

# Enforcement Appeal Decision

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<b>Appeal Reference:</b>	2022/E0047
<b>Appeal by:</b>	Mr Barry McKernan
<b>Appeal against:</b>	An enforcement notice dated 14 <sup>th</sup> December 2022.
<b>Alleged Breach of Planning Control:</b>	The alleged unauthorised erection of a building and associated underground tank which is used the keeping of pigs and the laying of a hardcore area.
<b>Location:</b>	Land at approximately 45m NW of 163a Creggan Road, Carrickmore.
<b>Planning Authority:</b>	Fermanagh and Omagh District Council.
<b>Authority's Reference:</b>	LA10/2022/0145/CA
<b>Procedure:</b>	Informal Hearings on 24 <sup>th</sup> July 2023 and 31 <sup>st</sup> August 2023.
<b>Decision by:</b>	Commissioner Jacqueline McParland, dated 26 <sup>th</sup> June 2024.

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## 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).

## Preliminary Matter

2. At the hearing, the appellant stated that he did not own the appeal site, nor was he a director in Creggan Pig Farm Ltd who operate the pig farm and he did not occupy it by virtue of a lease or licence at the time the Notice was issued, and the appeal lodged. In respect of the right to an appeal against the service of an Notice, Section 143 (1) of the Act states a person having an estate in the land to which an enforcement notice relates or a person to whom subsection (2) applies may, at any time before the date specified in the notice as the date on which it is to take effect, appeal to the planning appeals commission against the notice, whether or not a copy of it has been served on that person. Section 143(2) of the Act states that this subsection applies to a person who - (a) on the date on which the enforcement notice is issued occupies the land to which it relates by virtue of a licence; and (b) continues to occupy the land as aforesaid when the appeal is brought.

3. Of note is that the appellant supplied post hearing evidence to contradict his oral testimony. This included a letter from his solicitor which states that Mr Barry McKernan is a company director of Creggan Pig Farm Ltd. The letter refers to additional evidence such as a HSBC bank account for Creggan Pig Farm Ltd and states that Mr Barry McKernan and Mr John McKernan are joint account holders. The letter also includes a contract for a mortgage for the building subject to this appeal between Creggan Pig Farm Ltd and HSBC Bank dated 22<sup>nd</sup> December 2022 which was signed by Barry McKernan who is listed as a company director. The Council also submitted documentation from Companies House which demonstrates that the appellant was reappointed a director of Creggan Pig Farm Ltd on 2<sup>nd</sup> September 2022 and continues to hold this role. Given the evidence submitted by the appellant and the Council I am satisfied that, at the time the Notice was served and at the time the appeal was brought, the appellant, Mr Barry McKernan was a director in the company who occupied the appeal site and had an estate in the land. Accordingly, Mr Barry McKernan had the right to bring the appeal in accordance with Section 143 of the Act. The appeal is valid.

### **The Notice**

4. The appellant considers that the area of hardstanding indicated as a hatched yellow area on the aerial photograph which accompanied the Enforcement Notice (the Notice) is greater than and not representative of the area of hardstanding which exists at the appeal site. An aerial photograph was issued with the Notice. At the hearing the Council stated that this aerial photograph was indicative of the area of hardcore which existed on the appeal site at the time the Notice was issued. The aerial photograph showing the area hatched yellow is mainly a similar grey colour to that of the access lane, which is laid in hardcore. Whilst I note from my site visit that the area to the south-east of the building is now laid in grass, no persuasive evidence was submitted to demonstrate that this area was not laid in hardcore at the time the Notice was issued.
5. Notwithstanding this, it is evident from the aerial photograph issued with the Notice that there are two areas of grass to the south of the building adjacent to the access lane which were included within the hatched area. Therefore, I am persuaded by the appellant's arguments in relation to these two small areas. The Notice will be corrected to refer to a revised hatched area as illustrated by map PAC 1.

### **Ground (a) and the Deemed Planning Application.**

6. At the hearing the Council withdrew its suggested reason for refusal relating to Policy FLD03 of the Fermanagh and Omagh District Council Local Development Plan 2030 - Plan Strategy (PS).
7. After the hearings, the Commission received a letter dated 19<sup>th</sup> December 2023 from the Northern Ireland Environment Agency (NIEA), Natural Environment Division which advised that their 2012 Ammonia Standing Advice "Livestock Installations and Ammonia" (hereafter referred to as the Operational Protocol), was no longer to be relied on. Instead, NIEA was to provide competent authorities with case and site-specific advice until such times as a new ammonia strategy and updated standing advice were agreed and in place. As a result, the appellant proposed a change to the type and number of pigs to be housed in the appeal

development from 600 fatter pigs to 1200 weaner pigs. As the description of development on the notice refers to the unauthorised erection of a building for the keeping of pigs and does not mention the type or quantity of pigs, I consider that this change is admissible. The Council and the third parties have both been provided with the opportunity to comment on this change. Accordingly, no prejudice arises. The following consideration is based on the appeal development to house 1200 weaner pigs and the appellant's revised Air Quality Impact Assessment (AQIA).

## **Consideration**

8. The main issues in this appeal are whether the appeal development:
  - is acceptable in principle in the rural area;
  - results in a detrimental impact on the amenity of residential dwellings outside the farm holding by reason of noise, smell and pollution;
  - results in an adverse impact to natural heritage; and
  - results in a danger to road safety.
9. Section 45(1) of the Act requires the Commission when dealing with an appeal to have regard to the Local Development Plan (LDP), so far as material to the application, and to any other material considerations. Section 6(4) requires that where regard is to be had to the LDP, the determination must be made in accordance with the plan unless material considerations indicate otherwise.
10. On 16th March 2023, the Council adopted its PS. In line with the transitional arrangements as set out in the Schedule to the Local Development Plan Regulations 2015 (as amended) the Local Development Plan now becomes a combination of the Departmental Development Plan (DDP) and the PS read together. In this appeal the Omagh Area Plan 1987 - 2002 (OAP) is the relevant DDP. Again, 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.
11. In accordance with paragraph 1.9 of the Strategic Planning Policy Statement (SPPS), as the Council has now adopted the PS the previously retained policies such as the Planning Policy Statements have now ceased to have effect within this Council District.
12. In the OAP the appeal site is located in the countryside and outside any designations. The OAP contains a number of planning policies for development in the open countryside and areas of environmental designations. In the OAP, the appeal site lies within the open countryside. The OAP contains a number of policies regarding development in the open countryside. Section 117.2.1 states that proposals to improve the agricultural sector or create alternative economic opportunities in keeping with amenity will normally receive sympathetic consideration. Section 109 refers to the aims and objectives of the rural strategy for Omagh district which includes aims to achieve the proper balance between economic and social demands and environmental protection; to protect the countryside from incongruous forms of development and to protect and where possible, enhance natural landscapes, wildlife sites and buildings or sites of archaeological, architectural or historic interest. In terms of Conservation features, section 115.1 to 115.3 indicates that developments will not normally be given

permission where they would be likely to damage the scientific interest or prejudice the essential character of areas within the district, which have been declared by the Department on the basis of their scientific value as Areas of Special Scientific Interest or National Nature Reserves. Black Bog Area of Special Scientific Interest is specifically mentioned at section 115.2. It notes that Black Bog is the largest area of intact lowland raised bog in Northern Ireland and is of special scientific interest because of the quality of its vegetation.

13. In the PS, Strategic Policy SP01, titled 'Furthering Sustainable Development' requires proposals to further sustainable development, promote measures to mitigate and adapt to climate change and to have regard to the LDP and other material considerations, unless the proposed development will cause demonstrable harm to interests of acknowledged importance.
14. In the PS, the appeal site is located within the countryside. Policy DE01 indicates that development proposals would not be supported where they unacceptably affect: 1) the amenities of the area or the residential amenity of nearby properties or sensitive receptors; and 2) the existing use of land and buildings, public safety (including road safety) and visual amenity ought to be protected in the public interest. Policy DE03 titled 'Sustaining Rural Communities' supports a range of types of development in the countryside. One of these is a proposal for agricultural and forestry development in accordance with Policy IB06. In addition, all proposals must comply with the development and design policies namely, DE04, DE05 and DE06. These relate to integration and design of buildings in the countryside, rural character and the setting of settlements respectively. I will address the compliance or otherwise of the appeal development with the OAP and PS later in this decision.
15. The appeal site comprises around 0.5 hectares of a larger agricultural field. An existing pig shed, concrete loading area, area of hardstanding, underground slurry tank, air scrubber, site office and feed bin occupy the appeal site. The site is accessed via an existing farm lane. The building itself has roof fans and windows. The appellant stated that the roof fans are sealed and are not in use and the building operates under negative air pressure.
16. Policy IB06 of the PS states that the Council will support proposals for agricultural and forestry development where criteria (a) to (e) is met. The Council and the third party consider that the development is contrary to criterion (c) of Policy IB06 and Policy DE01 as they consider it results in an adverse impact to the residential amenity of nearby residents outside the farm holding by reason of noise, smell and pollution as well as vibration and general disturbance.
17. The appellant's noise impact assessment (NIA) and revised AQIA provided modelling in relation to the noise and odour effects of the development on several nearby properties. No. 165 Creggan Road, which is the closest residential property to the appeal development was omitted from the reports. The third party provided Land Registry documents dated 23<sup>rd</sup> April 2023, demonstrating that No. 165 Creggan Road was owned by Felix McKernan and Mary McKernan and was not in Mr Barry McKernan or Mr John McKernan's ownership. At the hearing the appellant stated that Ms Mary O'Kane was the owner of No. 165 and that she was not part of the farm business. Furthermore, the appellant submitted oral evidence from a solicitor's letter to Mr John McKernan and his wife dated 8<sup>th</sup> June 2023,

which stated that an application to transfer the property at No.165 to them would shortly be made to Land Registry. However, no persuasive evidence was submitted to demonstrate that this transfer had occurred by the time of the hearing or since. Therefore, in the evidential context provided, I am not persuaded that No. 165 Creggan Road was within the ownership of the farm holding. Accordingly, it must be considered as a dwelling and a sensitive receptor outside the farm holding. The appellant's NIA and AQIA indicates that No. 167 Creggan Road is the closest sensitive receptor. As neither the NIA nor the AQIA assess the impact on the dwelling at No. 165 Creggan Road, I cannot conclude that the appeal development would not have an adverse impact on the residential amenity of this property by reason of noise and odour.

18. Furthermore, the submitted NIA states that noise surveys were taken between 12<sup>th</sup> and 20<sup>th</sup> April 2023 in the vicinity of the shed, when it housed 600 fattener pigs. This noise survey was completed while the shed was occupied. The revised AQIA states that the previously submitted NIA remains unchanged as a result of the proposed introduction to weaner pigs. However, I have not been provided with a revised NIA to demonstrate any analysis which illustrates that the increase in the number and type of pigs would not result in increased noise. As such I cannot ascertain that the change to the appeal development to house 1200 weaner pigs would not result in an unacceptable adverse impact to residential amenity of nearby properties.
19. At the hearing there was much debate in relation to the methodology for odour assessment and the input parameters used to conduct the NIA and AQIA and the sniff tests carried out by the appellant. The revised AQIA shows a small increase in maximum annual 98<sup>th</sup> percentile hourly mean concentration of odour at the sensitive receptors of Nos. 163, 169B and 167 Creggan Road, as a result of the proposed change to 1200 weaners. This estimates that there would be a proposed increase in odour with the revised scheme over that shown in the original AQIA in relation to 600 fattener pigs. Therefore, my observations on site, at the time when the building housed the fattener pigs is of relevance as it represents a lower predicted odour at those three properties than what would now be proposed with 1200 weaners.
20. The revised AQIA states that a sniff test was carried out on site on 20<sup>th</sup> April 2023 in the front and rear garden of No. 163A Croghan Road, which is the appellant's property. The sniff test was carried out when the 600 fattener pigs were housed in the appeal development and the results state that no discernible odours were observed. The appellant has also summarised complaints to the Council in appendix two of their rebuttal. In this summary it is indicated that the shed was restocked with pigs on 29<sup>th</sup> March 2023. Therefore, the pigs were only at around week 3 of the 14-week cycle when the sniff test was undertaken. At the hearing, the appellant stated that the noise and odour emitting from the pigs increases as they get bigger throughout the 14-week cycle. The submitted sniff test conducted at the beginning of the cycle when the pigs were much smaller is not representative of the average odour that would result from the operations of the pig shed. Therefore, I am not persuaded that the results of the sniff test within the AQIA are representative of the average odour generated by the pig shed for the duration of the 14-week cycle.

21. Furthermore, the final position of the appellant was that the NIEA document entitled 'Odour Impact Assessment Guidance for Permitted and Licenced Sites 2012' was the appropriate guidance document for conducting a sniff test at the appeal site. The appellant's revised AQIA includes the results of a sniff test which was conducted in the front and rear garden of No. 163A Creggan Road which is located to the south-east of the appeal development. However, the sniff test conducted was not in accordance with the NIEA guidance cited by the appellant.
22. The NIEA guidance states that "the odour investigator may choose fixed odour assessment locations so as to evaluate the changing situation over a period of time (*days, weeks, months*)" (my emphasis). The word "days", plural, indicates that sniff tests should be taken over more than one day. A sequence of locations is also suggested within the guidance and the appellant offered no persuasive explanation as to why this sequence was not followed. Furthermore, the guidance states that when the assessment is being carried out in response to a specific complaint, if time permits the starting point should be upwind of the suspected source prior to visiting the complainant property. The appellant's sniff test was conducted once in each of the monitoring locations for five minutes per monitoring station on one day and a northerly wind direction was noted. At the hearing the appellant stated that no sniff test was conducted up wind of the appeal development. Whilst several of the appellant's team stated that they did not detect any strong odour whilst on site, none of them could advise me of the predominant wind direction at the time of their visit or whether they were standing in an upwind position. Accordingly, the appellant's sniff test was not conducted in accordance with the NIEA guidance and therefore I am not persuaded of its efficacy.
23. The appellant's revised AQIA also models predicted odour results at most nearby sensitive receptors, again, with the exception of No. 165 Creggan Road. This model predicts that cumulative odour would not exceed 1 ou/m<sup>3</sup>, which is within the acceptable limit of 3 ou/m<sup>3</sup>. Notwithstanding this, I carried out site visits on 7<sup>th</sup> June 2023 and 11<sup>th</sup> October 2023. On 7<sup>th</sup> June the wind direction was from the south-east and there was no discernible odour to the east or south of the pig shed towards the nearby sensitive receptors. However, on 11<sup>th</sup> October 2023 the wind direction was from the north-west and there was a strong odour from the pig shed at the boundary of the third party at No. 163 Creggan Road. I consider that the strength of the odour experienced at my site visit would be offensive and would impact the residential amenity at the property of No. 163 Creggan Road. Accordingly, my onsite observations are contrary to the sniff test and predicted modelling undertaken within the appellant's revised AQIA.
24. Furthermore, at the hearing the Council stated that they have noted an offensive odour during their site visits and as a result they served the appellant with an Odour Abatement Notice on 18<sup>th</sup> August 2023, under Part 7, Subsection 63 of The Clean Neighbours and Environment Act (Northern Ireland) 2011. The appellant stated that he intends to appeal against the notice. However, given my observations on site, my conclusions that the sniff test was not carried out in accordance with the appropriate guidance, the revised AQIA and NIA not assessing the closest sensitive receptor and the fact that the Council also observed an offensive odour and issued an Odour Abatement Notice for the appeal development, I consider that the proposal would have an adverse impact on nearby residential amenity of residents outside the farm holding by reason of

odour and noise. Accordingly, the proposal is contrary to Policy DE01 and criterion (c) of Policy IB06 of the PS.

25. The third party also considers that it has not been demonstrated that the development is necessary for the efficient use of the agricultural holding and is therefore contrary to criterion (b) of Policy IB06. At the hearing the appellant stated that the development of the appeal building allowed the farm to diversify into pig farming. The Farm business is owned by Mr John McKernan, and the appeal development is operated under Mr John McKernan's active and established farm business. The appellant stated that a company Creggan Pig Farm Ltd has been established and it has entered into a contract with JMW farms. The pigs were registered with DAERA to Mr Barry McKernan, who is a director of Creggan Pig Farm Ltd. As part of this contract JMW farms supplies him with pigs to be housed in the appeal development. The appellant and his father are responsible for the pigs' welfare by feeding them and keeping them in good health. At the end of the 14 week cycle JMW farms pay them. The appellant stated this contract brought in additional income to the farm business owned by Mr John McKernan. Whilst the appeal development is a joint venture, Mr John McKernan is involved and has financial responsibility for the appeal development. However, the letter from JMW Farms indicates that the site was identified by JMW Farms as it was located close to JMW Farm's Cookstown processing plant, the availability of the main road network and it was located in a "pig clean zone". These factors relate to JMW Farms requirements and not the appellant's farm. The appellant's main argument that this appeal development would make the agricultural holding of Mr John McKernan more profitable, does not, in itself, make the development necessary for the efficient use of his farm holding. As such, it has not been demonstrated that the appeal development is necessary for the efficient use of the agricultural holding. The development fails to comply with criterion (b) of Policy IB06 of the PS.
26. Policy IB06 of the PS also requires development proposals for intensive farming or animal husbandry to demonstrate that it would not result in any significant adverse environmental effects, particularly through increased ammonia emissions. The PS states that ammonia (NH<sub>3</sub>) is a gas emitted into the air as a result of many farming activities such as the housing of livestock, the storage and spreading of animal manures and slurries and the use of chemical fertiliser. 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, as well as human health.
27. Furthermore, Policy NE01 of the PS states that it would only support development that, either individually or in combination with existing and/or proposed plans or projects, is not likely to have a significant effect on an existing or proposed SPA, existing or candidate SAC, Sites of Community Importance, or a listed or proposed RAMSAR site. A development proposal which could adversely affect the integrity of an international site may only be permitted in exceptional circumstances and where there are no alternative solutions; and the proposed development is required for imperative reasons of overriding public interest; and compensatory measures are agreed and fully secured through conditions or a planning agreement. Additionally, Policy NE01 states that development affecting an ASSI, National Nature Reserve or Nature Reserve will only be permitted where it is not likely to adversely affect the integrity of the area, including the value of the site to the habitat network or the features for which it has been designated; or any such

adverse effects are clearly outweighed by social, environmental or economic benefits of national importance. In such cases, appropriate mitigation and/or compensatory measures will be required.

28. The application site is in close proximity (within 7.5km) to the following nationally, European and internationally designated sites:
- Black Bog SAC/ASSI/Ramsar site;
  - Owenreagh River ASSI;
  - Ballinderry River SAC/ASSI;
  - Owenkillew River SAC/ASSI;
  - Lough Doo ASSI;
  - Cashel Rock ASSI;
  - Murrins ASSI;
  - Lough Macrory ASSI;
  - Priority peatlands habitats; and
  - SLNCIs.
29. The Council consider that the original appeal development would have resulted in adverse impacts on nearby designated site of Black Bog which is an Area of Special Scientific Interest (ASSI), Special Area of Conservation (SAC) and RAMSAR. Black Bog SAC is situated c.2.38 kms from the pig shed. The Ramsar site boundary is entirely coincident with both that of the Black Bog ASSI and the Black Bog SAC. It is one of the largest lowland raised bogs in Northern Ireland. The raised bog, which covers most of the site exhibits the full range of characteristic vegetation and structural features associated with this type of habitat and is surrounded by cut-over bog with poor fen.
30. In post hearing evidence the Council supplied three consultations from NIEA in respect of the revised appeal development dated 31st January 2024, 22<sup>nd</sup> May 2024 and 30<sup>th</sup> May 2024 respectively. NIEA advised that they would use a 0.08% process contribution (PC) to inform their response. This is in line with the scientific findings of the Joint Nature Conservation Committee (JNCC) report "Guidance on Decision Making Thresholds for Air Pollution (December 2021(3))". The PC is the additional pollutant loading to a receptor (e.g. designated site) as a result of a process or development. It is 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).
31. All parties are agreed that the designations all have a CLe of 1µg/m<sup>3</sup>. All parties and NIEA are agreed that with the removal of the slurry off site and the introduction of mitigation measures such as a Schulz 2-Stage Exhaust Air Purification System, the Process Contribution (PC) from the appeal development would be at the de-minimis threshold of 0.08% of the CLe. NIEA in their response of 22<sup>nd</sup> May 2024 have also stated that Table 24 of the appellant's revised AQIA, which details Nitrogen deposition, indicates that all PC's are below the de-minimis thresholds for woodland and grassland. Furthermore, NIEA also stated that the proposal would not have an adverse impact on the Owenreagh River ASSI subject to any drainage and run-off being directed to a collection tank. I consider that these mitigation features could be conditioned if approval was forthcoming.



Accordingly, if all mitigating factors were implemented the appeal development would have a PC contribution of 0.08% of the CLe.

32. Notwithstanding this, the Council raised concerns in relation to the removal of the slurry from the appeal development to the Anaerobic Digester (AD) plant - PAR Renewables - which is located outside Stewartstown, within the Mid Ulster Council Area. This AD was granted planning permission by application LA09/2022/0153/F on 12<sup>th</sup> May 2022. That planning permission contained a negative condition which required a Nutrient Management Plan (NMP) to be submitted and agreed with Mid Ulster District Council and the condition formally discharged prior to the next land spreading season. At the hearing, all parties were agreed that no habitats regulations assessment was conducted in respect of that application relating to its potential effects on designated sites arising from the AD plant itself or the associated land spreading of digestate.
33. The appellant stated that the case officer report which considered the impact of the AD indicated that a negative condition requiring the submission of a NMP would adequately ensure that there would be no impact on any protected designations or features of ecological importance. The appellant also stated that a HRA could be completed on the discharge of condition application. The appellant also indicated that as this project was approved and constituted as a project in its own right, it is outside the scope of consideration for the appeal development as it has planning permission to receive slurry and the company has stated that it has the capacity to receive the appeal developments slurry. However, the appeal development and the production of slurry as a result of its operation are inextricably linked. I must be satisfied that the appeal development, including any end waste, would not result in an adverse impact on the environment. At this point I note that the agreement between the appellant and PAR Renewables is predicated on a calculation of the amount of slurry that 600 fatterer pigs would produce. I was not presented with a revised agreement or calculation based on the 1200 weaner pigs. Accordingly, I am not certain that the AD would have the capacity to accept the slurry for the development the appellant is now proposing.
34. Furthermore, in their consultation response of 22<sup>nd</sup> May 2024, NIEA Water Management Unit (WMU) stated they have requested further information to assess the impact of the land spreading of digestate from the AD and its impact on nearby designated sites. The condition has still not been discharged over two years after the AD plant secured planning permission. Consequently, I cannot state that this is a viable waste disposal option as the condition has not been discharged and no HRA has been conducted for the AD and the resulting land spreading. Accordingly, I must adopt a precautionary approach with regard the disposal of waste from the appeal development currently before me.
35. At the hearing a representative of NIEA WMU stated that insufficient information had been submitted to demonstrate that there would be no adverse effects as a result of land spreading from the digestate from the AD. The NIEA WMU representative also stated that all receiving water bodies such as Lough Neagh would pose a concern. They remain to be convinced that there is a sustainable outlet which would allow the AD to spread the digestate over land and until that information is submitted, they cannot be certain that there would be no adverse effects of protected designations. NIEA WMU further stated that the land on which the digestate would be spread was within 7.5km of Upper Ballinderry SAC, Lough

Neagh SAC, Lough Beg Ramsar site and numerous ASSI's. As noted from the NIEA consultation response of 22<sup>nd</sup> May 2024 key data from the Trends Report 2023 for designated sites in Northern Ireland indicated that 100% of Special Areas of Conservation (SACs) had nitrogen deposition rates exceeding their Critical Level. This NIEA consultation also states that 99.5% of Areas of Special Scientific Interest (ASSIs), which are nationally important sites, had nitrogen deposition rates exceeding their Critical Level for at least one feature. It also states that 100% of SACs and 98.6% of ASSIs in NI had ammonia concentrations greater than 1µg m<sup>3</sup> (the long term annual average Critical Level for lichens and mosses and for ecosystems in which they are important)...". Accordingly, given that the majority of designated sites within 7.5km of the land on which the resultant digestate would be spread are over their recommended critical levels, I cannot say beyond reasonable scientific doubt that the resulting land spreading, of which this appeal development would add to, would not have an impact on these designated sites.

36. At the hearing, the appellant suggested that if the discharge of condition application to Mid Ulster District Council was unsuccessful, then an adequate slurry disposal method could be conditioned by the Commission to be submitted to and agreed by the Council. However, Regulation 43(2) of the Conservation (Natural Habitats etc) Regulations 1995 as amended states that a person applying for any such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment. The appellant was given the opportunity to address the disposal of waste produced by the development as the Council and NIEA raised the problems facing the discharge of condition application for the AD in written evidence, during the hearings and in their response of 31<sup>st</sup> January 2024. The appeal development is currently operational and producing slurry which needs disposed of. Despite the concerns being raised at the hearing and in post hearing evidence, no information was presented by the appellant to demonstrate that the disposal of slurry to the AD would not result in a breach of the de-minimis PC of 0.08% of the CLe of the designated sites within 7.5km of the land spreading areas associated with the AD, or regarding the possible location of landbanks required for the volume of slurry produced, in the event that the AD is not a viable option. Accordingly, given these uncertainties, reasonable scientific doubt remains that the disposal of the slurry produced by the appeal development would not have an impact on a designated site. Consequently, the appeal development fails to meet the requirements of Policies IB06 and NE01 of the PS and section 115.1 of OAP.
37. At the hearing the appellant argued that if the proposal failed to meet Policy IB06 it should be considered under Policy IB05 of the PS entitled 'Agricultural Diversification'. However, a ground (a) application is limited to the use as described on the Notice, which is the erection of a building for the use of the keeping and rearing of pigs. All parties were agreed that this use comprised an agricultural use. Policy IB05 of the PS indicates that agricultural diversification would comprise of uses including processing agricultural products ancillary to the main farm, manufacturing of craft items and tourist accommodation etc. Whilst this list is not exhaustive, the policy allows for alternative uses to agriculture, and I agree with the third party that it is not applicable when assessing an agricultural development use.
38. As the proposal has failed to meet the requirements of Policy IB06, NE01 and DE01 of the PS, it also fails to be considered an acceptable form of development

permitted by Policy DE03 of the PS. Also, due to its impact on air quality and its potential impact on designations of environmental importance, it has not been demonstrated that it is a sustainable development. Accordingly, I must conclude that the appeal development fails to meet Policy SP01 of the PS.

39. The third party also raised concerns in relation to road safety. They stated that insufficient visibility splays were in place at the entrance of the private lane with the Creggan Road. Policy TR01 of the PS entitled Land Use and Transport states that the Council permit development where it is demonstrated that the access arrangements do not prejudice road safety or significantly inconvenience the flow of traffic. All parties were agreed that visibility splays of 2.4 metres by 33 metres are required and that the provision of these would require the 1.2 metre post and wire boundary fence to land which lies to the south of the farm lanes junction with Creggan Road to be set back.
40. Paragraph 6.43 of Policy TR01 of the PS states developers are required to provide requisite visibility splays under their control which are retained free from obstruction at all times. The third party considers that the appellant cannot meet this requirement as the land to provide the visibility splays are not under his control. The appellant stated that the owner of the land to the south of the farm lanes junction with the Creggan Road had notice served upon them through planning application LA10/2023/1299/F and raised no objection to their land being used to provide the visibility splay. From this and in the absence of any evidence to the contrary, I can infer that they have no objection to this occurring. Accordingly, I agree with the appellant and the Council that the provision of the visibility splays could be conditioned to be provided within six weeks of approval if approval was forthcoming. The proposal therefore meets the requirements of Policy TR01 subject to such a condition.
41. Nevertheless, I have found that the proposal fails to meet policies IB06, DE06, NE01 and SP01 of the PS and section 115.1 of OAP. For the reasons given, the appeal on ground (a) fails and planning permission is refused.

**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 appellant stated that he required four months to allow for the 14-week cycle to be completed prior to complying with the steps required by the Notice. The appellant stated that moving the pigs within 20 days as required by the Notice would mean transferring the pigs to another building and mixing them with other herds which would raise biosecurity issues. Notwithstanding this, at the hearing the appellant stated in response to questioning, that the pigs could be moved to another empty building, which was at the end of its 14-week cycle, within one of JMW farms other contractors. Accordingly, I am not persuaded that a period of 20 days would fall 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 4 bullet point three to delete the words “site location plan 01” and insert the words “map PAC 1”;
- The appeal on Ground (a) fails and planning permission is refused; and
- The appeal on Ground (g) fails.
- The enforcement notice as amended is upheld.

**COMMISSIONER JACQUELINE MCPARLAND**

**List of Appearances**

- Planning Authority:
- Mr Martin McCarroll (24<sup>th</sup> July & 31<sup>st</sup> August 2023)
  - Mr Malachy Kearney, SES (24<sup>th</sup> July & 31<sup>st</sup> August 2023)
  - Mr Keith Finnegan, NIEA (24<sup>th</sup> July & 31<sup>st</sup> August 2023)
  - Roslyn Stewart, NIEA WMU (24<sup>th</sup> July & 31<sup>st</sup> August 2023)
  - Mr Brian Furey, EHD (24<sup>th</sup> July & 31<sup>st</sup> August 2023)
  - Ms Jill Crawford, EHD (24<sup>th</sup> July & 31<sup>st</sup> August 2023)
  - Mr Cahir McKnight, EHD (24<sup>th</sup> July & 31<sup>st</sup> August 2023)
  - Mr Michael Fogarty, EHD (24<sup>th</sup> July & 31<sup>st</sup> August 2023)
- Appellant:
- Mr Conor Fegan BL
  - Mr Gavin McGill 24<sup>th</sup> July & 31<sup>st</sup> August 2023)
  - Mr Philip Marshall, Henry Marshall Brown Architectural Partnership (24<sup>th</sup> July & 31<sup>st</sup> August 2023)
  - Mr Christy Carr (Irwin Carr Consulting) (24<sup>th</sup> July & 31<sup>st</sup> August 2023)
  - Mr Mark Colvin (Sheehy Consulting) (24<sup>th</sup> July & 31<sup>st</sup> August 2023).
- Third Party:
- Ms Oonagh Given (24<sup>th</sup> July & 31<sup>st</sup> August 2023)
  - Mrs MARRISA MCKERNAN (24<sup>th</sup> July 2023)
  - Mr Kieran McKernan (31<sup>st</sup> August 2023)

**List of Documents**

- Planning Authority: -
- "A1" Statement of Case
  - "A2" Rebuttal
  - "A3" Post hearing evidence relating to validity.
  - "A4" Council's letter dated 19<sup>th</sup> February 2024 and revised NIEA comments.
  - "A5" Council's letter dated 31<sup>st</sup> May 2024 and revised NIEA comments.
- Appellant:
- "A1" Statement of Case
  - "A2" Rebuttal
  - "A3" Post hearing evidence relating to validity.
  - "A4" Letter dated 30<sup>th</sup> April 2024 and revised AQIA.
- Third Party:
- "A1" Statement of Case
  - "A2" Rebuttal
  - "A3" Post Hearing evidence relating to validity.



# LA10/2022/0145/CA PAC 1



**Location:** Lands 45 NW of 163a Creggan Road, Carrickmore

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