



An
Bord
Pleanála

Inspector's Report ABP-303172-18

Development	Retention of prefabricated Sales Office Structure, Floodlights and CCTV Cameras and all ancillary site works.
Location	Blackhill, Kill, County Kildare.
Planning Authority	Kildare County Council.
Planning Authority Reg. Ref.	18/920
Applicant	Lilly Fusion Ltd.
Type of Application	Retention Permission.
Planning Authority Decision	Refuse Retention Permission.
Type of Appeal	First Party v. Decision.
Appellant	Lilly Fusion Ltd.
Observer(s)	None.
Date of Site Inspection	8 th March 2019.
Inspector	Susan McHugh

1.0 Site Location and Description

- 1.1. The subject site is located in the townland of Blackhill, north of the N7 and c. 1.5km north east of Kill, Co. Kildare. It is c. 550m east of Exit 7 on the N7 and is accessed off a local road where a speed limit of 50kmh applies.
- 1.2. The area is characterised by one off rural houses and agricultural lands. The residential property of Aghada is located c. 25m to the north, the property to the north east is in use as a Montessori and is c. 50m from the appeal site. A number of agricultural outbuildings are located to the east, with agricultural lands located to the south and west. A free-standing sign is located outside the site to the south west.
- 1.3. The site is currently in use for the sale of private and commercial vehicles from the forecourt display area, and trades as 'Bishopscourt Motors'. Existing structures on site comprise a single storey metal container located along the northern boundary, a double height garage/workshop with a barrel-vaulted roof, adjoining WC located in the north-west corner of the site, and a prefabricated structure in use as an office / reception area to the south of the garage/workshop. Existing floodlights and security cameras are located at the entrance to the site and along the southern perimeter boundary.
- 1.4. Boundaries to the site are defined by green palisade fencing, with gated access to the site from the local road to the east. The site is well screened on approach from the west by mature planting along the northern side of the local road and on approach from the north along the western side of the local road.
- 1.5. The overall site appears to be serviced by a waste water treatment plant located outside the site to the west.
- 1.6. The site which is partially surfaced in tarmacadam and loose gravel chipping has a stated area of 0.23ha.

2.0 Proposed Development

- 2.1. Permission is sought for the retention of a prefabricated sales office structure, floodlights and CCTV cameras including all ancillary site works.

- 2.2. The prefabricated structure has a stated area of 38.19sqm and is located to the south of the existing workshop. It measures 63m x 73m and has a height of 3m. The front / east facing elevation⁴ includes two white upvc windows and a main door in grey colour with a blue fascia. This includes signage along the eastern and southern elevations.
- 2.3. The four no. floodlights are located in three corners of the site with the remaining floodlight located to the rear and south-western corner of the workshop. Floodlights no.s 1 and 2 are 4m in height, while floodlights no.s 4 and 5 are 5m in height. The taller floodlights have CCTV cameras attached at a height of approx. 2.9m.

3.0 Planning Authority Decision

3.1. Decision

The planning authority **refused** permission for retention on 12/11/2018. The reason for refusal was as follows;

'Policy 10.4.10 of the Kildare County Development Plan 2017-2023 seeks to ensure that, employment and rural enterprises should be directed to local employment centres, small towns and villages catering for local investment and small-scale industry. One -Off enterprises in the rural area may be located in the open countryside only where the Council is satisfied that the enterprise is suitable for that location in the first place and that it will comply with the criteria outlined in Table 10.3. Given the location of the subject site in an un-zoned rural area adjacent to the M7 national primary route, it is considered that the proposed development does not comply with the requirements of policy 10.4.10 of the Kildare County Development Plan 2017-2023 and the proposed development would therefore be contrary to the proper planning and sustainable development of the area.'

3.2. Planning Authority Reports

3.2.1. Planning Reports (dated 21/09/2018 and 12/11/2018)

The Planners Report is the basis for the Planning Authority decision. The 1st Report in summary states:

- The portacabin structure is of a modest scale fitting with the operation and business located on the site.
- The floodlights and CCTV cameras and poles are considered appropriate for the scale of the business operating from the site.
- The use of the site as a motor vehicle sales yard and garage is unauthorised and current enforcement file is open on the site. Unauthorised use of lands located in a rural area for;
 - a) Private and commercial motor vehicles sales, including car sourcing and servicing.
 - b) Associated outdoor display area/forecourt for private and commercial vehicle sales.
 - c) Unauthorised use of an existing shed as mechanics workshop.
 - d) Unauthorised erection on site of 2 no. single storey stand-alone structures for use as ancillary office and reception area, for motor sales and servicing.
 - e) Erection of floodlighting standards and CCTV, to the sites perimeter boundary.
 - f) All associated signage within the site boundary.
- The Enforcement Investigation has confirmed that while the main shed structure and hard surfaced yard area etc. on site is 'statute barred' from enforcement action, it remains an unauthorised structure and an unauthorised use on site.
- Recommends further information to confirm the;
 - Planning status of the site and its alleged unauthorised use for motor sales/servicing/sourcing/fully equipped motor workshop, the historical use of the site and
 - Planning history of all of the structures located on the site including information about the other single storey portacabin/steel container, and the double height garage/workshop with a barrel-vaulted roof.

The 2nd Report in summary states;

- The planning application relates to the part use of the site.
- The use of the site for motor vehicle sales and repairs is considered development and the change of use of the site is not considered to be exempted development ((as defined on Section 3(1) of the Planning and Development Act 2000 (as amended) as defined by the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001 (Article 10-Change of use) as amended).
- Rates have been paid for offices, workshop and yard for the past seven years but not for the use of the subject site as a motor vehicle and sales garage repair use.
- Recommends refusal.

3.2.2. Other Technical Reports

District Engineer: No objection subject to conditions.

Roads and Transportation Section: No objection subject to conditions.

Environment Section: No objection subject to conditions.

Water Services: No objection.

CFO: No objection.

3.3. Prescribed Bodies

Irish Water: No report received.

3.4. Third Party Observations

None received.

4.0 Planning History

No recent planning history pertains.

Enforcement

P.A. Ref. UD- 7071 Unauthorised development and use of the site.

5.0 Policy and Context

5.1. Kildare County Development Plan 2017-2023

Chapter 5 refers to Economic Development Enterprise and Tourism.

Table 5.2 refers to the Economic Hierarchy which identifies Kill as a local employment centre and as a Small Town.

Chapter 10 refers to Rural Development

Policy 10.4.10 refers to Rural Enterprises

'The Council acknowledges that the development of rural enterprise and employment opportunities will be vital to sustaining the rural economy. In accordance with the economic strategy for the overall county, employment, servicing the rural areas, should, in general, be directed to local employment centres, small towns and villages (see Chapter 5 Table 5.2 Economic Development Hierarchy, County Kildare), catering for local investment and small scale industry. Within the rural settlements / nodes and the rural countryside, agriculture, horticulture, forestry, tourism, energy production and rural resources-based enterprise should be facilitated.'

Key considerations for rural enterprise (relevant to the current appeal) include:

- *'In general, existing 'footloose' commercial or industrial activities in towns and villages will not be permitted to re-locate to unserviced rural areas.*
- *Where established authorised rural based enterprises seek to expand beyond their existing capacity and, in the opinion of the planning authority, the expansion proposed would seriously affect the rural nature or amenity of the rural areas and surrounding countryside, it will generally be encouraged to locate in serviced zoned lands.*
- *One-off enterprises in the rural area may be located in the open countryside only where the Council is satisfied that the enterprise is suitable for that location in the first place and that it will comply with the criteria outlined in Table 10.3.*
- *Commercial / industrial developments in rural areas may be acceptable subject to proper planning considerations, where the Council is satisfied that the proposed*

development requires to be located in the rural area due to its dependence on an existing local resource or source material that is required for the carrying out of the industrial process / commercial activity / service. The local resource or source of material shall be in close proximity to the location of the proposed development.

- *Apart from rural housing, as provided for in Chapter 4, there are other land-uses which may be considered in the rural countryside. Where an area is not within an identifiable settlement, and is not otherwise zoned as part of this Plan, or any of the Local Area Plans, the use of such land shall be deemed to be primarily agricultural.'*

Table 10.3 lists criteria for assessment of One-Off Enterprises in Rural Areas.

'Proposals for the development of one-off new small-scale enterprises in rural areas outside of designated employment centres will be assessed against the following criteria:

- As a general guide, development proposals shall be limited to small-scale business development with a floor area at circa 200sq. m. and shall be appropriate in scale to its location;*
- The development will enhance the strength of the local rural economy;*
- The proposed development shall be located on the site of a redundant farm building /yard or similar agricultural brownfield site;*
- There is a social and economic benefit to being located in a rural area;*
- The proposal will not adversely affect the character and appearance of the landscape;*
- The development will not be detrimental to the amenity of nearby properties, and in particular the amenities of nearby residents;*
- The existing or planned local road network and other essential infrastructure can accommodate extra demand generated by the proposal;*
- The proposal should be accompanied by a mobility plan catering for employees' home to work transportation;*
- Adequate proposals to cater for any waste arising at the facility;*
- All advertising should be kept to a minimum and be suitable in design and scale to serve the business;*

- *Proper planning and sustainable development;*
- *The proposals should conform to other objectives of the County Development Plan.'*

Chapter 17 relates to Development Management Standards and **Section 17.1.1** refers to Enforcement.

Section 17.1.3 refers to Non-Conforming Uses. It states

'Throughout the county there are uses that do not conform to the zoning objectives for that area. These are uses which;

- 1. Were in existence on 1st October 1964;*
- 2. Have valid permissions; or*
- 3. Have no permission and which may or may not be the subject of enforcement proceedings. Extensions to and improvement of premises referred to in categories 1 and 2 above may be permitted. This would apply where proposed development would not be seriously injurious to the amenities of the area and would not prejudice the proper planning and sustainable development of the area.'*

5.2. Natural Heritage Designations

- 5.2.1. There are no designated sites within the vicinity.

5.3. EIA Screening

- 5.3.1. Having regard to the nature of the proposed development to be retained, the nature of the receiving environment, and proximity to the nearest sensitive location, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

6.0 The Appeal

6.1. Grounds of Appeal

The First Party appeal against the Planning Authority's decision to refuse permission has been submitted by Vincent JP Farry and Co. Ltd Planning and Development Consultants on behalf of the applicant. The main grounds can be summarised as follows;

- *Background* – Site contains unlawful development which was developed in the 1970s. The site has been used for the sourcing, sale, servicing and repair of motor vehicles for over seven years. The appellant is a new owner of the site.
- *P.A. Assessment* – Does not criticise the impact of the subject structures on amenity, and raises no objection, apart from the overall use of the site.
- *Immunity from Prosecution* - Query whether permission can be granted for the retention of certain illegal structures on the land where the site will continue to accommodate an unlawful development, which are immune from prosecution.
- Asserts that the items for which retention permission is sought and the remainder of the development should be treated as being wholly separate.
- *Established Use* - Two separate sources have confirmed that the property was used for vehicle sales, sourcing, servicing and repair purposes for at least 10 years.
- *Statute-Barred* - Contend that the Board should consider the nature of any link between these physical features, on the one hand and the continuation of the existing activity.
- Notes the approach taken by the Board previously on other cases where it has refused permission where a proposal would actually facilitate the continuation of an unauthorised use, e.g. ABP.PL16.222802. where the Board refused permission for quarry equipment.

- Asserts that in the current case the continuation of the use of the site for motor-related activities will continue regardless of whether the cameras, lights and portacabin remain on site.
- Contends that illegal but immune developments should be acknowledged when new proposals are being assessed, and refers to the ruling of the UK High Court in *Western Fish Products v. Penworth District Council*. Notes that the P.A. have avoided acknowledging that the main development is immune from proceedings.
- Requests that the Board grant permission on the basis that these items do not adversely affect visual amenity, prejudice road safety (especially in terms of glare) or the enjoyment of local houses and there are no grounds on which consent might reasonably be withheld.

6.2. Planning Authority Response

A response was received from the Planning Authority, and reiterates many of the points raised in the planner's report, in summary it states;

- In assessing the application due regard was given to the existing and current planning history on the site and the identified unauthorised developments and activity.
- The Enforcement Investigation continues and confirm that;
 - The use of the site as a motor sales/repair garage is unauthorised, is not considered to be statute barred, as the respondents have stated that the site has not been continuously used for the past seven years.
 - The public notices do not describe the full nature and extent of the development on site and is considered misleading.
 - A further warning letter has been issued dated 8/11/2018 pertaining the to the possible unauthorised use of lands located in a rural area.

6.3. Applicant Response

6.3.1. A response to the Planning Authority response was submitted by the Third Party. It was accompanied by a number of letters from adjoining residents, previous owner, previous tenant and customer and can be summarised as follows.

- The letters refer to the main buildings including the workshop which was originally constructed either in the late nineteen seventies or the early nineteen eighties, that the site was surfaced at the same time so as to allow for the movement of cars and delivery vehicles and a security fence was erected shortly afterwards. They also refer to the nature of the previous uses of the site.
- Contends that the P.A. response avoids commenting on whether the items for which retention permission is now being sought are objectionable.
- Legal and planning arguments raised in the response to further information have not been addressed by the P.A.
- Dispute the P.A. view that the use of the site is statute barred on the basis that the site has not been continuously used for the past seven years. They have not provided evidence to support this assertion and the fact that rates have been paid for the past seven years is somewhat contradictory.
- Assert that there is no legal impediment to a grant of permission.

6.4. Observations

None.

7.0 Assessment

7.1. The main issues in this appeal are those raised in the grounds of appeal and I am satisfied that no other substantive issues arise. Appropriate Assessment also needs to be considered. The relevant issues are addressed under the following headings:

- Non-Conforming Use
- Compliance with Development Plan Policy

- Residential and Visual Amenity
- Other Matters
- Appropriate Assessment

7.1.1. It is important to state from the outset that the applicants have an unauthorised commercial undertaking on site comprising vehicle sales, sourcing and repair. The unauthorised nature of the use is not disputed by either party.

7.1.2. The Planning Authority note that the use of the site for motor vehicle sales and repairs is considered development and the change of use of the site is not considered to be exempted development. In the absence of any planning history on the site, I concur with this view that the current commercial use is unauthorised.

7.1.3. The current application for retention seeks to regularise more recent unauthorised developments on site, which are currently subject to enforcement by the Planning Authority. It is also important to note that the Board have no role in enforcement matters. The current application will therefore, be assessed on its own merits.

7.2. **Non-Conforming Use**

7.2.1. The existing commercial use on site is a non-conforming use located in a rural area without the benefit of planning permission, and as already stated is the subject of enforcement proceedings. Section 17.1.3 of the County Development Plan refers to non-conforming uses and states that extensions to and improvement of premises may be permitted where the proposed development would not be seriously injurious to the amenities of the area and would not prejudice the proper planning and sustainable development of the area. My assessment will address amenity issues in section 7.4 below.

7.2.2. The appellant asserts that the existing use on site is an established use. They have submitted letters as part of their application and on appeal to evidence the longstanding use of the site as a motor sales/repair business. I note however, that no photographic evidence or aerial photography was submitted to substantiate this claim.

- 7.2.3. The appellant further states that the existing use and development on site is consequently 'statute barred', i.e. by virtue of the fact that it has been in existence for 7 years. The Planning Authority argue differently and contend that development on site is not 'statute barred'. Notwithstanding, the Planning Authority have confirmed in their assessment and on appeal that rates have been paid for the last 7 years.
- 7.2.4. While it might be construed that the current application which seeks retention for individual structures only, rather than the use of the overall site as outlined in red in the application as lodged, is intended to circumvent the unauthorised use on site, I am nonetheless, reasonably satisfied that the use on site is an established use.
- 7.2.5. I can confirm from my site inspection around midday on a weekday, that the site is currently in use as a motor repair and sales garage. Approx. 40 second hand cars and vans were parked on site, and appeared to be at capacity. I also consider that the principle use of the site is for motor sales, on the basis of the number of vehicles on display, advertising signage both within and outside the site, location of the floodlights and security cameras primarily along the southern boundary and entrance to the site.
- 7.2.6. I do not accept the appellants assertion that the subject application should be treated separately from the remainder of the development. In my opinion, the elements of the proposed development for retention which include the sales office and reception area, the floodlighting with security cameras are intrinsically linked to the overall use of the site. I also consider that the nature of the current use appears to constitute an intensification of the use of the site, based on former aerial photography of the site (see attached).
- 7.2.7. I note the appellants claim that legal and planning arguments, were not fully considered by the P.A, and reference the approach taken by the Board previously on other cases. In particular, the appellants cite the decision by the Board on PL16.222802 in which permission was refused for quarry equipment, where the Board held that the quarry was not an established use and that extra apparatus would facilitate the continuation of an unauthorised use for quarrying. In the current case however, there is an established use, and I do not consider that the Boards decision on this particular case is necessarily relevant.

7.2.8. On the basis of the submissions made in connection with the planning application and appeal, I am satisfied, that the proposed development for retention relates to a site the use of which is unauthorised for the carrying on of a motor sales/repair business, and that the proposed development would facilitate the consolidation and intensification of this unauthorised use. Accordingly, I consider that it would be inappropriate for the Board to consider the grant of a permission for the retention of the proposed development.

7.3. Compliance with Development Plan Policy

7.3.1. The appeal site is located in a rural area c. 1km north east of the development boundary of the small town of Kill as identified in the Kildare County Development Plan 2017-2023 (see attached). I note that the towns development boundary is primarily located on the southern side of the N7.

7.3.2. The reason for refusal refers to non-compliance with Policy 10.4.10 of the County Development Plan. This policy seeks to ensure that, employment and rural enterprises should be directed to local employment centres, small towns and villages catering for local investment and small-scale industry. In particular, the location of the subject site in an unzoned rural area adjacent to the M7 national primary route is noted. The proposed development for retention is in my opinion directly associated with the existing commercial use, which is located in an unzoned and unserved rural area.

7.3.3. The development for retention is assessed in the context of the criteria for one off rural enterprises as set out in Table 10.3 of the County Development Plan. In my opinion the proposed development for retention is intrinsic to the commercial use of the site which has no link to the rural area.

7.3.4. I am satisfied, that the proposed development for retention which is intrinsically linked to a commercial use in a rural area, is not in accordance with Policy 10.4.10 and fails to meet the criteria for one-off enterprises as set out Table 10.3 of the County Development Plan 2017-2023 and would therefore, be contrary to Policy 10.4.10.

7.4. Residential and Visual Amenity

- 7.4.1. There are 3 elements to this application for retention. Firstly, the prefabricated structure, which is located next to the workshop, and is in use as an office and reception area. Secondly, the four no. floodlights which are located at the farthest end and either side of the entrance to the site, with another along the southern perimeter of the site and to the rear of the workshop. Thirdly, the CCTV cameras which are located at the entrance to the site and along the southern perimeter boundary. Combined they effectively light and monitor the open display forcecourt area where vehicles are parked.
- 7.4.2. The appellant notes that the Planning Authority did not comment on whether the individual elements of the development to be retained would otherwise be acceptable. On my reading of the planners report, I would concur and instead focus on the unauthorised nature of the use of the overall site as outlined above.
- 7.4.3. Notwithstanding, I do not consider that the structures in isolation which are subject of retention seriously detract from the amenity of the area. The site is reasonably well screened, on approach from the west and north and the site is not located in a designated landscape area. The adjoining residential properties to the north and north east are well set back and screened from the site. I also note that no submissions were received by the planning authority from adjoining residential properties. I do however, note that when the floodlights are in use in the evenings that this results in a different visual impact, the operational hours of which are not regulated by condition of a planning permission.
- 7.4.4. On balance, I am satisfied, that the structures to be retained do not detract from the residential or visual amenity of the area.

7.5. Other matters

- 7.5.1. *Public Notices* -The Planning Authority have noted in response to the appeal that the public notices are misleading as they do not describe the full nature and extent of the development. I concur with this view, in that the description appears to refer to the structures rather than the nature or purpose of the use of the overall site which is outlined in red.

8.0 Appropriate Assessment

- 8.1.1. Having regard to the nature and scale of the development proposed for retention, and to the nature of the receiving environment, no appropriate assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

9.0 Recommendation

I recommend that permission for retention be refused for the following reasons and considerations.

10.0 Reasons and Considerations

On the basis of the submissions made in connection with the planning application and appeal, it appears to the Board that the proposed development relates to a site the use of which is unauthorised for the carrying on of motor sales and repair and that the proposed development for retention would facilitate the consolidation and intensification of this unauthorised use. Accordingly, it is considered that it would be inappropriate for the Board to consider the grant of a permission for the proposed development in such circumstances.

Susan McHugh
Planning Inspectorate

14th March 2019