

Enforcement Appeal Decision

Appeal Reference:	2022/E0032
Appeal by:	Mr Damien Maguire
Appeal against:	An enforcement notice dated 27 th September 2022
Alleged Breach of Planning Control:	Unauthorised erection of a building and associated underground tank, which is used for the keeping and rearing of pigs and the laying of a hardcore area
Location:	Land at approx. 75 North East of 29 Annaghilly Road, Derrynacloy, Rosslea
Planning Authority:	Fermanagh and Omagh District Council
Authority's Reference:	EN/2022/0197
Procedure:	Informal hearings on 7 th December 2023 and 28 th June 2024
Decision by:	Commissioner Carrie McDonagh, dated 4th October 2024

Grounds of Appeal

1. The appeal was brought on Grounds (a) and (g) as set out in Section 143 (3) of the Planning Act (Northern Ireland) 2011 (the Act). There is a deemed planning application by virtue of Section 145 (5) of the Act.

The Notice

2. The Enforcement Notice (the Notice) refers to “the laying of a hardcore area” as part of the alleged breach of planning control. It relates to an area identified in yellow on the aerial image which accompanied the Notice. The Council confirmed that this area, to the east of the appeal building, is a mixture of soil and stones and is not hardcore. It is undisputed that this area is not part of the breach.
3. The Commission have the power under Section 144 (2) of the Act to correct any misdescription, defect or error in a Notice if it is satisfied that the correction can be made without injustice to the parties. The variation of the Notice to remove the references to the laying of a hardcore area clarifies and reduces the scope of the alleged breach so no injustice occurs. Accordingly, the Notice is varied to remove all references to the hardcore.

Ground (a) and the Deemed Planning Application

Preliminary Matters

4. Having reviewed their deemed refusal reasons prior to the second hearing, the Council provided an updated reason in respect Policy SP01 of the Fermanagh and Omagh Local Development Plan 2030 - Plan Strategy (PS). This policy is titled "Furthering Sustainable Development" and the updated reason for refusal now reads - "*The proposal is contrary to the FODC LDP, Strategic Policy SP01 – in that the proposal does not comply with the sustainable development objectives as outlined in the Plan Strategy*". There are no objections to the inclusion of this updated objection and as all parties had the opportunity to respond at the hearing no prejudice arises from its inclusion. As such it forms part of my consideration.
5. Following the first hearing, a letter from Northern Ireland Environment Agency (NIEA), Natural Environment Division (NED) dated 19th December 2023, advised that the use of their 2012 Ammonia Standing Advice "Livestock Installations and Ammonia" (hereafter referred to as the Operational Protocol) was no longer to be relied on. A subsequent response of 4th January 2024 stated, "following an in-combination assessment and site-specific considerations, NED cannot rule out significant effects on designated sites as a result of the appeal development". As a result, the appellant proposed a change to the type and number of pigs to be housed in the appeal building from 720 fatterer pigs to 1570 weaner pigs (up to 30 kilos). An updated Air Quality, Noise and Odour Impact Assessment, dated 19th February 2024 (AQIA) reflects the proposed change. It also removes two proposed weaner pig sheds and a cattle shed which had been included in previous iterations of the AQIA and forms part of a pending planning application LA10/2020/1270 on lands adjacent to and including the appeal site.
6. The deemed application, as defined by the breach (as now varied) relates to an 'Unauthorised erection of a building and associated underground tank, which is used for the keeping and rearing of pigs.' It does not mention the type or quantity of pigs. Whilst the third party objected to the introduction of 1570 weaner pigs at appeal stage, I consider that this change is permissible as pigs are still to be housed in the building. The appeal development could be conditioned in the event of an approval to limit the number of pigs housed in the subject building and restrict their size to up to a maximum of 30 kilos. This would provide a mechanism of control on any future re-use of the building by fatterers. The following consideration is therefore based on the appeal building housing 1570 weaner pigs and the updated AQIA.

Consideration

7. The main issues in this appeal are whether the appeal development results in an unacceptable adverse impact on residential amenity, natural heritage and road safety.

Policy Context

8. Section 45 (1) of the Act requires the Commission to have regard to the local development plan (LDP), as 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.

9. The notice site is in the countryside in the Fermanagh and Omagh Local Development Plan 2030 - Plan Strategy (PS), adopted on 16th March 2023. In line with the transitional arrangements set out in Paragraph 3 of the Schedule to The Planning (Local Development Plan) Regulations (Northern Ireland) 2015 (as amended), the LDP now becomes a combination of the Departmental Development Plan (DDP) and the PS read together. In this appeal the Fermanagh Area Plan 2007 (FAP) operates as the relevant DDP. In accordance with the subject legislation, any conflict between a policy contained in the DDP and those of the PS must be resolved in favour of the PS.
10. In the FAP, the Notice site is located in the countryside and outside any designations. Whilst there are generic policies in the plan that relate to the protection of the natural environment, I am satisfied, having reviewed the DDP, that there is no conflict with the PS. In accordance with paragraph 1.9 of the Strategic Planning Policy Statement (SPPS), as the Council has now adopted a PS, the previously retained policies such as the Planning Policy Statements (PPSs) have ceased to have effect within this Council area. The appeal development therefore falls to be considered against the provisions of the most up to date operational policy for the area, which is contained in the PS.
11. In the PS, Strategic Policy SP01 'Furthering Sustainable Development' requires proposals to further sustainable development, promote measures to mitigate and adapt to climate change and have regard to the LDP and other material considerations. The Council consider this policy is offended.
12. Policy DE03 titled "Sustaining Rural Communities" supports a range of types of development in the countryside which sustain rural communities whilst protecting and improving the environment, including those in accordance with Policy IB06 "Agricultural and Forestry Development". Criterion (c) of Policy IB06 requires that the appeal development does not result in a detrimental impact on the amenity of residential dwellings. Policy DE01 titled "General Amenity Requirements" requires that proposals should not unacceptably affect the residential amenity of nearby properties or sensitive receptors. The Council and third parties consider that the appeal development is contrary to policies IB06 criterion (c) and DE01 as it results in a detrimental impact on residential amenity by reason of noise, smell or pollution.
13. Policy IB06 also requires that proposals for intensive farming do not result in any significant adverse effects, particularly through increased ammonia emissions. It notes that air pollution related to ammonia, and the associated nitrogen deposition, is known to have a damaging impact on sensitive habitats, wider biodiversity and ecosystem resilience. Policy NE01 'Nature Conservation' also sets out policy for development affecting natural heritage assets. It provides support for development that, either individually, or in combination with and/or proposed plans or projects, is not likely to have a significant effect on a Special Protection Area (SPA), Special Areas of Conservation (SAC) or a Ramsar Site. Where a development is likely to have a significant effect (either alone or in combination) or a reasonable scientific doubt remains, the Council shall make an appropriate assessment (AA) of the implications in view of the site's conservation objectives. Only after having ascertained that it will not adversely affect the integrity of the site can the Council agree to the development and impose appropriate mitigation measures in the form of planning conditions or a planning agreement.

14. The Council's final position at the hearing was that the appeal development results in a significant effect on Kilroosky Lough Cluster SAC and is therefore contrary to Policy NE01.
15. The third parties also raise road safety matters. The relevant policy in the PS indicates that development will be permitted by Policy TR01 titled "Land Use and Transport" where it is demonstrated that access arrangements do not prejudice road safety or significantly inconvenience the free flow of traffic. These issues are discussed in detail below.

Description of site

16. The 0.3ha Notice site contains an agricultural building, perpendicular to the Annaghilly Road. Farm gates set behind the northern boundary lead to a stoned yard alongside the western elevation of the appeal building. A 3m high soil heap/grass mound, with fields beyond, forms the eastern boundary. A post and wire fence separates the notice site from farmland to the south. The western boundary is undefined. Beyond the notice site (to the west), is a slated concrete surface with underground tank below and six buildings, two of which front the Annaghilly Road. All are accessed via a lane at the crossroads with Follum Road. Further west is the appellant's dwelling at 29 Annaghilly Road (72 metres from the appeal building). It is situated behind a further stone roadside building.
17. The appeal building is constructed from tin cladding, with wall panels coloured green and a grey coloured roof. Three ventilation fans/inlets and four chimneys sit on the building's pitched roof. The building measures approximately 44 metres long, 12.85 metres wide and has a footprint area of 532 sqm. It has a concrete slatted floor and is subdivided into eighteen animal holding pens either side of a central access passage which runs from a rear access door in the southern elevation to the animal loading bay at the front of the northern elevation. The covered loading bay extends for a further 7.2 metres towards the Annaghilly Road, with its concrete surface sloping in a southerly direction towards grates falling into a concrete slurry storage tank beneath the appeal building. A 3 metre wide and 9.8 metre high galvanised steel feed bin is situated to the northeast of the building.

Residential Amenity

18. The appellant's AQIA provides modelling in relation to predicted noise impact (contained within an integral Noise Impact Assessment (NIA)) and odour effects of the appeal development on five nearby dwellings:
 - 30 Follum Road (Receptor R1) located 280 metres north of the appeal building,
 - 39 Annaghilly Road (Receptor R2) located 350 metres east of the appeal building,
 - 35 Annaghilly Road (Receptor R3) located 315 metres east of the appeal building,
 - 27 Annaghilly Road (Receptor R4) located 155 metres west of the appeal building, and
 - 25 Annaghilly Road (Receptor R5) located 250 metres west of the appeal building.

19. In respect of noise, the appellant's NIA predicts noise levels (in this case derived from "library data") arising as a result of the appeal development in its totality at the closest third-party receptors and compares them to the World Health Organisation's (WHO) guidelines. The appellant concludes that the maximum predicted sound pressure levels at the closest third-party receptor are a minimum of 29 dB below the WHO recommended lower external daytime noise level of 50dB LAeq. Their NIA also utilises the British Standard BS 4142:2014 & A1:2019 assessment methodology which uses noise change criteria, where the same predicted noise levels are compared to the existing background sound levels (taken from a survey of the area). The standard introduces the concept of a Rating Level (LAr) to account for the fact that certain characteristics of the noise source can increase the likelihood of an adverse impact, such as those of an irregular nature or those that contain distinguishable, discrete tonal noise. To reflect the intermittent nature of the associated HGV and tractor movements only, a correction of +3 dB has been added to the predicted Specific Noise Level (LAeq). The overall difference in the noise rating level for the overall appeal development is shown as -10dB in daytime and -11dB at night-time which equates to a "low impact".
20. However, the Council's Environmental Health Department (EHD) raised several technical concerns including the night-time background sound level selected and the predicted noise levels, including inadequate character corrections. They also raised concerns around the lack of consideration given to the proposed change to weaners and the greater quantity of pigs. They allege that, combined, these concerns undermine the NIA's conclusions.
21. In respect of the background sound levels, the EHD argue that the average sound level, of 30 dB LA90 during night-time hours is not fully representative of, what all the parties agree, is a quiet rural area. The survey results show the most frequently occurring (modal) background sound level is 21dB LA90 (15mins). The frequency of such occurrence is 16 occasions. The level selected by the appellant is +9 dB LA90 greater, recorded on 11 occasions. The appellant argued that 30 dB LA90 is representative as it lies centrally within the main data range and is similar to the mean level of 32 dB LA90. Whilst I note their argument that the relevant technical guidance within the British Standard has been updated and it should no longer be assumed that a representative background level is either the minimum sound level (20 dB LA90) or the modal average value (21 dB LA90), their analysis fails to adequately consider the 55 occurrences when background sound levels were <30 dB LA90. To my mind, the failure to model the worst-case scenario undermines the assessment of background sound levels and thus the overall noise change due to the development. I therefore agree with the EHD that the night-time background sound level of 30 dB LA90 cannot be relied upon as reflective of the local context.
22. The NIA's predicted noise levels are based on "library data" within Table 3.80 of the "BREF- Best Available Techniques (BAT) Reference Document for the Intensive Rearing of Poultry or Pigs – August 2015". It provides typical sources and examples of noise levels on pig farms. At the hearing, the appellant stated that the BREF utilises a generic sound pressure level of 67 dB(A) for the housing of pigs and does not distinguish between fatteners and weaners nor does it change dependant on the number of pigs housed in a building. I am advised that comparable noise levels for weaners and fatteners are not available. However, even if the noise levels from both were the same, I agree with the EHD that a survey of the operational development on site would have secured a more robust

outcome. While I accept that activity from a surveyor undertaking such an assessment from inside the building could aggravate the pigs and cause elevated readings and that the appellant has uplifted the BREF figure to 80 dB(A) to provide for a more conservative analysis, there are other sound recording options and equipment available to establish the actual noise levels arising. Had this been done, it would have provided greater certainty rather than utilising predictions based on typical noise levels.

23. Even if I were to accept that the mechanical ventilation fans cannot be surveyed while operational, I agree with the EHD that noise from these fans must be considered in the context of the quiet rural environs which the site lies within, including the low background noise. Also, the noise from the surrounding cattle sheds would be distinguishable as 24-hour mechanical ventilation plans are not commonplace. Given an objective of noise modelling is to reduce uncertainty, I again must agree with the EHD that a character correction for the tonal nature of the mechanical fans could have been added. Alternatively, the appellant could have used the manufacturer's sound power level data specific to the fans as installed. Again, this would have provided for more representative modelling.
24. My observations on site also lead me to query the robustness of the NIA and reinforce my reservations as expressed above. The NIA predicts the maximum noise occurring from the appeal development during daytime hours is 20.8 dB at R3 (35 Annaghilly Road). The noise level at R4 (27 Annaghilly Road) is 19.6 dB. Appendix D, Map 1, of the NIA shows a noise contour map with each 5 dB (A) contour colour coded as one moves out from the appeal building towards the receptors. However, the noise I experienced extended further eastward towards R3 and westward towards R4 than indicated on the contour map which would indicate that, at the time of my site visit, the noise levels were experienced over greater distances than predicted in the NIA. Whilst travelling around the area I experienced a significant level of noise, which I would describe as adverse mainly due to pigs squealing. There were also several associated thudding noises. The noise escalated when I parked at and entered the yard area. Beyond R3, the noise became mixed with that of other farm animals. To the west of the appeal building, adverse noise levels extended as far as the R4 receptor. The EHD also referred to having received three complaints specifically in respect of adverse noise and given my experience, I can appreciate why.
25. Furthermore, at the time my site visit, the appeal building was occupied by 720 fattener pigs. It is the appellant's position that the noise levels are not affected by the proposed change to weaner pigs or the almost doubling in the quantity of animals. In the absence of any evidence to the contrary, I consider it is reasonable to conclude that the adverse noise which I observed would be equally applicable if the fatteners were replaced with weaners as proposed and thus my observations can be relied on for the appeal development. For the reasons set out above, I consider that an on-site survey would have been more representative or as a minimum, the NIA could have been more representative if an acoustic feature correction for the fans had been built into the model or the specification of the technical equipment installed was utilised.
26. As noted previously, the assessment of noise impact within the NIA subtracts the background sound level from the predicted noise level to identify the presence or otherwise of an adverse impact. I have previously set out that 21 dB LA90

represents the worst-case scenario for the background night-time sound level in this quiet rural area. On this basis, the noise difference at night time as set out in Table 5 of the NIA would reduce from -11dB to -2dB. Receptor 4 (27 Annaghilly Road) is predicted to experience the maximum noise at 19 dB however, as set out above, an on-site survey or a different approach to the installed mechanical fans could increase this figure above the 19 dB LAr predicted. I accept the EHD's analysis that the difference could exceed +5dB at R4 indicating an adverse impact on residential amenity at this property. R3 is predicted to have a lower night-time predicted sound level at 16dB (equating to a difference of -6dB based on the lower night-time background sound level), however, whilst less likely, I cannot rule out adverse impact on the residential amenity of this property when the issues identified above with the predicted noise levels are taken into account. The lack of robustness surrounding the predicted noise levels are similarly tied to the assessment under the WHO guidelines, thus its conclusions, as referred to previously cannot equally be relied on.

27. I do not agree with a third party that the reliance on the Transport Assessment Form (TAF) for a larger proposed development (LA10/2020/1270/F as referred to previously) undermines the robustness of the noise modelling. I have come to this conclusion partly because the HGV and tractor movements associated with the appeal development are part of, and therefore less, than those assessed in the TAF. The quantity of trips therefore represents a worst-case scenario. In addition, a +3dB acoustic feature correction has been added to the predicted day-time noise level to account for the intermittent nature of noise from these types of vehicles. Given the limited frequency of animal transporters and feed deliveries, and the likelihood of their arrival during day-time hours only, I am satisfied that this correction, when added to the over-estimated trips, adequately accounts for the noise from vehicles associated with the appeal development. As such, this objection is not sustained.
28. The appellant advised that adverse noise is controlled and complaints investigated in line with the measures set out in the Farm Management Plan and through good animal husbandry. However, the latter was not witnessed while I was on site. I was advised there was no means to access the appeal building and consequently no available remedy at that time to control the noise arising from within. However, I accept that supervision can be controlled in future via a condition, if the development were to be allowed. Notwithstanding, I cannot set aside my concerns with the robustness of the noise modelling, nor am I fully satisfied that the conclusions therein are reflective of the proposed change to weaner pigs in greater numbers. This leads me to conclude that the appeal development will unacceptably affect the residential amenity of the residents in the R3 and R4 receptors due to noise.
29. Acoustic considerations are only one aspect of residential amenity. Odour and general disturbance are others. Unlike the assessment of noise impact, the assessment of odour is revised to reflect the proposed change to house 1570 weaner pigs. This is accounted for through the reduction in the building's efflux temperature to 24 degrees and the use of an odour emission factor of 6 ou/s per weaner animal. At the hearing, the appellant accepted that Table 19, which contains their odour modelling over 5 consecutive years at the nearest sensitive receptors for the 4 existing cattle sheds and the proposed development contains erroneous information. They corrected the average odour levels at the nearest

residential properties to 0.83ou/m³ for R1, 0.25ou/m³ for R2, 0.3ou/m³ for R3, 1.74ou/m³ for R4 and 0.57ou/m³ for R5. R4 is also predicted to experience the highest impact over any individual year at 2.24 ouE/m³ as per Table 20. This is categorised as 'slight' and less than the odour benchmark level of ≤3 ou/s for intensive livestock rearing as set out in the guidance from the Environment Agency 2011 "H4 Odour Management".

30. The EHD argued the appellant's air dispersion modelling does not meet best practice guidance as the input parameters selected have a bearing on the robustness of the source-pathway-receptor chain for odour exposure and accordingly the overall odour concentrations experienced. They disputed the Aldergrove weather station used as being typical of the weather and terrain conditions in Fermanagh, thereby impacting on the modelling of the pathway for the odour to travel resulting in unrealistic results. They further argued that the differences between the Windrose meteorological data over the two five-year data sets used in the latest iterations of the AQIA demonstrates that low wind speeds (<3m/s) are more prevalent around the appeal site. I am advised that lower winds limit the dilution and dispersion of an odorous pollutant, increasing the odour concentration closer to the source of the pollution, i.e. the pig shed.
31. The appellant referred to NIEA's Operational Protocol endorsing Aldergrove as a representative weather research and forecasting station for meteorological data for air dispersion modelling purposes of south westerly wind conditions. However, as set out in Paragraph 5 of this decision, that document is now withdrawn. It cannot therefore be relied upon.
32. In terms of the wind data inputted to the model, the appellant explained it has been generated from a nested domain area centred on Aldergrove at a 4km grid resolution. I am advised the corresponding meteorological datasets are more accurate than the 12km grid resolution used in the earlier iterations of the AQIA. However, the EHD argue neither this nor the changes to the modelling referred to previously can explain the recent variations to the odour results.
33. The original AQIA's Modelling Results (as found in Tables 35-44) are not reproduced in the current AQIA. The EHD referred to Table 40: Predicted Odour Impact – Shed 6 (i.e. the appeal building only) in the earlier version and its average predicted odour levels of 0.54ou/m³ for R2 and 0.66 ou/m³ for R3. The EHD pointed out that in the updated modelling the odour averages reduce for R2 (to 0.25ou/m³) and R3 (to 0.3ou/m³) despite the inclusion of the 4 existing cattle sheds, which have a combined odour emission rate of 1788ou/s. They argue this is surprising. They further refer to what they consider to be ambiguities between Table 20, which reflects the maximum annual 98th percentile hourly mean concentration of 0.27ou/m³ for R2 compared to 0.82 ou/m³ in the previous Table 40 (for the appeal building alone) and 0.33ou/m³ for R3 compared to 0.96ou/m³ previously. These relate to percentage change reductions of 67% for R2 and 64% for R3 despite the inclusion of the odour from the existing cattle sheds and thus, the EHD argue they do not stand up to scrutiny. Having listened to the debate at the hearing in respect of low wind speed, I consider that there remains uncertainty as to whether Aldergrove is fully representative of the wind conditions within this specific appeal context. However, in the absence of definitive evidence from the Council to support a suggested correction or adjustment, I accept it does provide a yardstick for modelling wind conditions. I will also be guided by my own observations.

34. Appendix D of the AQIA provides a diagrammatic representation of the maximum predicted ground level odour concentration. The highest predicted level (identified in yellow) focuses on the four existing cattle sheds to the west of the appeal development. As noted previously, no identified receptor is predicted to experience odour above 3 ou/m. However, at my site visit I experienced adverse pig odour, distinct from other farm related odour including manure, for a greater distance than that represented in the diagram. The wind was strong and from a south easterly direction. Whilst the adverse odour cleared quickly once I reached R4 in the west, it extended past No 31 Annaghilly Road as far as the garden of No 35 to the east (R3). Whilst the nature of odour is generally intermittent given wind direction, speed, humidity and other weather conditions which can influence its dispersion, my observations are consistent with that of the local residents and the EHD, who confirmed that they had also experienced adverse odour on several occasions between January 2021 and March 2023 (following 12 complaints from six nearby residents).
35. However, as noted previously, fatteners were in the appeal building at the time of my site visit and during the EHD investigations and the predictions for odour from weaners differs to that of fatteners. Table 20 sets out the maximum annual 98th percentile hourly mean concentration as 0.33 ouE/m³ for R3 and 2.24 ouE/m³ at R4 (the receptors where I experienced adverse odour). There is no equivalent table for fatteners and the existing cattle sheds in the earlier AQIA. I shall therefore base my consideration on the closest equivalent, which I judge to be Table 40. Taking R4 as the maximum predicted odour impact, whilst omitting the existing cattle sheds, it has a predicted maximum odour impact at R4 of 1.25 ouE/m³ based on fatteners. Table 20 of the updated AQIA predicts a maximum of 2.24 ouE/m³ for weaners in the building, a 76% increase on the R4 odour predicted previously for fatteners. As I have already stated, I consider the odour I experienced to be adverse based on fatteners. Therefore, I consider it is likely to be worse if the shed housed a greater number of weaners. This further supports my conclusion that the odour arising would have a detrimental impact on its residential amenity.
36. The Council and third party query the appellant's omission of Nos. 31 and 33 Annaghilly Road as sensitive receptors as the appellant has already availed of an exception for their own residence (No. 29 Annaghilly Road). No. 33 is located 172m to the east of the appeal building and the permission for a replacement dwelling has expired. The building is vacant and in need of repair to make it habitable. Accordingly, I do not consider this building is a sensitive receptor. No. 31 is the closest dwelling to the appeal development, located around 108m to the east. I am advised by the appellant that it is in their ownership and rented to a tenant unconnected to the farm business. However, as it is within their farm holding, they argue that no further assessment is necessary as Policy IB06 (c) only requires an assessment of residential amenity for dwellings outside the holding. No. 31 is located between the appeal development and R3, which I have found to be adversely impacted by the appeal development. As an intervening property, No. 31 also would experience an adverse impact due to noise. Irrespective of whether No. 31 falls to be assessed, I have already found residential amenity to be harmed to other receptors.
37. I am not satisfied that the mitigation measures discussed would satisfactorily safeguard residents' amenity, due in part to the issues surrounding the use of Aldergrove and the consequential effect on wind speed and odour dispersion

which casts some doubt on the robustness of the odour modelling. A condition requiring further site-specific modelling, in the hope that it may provide greater certainty is not safe as I cannot be certain that levels less than the odour target value of c98, 1 hour ≤ 3 ou/m³ can be achieved. For these reasons, I conclude that the objections on residential amenity grounds due to noise and odour emissions are sustained. As such the deemed reasons for refusal based on policies DE01 “General Amenity Requirements” and IB06 (c) “Agricultural and Forestry Development” are sustained.

Nature Conservation Designations and Ammonia Loads

38. The appeal development is within 7.5km of the following designated sites:
- Slieve Beagh-Mullaghfad-Lisnaskea SPA
 - Magheraveely Marl Lough SAC/Ramsar Site
 - Kilroosky Lough Cluster SAC (RoI)
 - Slieve Beagh SPA (RoI)
 - Annachullion Lough ASSI
 - Lough Corry ASSI
 - Burdautien Lough ASSI
 - Summerhill Lough ASSI
 - Drumacrittin Lough ASSI
 - Kilroosky Lough ASSI
 - Knockballymore Lough ASSI
 - Ballagh ASSI (earth science)
 - Carnmore ASSI (earth science)
39. As previously outlined, the approach of NIEA in the assessment of the potential risk associated with the effects from air pollution on designated habitats has changed during the course of this appeal. The final position of NIEA is that the interim Air Pollution Decision and Advisory Framework has been followed and the appeal development does not represent a high risk to the qualifying features of any site that has been designated. As a result, NIEA do not have air quality concerns. It further notes the Process Contributions (PC’s) do not exceed the site relevant threshold (SRT) of 0.34% and the decision-making threshold (DMT) for nitrogen deposition. The PC is the additional pollutant loading on a receptor (e.g. designated site) as a result of a process or development expressed as a percentage of the Critical Level (CLE), defined as “concentrations of pollutants in the atmosphere above which direct adverse effects on receptors, such as human beings, plants, ecosystems or materials, may occur according to present knowledge” (APIS, 2017 cited at UNECE, 2003).
40. At the hearing, the Council disagreed with NIEA and drew support from Shared Environmental Services (SES) who undertook a draft Habitats Regulation Assessment (dHRA) on the 21st of July 2021 for the planning application referred to earlier in this decision. They argued the appeal development will have a significant effect on Kilroosky Lough SAC, an internationally designated site within 4.5km of the appeal development in County Monaghan, in the Republic of Ireland (ROI). Table 26 of the AQIA identifies a PC from the appeal development of 0.17% at Kilroosky Lough Cluster SAC. The average background of nitrogen deposition is 20.7 kg/N/ha/yr. In respect of fens, which are a qualifying feature of the SAC that are sensitive to nitrogen, the background levels of ammonia and nutrient nitrogen exceed the relevant critical load (15-20kg N/ha/yr) across the designated site.

41. The Council further relied on the response from The National Parks and Wildlife Service (NPWS) within the Department for Housing, Local Government and Heritage, who are the nature conservation authority in the ROI. Their response dated 14th November 2023, is based on a higher PC level of 0.5% (as per the appellant's original AQIA undertaken prior to the proposed change to house weaner pigs). It agrees with the findings of the dHRA and refers to Kilroosky Lough Cluster SAC's three qualifying interests (Alkaline fens, hard oligo-mesotrophic waters and Calcareous fens) which are already significantly in exceedance of the Critical Levels above which adverse effects may occur. They further consider that although the PC from the appeal development is less than 1% of the relevant critical level for ammonia (1 ug/m³), as the background levels were, at the time of the assessment, already 340% of this level, it cannot be concluded beyond reasonable scientific doubt that an additional contribution will not adversely affect the integrity of the SAC in view of its conservation objectives.
42. Water Management Unit, Agricultural Regulations Team require the submission of a Nutrient Management Plan (NMP) to include soil sample analysis detailing the proposed land spreading of 2696m³ of pig slurry generated per annum to determine the potential impact upon the water environment.
43. The AQIA calculates the total ammonia emissions from land spreading at 269.6kg/yr based on 999t/yr amount of slurry spread. The required area of land spreading is 88.27 hectares. Two Nutrient Management Plans were provided for the year 2020. One was for the landbanks on the appellant's farm unit and relates to 630m³ of pig slurry on a total spreadable area of 18.57h. The second NMP document relates to the spreading of 2066m³ of slurry on 55.86h within a relative's farm. A third-party referred to the lack of soil analysis in either document, and considered the slurry spreading to be under-estimated. At the hearing, the appellant advised they were no longer relying on either NMP, accepting that such documents have a propensity for change and they did not reflect the updated appeal development. They did not dispute a number of omissions identified by the Council. In the absence of an NMP, I cannot ascertain that there is currently a sustainable outlet for the 2696m³ of pig slurry associated with the development.
44. As the 0.17% PC from the appeal development is above the 0.08% DMT advocated by the Joint Nature Conservation Committee (JNCC) report "Guidance on Decision Making Thresholds for Air Pollution (December 2021(3))" but below the SRT of 0.34% provided by NIEA, the disagreement between SES and NIEA in respect of the methodology in calculating SRT is relevant to this appeal. NIEA referred to the "Future Operational Protocol to Assess the Impacts of Air Pollution – Call for Evidence" in respect of how their SRT considers the risk of proliferation and local contribution from the source group (e.g. agriculture, transport etc) at the site. If a proposal contributes less than the SRT, it is 'screened out' of further assessment (low risk) on the basis that the assessment undertaken indicates the appeal development will not undermine a designated site's conservation objectives. NIEA further advised that their approach is based on logical and empirical grounds in adherence to the approach in the JNCC and provides an evidentiary basis for the application of DMTs to determine whether the risk from air pollution related impacts is sufficiently small that no further assessment effort is necessary.

45. NIEA are the statutory nature conservation authority and whilst I am required to consider their advice as said authority, in this case the European protected site is within ROI. NPWS have advised that it cannot be concluded beyond reasonable scientific doubt that an additional contribution will not adversely affect the integrity of the Kilroosky Lough Cluster SAC in view of the site's conservation objectives. As NIEA's assessment is based on an interim case-by-case approach that is partly disputed by SES and considering NPWS have raised objection based on background levels in exceedance of 340% at Kilroosky Lough Cluster SAC, I consider that the designated site requires further assessment based on the precautionary approach contained within the Habitats Directive.
46. The Commission is a competent authority in accordance with Regulation 5 of The Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 (as amended) in 2015 (Conservation Regulations). A precautionary approach to decision-making in respect of designated sites is required under these regulations. Case law has established that one must consider whether the trigger for AA is met as whether significant adverse effects on the designated sites are likely. An effect is 'likely' if it cannot be excluded on the basis of objective information. An effect is 'significant' if it undermines the site conservation objectives. The Habitats Regulations requires the exclusion of reasonable scientific doubt. Whilst the Courts have recognised that there is no such thing as absolute certainty, decision makers need to identify reasonably foreseeable risks, on the basis of information that can reasonably be obtained and put in place a legally enforceable framework with a view to preventing those risks from materialising. Furthermore, the Courts have also established that, whilst a risk is sufficient to constrain development under the Habitats Regulations, there must be credible evidence that there is a real, rather than a purely hypothetical risk, which must be considered.
47. I must therefore be satisfied that no reasonable scientific doubt remains as to the absence of adverse effects on site integrity. It is not for the Commission to show that there is harm to the integrity of the European site before dismissing an appeal, but for it to be satisfied that there would be no harm to site integrity before granting approval.
48. At the hearing, NIEA referred to the different approach to the assessment of thresholds in the various jurisdictions. I was referred to its Call for Evidence, Annex A, Table 11 – "Comparison of air quality assessment guidance in UK and Ireland" which identifies Kilroosky Lough Cluster SAC as one of the three identified exceptions to the NPWS typical zone of Influence for Designated Sites and Screening Thresholds. My understanding is that such an exception is an indication that greater caution should be applied given the cross-border catchment of the designated site.
49. Whilst I have not been provided with any information from NPWS in respect of SRT's, their consultation response refers to a PC from the appeal development of less than 1% of the relevant critical level for ammonia (1 ug/m³). As the background levels were, at the time of their assessment, already 340% of this level, it cannot be concluded beyond reasonable scientific doubt that an additional contribution will not adversely affect the integrity of the Kilroosky Lough Cluster SAC. Whilst the PC on the SAC is reduced from 0.5% to 0.17% as a result of the revisions to the appeal development, the NPWS response refers to a PC of less than 1% and therefore I must consider, on a precautionary basis, that it still applies within the

specifics of this designated site. As the advice of the statutory body responsible for the protection of the environment in ROI is that three of the SAC's qualifying interests are already significantly in exceedance of the Critical Levels above which adverse effects may occur on these habitat types, it cannot be concluded beyond reasonable scientific doubt that an additional contribution will not adversely affect the integrity of the Kilroosky Lough Cluster SAC in view of the site's conservation objectives.

50. There is also an element of uncertainty from the air dispersion modelling referred to previously in respect of odour. These figures are carried through into the assessment of the ammonia emissions on natural heritage interests, with an element of uncertainty remaining on that basis.
51. The appeal development is currently operational and producing slurry which needs disposed of and the associated landspreading is a pathway leading to the potential degradation of aquatic habitats through a deterioration in water quality. The appeal development and the production of slurry as a result of its operation are therefore inextricably linked. In the absence of an associated NMP I do not have sufficient evidence to show that slurry arising from the appeal development can be satisfactorily disposed of. The appellant suggested an altered or updated NMP could be provided as a condition of an approval, to be agreed by the Council. It was argued that if the appellant could not find any land for spreading of the resultant slurry, the appeal building could not be used, hence no adverse impact arises. The Council argued that this is unenforceable and unpractical. SES argued that it was not appropriate to leave such issues to post consent.
52. There are large volumes of slurry involved and the Council may be required to carry out an Appropriate Assessment. All aspects of the development which affect the conservation objectives of the SAC must be identified before consent, as underpinned by best practice and case law. Conditions need to be enforceable, precise and necessary. Matters in relation to landspreading cannot be dealt with via a negative condition as the possibility cannot be excluded that, although planning permission had already been granted, the development would still have an unacceptable impact on designated sites, so breaching the directive. Accordingly, given these uncertainties, reasonable scientific doubt remains that the appeal development, in particular its land spreading element, will adversely affect the integrity of the SAC and no exceptional circumstances are argued. Accordingly, applying the precautionary approach, the appeal development fails to meet the requirements of Policy NE01 of the PS and the relevant requirement of Policy IB06.
53. As the proposal has failed to meet the requirements of Policy IB06, and it is not permitted within any other policy within the LDP, it also fails to be considered as an acceptable form of development permitted by Policy DE03 of the PS. As it has not been demonstrated to be a sustainable form of development, the appeal development also fails to meet Policy SP01 of the PS.

Road Safety

54. The third party also raise concerns in relation to road safety. As the access location is directly opposite an existing field entrance, they argue that a traffic speed assessment, if undertaken, would have shown speeds along this straight stretch of road often exceed 45mph, which requires visibility splays greater than 2.4m x 60m. They have other concerns including the underestimation of trips associated with the operation of the appeal building, including the transportation of slurry, the encroachment of the appeal building over views onto the public road and a loss of hedgerow to facilitate the required visibility splays.
55. Whilst narrow, the road is typically rural in nature, with agricultural traffic a normal occurrence. I found passing vehicles to be travelling within the speed limit and generally below 45mph. I consider that drivers would exercise due caution as a response to the width and alignment of the road and lack of passing spaces. On exit from the appeal site, the x-distance was sufficient to allow for waiting off road and there was visibility across the loading area to the front of the appeal building, due to its open sides. Combined with a gap in the road frontage hedge to the right, I found visibility to be satisfactory. The adjacent road frontage sheds are sufficiently set back so as not to obstruct views to the left on exit. I am satisfied that the access arrangements do not prejudice the safety and convenience of road users.
56. The Council acknowledged the narrow width of the road resulted in insufficient off-road space to facilitate a waiting animal loader. Notwithstanding, they accepted there was adequate circulation space within the Notice site for the off-road loading of animals and feed bins. Accordingly, I agree with the appellant and the Council that the circulation and waiting of vehicles could be controlled via a condition to take place within the site only. I am satisfied that the appeal development does not offend Policy TR01, subject to such a condition. The objectors concern in this regard are not sustained.
57. Third party concerns also related to the health and well-being of the local community in general. The AQIA demonstrates the predicted ammonia levels are significantly below the air quality target levels for the protection of human health, so this objection is not sustained.
58. I have found that the appeal development fails to meet policies IB06, DE01, NE01 and SP01 of the PS. The appeal on ground (a) therefore fails and the deemed application is therefore refused.

Ground (g) – that any period specified in the notice falls short of what would reasonably be allowed

59. The appellant stated that the 30 days specified in the Notice was insufficient. They asked for four months to allow for the completion of the fourteen-week fatterer pig cycle and to undertake the works required to remove the residual slurry from the underground tank and permit sufficient time for demolition. The final position of the Council and third party was that the 4 months minimum requested was unnecessary as weaner pigs had a shorter cycle and would be moved on to a fatterer shed elsewhere regardless of the outcome of this appeal.
60. I am not sufficiently persuaded that the cycle of either type of pig means that they could not be easily moved to another facility. The slurry tank and the buildings are

easily accessible from the roadside and could be emptied and demolished with relative ease. On this basis, I do not accept that a period of 30 days falls short of what should reasonably be allowed. Therefore, the appeal on ground (g) fails.

Decision

The decision is as follows: -

- The Notice is amended at Part 3 to delete the words “and the laying of a hardcore area” and the third bullet point at Part 4 is also deleted.
- The appeal on Ground (a) fails and the deemed application is refused.
- The appeal on Ground (g) fails.
- The Enforcement Notice as varied is upheld.

COMMISSIONER CARRIE McDONAGH

List of Appearances

Planning Authority: -	Mr Martin McCarroll, Fermanagh and Omagh District Council (First Day) Mr Seamus Kelly (Second Day) Mr Colin Harkness, Fermanagh and Omagh District Council* Ms Jill Crawford, Environmental Health Department, Fermanagh and Omagh District Council* Mr Brian Fury, Environmental Health Department, Fermanagh and Omagh District Council* Dr Michael Fogarty, Katestone* Mr Keith Finegan, Natural Environmental Division, Department for Agriculture, Environment and Rural Affairs (DAERA)* Ms Lisa McNally, Natural Environmental Division, (DAERA) Mr Malachy Kearney, Shared Environmental Services*
Appellant: -	Mr Andrew Ryan, TLT* Mr Gavin McGill, Clyde Shanks Limited* Mr Christy Carr, Irwin Carr Consulting* Mr Philip Marshall, Henry Marshall Brown Architectural Partnership Mr Damian Maguire, Appellant* Ms Maguire, Appellant family
Third Party: -	Mr Darren Campbell, Annaghilly Road Concerned Residents Group* Mr James Orr, Director, Friends of the Earth NI

Denotes both days*

List of Documents

Planning Authority: -	Fermanagh and Omagh District Council "A1" Statement of Case including Appendices. "A2" Email of 21 st June 2023 re appeal program. "A3" Email dated 6 th July 2023 re NIEA update. "A4" Email of 21 st July 2023 re timescales. "A5" Letter dated 14 th November 2023 in response to PAC letter of 30 th October 2023 enclosing copy of Negative Screening for Environmental Impact Assessment and response from National Parks and Wildlife Service (NPWS) in ROI. "A6" Letter of 19 th December 2023, from Liz Loughran of NIEA titled "Planning Consultations for Agricultural Developments". "A7" Post hearing submission of enforcement map showing yellow hardcore area.
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“A8” Letter dated 19th January 2024, Received 4th March 2024 in respect of area of yellow hardstanding/hardcore.
“A9” Letter dated 22nd January 2023 (sic), containing amended refusal reason and enclosing comments from NIEA dated 4th January 2024.
“A10” Letter dated 15th March 2024, enc NIEA response dated 6th March, EHD SoC dated 14th March and without prejudice conditions.
“A11” Letter dated 14th June 2024, in response to PAC Letter of 11th April 2024 providing updated refusal reason.

Appellant: -

Clyde Shanks on behalf of Mr Damien Maguire
“B1” Statement of Case including Appendices.
“B2” Letter dated 9th June 2023 enclosing NIEA correspondence to planning heads dated 31st May 2023.
“B3” Letter dated 6th July 2023 re adjournment request.
“B4” Letter dated 20th September 2023 re Ecologist.
“B5” Letter dated 3rd October 2023, providing NIEA letter of 29th September 2023 titled “Planning Consultation for Agricultural Developments”.
“B6” 8th January 2024 correspondence in respect of post hearing map showing hardcore area.
“B7” Correspondence of 22nd January 2024, in response to letter of 28th Dec 2023 re comment on NIEA position.
“B8” Correspondence dated 20th February 2024, amending appeal development and enclosing new Irwinn Carr report.

Third Party: -

Concerned Annaghilly Road Residents
“C1” Statement of Case.
“C2” Response regarding position taken by NIEA in respect of ammonia.
“C3” Response to 1st March 2024, letter from PAC re amended appeal development.