

Enforcement Appeal Decision

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Appeal Reference:	2023/E0031
Appeal by:	Mr Tom Patterson.
Appeal against:	An Enforcement Notice dated 5 October 2023.
Alleged Breaches of Planning Control:	The unauthorised erection of an agricultural shed used for the keeping of animals and as a milking parlour with associated underground storage tanks; The unauthorised construction of underground storage tanks comprised of concrete walls and slatted concrete slabs and The unauthorised creation of an area of concrete hardstanding.
Location:	Lands approximately 110m north east of no. 59 Cottage Road, Lurgan, BT67 9HD.
Planning Authority:	Armagh City, Banbridge and Craigavon Borough Council.
EN Reference:	LA08/2018/0262/CA.
Procedure:	Informal Hearing on 14 May 2024.
Decision by:	Commissioner Mandy Jones, dated 5 July 2024.

Grounds of Appeal

1. The appeal was brought on Grounds (c), (d), (f) and (g) as set out in Section 143 (3) of the Planning Act (Northern Ireland) 2011. At the hearing, the appellant also raised Ground (e).

The Notice

2. Section 144 (2) of the Planning Act allows the planning appeals commission to correct any misdescription, defect or error in the enforcement notice (EN), if it is satisfied that the correction can be made without injustice to the appellant or the council. The appellant argued that the description of the breaches is incorrect and requested that the Commission amend these under their powers of Section 144 (2).
3. The appellant is not arguing the enforcement notice (EN) is a nullity, but rather that the term 'shed' is ambiguous in its description. It is contested that this is a singular shed and that the breach consists of 2 no. agricultural sheds (plural) which were constructed separately. This is also apparent in their construction, external appearance, separate underground storage tanks and function. It was argued that the Council's Planning Convention Notice (PCN) issued on 24 March 2022, in respect of development on the site, at question (v) referred to '2 sheds' and at (xv) referred to the use of the building marked 'A' and the use of the

building marked 'B'. As such there is inconsistency between the description of the breach as set out in the EN and the PCN.

4. It was also argued that the underground tanks in paragraph 3 (1) are indicated as plural but are not depicted accurately on the attached map. In comparison, paragraph 3 (2) references each tank as B,C,D & E and indicates their location on the attached map. As such, the wording is imprecise and lacks the clarity to identify the location of the underground storage tanks.
5. Section 140(1)(a) of The Planning Act (Northern Ireland) requires an enforcement notice to state the matters which appear to the Council to constitute the breach of planning control. Section 140 (2) states a notice complies with subsection (1)(a) if it enables any person on whom a copy of it is served to know what those matters are.
6. The shed has an approximate footprint of 65.5m x 82m and the design is of typical agricultural construction with finishes of reinforced concrete lower walls and profiled metal cladding to the upper walls with a profiled metal roof. It has a double bay portal frame, and a double pitch 'M' shaped roof profile to deal with the large span. Internally, it is one single enclosure with a central line of columns (supporting the central valley). I would concur with the Council that the double bay structure and double pitch roof does not infer 2 separate sheds. Rather, it is one single enclosure which is physically and functionally connected.
7. Irrespective of the Council's questions within the PCN, the contents of which would have formulated the wording of the breaches, the PCN is not the EN. Expediency is a matter for the Council.
8. Regarding *Millar – Mead v Minister of Housing and Local Government (1963) 2 QB 196*, Upjohn LJ states that the test is 'does the notice tell him (the person served) fairly what he has done wrong and what he must do to remedy it ?'. It was also held that the person served with the EN 'is entitled to say that he must find out from within the four corners of the document exactly what he is required to do or abstain from doing'. I consider the breach accurately describes the agricultural shed and its associated underground storage tanks. The appellant is well aware of the breach and what he is required to do.

The appeal site and development

9. The enforcement appeal site is located 110m north east of 59 Cottage Road (Grace Hall) and is outside the development limits of Dollingstown, as defined in the Craigavon Area Plan 2010 (which operates as the relevant LDP for the area.) The context is typically rural in nature. It is located between Cottage Road and Damhill Road and is approximately 0.5 miles north of Dollingstown. Access is from a laneway off the Damhill Road.
10. The notice shed is located to the rear of Grace Hall (a Grade B listed building) on land which sits at a lower ground level relative to Grace Hall. The shed is used to house livestock with underground collection tanks. There is also a milking parlour within the shed. The shed has a footprint of approximately 82m x 65.5m and it is

of a typical agricultural construction with reinforced lower concrete walls and profiled metal cladding on the upper walls and a profiled metal roof. The roof has a double 'M' pitch with perspex panels on the roof. On the front elevation there is a large door opening leading to an area where cattle are wintered. There are also pedestrian doors into the milking parlour on the front elevation. A section of the front elevations remain to be clad, opening directly onto the hardstanding. The rear elevation and part of the roof at the rear also remains to be clad and there are temporary plastic coverings fixed to the rear of the shed.

11. Internally within the shed there is an area for housing adult cattle which is comprised of two enclosures running the length of the shed with a central walkway between them for animal access and feeding. In the centre of the shed, there is a milking area with associated milking, plant and machinery, washing areas and a milk collection tank. The rest of the shed is predominantly comprised of pens for rearing young calves. According to the PCN there are two tanks under the shed.
12. An area of hardstanding is at the front of the shed which provides circulation space and to the rear of the shed there are four underground tanks identified as B, C, D and E on the EN map. There are several other agricultural buildings adjacent to the notice shed used for agricultural storage purposes.

EIA Consideration.

13. The background documents stated that having regard to the development which is subject of the EN, when assessed against the provisions of The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017, (EIA Regulations), the Council in accordance with Regulation 34 (1) determined that the breaches of planning control, as set out in the EN constituted EIA development which falls within Schedule 2, category 1 (c) Agriculture and Aquaculture, Intensive livestock installations, in that the area of floorspace exceeds 500 sq m, of the above regulations. A Regulation 34 Notice was issued with the EN advising that an environmental statement was required to be submitted should the appellant exercise his right of appeal under Section 143 of the Planning Act (Northern Ireland) 2011. The appellant did not seek a hearing in respect of this EIA determination and therefore the development is unauthorised EIA development.

Ground (e) that copies of the enforcement notice were not served as required.

14. Section 138(2)(a) of the Planning Act (Northern Ireland) 2015 requires that copies of the Enforcement Notice (EN) is served (a) on the owner and on the occupier of the land to which it relates; and (b) on any other person having an estate in the land, being an estate which, in the opinion of the council, is materially affected by the notice.
15. Background documents indicates that a copy of the EN and Regulation 34 Notice was hand delivered to the appellant on 5 October 2023 who was on the site to

receive the notice. A further copy was also issued by registered post (Royal Mail) on 6 October 2023 to the appellant and signed for.

16. However, the appellant argued at the hearing that 'Barclays Bank PLC' have legal charge of the lands and should have also been served the EN (as shown on the Land Registry documents). It was argued that they have an estate in the land and are materially affected by the EN. In response, the Council considered that copies of the EN had been served correctly and that, in their opinion, the charge holder (money lender) is not materially affected by the EN as they have no control over any of the lands or buildings.
17. Section 144 (3) of the Act provides that where a person required to be served with a copy of the EN was not so served, the Commission may disregard the fact if that person has not been substantially prejudiced by the failure to serve the copy of the EN on them. The critical test to be considered is whether anyone has been denied an opportunity to participate in the appeal proceedings.
18. As such, for completeness, the Commission wrote to Barclays Bank PLC, and advised that an EN which affected the lands and buildings has been served and an appeal hearing to consider it had already taken place. The bank was further advised that they inform the Commission in writing by 4pm on 26 June 2024, if they wished to participate in any further proceedings in relation to the EN. No further comments were received.
19. They were invited to comment upon the EN and gave an opportunity to participate in any further proceedings. They did not avail of the opportunity to participate. I am satisfied that no substantial prejudice has been caused. Therefore, the appeal under Ground (e) fails.

Ground (c) that those matters (if they occurred) do not constitute a breach of planning control.

20. Section 23 of the Planning Act (Northern Ireland) 2011 defines development as the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change of use in the buildings or other land. Section 24 (1) of the Act states that planning permission is required for the carrying out of any development of land. The appellant's case was that the underground storage tanks, milking parlour and the concrete hardstanding would be permitted development and would fall under Part 7, Class A – Agricultural Buildings and Operations within the Planning (General Permitted Development) Order (Northern Ireland) 2015 (GPDO). It was argued that these are separate breaches of planning control, which have no relationship to the construction of the agricultural sheds, and they are separate operations in their own right.
21. The GPDO operates to grant planning permission for various descriptions of development without the need for an express grant of planning permission (on foot of a relevant application). However, the GPDO contains various general exemptions to the availability of permitted development rights. Article 3 of the GPDO sets out the general conditions for permitted development. Paragraph 3 (8) advises that the GPDO does not grant permission for development of a

description mentioned in column 1 of the table in Schedule 2 to the Planning (Environmental Impact Assessment) Regulations 2017 (the EIA Regulations): where :

- (1) any part of the development is to be carried out in a sensitive area; or
- (2) 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, or as the case may be, the Department has given a determination pursuant to regulation 5 of the EIA Regulations that the proposed development is not EIA development.

22. The EN was accompanied by a Regulation 34 Notice which determined that the development subject of the EN constituted EIA development falling within Column 1 of Schedule 2, category 1 (c) Agriculture and Aquaculture, Intensive Livestock installations. The applicable threshold which relates to this type of development is found within Column 2. It states that the area of floorspace exceeds 500m². The total area of floorspace of the building alone is approximately 5371m² and in addition there are a number of underground tanks (size unknown) and a concrete hardstanding measuring approximately 635m². As such, the floor area of the appeal development exceeds the threshold of 500m².
23. As the appeal development has been determined as EIA development, it cannot avail of any permitted development entitlements.
24. Notwithstanding, this conclusion, the Council also argued that the development does not comply with the criteria listed in Part 7, Class A, A1 of the GPDO. Class A allows that the carrying out on agricultural land comprised in an agricultural unit of any excavation or engineering operation reasonably necessary for the purposes of agriculture within that unit is permitted development. Eight criteria are listed (a) – (i), which would prevent development being permitted by Class A. The Council considered that the appeal development does not comply with criterion (g) which states that development is not permitted where:

(g) the ground area to be covered by –

- (i) any works or structure (other than a fence) for the purposes of accommodating livestock or any plant or machinery arising from engineering operations; or
 - (ii) any building erected or any building extended or altered; exceeds 500 square metres, calculated described in paragraph A. 2 (b).
25. Paragraph A.2 sets out the interpretation of Class A and confirms: (b) the ground area referred to in A.1 (g) is the ground area which the proposed development covers together with the ground area of *any building (other than a dwelling house) or any works, structure, plant or machinery within the same unit* which is being provided by Class A or has been provided within the preceding two years and any part of which is within 75 m of the proposed development.
 26. This interpretation clarifies how the 500m² area is calculated and this includes the shed together with the underground tanks and the associated areas of

hardstanding. The floorspace of the shed is 5371m², which alone is well in excess of the permitted 500m² limit. As such the appeal development fails to comply with criteria (g).

27. I consider that the underground storage tanks are an integral part of the agricultural building and as such cannot be described as a distinct and separate operation. The milking parlour is a use within the overall agricultural shed and is not a separate and discrete operation. The hardstanding to the front of the shed provides circulation space to the front of the shed and is also part and parcel of the appeal development. These elements are all inextricably linked both functionally and physically with the agricultural shed. I would concur with the Council that the overall project cannot be 'salami sliced' into individual components to benefit from permitted development rights.
28. As the development does not constitute permitted development and requires planning permission, the appeal on Ground (c) must fail.

Ground (d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters.

29. Section 132 (1) of the Planning Act (Northern Ireland) 2011 sets out the time limits for taking enforcement action. In relation to building, engineering, mining or other operations and changes of use, no action may be taken after the end of the period of 5 years beginning with the date on which the operations were substantially completed. The EN was issued on 5 October 2023. Therefore, to be immune from enforcement action, the appellant must demonstrate that the development subject of the notice was substantially complete and has been in place and continuously at this location from 5 October 2018. Under this ground of appeal, the onus is on the appellant to demonstrate on the balance of probabilities that the unauthorised development and use are immune from enforcement action.
30. There is no definition in Legislation to define what is meant by 'substantially completed' however, as pointed out by the Council, case law in *Sage v Secretary of State for the Environment, Transport and the Regions and others (2003)*, confirmed that a holistic approach should be taken to the issue. The definition of substantially completed must be decided as a matter of fact and degree.
31. The appellant has stated that a considerable part of the development was immune, including the first and second underground tanks under the shed and that the milking parlour was installed, before the critical date of 5 October 2018. At the hearing the appellant accepted that the agricultural shed was not substantially complete prior to the critical date. The following evidence and commentary were submitted:
 - two grant payments from DARD, for £ 78,007.98 (first payment on 21 April 2009 for £25,500 and second payment on 26 January 2010) for the underground tanks, which are shown completed and in situ on the LPS ortho V3 image dated 6 November 2011;

- It is noted that on the Regulation 34 Notice – DEARA Water Management Unit commented that ‘They have not received a notification for any new tanks on this farm since 2009. However, some of the footprint of the new buildings is over what may be an existing tank’;
- LPS ortho V4 image dated 8 June 2013 – this depicts the previously installed tank, and excavation works (operational development) has commenced to form the basis for the second tank, which is located under the alleged unauthorised first shed. The footprint is apparent given the shadow resultant from the difference in ground levels and the removed spoil, which is located to the southeast, and excavated soil to the north which can be seen;
- LPS ortho V5 image dated 21 April 2016 depicts that the shuttered concrete walls and concrete floor of the second tank has been completed, with piers to carry the slatted concrete floor all in place. The original tank remains operational in the south west corner;
- Google earth image dated 7 May 2017 depicts the ground levels having being reduced to the west, given the shadow resultant from the difference in ground levels, and the former chicken lagoon has been removed;
- Google earth image dated 24 May 2018 depicts the slotted floor completed for the second tank in building one. The steelwork has been completed to carry the roof of the northern part of building one and the roof cladding has been fixed on half of the first agricultural shed. The white outline marks out the area for excavation for the third underground tank;
- Google earth image dated 15 October 2018 (10 days after the critical date of 5 October 2018), depicts the second part of the steelwork is up for the first agricultural building. The third underground tank shuttered walls have been completed, and the milking parlour and been installed all prior to the critical date;
- It is noted in the Regulation 34 Notice ‘ Are the environmental effects likely to be significant ? The Council state that ‘ This unauthorised development, which has been operating since around the summer of 2018.....’
- Google earth image dated 10 February 2019 depicts the steel portal frame and batons for sheeting to be fixed to the second agricultural shed. The first agricultural shed has its roof sheeting in place and
- LPS ortho image dated 23 April 2019 depicts both agricultural sheds with sheeted roofs.

32. In regard to the responses provided by the Council in the Regulation 34 Notice, I note that this did not qualify which development was operating since the summer of 2018 and reference to this does not assist the appellant’s case.
33. Although the appellant claims that the milking parlour was installed prior to the critical date I have no evidence to support this claim. At the hearing the Council accepted that the underground tank (as indicated as A1 on the map attached to this decision) was in place prior to the critical date. However, it was argued that this underground tank is part of the totality of the overall development, which at the critical date was not substantially completed. They argued that it was clearly the intention of the appellant to construct the agricultural shed over the underground tanks to house animals.

34. I would agree that the evidence presented including aerial photography (Google earth image dated 24 May 2018), DARD payments to the appellant in 2009/2010 for £78,007.98 and evidence at the hearing including the Council's concession demonstrates that, on the balance of probabilities the underground tank (as indicated as A1) was in place prior to the critical date and prior to being subsumed within the overall development. As such, I would consider that for a period of time it appeared to be structurally independent prior to the critical date, notwithstanding any future intentions of the appellant.
35. I agree that at the date of the service of the EN, (5 October 2023) the underground tanks had been subsumed within the overall development and had become an integral part of the development both physical and functionally, as concluded earlier in this report. However, at the time of the critical date for immunity of 5 October 2018, the underground tank (as indicated as A1) appeared to be physically insitu.
36. The development is unauthorised EIA development. The EIA Regulations prohibits the Commission from granting consent for an EIA development unless an environmental impact assessment has been carried out. As such, I can only conclude that the operational development of the underground tank (as indicated as A1) is immune from enforcement action. For the avoidance of doubt, this does not include the use (for the storage of slurry) which is part of the overall EIA development. The EN shall be varied to cease the unauthorised EIA use of underground tank A1.
37. As such, I consider the operational development (only) of underground tank (indicated A1 on the map attached to this decision) is immune from enforcement action. The ground (d) appeal succeeds to that extent.

Ground (f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach

38. Section 140 of the Planning Act requires an EN to specify the steps required to be taken or the activities required to cease in order to achieve, wholly or partly, certain stated purposes. These purposes include remedying the breach of planning control by restoring the land to its condition before the breach took place or remedying any injury to amenity.
39. The appellant's appeal on ground (f) is only in regard to the hardstanding. At paragraph 4, (3) the remedy is to permanently remove the concrete hardstanding. It was argued that there is no material harm or injury to amenity caused by the concrete hardstanding and reference was made to the Mansi principal. It was argued that the steps cannot seek to remove legitimate rights.
40. The Mansi principle is that an enforcement notice cannot take away legally permitted rights. The Council referred to case law *Mohamed v SSCLG (2014) EWHC 4045*, which establishes that the Mansi principle applies to the retention of

use rights, not the retention of buildings erected in breach of planning control. In this case, the Courts held that the Mansi principle did not extend to buildings which had been unlawfully constructed. As such, it is not relevant.

41. As discussed, the development subject of the EN is unauthorised EIA development and there are no permitted development rights for the appeal development. At paragraph 4, (3) the remedy is to permanently remove the concrete hardstanding. The breach of planning control of the hardstanding can only be remedied by its removal. The steps do not exceed what is necessary to remedy the breach of planning control. Accordingly, the appeal on ground (f) fails.

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

42. The time period set out in the EN for compliance is 180 days of the notice taking effect. The appellant argues that the period for compliance does not take into consideration that the underground tanks are to be emptied in advance of any removal works. The slurry is required to be safely disposed of in accordance with the DAERA Regulations, as set out in the Nutrient Action Programme (NAP) Regulations 2019-2022, which places limitations on the volume and times of year when landspreading can occur. The appellant has a significant land holding and 1000 livestock. The tanks have a significant cubic capacity which will need to be emptied in advance of any removal works.
43. A period of not less than 18 months was considered to be reasonable to take account of the closed periods for land spreading and to ensure compliance with NAP Regulations, prior to the demolition works taking place.
44. Given the appellant's arguments, the consequences for landspreading during the closed and open seasons, the sheer size and scale of the appeal development, including the requirement that all tanks are required to be emptied which are sizeable, in these particular circumstances, I consider that 18 months would allow a reasonable period of time for compliance. The appeal on ground (g) succeeds.

The Decision is as follows:

- **The appeal on ground (e) fails;**
- **The appeal on ground (c) fails;**
- **The notice is varied at paragraph 4 (1) by deleting 'Permanently remove the agricultural shed and associated underground storage tanks, the approximate location is indicated as A on the attached map no 2' and substitute 'Permanently remove the agricultural shed and associated underground storage tanks, the approximate location is indicated as A (with the exception of underground tank indicated as A1 on the map attached to this decision, and cease the use of this tank);**
- **The notice is varied at paragraph 4 (4) by deleting 'Permanently backfill all the underground storage tanks with soil, remove all resulting rubble and materials associated with items 1 – 3 above and**

re - soil and seed the entire site' and substitute 'Permanently backfill all the underground storage tanks (with the exception of tank indicated as A1 on the map attached to this decision) with soil, remove all resulting rubble and materials associated with items 1 – 3 above and re - soil and seed the entire site'

- The appeal on ground (d) succeeds to that extent.
- The appeal on ground (f) fails.
- The appeal on Ground (g) succeeds and the period for compliance is extended to 18 months from the date of this decision.

The Notice as so varied is upheld.

COMMISSIONER MANDY JONES

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List of Documents

Planning Authority: ‘A’ Statement of Case

Appellant: ‘B’ Statement of Case

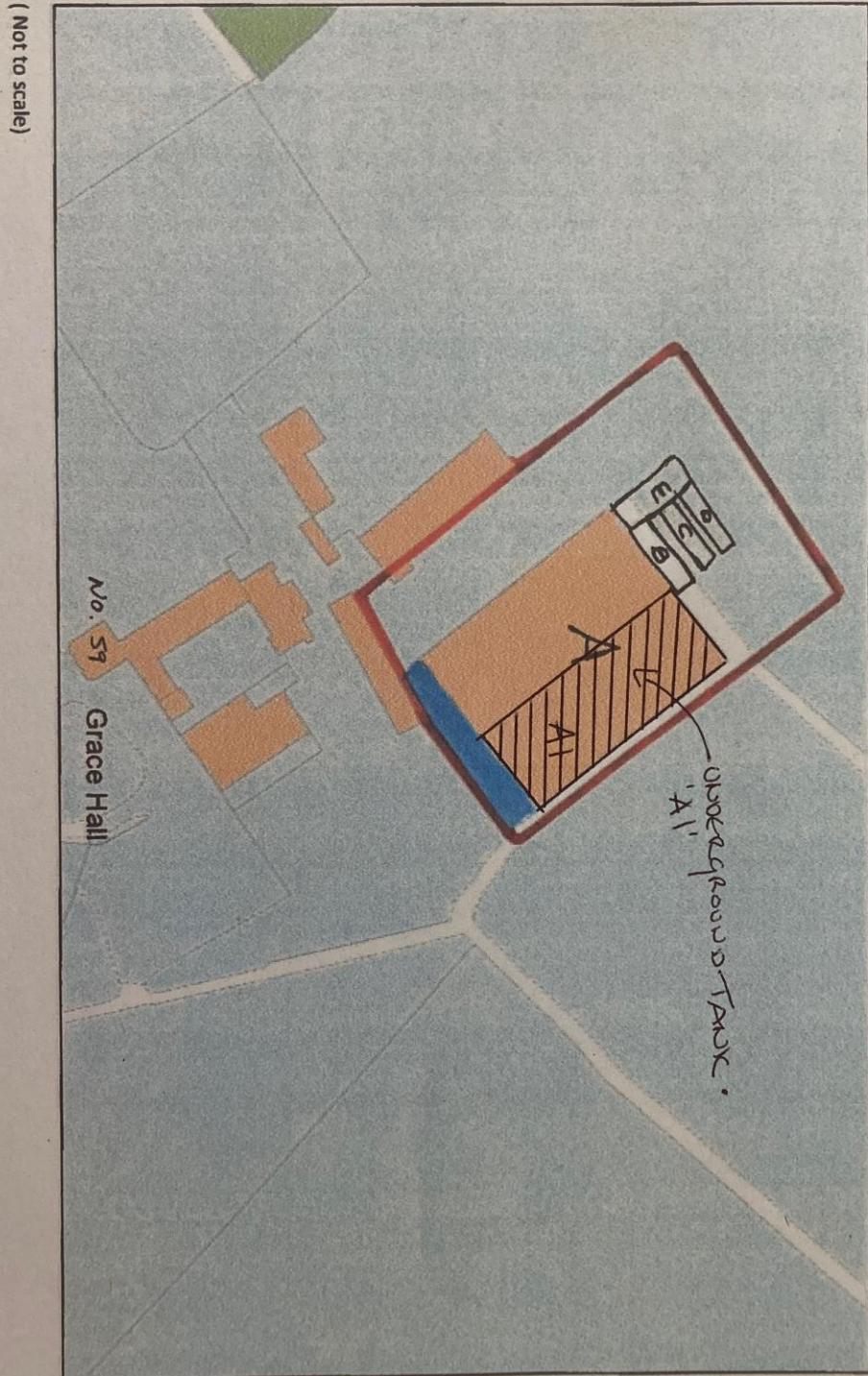
Appearances at Hearing

Planning Authority: Ms O Starrs *
 Ms S Heasley *
 (Armagh, Banbridge and Craigavon Borough Council)

Appellant: Mr Andy Stephens
 (Matrix Planning Consultancy)

* Denotes attended remotely

Site location Map 2



(Not to scale)

Annotated by MJ.

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