

## APPEAL UPDATE FOR 2020-21

**Report Author:** Chris Nash  
Development Management Manger

**Contact Details:** chris.nash@milton-keynes.gov.uk  
07775 110809

### 1.0 INTRODUCTION

1.1 The report sets out a summary of key planning appeal results received in the third quarter and most of the final quarter of 2020-21. Due to the date of the previous report, this report covers mid-October 2020 to the middle of March 2021.

1.2 It is recommended that the report be noted by the Committee.

### 2.0 APPEAL DECISIONS

2.1 During the above period the Planning Service received several appeal decisions of note. These are summarised below with any key points discussed so to assist with the future consideration of planning proposals.

19/03351/FUL (Appeal ref. APP/Y0435/C/20/3247981 & APP/Y0435/W/20/3247967)  
Part change of use from C3 to Sui Generis (car sales) (retrospective) on land adjoining  
74 & 74 Newport Road, New Bradwell

2.2 The appeal was considered through written representations and **Dismissed** on 20<sup>th</sup> October 2020.

2.3 This was a conjoined appeal considering a planning appeal against refusal of retrospective permission under delegated powers and an enforcement appeal against the issuing of an enforcement notice (EN). The grounds of appeal under the enforcement appeal were that additional time was required to comply with the requirements of the EN.

#### *Planning appeal*

2.4 Aligning with the delegated decision to refuse permission, the Inspector considered the main issues were:

- the effect of the development on the living conditions of the occupiers of neighbouring residential properties, with regard to outlook and privacy;
- the effect of the development on highway safety; and
- the effect of the development on flood risk.

2.5 The Inspector noted the area to be used for storage/display of vehicles would be reduced in size from a similar scheme dismissed at appeal in 2019. However, it was

observed that the area used would still be quite extensive in size and a large number of cars would be stored on the site with very little space between them, alongside customer's vehicles. The appellant stated there would be around 2 appointments per day, resulting in 8 vehicle movements per day in respect of customers visiting the site. However, the Inspector considered this appeared to be a low estimate, given the large number of cars stored/displayed for sale.

- 2.6 Even with the reduction in the site area, it was considered that the development would still be experienced as a prominent and dominant feature when viewed from adjacent dwellings (as with the 2019 appeal scheme), to the extent that the living conditions of the occupiers would be significantly harmed. Furthermore, customers and staff could potentially look directly into adjoining gardens and appreciable reduce the privacy enjoyed by the occupiers.
- 2.7 On highway matters, the Inspector considered it reasonable that cars would be stored in a similar way to that observed at the site visit. The 'packed' nature of the cars meant it was not clear how cars would be extracted without occupying customer parking or blocking the drive. The Inspector again concurred with the findings of the previous Inspector that it had not been demonstrated that parking areas were suitable in terms of circulation and safety, to the extent that it was likely the development would have an unacceptable impact on highway safety.
- 2.8 Turning to flood risk concerns, the appellant submitted a Flood Risk Assessment (FRA). The Inspector found that the proposed gravel surfacing could be used as a permeable hardstanding. However, it was found that the FRA did not take into account that a large number of cars would be stored on the site, and that their proximity creating a physical mass that could displace flood water from the site and lead to increased risk of flooding elsewhere. It was considered this impact could not be alleviated by way of conditions.

#### *Enforcement appeal*

- 2.9 The EN required the sales to cease within 2 months, and for vehicles to also be removed in this period. The appellant considered that it would take a longer period to remove the cars from the site. However, the Inspector considered it reasonable that cars could be moved to an alternative site before they are sold, and there was little evidence to suggest this alternative solution could not be secured within the time limit.
- 2.10 However, in relation to the requirement to remove all fixtures, fittings and materials/paraphernalia associated with the use, the Inspector noted that the site could be utilised until the 2 months in relation to sales/storage had expired. As a result, it was considered reasonable to allow an additional 2 months to carry out this requirement.
- 2.11 Overall, this appeal decision further ratifies the continued resistance of the proposals for the site and demonstrates the success of appropriate enforcement proceedings in the public interest.

19/02134/FUL (Appeal ref. APP/Y0435/W/20/3254217)

Erection of drive-through restaurant (Class A3/A5) and 87-bed hotel (Class C1), with associated parking and landscape at Site 2, Elmswell Gate, Milton Keynes

- 2.12 The appeal was considered through written representations and **Dismissed** on 7<sup>th</sup> December 2020.
- 2.13 This was a delegated decision to refuse permission due to the lack of evidence demonstrating this was the most sequentially preferable site for a main town centre use, as well as biodiversity loss and sustainable construction concerns.
- 2.14 The Inspector noted that the proposal would result in a net loss of biodiversity, and the evidence gave a 'strong' indication that the required net gain cannot be achieved on site. Although suggesting that this reduction could be compensated for off-site, no specific proposals for doing so were advanced by the appellant. Further, whilst motioning the use of a planning obligation to secure this compensation, no s106 agreement was provided. With no method of mitigating the impact and securing the gains required, this Inspector found harm in this respect.
- 2.15 Whilst the appellant evidenced the proposal's 'Good' BREEAM standards and calculated the required contribution to the Carbon Off-Set Fund, there were no means available to secure this contribution (i.e. a planning obligation). The Inspector also considered a condition would not be appropriate. This further weighed against the proposal.
- 2.16 In response to the out-of-town location, the appellant provided a sequential assessment. This focussed upon the Kingston District Centre and the availability of alternative 'town centre' and 'edge of centre' sites and premises. The submitted sequential assessment concluded that there are no suitable sites or units within closer proximity that would be available, and the Inspector considered the Sequential Test had been passed. Furthermore, the Inspector considered links to this centre are reasonable and the site is a short distance away.
- 2.17 In terms of the impact on local infrastructure, the Inspector found no basis to conclude that the existing capacity of local infrastructure, including the local highway network, would be breached. Although attention was drawn to policy CC1 and the need to contribute towards the provision of cultural wellbeing including public art, the lack of a planning obligation to secure this "*would not necessarily cause harm*". This is perhaps a disappointing comment given the policy was found to be sound in plan-making terms and so there is a reasonable expectation that failure to adhere to it would be viewed as harmful by a decision maker.
- 2.18 Nonetheless, the Inspector's decision here is clear in that it was the lack of a mechanism to mitigate impacts of the development which led to the appeal being dismissed, and not necessarily whether those impacts *could* be appropriately mitigated.

19/02444/REM (Appeal ref. APP/Y0435/W/20/3246813)

Reserved Matters for the erection of 31 dwellings relating to appearance, landscaping, layout and scale in respect of outline approval 17/01536/OUT on land to the east of Maltings Field, Castlethorpe

Hearing held on 27 October 2020 and **Allowed** 14<sup>th</sup> December 2020

- 2.19 The appeal was made against non-determination of the planning application. The applicant was seeking changes to the tenure mix and infrastructure planning obligations, originally set in the section 106 agreement agreed at the outline stage.
- 2.20 Officers advanced three reasons for refusal under delegated arrangements – impact on the character of the area, amenity and inaccuracies in the plans. The Inspector agreed that the main issues were the effect of the proposed development on:
- the character and appearance of the area, including whether it would preserve the setting of the Castlethorpe Conservation Area; and
  - the living conditions of neighbouring occupiers, with particular regard to noise, disturbance and privacy.
- 2.21 The Inspector noted that changes to tenure mix and infrastructure contributions were sought – these proposing 100% affordable housing and no infrastructure contributions. However, the Inspector considered these matters were beyond the scope of the reserved matters of appearance, landscaping, layout and scale, and did not accept the submitted tenure plan as part of the appeal.
- 2.22 It was concluded that while the site would be urbanised, the public open space (POS) and road layout would preserve visual and physical connection between the edge of the conservation area and the village’s countryside ‘frame’. The POS would also retain some transition between the conservation area and countryside. In combination with the retained hedgerow boundary and the proposed landscaped buffer along the eastern edge, it was felt it would soften the interface between the development and the countryside beyond. It was also observed that supporting text to Policy 2 of the emerging modified version of the Castlethorpe Neighbourhood Plan (NP) meant a full replication of built form and detailing of Paddock Close was not a requirement. The proposal was held to preserve the setting and thus significance of the conservation area, resulting in no harm to its character or appearance.
- 2.23 The Inspector also dismissed, relatively succinctly, the matters relating to the living conditions of neighbouring occupiers. It was noted that the POS would retain a semi-naturalistic character and would not be a large formal park with play equipment on it. It would also be open to natural surveillance. Therefore, it was considered that the POS would be a ‘low key’ green space which would not be likely to attract use resulting excessive noise and disturbance. With adequate separation to adjacent houses on Maltings Field, the Inspector concluded that there would not likely be harm to the living conditions of neighbouring occupiers in respect of noise, disturbance and privacy.
- 2.24 The appeal was allowed, but the matter of tenure mix remains for the developer to resolve. If they wish to proceed with a 100% affordable scheme and stand down

planning obligations, a further, fully evidenced approach to vary the terms of the s106 agreement will be necessary.

#### Costs

- 2.25 An application for costs was made, centring on the claim that the Council (a) made inaccurate assertions about the proposal's impact which were not supported by objective analysis or evidence; and (b) did not engage with their submissions in respect of affordable housing and its viability implications, and a related set of revised plans provided at the appeal stage.
- 2.26 The Inspector dismissed the application, noting evidence of a rationale for the Council's position on the degree of integration with surrounding land, and the impact on character and appearance. The same was found to be the case regarding the impact of public open space on neighbouring living conditions. It was held that the Council was entitled to reach its planning judgement on these matters. On the second point, as set out above, tenure mix was beyond the scope of the reserved matters and thus it was not unreasonable for the Council to not engage on this topic.

20/00938/FUL (Appeal ref. APP/Y0435/W/20/3260556)

Erection of a two-storey detached dwelling with under croft voids and car port with the extension to the existing access track and associated works at The Paddocks, Lakes Lane, Newport Pagnell

The appeal was considered through written representations and **Dismissed** 28<sup>th</sup> January 2021

- 2.27 The application was determined by the Development Control Committee in July 2020, following the officer's recommendation to (a) refuse as a matter of principle, the site being in open countryside as defined in Plan:MK; (b) that the site was not sequentially preferable in flood risk terms (it did not pass the Sequential Test); and (c) that it had not been demonstrated that the development would not increase flood risk elsewhere. The Inspector agreed these were the main foci of the appeal.
- 2.28 The site formed part of a wider paddock which was subject to an extant outline permission. However, the red line defining the two sites differed. The appellant failed to make the argument that the extant permission could form the basis of securing the principle of development for this proposed dwelling. This was even when accepting of the strong likelihood that the extant permission would be built out.
- 2.29 The Inspector commented:

*“Outline planning permission (the extant permission) was granted by the Council in June 2017 for a dwelling upon an area of land that forms part of the appeal site [...] However, the proposal that is before me relates to a dwelling of larger size. It is also a site of different and noticeably larger extent, made up (in part) of land set further away from both Lakes Lane and Newport Pagnell's main built-up area. On this basis the proposed dwelling, when compared to that consented under the extant permission, would sit less agreeably in its open countryside surroundings. Indeed, even if a mechanism could be formulated to provide assurance that the extant*

*permission would not be implemented in the event the appeal be successful, the permission does not represent a comparable 'fallback' position and does not establish the principle for the proposed development in this location".*

2.30 Clearly, the Inspector also considered the difference in design of the two dwellings and their relative effects on the countryside in reaching this decision; but importantly the decision confirms that the existence of an extant permission does not establish the principle of further development in such a location. The Inspector confirmed conflict with the strategy of both Plan:MK and the NP.

2.31 As the site was in Flood Zone 3, it was contended that the application needed to be subjected to the Sequential Test. The appellant argued that the Sequential Test did not need to be applied in this instance as the site was within an area that was 'protected' by virtue of the flood defences at Kickles Lodge. The theory was that these defences reduce the flood risk to that which is equivalent to Flood Zone 1.

2.32 Reliance was placed on a previous application and appeal at 6-10 Caldecote Street, Newport Pagnell (ref. 19/00672/FUL) that flood defences do not remove the need to apply the Sequential Test. The Inspector agreed, noting:

*"...as set out in the Planning Practice Guidance (the Guidance), Flood Zones refer to the probability of river and sea flooding ignoring the presence of defences. The Sequential Test is applied on this basis. Indeed, as set out by the Council, the permanence and ongoing maintenance of flood defences falling outside of the appellant's control cannot necessarily be guaranteed. This is even where the defences in question fall under the control of a competent public body".*

2.33 Again, the Inspector considered the claimed fallback of the extant permission. However, this was explicitly discounted. The decision states that, *"for the avoidance of doubt, the extant permission has little relevance in the context of the sequential approach to site selection"*. The Inspector noted that no comprehensive assessment of the potential suitability and availability of alternative sequentially preferable sites had been carried out.

2.34 The Inspector's comments reassert the need for a 'defences off' approach when it comes to assessing the principle of development relative to flood risk. The defences at Kickles Lodge also cover a large swathe of land within the settlement boundary of Newport Pagnell, so it will remain necessary to apply the Sequential Test to new residential development in that area. It also confirms the need to approach the Sequential Test 'afresh' for each new application.

15/02337/OUT, 18/01304/REM, 19/01357/REM and 19/02988/CLUP  
Land north and west of Wavendon Business Park, Ortensia Drive, Milton Keynes (The Stables)

2.35 Members will recall the reporting of the outcome to two appeals relating to the above site. The first appeal related to the removal of a Deed of Easement condition, attached by the Committee to the reserved matters approval. This appeal was allowed and a full award of costs was given. This was reported to the Committee in the 6<sup>th</sup> August appeal update.

- 2.36 The second appeal related to a Lawful Development Certificate (LDC) refused by the Committee in January 2020. The appeal was allowed in August 2020, and this outcome was reported to Committee in the appeal update on 5<sup>th</sup> November 2020. Again, a full award of costs was given.
- 2.37 The developer has recently submitted its claim for both costs awards. Whilst these are presently being reviewed in detail by legal officers, the claim sought is £183,572.50 .
- 2.38 The appeals themselves reassert the need to have full regard to the tests for imposing conditions, as set out in the NPPF, as well as consider the stage at which they should be imposed. Conditions which go to the heart of the development to be permitted must be attached at the full or outline stage (when the principle of development is to be established).

### **3.0 APPEAL CASEWORK**

- 3.1 The Planning Service is currently dealing with the following appeals of note or awaiting decisions from the Inspectorate.

19/00124/FUL: 42 Portland Drive

This is a linked planning and enforcement appeal, arising from the refusal of permission by the Committee in July 2019 and associated EN relating to the development. The public inquiry was held in January 2021 and a decision is awaited.

19/02771/FULMMA: 1 Yeomans Drive (Blakelands)

Permission was sought for the variation of the conditions 1 (Approved Plans), 12 (HGV Operating Hours) and 19 (External Lighting) of planning permission ref. 18/02341/FUL. This was refused under delegated powers in January 2020. At the time of writing, a hearing (to be held virtually) is scheduled for the 23<sup>rd</sup> March 2021.

15/00619/FUL: South West Milton Keynes (Salden Chase)

The application was refused by the Committee in November 2019, contrary to officer recommendation, and the appeal is scheduled to be heard at public inquiry (held virtually), which is now due to open on 11<sup>th</sup> May 2021 and set to last for up to 8 days. The appellant has provided several updates to its evidence since the appeal was lodged, with an updated Transport Assessment in May 2020 and a Technical Note and addendum in January 2021. The appellant has now confirmed that this would be the information that would be relied upon at the Inquiry and that no further updates would be provided.

20/01834/FUL: Land adjacent to Main Road and Cranfield Road, Astwood

Permission was sought for the erection of 5 dwellings. The DCP refused permission contrary to officer recommendation in February 2021, citing conflict with the emerging Neighbourhood Plan as the main reason. At the time of writing, the appeal has been lodged but no start letter has been issued by the Inspectorate.

20/00678/FULMMA: Bletchley Landfill Site, Guernsey Road, Bletchley

Permission was sought for the variation of conditions 2 (operational life), 3 (restoration sequence) and 5 (final restoration of the site) attached to planning permission

MK/806/95 so to extend the operational life of the site by 15 years with final restoration of the whole site to be completed within a further 24 months. Permission was refused by the Committee, in line with officer recommendation, in September 2020. The appellant has put the Council on notice of their intent to lodge an appeal, requesting it proceed by inquiry. It has been suggested such an inquiry would last 10 days. At the time of writing, the appeal has not been lodged – it must be lodged by close of play on 24<sup>th</sup> March.

#### 4.0 APPEAL PERFORMANCE

- 4.1 At the time of writing, 49 appeals have been determined since April 2020, with one withdrawn before a decision could be made (see **Table 1**). Of those determined under delegated powers, 73% have been dismissed in full or in part, broadly in line with the national average which shows that 26% of appeals are allowed.
- 4.2 Committee or Panel decisions led to 5 appeals. Adding these to the above figures results in a reduction in dismissed appeals to 67%. Within these 5 decisions, four were allowed, of which two were contrary to officer recommendation. However, one decision contrary to the recommendation was dismissed.
- 4.3 Overall, appeal performance is below the English average of 26%, based on data from quarter 3 of 2020. Since the beginning of 2021, however, just one appeal has been allowed out of 11 decided.
- 4.4 The overall number of appeals received represents just 1.8% (approx.) of all applications determined in the same period, demonstrating that decision making is generally robust and based on well considered reports.

	Dismissed	Split	Allowed	Withdrawn	Total
Delegated	31	1	12	1	45
DCC decision following recommendation	0	0	0	0	0
DCP decision following recommendation	0	0	2	0	2
DCC decision contrary to recommendation	1	0	2	0	3
DCP decision contrary to recommendation	0	0	0	0	0
Appeal against non-determination	0	0	0	0	0
<b>Total</b>	<b>32</b>	<b>1</b>	<b>16</b>	<b>1</b>	<b>50</b>
<b>Percent</b>	<b>64%</b>	<b>2%</b>	<b>32%</b>	<b>2%</b>	<b>100%</b>

**Table 1:** appeals decided since 1<sup>st</sup> April 2020