA Regulations. As such, it comprises Schedule 2 development regardless of the thresholds in Column 2 of the table (though I have concluded above that the area of floorspace exceeds the 500 square metres threshold in any case). Given the AONB location of the development, the appellant's arguments in respect of the Column 2 threshold are misplaced.

23. As Schedule 2 development, Article 3 (8) of the GPDO indicates that the proposal could not constitute permitted development unless the Council has given a determination pursuant to Regulation 5 of the EIA Regulations that the proposed development is not EIA development. As the Council's own refusal reason points out, the proposal ought to be subject to an EIA determination. This begs the question, why did the Council not carry out an EIA determination before deciding the application? I consider that additional information on the likely significant effects of the development would be required in order to carry out an EIA determination. The Council has sustained its second reason for refusal.

24. The proposal would not be permitted development under Part 7 Class A of the Schedule to the GPDO because the ground area of the development would exceed 500 square metres, and both an EIA determination and a Habitats Regulations assessment of the impact of the development on the River Faughan SAC in view of its conservation objectives are required. The Council's refusal to certify the proposed development was well founded. Accordingly, the appeal must fail.

This decision is based on the following drawings:-

Drawing No.	**Title**	**Scale**	**Received by Council**
01	Site Location Map	1:2500	05 May 2022
02	Existing Site Layout Plan	1:500	05 May 2022
03	Proposed Plans and Elevations	1:100	05 May 2022
04	Proposed Site Layout Plan	1:500	05 May 2022
05	Proposed Building Sections	1:100	05 May 2022

COMMISSIONER GARETH KERR

List of Documents

Planning Authority:-	A	Statement of Case Derry City and Strabane District Council
Appellant:-	B	Statement of Case Blackgate Property Services Ltd.
	C	Rebuttal Statement Blackgate Property Services Ltd.