

PLANNING & LICENSING COMMITTEE

24TH MAY 2022

ADDENDUM REPORT

Report no.	Item no.	Application no.	Applicant	Parish
98/2022	1	2021/0265/FUL	MR SHAUN ALEXANDER	BELMESTHORPE

The applicant has provided a letter from Alltech confirming that Mr Alexander takes away 5 tons per week of product which is waste from them flushing out the dry blending machines. Alltech have confirmed that they intend to continue this arrangement indefinitely. In addition Mr Alexander has also provided additional invoices to show financial earnings from other enterprises including works contracting at Alltech, and animal feed sales over and above what they use in their beef animal and sheep rearing operations, all based at Green Lane Farm. These together generate a further £60,000 per annum.

Officers have discussed this additional income with the Council's Agricultural Consultant who has advised that in his professional opinion this additional income should not be taken into account when assessing the viability of the business. The arrangement with Alltech is one specific to the applicant, if for any reason someone else was to take over the farming enterprise it is unlikely that they would benefit from the same arrangements, this would then bring into question the viability of the farming enterprise and its ability to support a dwelling of the size proposed.

Recommendation:

That the application is refused for the reasons set out in the report but that the applicant is advised that a smaller dwelling may be more acceptable as this could be sustained by the income from the farming business.

Report no.	Item no.	Application no.	Applicant	Parish
98/2022	2	2021/1263/OUT	MULLER PROPERTY GROUP	WHISSENDINE

Additional Comment Received:

One additional letter of comment has been received. The key points are summarised as follows:

- Highway Safety as the village is at gridlock at school drop off and pick-up times
- How will mud on the road be managed
- Blind bend and increase in traffic further risk
- Concerns about flood risk and flood water disposal
- Lack of a GP surgery and NHS dentist

The applicant has also submitted a letter and legal advice in support of the application (see attached)

Officer Recommendation

That the application be deferred to the Chairman for approval subject to the submission of an additional bio diversity assessment, the completion of a S106 agreement and the conditions in the main agenda subject to the suggested change to condition 22 below.

It is also recommended that condition 22 be amended to state

22. Prior to first occupation of any dwelling, vehicle to vehicle visibility splays of 2.4m x 25m at internal junctions, vehicle to pedestrian visibility splays of 2m x 2m at all vehicle accesses and forward visibility splays of 25m shall be provided on site and shown on the plans to be submitted at the Reserved Matters stage.
Reason – In the interest of highway safety.

MÜLLER

Our ref: CRM/DNF/16906
19 May 2022

Mr Justin Johnson
Development Manager
Rutland County Council
Catmose
Oakham
LE15 6HP

Dear Mr Johnson,

RE: TOWN AND COUNTRY PLANNING ACT 1990
PLANNING AND COMPULSORY PURCHASE ACT 2004
LOCALISM ACT 2011
LAND TO THE SOUTH OF STAPLEFORD ROAD, WHISSENDINE
PLANNING APPLICATION REF: 2021/1263/OUT

I am writing to you in respect of the above matter with the intention of trying to bring to a swift conclusion the current negotiations between my company and your Council.

In this regard I understand that you are taking the above application to Planning Committee on 24 May 2022; I have seen the report prepared by your colleagues and yourself and am grateful for the work you have put in to the matter and also for your advice to members regarding the overall case and the desirability of avoiding a lengthy and costly appeal process as per paragraph 54 of your report to members.

I can only endorse your advice; in order to assist your preparation for the Committee I have commissioned a legal Opinion from Mr John Barrett who I am sure you will be aware is a highly respected senior barrister with considerable experience in planning matters. I have attached a copy of his Opinion and you will see that this provides a very thorough and detailed analysis of the case, including your recently submitted Statement of Case in respect of the current appeal.

What I believe is very clear to all concerned is that the Council's decision to withdraw its draft Local Plan has had a material and significant bearing upon the Council's original position whereby a 5 year housing land supply can no longer be demonstrated and the titled balance has been triggered. It is also apparent from a review of your Council's Statement of Case that other aspects of the appeal set out in the original reason for refusal are all capable of being dealt with by detailed design matters or mitigation strategies such that there is no longer any impediment to the grant of planning permission.

It is also noteworthy that the Council's original assessment of the development potential of this site, through the Local Plan process, found no fundamental reason not
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to allow development across the entirety of the application site. I would stress that my company has applied for an Outline Planning Permission and we fully expect to engage with you and your colleagues on the detailed design of the layout at the Reserved Matters stage at which time appropriate designs can be discussed and agreed in respect of the layout, house types, detailed drainage solution and biodiversity mitigation.

In this context it is clear that we have reached the position whereby there is no reasonable objection to the release of this land for housing development and that if the Council continues to resist development on the site this is clearly going to constitute unreasonable behaviour and simply push all parties further down the appeal route with both parties having to incur significant fees. If planning permission is refused on Tuesday, I will instruct my consultants to lodge an appeal against that refusal and to seek its cojoining with the current appeal. I am afraid to say that I will have no option but to seek costs for pursuing the appeals. I am sure this is a matter which you would wish to avoid as well as wishing to avoid your own costs in instructing Counsel and consultants to advise you.

The alternative is that planning permission secured in the very near future and that members resolution to grant planning permission on Tuesday evening allowing us to deal with the finalisation of the Section 106 Agreement regarding affordable housing and that we also address your desire to receive a Biodiversity Net Gain report, which I am fully committed to and providing for you. This will enable us to proceed to resolve the current planning application and, upon receipt of the decision notice, and the passing of the 6 week judicial review period, I will be able to instruct my consultants to withdraw the current appeal.

I can confirm that if the Council does resolve to grant planning permission on Tuesday evening I would not pursue costs in respect of the current appeal. Should the Council choose to do otherwise, however, I will have no option but to pursue costs in respect of both the current appeal but also any further appeal which is made following the refusal of planning permission on Tuesday.

I hope you have found this letter of assistance in understanding my company's position and that you also understand that I would very much prefer to work constructively with you and your colleagues over the next couple of months to resolve matters so that the site can be brought forward for development, providing much needed market and affordable housing in Rutland County.

Perhaps you would be kind enough to acknowledge receipt of this email and the attachments; I would be very happy to discuss matters over the telephone with you if you feel this would be of assistance.

Yours sincerely

COLIN MÜLLER
MÜLLER PROPERTY GROUP

MÜLLER

TOWN AND COUNTRY PLANNING ACT 1990

LAND AT STAPLEFORD ROAD, WHISSENDINE, OAKHAM, RUTLAND

APPLICATION AND APPEAL BY MULLER PROPERTY GROUP

OPINION

Introduction

1. I am instructed by Muller Property Group to advise in respect of development proposals in respect of land at Stapleford Road, Whissendine and in particular the prospects of succeeding in a securing an award of costs in the event that the current appeal is to be determined by the Planning Inspectorate.

Background

2. The subject matter of the appeal relates to a proposal for outline planning permission for the development of up to 66 dwellings, public open space and associated infrastructure. All matters are reserved for subsequent approval save for access.
3. The Refusal Decision Notice is dated 14th July 2021. The single Reason for Refusal had a number of separate components:
 - (a) The development site was outside the Plan Limits to Development for Whissendine and, in policy terms, was regarded as open countryside. It added that in respect of the affordable houses proposed there was “no overriding need” for them in the settlement.

- (b) An asserted failure to demonstrate that “up to 66 dwellings” can be accommodated on the site having regard to appropriate densities, open design principles, ecology and highway safety. It was asserted that the development would potentially result in a cramped form of development that would be detrimental to the character of the edge of the village, lack adequate open space, be harmful to biodiversity and potentially result in parking and access difficulties.
 - (c) A failure to demonstrate that the surface water from the site can be drained satisfactorily to prevent additional flooding issues in the village.
 - (d) The scheme would result in a net loss of biodiversity.
4. Following the issuing of the Decision Notice, the LPA decided to formally withdraw the emerging Local Plan that had been submitted for examination. This decision has fundamental consequences for both the determination of the appeal and the determination of the current planning application which is to be imminently presented to the LPA Planning Committee.
- (a) **Settlement Boundary Issue**
5. It is accepted that in policy terms the site for the proposed development is within the “countryside” because it is beyond the current settlement boundary for Whissendine.
6. In the emerging Local Plan that was withdrawn, a substantial part of the site was identified as being suitable for development in that it was proposed to allocate 1.03 ha for residential development to accommodate some 25 dwellings. Whilst no weight can be given to the policies of a withdrawn Local Plan or emerging Local Plan, the evidence base and the judgments made by the LPA in proposing to allocate such land will be relevant. It must be the case that the LPA considered, at the very least, a significant portion of the site to be suitable, in principle, for residential development.
7. Indeed, interrogation of the evidence base of the emerging Local Plan by reference to the Site Allocations Assessment in December 2019 considered the total site and recognised it as being suitable for allocation for residential use. Whilst only the smaller 1.03 ha site was proposed to be allocated no explanation or justification for the rejection of the larger site was put forward.

It is certainly the case that no land use reasons were advanced to establish the LPA's consideration that development was unacceptable.

8. Importantly, the LPA is unable to demonstrate a 5 year supply of developable housing land. The LPA has insufficient previously developed land to accommodate the housing requirement with the consequence that greenfield sites are inevitably required. In the absence of an adopted or advanced development plan there is little to nothing that the LPA can point to in terms of a policy basis for rejecting the principle of development. The inability to demonstrate the 5 YHLS engages Paragraph 11(d) of NPPF and the "tilted balance" in favour of the grant of planning permission.
9. The Council's case in its Statement of Case in respect of the appeal is that it is able to demonstrate a 3.4 YS. This is challenged by the Appellant. Appendix B of the Addendum Statement of Case is a detailed assessment of land supply that concludes the LPA can only demonstrate a 2.68 YS. I note that the Council's own Statement of Case does not directly challenge any of the analysis and conclusions set out in the Appellant's case. The greater shortfall adds weight to the benefit of providing more housing.
10. Nevertheless, the LPA is clearly acknowledging that there is a significant shortfall even on its own case. It is on this basis that the LPA has acknowledged that the first element of the refusal (concerning the countryside and settlement boundary issue) has "fallen away and is not contested." Similarly, the further point relating to an absence of the need for the level of affordable housing in Whissendine clearly references the obligation that will be required to secure a contribution of 30% affordable units. I detect no criticism of the quantum of affordable housing to be provided.
11. The upshot is that there is a clear and obvious benefit in relation to the provision of further market and affordable housing in circumstances where the LPA cannot demonstrate a 5 YHLS. This would be consistent with numerous Secretary of State and Inspector decisions.
12. This is a matter which would be given significant weight in the determination of the appeal.

(b) Overdevelopment Assertion

13. As is pointed out in the Addendum Statement of Case on behalf of the Appellant¹, the RfR does not explain what harm is considered to arise from the density of the appeal scheme even upon the assumption that 66 units would be produced.
14. The first matter to observe is that the application is in outline and save for access all matters are reserved for subsequent determination. The development proposal is not for a specific number. It is for “up to 66 dwellings”. There would remain at reserved matters stage the clear prospect of rejection of any scheme that produced unacceptable harm in terms of amenity or impact on character and appearance.
15. The approach adopted is consistent with Paragraph 199 of NPPF whereby the national policy promotes: “effective use of land in meeting the need for homes and other uses.” this is clearly an exhortation to maximise the use of land consistent with sound design principles.
16. More specifically, in the emerging Local Plan an indication of an appropriate level of density was provided. As noted earlier, a proposed allocation for 25 units on 1.03 ha was proposed. This produces a gross density of 24.7 units per hectare. The maximum density of the appeal scheme is 19.07 units per ha and 35 dwellings per ha on a net basis. The net figure allows for retention of onsite vegetation, the provision of green infrastructure, sustainable urban drainage features and children’s play space. The proposal it is said by the LPA would have an unacceptable impact on the character of the settlement and it is to be noted that the LPA case does not set out how the character would be harmed. The analysis in the Addendum SoC demonstrates that the density of development when compared to existing developments in the settlement fares very well so that it can be concluded that the scheme is of an appropriate size and quantum compatible with the appearance and character of the settlement.
17. In short, there is no reason to consider that a development of up to 66 houses could not be accommodated on the appeal site and that would also involve retention of principal planting, landscape features, the accommodation of green infrastructure and public open space.
18. It should be noted that the LPA and the professional Officers have not put forward a case demonstrating that “up to 66 dwellings” could not be appropriately achieved and by an appropriate design could not be secured on this outline application.

¹ Paragraph 5.2.

19. In terms of highways, there is no objection to the proposed means of access from the County Highway Officer. Appendix F to the Addendum Statement of Case is a Technical Note dealing with highways, transportation and access issues. It demonstrates that the density of development as proposed is appropriate on plot parking to be provided.
20. The Masterplan that accompanied the outline planning application identified areas of formal and informal open space that can be used for casual walking and children's play. Its sustainable urban drainage features will be included within the overall green infrastructure provision that include the retention of existing boundary hedgerows and the small copse at the centre of the site. Green infrastructure elements of the appeal scheme are in the order of 34% of the site area. The Council's policy on open space provision would require some 0.448 ha, whereas the appeal proposal intends to provide some 1.18 ha. This is considerably in excess of the policy requirement.

(c) Surface Water Drainage

21. Whilst the LPA RfR reference surface water drainage as an issue, this was not a matter pursued by the Council Officer in the letter to PINS. The Council's own Statement of Case acknowledges that the concern can be addressed by way of condition. Appendix G to the Addendum Statement of Case produces a Technical Note that demonstrates an acceptable surface water drainage strategy can be produced which would not cause any off-site surface water drainage issues and would, as a matter of fact, produce a modest degree of betterment over the existing state.

(d) Biodiversity Net Gain

22. The appeal scheme is an outline, so a detailed biodiversity assessment can only be made at a Reserved Matters stage when all the details of the layout, landscape, planting and green infrastructure has been identified and can be assessed.
23. Appendix H to the Addendum Statement of Case is a Technical Note that assesses the site and concludes that an appropriate mitigation strategy can be formulated that can be brought forward at the Reserved Matters stage. This is a matter capable of being controlled by a

planning condition. It is also noted in the Addendum SoC² that this is the approach adopted by the LPA on another site at Ketton.

Planning Application

24. The Appellant submitted a further application following the refusal set out above.
25. The planning application is to be considered at the LPA's Planning Committee on 24th May 2022.
26. In short, the recommendation of the professional Officers in respect of the duplicate application is that planning permission ought to be granted subject to a number of conditions and the completion of a Section 106 planning obligation to deliver affordable housing and open space (together with maintenance). Specifically, the Officers' assessment as expressed in the Executive Summary is:

"The scheme is therefore sustainable development and should be approved in accordance with Paragraph 11(d) of the NPPF."

27. The Report specifically acknowledges that the RfR in relation to the settlement boundary issue is "no longer relevant and the principle of development here is acceptable"³.
28. In respect of the other issues, the Officer's Report further acknowledges:
 - The impact of development on landscape is not a valid reason or refusal in principle referencing the 2017 Landscape Study and the evidential base for that conclusion;
 - The impact on neighbouring properties would be "very limited" as all new dwellings would be located well away from existing dwellings⁴;
 - The Conservation Officer has raised no concerns in respect of heritage issues. The Officer's Report references the Conservation Officer's assessment that the development will not have any significant impact on locally Listed Buildings. The

² Paragraph 7.4.

³ Paragraph 13.

⁴ Paragraph 21.

concerns in relation to ridge and furrow are acknowledged to have been considered in the previous application and are not a matter the subject of the RfR;

- The Report references that the Highway Authority has no objections in principle to the site being accessed as proposed. The conclusion in respect of this issue was that there was no reason to refuse planning permission on highway safety grounds⁵;
- The Report acknowledges that, subject to the imposition of conditions, there is no issue concerning surface water drainage.

29. Concerning Ecology, the LPA is proposing a condition in order to identify the baseline position to then inform the mitigation strategy at Reserved Matters. The conclusion at Paragraph 52 states:

“Whist [sic] there are remaining concerns about the open design solutions and the impact on ecology, or particularly the post-development position on biodiversity gain, it is not anticipated that these cannot be overcome.”

30. The conclusion goes on to recognise that approval of the application would potentially avert a lengthy and costly appeal process, but emphasises that such is not a reason for approving the scheme. Importantly, the consideration of the Officer was specifically to treat the application to be determined in May 2022 “on its merits”.

Advice sought in relation to Costs

31. As will be readily appreciated by those instructing me, an award of costs in a planning appeal can only be granted in circumstances where the party has acted unreasonably and that such unreasonable conduct has caused costs to be incurred by the party applying for such.

32. For the reasons I shall now develop, I consider that Muller Property Group would, in the event of the appeal proceeding, have a very strong case for an award of costs against the LPA.

33. The Planning Practice Guidance at Paragraph ID:16-049 sets out a non-exhaustive list of examples of behaviour that may give rise to a substantive award of costs against a LPA. This includes:

⁵ Paragraph 28.

- (a) Unreasonable behaviour with respect to the substance of the matter under appeal, for example by unreasonably defending appeals;
- (b) Preventing or delaying development which should clearly be permitted having regard to its accordance with the Development Plan, national policy and other material considerations;
- (c) Failure to produce evidence to substantiate each reason for refusal;
- (d) Vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective evidence;
- (e) Refusing planning permission on a planning ground capable of being dealt with by a condition;
- (f) Not reviewing their case promptly following the lodging of an appeal against refusal of planning permission as part of sensible on-going case management.

34. In my view, the above sub-paragraphs will be relevant to the circumstances of this case and in particular:

- (a) The inevitable consequence of the LPA withdrawing the emerging Local Plan rendered it unable to demonstrate a 5 YHLS. That has inevitably triggered the "tilted balance" in Paragraph 11(d) of NPPF. Ongoing case management should have indicated to the LPA that it was, after the withdrawal of the emerging Local Plan, unable to maintain its case in respect of the settlement boundary issue. This is a point acknowledged in the LPA Statement of Case and the Officer's Report referred to above.
- (b) The criticisms based on the proposal of "up to 66 dwellings". The LPA have not identified any evidence to substantiate what harm would be caused by such a proposal. The assertions that have been thus far made can be characterised as "vague, generalised or inaccurate assertions about a proposal's impact." As set out above, the Council's own assessment as part of its preparation of the emerging Local Plan had produced a density requirement not inconsistent with the proposal. A net density development of 35 dpa would be consistent with the existing character and examples

given in the evidence of the Addendum Statement of Case on behalf of the Appellants. Essentially it was for the LPA to demonstrate and produce evidence to substantiate this aspect of their case and they have demonstrably failed to do so.

(c) As is clear from the above, flooding is no longer an issue. This is a matter which was capable of being readily overcome by the imposition of a condition. Nevertheless, it is certainly the position that the continuation of an appeal based on surface water issues would be untenable in the circumstances. It should be noted that the LPA does not rely upon this aspect of the RfR at the appeal.

(d) In respect of biodiversity and in particular Biodiversity Net Gain, this is a matter that can be readily dealt with by a condition. This is an outline application. It has a number of dwellings that is not fixed. There is considerably greater land available for open space than requirements of local policy require. There is nothing, in principle, that would lead one to the conclusion that an appropriate BNG could not be achieved on this site. The ecological advisers to the LPA again have produced only generalised or vague assertions as to what the impact would be. In truth, as is recognised in the Addendum Statement of Case, this is a matter that can only be properly assessed and once the Reserved Matters application and the accompanying details have been provided upon which an informed assessment can be made. There is certainly nothing, in principle, as is recognised in the Officer's Report, to suggest that this is incapable of being achieved.

35. In view of the combination of contents of the Statement of Case (that offers little or in some instances no resistance to the Appellant's case) and the Officer's Report on the duplicate application that concludes planning permission should be granted the prospects of an award of costs in the event of an appeal would be very considerable. I have therefore concluded that the high threshold that an Appellant would have to demonstrate in order to secure an award of costs will be achieved in this particular case. I consider that the continuation of resistance to the appeal in such circumstances would be considered to be unreasonable conduct on the part of the LPA. The costs of the appeal would in such circumstances be likely to be awarded to the Appellant consistent with NPPG.

36. Procedurally, as those instructing me will be well aware, the application for costs needs to be notified to PINS prior to the opening of the hearing. It would be preferable that any application for costs is in writing and provided at the commencement of such hearing.

Conclusion

37. In conclusion, I advise as follows:

- (a) I have set out the various elements of the LPA case arising initially from the RfR and the subsequent SoC prepared for the planning appeal.
- (b) I have examined the Officer's Report concerning the determination of a duplicate application anticipated to be heard on 24th May 2022 by the LPA's Planning Committee.
- (c) In the event that the planning application is granted, there would be no utility in proceeding with any appeal. In those circumstances, the appeal, once the six week legal challenge period had expired, should be withdrawn to avoid incurring any further unnecessary costs.
- (d) In the event that the appeal nevertheless is required to proceed by reason of the refusal of the current application, it is my view that the Muller Property Group would enjoy very good prospects of succeeding in securing an award of costs against the LPA based on their unreasonable conduct.

38. If I can assist further please do not hesitate to contact me.

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JOHN BARRETT

18th May 2022