



Enforcement Appeal Decision on Legal Grounds

Park House
87/91 Great Victoria Street
BELFAST
BT2 7AG
T: 028 9024 4710
F: 028 9031 2536
E: info@pacni.gov.uk

Appeal Reference:	2019/E0034
Appeal by:	Assured Energy LLP
Appeal against:	An enforcement notice dated 16 th August 2019
Alleged Breach of Planning Control:	Alleged unauthorised anaerobic digester plant consisting of primary and secondary anaerobic digesters, Vielfraß solid feed unit, combined heat and power plant and office building, electricity substation, flare, weighbridge, feedstock storage clamps, concrete apron, hard standing, effluent storage tanks, pre pit, and use of sheds and slurry tanks for the storage of digestate
Location:	Lands north of 53 Dunalong Road, Bready
Planning Authority:	Derry City and Strabane District Council
Authority's Reference:	LA/2017/0053/CA
Procedure:	Hearing on 5 th February 2020
Finding by:	Commissioner A Speirs, dated 30 th September 2020

Grounds of Appeal

1. The appeal was brought on grounds (a), (b), (c), (d), (e), (f) and (g) as set out in Section 143(3) of the Planning Act (Northern Ireland) 2011. There is a deemed planning application by virtue of Section 145(5). The appellant's statement of case indicated that ground (e) was not being pursued. This decision considers grounds (b), (c), and (d) only.

The Notice

2. The appellants submitted that the Enforcement Notice (EN) is invalid as it would predetermine the outcome of a number of planning applications relating to the appeal site and the alleged breach of planning control, which the Council has not yet determined. It was argued that if these applications are approved, the alleged unauthorised development would cease to be such.
3. The Council has served an EN in respect of what appears to it to be a breach of planning control; Section 138(1) of the 2011 Act allows it to do so. The existence of undetermined applications does not preclude the Council's service of an EN. Section 148(1) of the Planning Act states that "where, after the service of – (a) a copy of an enforcement notice; or (b) a breach of condition notice, planning

permission is granted for any development carried out before the grant of that permission, the notice shall cease to have effect so far as inconsistent with that permission”; this provision clearly envisages situations where planning approval is granted for previously unauthorised development. The existence of current undetermined applications does not render the subject EN invalid.

Ground (b) – that the alleged unauthorised development has not occurred.

4. To succeed under this ground it has to be demonstrated that what is described in the notice as the alleged breach is not what was happening on the site on the key date, i.e. the date of the issue of the notice. This is a matter which is essentially one of fact. For the appellant company it was argued that no unauthorised change of use of the slurry storage tanks under the pre-existing farm building had occurred.
5. The EN refers to “...use of sheds and slurry tanks for the storage of digestate”. The Council sought to differentiate between slurry from cattle on the farm and digestate stored by the appellant company, some of which is sourced outwith the host farm. It was also submitted that digestate storage by the appellant company represented an intensification, tantamount to a material change of use of the underground tanks.
6. The Nutrient Action Programme Regulations (Northern Ireland) 2019 define slurry as:- (a) excreta produced by livestock whilst in a yard or building; (b) a mixture of such excreta with bedding, rainwater, seepage, washings or any other extraneous material from a building or yard used by livestock or in which livestock manure is stored; or (c) any other organic manure or any combination of these, of a consistency that allows it to be pumped or discharged by gravity at any stage in the handling process and includes dirty water that is stored with slurry or mixed with slurry. The same Regulations define organic manure as:- (a) livestock manure; and (b) fertiliser, not being livestock manure or chemical fertiliser, derived from organic matter, and **includes anaerobic digestate** (my emphasis), sewage sludge, residues from fish farms and other organic wastes. As the regulations effectively define anaerobic digestate as slurry, I do not accept that using the tanks under the sheds for storage of digestate, in itself, involves a change of use, irrespective of who carries it out.
7. It was also posited that the amount of waste now being stored is considerably greater than was envisaged when the tanks were built and that this involves a material change in the use of the tanks. I do not accept this argument for 2 reasons. Firstly, the tanks have a fixed volume and, when full, are at maximum storage capacity which cannot physically be exceeded. Secondly, the planning approval for the anaerobic digester did not include the existing building or seek to specify or restrict the source of slurry stored under same. The third party referred to a 400% overloading of the slatted storage; however, I note that this is a safety issue related to the physical structure of the tanks and not to their use in planning terms. I am not persuaded that the use of the tanks under the cattle sheds for storage of digestate involves a material change of use and ground (b) succeeds in respect of this matter, which should be deleted from part 3 of the EN.

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

8. For the appellant company it was argued that the EN includes development that has been the subject of the grant of planning permission under approval reference J/2011/0424/F. The approved drawing 03 revision 1 shows the layout of the approved development. The Council argued that, since parts of the operational development that has occurred are not in conformity with the approved plans, the entire development is unlawful. The judgements in *Sage v SoS for the Environment and the Regions* [2003] 1WLR 983 and *Singh v SSCLG & Sandwell BC* [2010] EWHC 1621 (Admin) were cited as relevant by the Council.
9. I was presented with a drawing showing the digester development as approved and as built. The 4 approved storage silos and the 2 digester structures are not built exactly in the positions shown in the approved plans. The silos are constructed approximately 4m further to the east and the digesters roughly 5-7m to the northeast. The secondary digester is marginally larger than approved. The weighbridge is larger than that approved and erected in a different position. The CHP building, as constructed, is around one-third larger than that approved and has been built in a different position, albeit with an overlap of the 2 footprints. The gas flare and NIE sub-station have been erected in different positions from those approved.
10. I consider the changes to the positioning of the silos and digesters to be non-material in the context of the site, and the extent of the approved scheme. The gas flare and sub-station, whilst fairly insignificant structures, are located in different positions from those approved. The changes to the positions of the CHP building and weighbridge, taken together with changes to their dimensions, are more significant alterations and, in my view, would have required planning permission. I note that planning applications have been submitted, seeking to regularise changes to boundary treatments, visibility splays and the changes to the positions and size of the CHP building, the weighbridge, the gas flare, and the NIE sub-station. An application for a Non Material Change was submitted in 2017 in respect of 'Proposed agricultural anaerobic digestion facility together with all associated site works'.
11. Although the anaerobic digester operation comprises several structures and buildings, all were elements included in planning application J/2011/0424/F. It is established law that if part of an approved development is unlawful, then the entirety of that development is unauthorised. The Council drew attention to the issue as addressed in *Sage* by Lord Hobhouse at paragraphs [23]-[25]. As is stated by Mr Justice Hickinbottom in *Singh*, "where a person wishes to change a development for which he has a final planning permission, the scheme does not allow such a change without the consent of the planning authority, under (for example) section 73 or section 96A" (the latter correspond with Sections 54 and 67 of the 2011 Planning Act in NI). None of the changes to the approved development have been granted consent by the Council. The changes that have been undertaken are therefore unlawful. This renders the entire development unlawful. Given this, the appeal on ground (c) cannot succeed. As the issue of non-compliance with condition 7 of the 2012 approval is not pursued by the

Council, I do not intend to address the appellant's submissions in respect of the matter as set out in its statement of case and in appendix 9 thereto, entitled 'Legal Submissions'.

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.

12. The EN was served on 16 August 2019 and in accordance with section 132(1) and (3), no enforcement action can be undertaken in respect of those operations which were substantially complete before 16 August 2014. The appellant company submitted that the various elements of the 2012 approval should be regarded as discrete operations and that the issue of substantial completion should be considered in respect of each of these. The Council submitted that the anaerobic digester operation is the critical matter and that each element should be regarded as part of a wider whole; as such the entirety of the operational development would have to be substantially complete by the critical date for the development to have acquired immunity from enforcement.
13. An aerial photograph of the ongoing development, dated 14th August 2014, has been provided in evidence. This shows the silos and digesters partially constructed and the foundations of the CHP building in place. The silos are incomplete, and the main walls of each section thereof do not appear to have been fully constructed. The digesters' outer walls have been constructed; however, the roof covering is not in place. The appellant's submission is that the digesters could have been used to store slurry as constructed by 14th August 2014 and were thus substantially complete. I do not accept this argument. Given that the digesters are constructed to process digestate, and to generate and contain biogas, the absence of the biolene roofing is a clear sign that the buildings were not substantially complete; they could not have been used for the purpose for which they were approved and built. I do not consider, nor have I been provided with any evidence, that the situation on site had changed by 16th August 2014, 2 days after the aerial photograph was taken. The static pressure tests, which started on 17th August, appear to relate to the concrete walls only and do not demonstrate that the roof coverings were in place by 16th August. In fact, the tests show that rainfall had increased water levels in the tanks during the testing period. In my opinion none of the operational development approved under permission reference J/2011/0424/F was substantially complete by the critical date and, in the circumstances, I judge that ground (d) of appeal fails.

Decision

- The appeal on ground (b) succeeds in respect of the reference to use of the sheds and slurry tanks for storage of digestate. It fails in all other respects.
- The appeal on ground (c) fails.
- The appeal on ground (d) fails.
- Part 3 of the notice is varied to read:-

“Alleged unauthorised anaerobic digester plant consisting of primary and secondary anaerobic digesters, Vielfraß solid feed unit, combined heat and power plant and office building, electricity substation, flare, weighbridge, feedstock storage clamps, concrete apron, hard standing, effluent storage tanks, and pre pit”

- Part 4 (c) of the notice is deleted.

COMMISSIONER A SPEIRS

List of Appearances

Planning Authority:- Mr C Fegan BL
Mr C Rodgers, Planning Department
Mr J Loughran, Planning Department

Appellant:- Mr S Beattie QC
Mr B Martyn, Cleaver Fulton Rankin Solicitors (CFR)
Mr A Larkin, Gravis Planning
Mr A McLoughlin, Appellant Company
Mr P McEvoy, Jr Counsel
Mr S McClintock, CFR
Mr A McLoughlin, Appellant Company
Mr R Agus, MRA

Third Parties:- Mr P Sweetman
Mr R Pollock
Mr CR Pollock

List of Documents

Council:- "A" – Statement of Case with Appendices
"A2" – Comments on post hearing evidence

Appellant:- "B" – Statement of Case with Appendices and Booklet of Authorities
"B2" – Documents provided at hearing
"B3" – Post hearing Submission
"B4" – 2nd Post hearing submission

Third Parties:- "C" – Statement of Case with appendices, Mr R Pollock
"C2" – Comments on post hearing evidence