

SOUTH CALDECOTTE INQUIRY

CLOSING SUBMISSIONS ON BEHALF OF THE COUNCIL

References to Core Documents appear in the form [x]

Introduction

1. This appeal arises out of a decision taken by Milton Keynes Council (“MKC”) on 26th February 2020 to refuse planning permission for the following Proposal (“the Proposal”):

Outline application including access for the development of the site for employment uses, comprising of warehousing and distribution (Use Class B8) floorspace (including mezzanine floors) with ancillary B1a office space, general industrial (Use Class B2) floorspace (including mezzanine floors) with ancillary B1a office space, a small standalone office (Use Class B1) and small café (Use Class A3) to serve the development; car and HGV parking areas, with earthworks, drainage and attenuation features and other associated infrastructure, a new primary access off Brickhill Street, alterations to Brickhill Street and provision of Grid Road reserve to Brickhill Street with appearance, landscaping, layout and scale to be determined as reserved matters.

2. MKC’s refusal was based on a combination of the following matters:
 - (i) the impact of the Proposal on archaeological remains (and in particular those situated beneath an area of approximately 6.5% of the appeal site, known as Area 2);
 - (ii) the impact of the Proposal on biodiversity;
 - (iii) the highways impact of the Proposal;
 - (iv) the overall planning balance (including the objective of building a strong and competitive economy).

3. Highways issues were resolved as between MKC and the Appellant before the start of this remote planning Inquiry on 26th of August but matters of archaeology, ecology and planning remained in issue between the principal parties and to be considered and determined by the Inspector over the course of the 11 days during which the Inquiry was scheduled to take place.

4. Of the three remaining issues the one which has been of greatest concern to MKC, not just because of its significance but because of its unique and therefore irreplaceable nature, is the impact of the Proposal on the archaeological remains beneath Area 2 and the failure of the Appellant to even attempt to design the Proposal so as to avoid such harm, contrary to MKC's Policy SD14 contained within its Plan:MK 2016-2013 [E1] which provides in its material parts as follows:

"Policy SD14

STRATEGIC EMPLOYMENT ALLOCATION, LAND SOUTH OF MILTON KEYNES, SOUTH CALDECOTTE

Land south of Milton Keynes in South Caldecotte, as shown on the Key Diagram and Policies Map, is allocated for the development of a mix of Class B2 and B8 employment floorspace within the plan period.

A comprehensive Development Framework for the site will be prepared and the development will be brought forward in line with all relevant policies in Plan:MK, particularly Policy SD1, SD9, SD10 and INF1 prior to planning applications being approved.

The development must accord with the following principles:

...

9. A desktop Archaeological Assessment should be undertaken to understand the likely presence of archaeological remains within the site. The recommendations of the Assessment will be implemented prior to each phase of development commencing. It may be necessary to undertake a field investigation to understand the archaeological potential and significance of this site and to inform the layout of development."

5. MKC's concerns about damage to Area 2's archaeological remains and the Appellant's failure to redesign its scheme to take account of this relatively small part of the appeal site has been clear since at least August of last year.
6. On August 31st 2019 Mr Crank, in his consultation response on the Proposal [J4] stated, so far as presently material at page 4 of 5, as follows:

“Justification for loss of Heritage Assets / Proposed Mitigation

...

The application contains no clear justification for the loss of heritage assets and fails to explain why the more significant areas of buried archaeological remains (in particular the Roman street and adjacent areas of Roman urban settlement) may not be protected and retained within the development layout. Contrary to Plan:MK Policy SD14 (9) the archaeological constraints have not informed the layout of the development. It is also unclear how the proposal has taken into account Plan:MK Policy SD14 (6) in relation to proposed building heights and the impact on the setting of the SAM.

The lack of a clear and convincing assessment of the significance of the affected heritage assets (in particular the uncertainty regarding the status of archaeological remains associated with the Roman town of Magiovinium) coupled with the lack of any justification for the loss of these remains or attempt to minimise or avoid harm (e.g. through a revised layout) makes it difficult to support this proposal in its current form.”

7. On 7th January, 2020 Mr Crank, in his consultation response on the Proposal [J5] stated, so far as presently material at pages 5 & 6 of 9, as follows

“Justification for loss of Heritage Assets / Proposed Mitigation / Reasonable Alternatives

The application fails to explain why the more significant areas of buried archaeological remains (specifically the Roman street and adjacent areas of Roman urban occupation) may not be protected and retained within an amended development layout. Contrary to Plan:MK Policies SD14 (9) & SD9 the archaeological constraints have not informed the layout of the development.

The area of most significant archaeology, namely the Roman street and adjacent areas of Roman urban settlement within 'Unwins' land at c.4ha comprises at most 7% of the allocated site area, yet the examination of options for preservation in situ in the SHA (4.36) rules out this option on the basis that all the archaeological assets within the site (including those of least significance) comprise 20% of the allocated site. The option of just preserving the area of most significant archaeology is not considered."

8. On 21st January, 2020 Mr Crank, in his consultation response on the Proposal [J43] stated so far as presently material at page 5 of 9, as follows

"Justification for loss of Heritage Assets / Proposed Mitigation / Reasonable Alternatives

The application fails to explain why the more significant areas of buried archaeological remains (specifically the Roman street and adjacent areas of Roman urban occupation) may not be protected and retained within an amended development layout. Contrary to Plan:MK Policies SD14 (9) & SD9 the archaeological constraints have not informed the layout of the development. The lack of consideration of alternative approaches to the development that would avoid and mitigate harm to the heritage assets is also contrary to Plan:MK Policy HE1 (F).

The area of most significant archaeology, namely the Roman street and adjacent areas of Roman urban settlement within 'Unwins' land at c.4ha comprises at most 7% of the allocated site area, yet the examination of options for preservation in situ in the SHA (4.36) rules out this option on the basis that all the archaeological assets within the site (including those of least significance) comprise 20% of the allocated site. The option of just preserving the area of most significant archaeology is not considered."

9. MKC has therefore been raising with the Appellant its failure to attempt a redesign of the Proposal in such a way which would avoid harm to Area 2's archaeological remains since at least last summer. Though not relevant to any matter before you, Sir, MKC does not accept that only upon exchange of evidence could or should the Appellant have been aware of this.
10. As a matter of fact these repeated concerns were not addressed by the Appellant, whether in discussions, correspondence, its Statement of Case or proofs of evidence,

until the commencement of the Inquiry when in the course of its Opening Submissions [ID1], the Appellant stated (at paragraphs 13 and 14) as follows:

- “13. *In short, these remains are non-designated heritage assets which are unprotected by any formal designation and therefore fall to be weighed in the intermediate balance of §197 of NPPF. To that end NC makes the superficially attractive point that Area 2 demarked in Orange on his appendix 1 comprises a mere 6.5% of the site area – and therefore why can't it simply be excluded from the developable area, especially when what is being proposed is in excess of the minimum 195,000m². Whilst Mr Crank may not have followed the import of CDA.38 (especially paragraphs 4.41 to 4.69 & 4.76) the import is clear and obvious (and indeed is repeated in the Addendum ES 5.3.4 to 5.3.10), merely excluding the orange area from the developable area would be insufficient. The location of the orange area is such that it effectively constrains the siting of large industrial units (as proposed by the allocation) on a much wider area of the site. Further, in order to redevelop the remainder of the site there is a need to substantially alter the topography and alter the hydrology of the site. Indeed to ensure that the hydrology of the remains were unaltered would mean leaving a large part of the southern part of the site undeveloped; which would result in literally no prospect of achieving anything approaching 195,000m² of large scale employment generating development on the SD14 site.*
14. *The consequences of excluding the orange land from the developable area will leave the Roman remains at significant threat from dewatering; and the removal of that threat would seriously undermine the ability of SD14 to deliver anything approaching the policy minimum square meterage.”*
11. Again, it is not a matter for you, Sir, but for completeness, MKC does not accept that the paragraphs to which the Appellant here refers (or for that matter the expert hydrological report prepared on behalf of the Appellant by BWB Consultants and received the day before the start of this Inquiry or indeed any other material) provide any form of proper answer to the questions MKC, through Mr Crank, has been posing since at least last summer or to the requirements of Policy SD14(9).

The Appellant's Revised Scheme

12. On Tuesday 1st September (i.e. Day 5 of this Inquiry), following the respective parties' archaeological evidence (and no doubt at least in part because of how that evidence had gone) the Appellant provided MKC with an alternative proposal which would leave Area 2 as well as some of the area of Priority Habitat informing the ecology reason for refusal undeveloped. At the same time the Appellant offered to secure the protection of archaeological remains and of biodiversity by means of appropriate conditions and/or relevant terms of a section 106 agreement.

13. In the course of the following morning, having satisfied itself that the revised scheme (together with appropriate conditions and/or s106 provisions) ("the Revised Scheme")
 - (i) addressed the reasons for which planning permission had been refused;
 - (ii) reduced (even to the point of complete removal) rather than added to the range of possible legitimate objections to the Proposal and therefore met the test for an amendment to a scheme without the need for further consultation according to the case of *Bernard Wheatcroft Ltd v SSE* [JPL, 1982, P37];
 - (iii) reduced the scope of likely significant environmental effects so that further consultation was not necessary in EIA terms;

MKC accepted that its reasons for refusal no longer applied and that the Revised Scheme did not give rise to any other reasons for refusal.

14. Consequently MKC also accepted that it would not be reasonable (or therefore lawful in public law terms) in the changed circumstances of the Revised Scheme to contest the Appellant's new case and confirmed that it would not therefore do so.

Matters in Dispute

15. Following the Appellant’s submission of the Revised Scheme, only two matters now remain in dispute, both relating to provisions of the draft section 106 Agreement and the principal parties have agreed that the Inspector should determine these two matters.

Biodiversity Offsetting

16. The first relates to the Biodiversity Offsetting Contribution to be made by the Appellant. This is defined within the Definitions and Clauses Section of Schedule 1 (Biodiversity Offsetting) (page 12 of 29 of **[ID6]**):

“Biodiversity Offsetting Contribution”

Means the estimated sum of One Million Two Hundred Thousand (£1,200,000) exclusive of VAT (if applicable) Index Linked or the sum of One Million Three Hundred and Seventy Thousand Pounds (£1,375,000) exclusive VAT (if applicable) Index Linked as determined by the Secretary of State or Inspector pursuant to his/her determination of the Appeal to be paid to the Council or Nominee by the Owners to be used toward the creation of new habitats to offset the loss of habitats on site in accordance with the Biodiversity Offsetting Scheme

17. The parties are therefore £175,000 apart in relation to the biodiversity offsetting contribution.
18. The following explanation for MKC’s position appears in the CIL Compliance Statement (at page 3 of 8 of **[ID8]**):

“Policy NE3 of Plan:MK requires development of this scale to be subject to the Defra metric or locally approved Biodiversity Impact Assessment Metric (BIAM) to demonstrate any loss or gain of biodiversity. The BIAM applied to this development calculated a required uplift of 166.07 biodiversity units, requiring a contribution of £1,680,000. A separate sum of £1,885,000 has been indicated as being necessary to provide a net uplift of 10% of biodiversity which MKC believe is an appropriate contribution. This would be in line with the government white paper environment bill. Also, PPG 024 Paragraph: 024 Reference ID: 8-024-20190721 Revision date: 21 07 2019 states in relation to Priority Habitats that habitat improvement will be a genuine additional benefit and go further than measures already required to implement a compensation strategy. This contribution will go towards enhancing biodiversity in other areas within the Borough.”

19. In essence the resolution of this issue depends on whether a 10% uplift is appropriate (as MKC contends) or whether a lesser figure is sufficient (as the Appellant contends).
20. Biodiversity is a critical natural capital asset and its rapid degradation has led to policymakers seeking solutions to restore biodiversity stocks. Biodiversity Net Gain (BNG) is a concept proposed in the 25 Year Environment Plan and mandated as a condition of the grant of planning permission in the 2019 Environment Bill. BNG requires a 10% increase in biodiversity after development, compared to the level of biodiversity prior to the development taking place.
21. The full paragraph of the NPPG here cited provides also that: “Biodiversity net gain complements and works with the biodiversity mitigation hierarchy set out in NPPF paragraph 175a. It does not override the protection for designated sites, protected or priority species and irreplaceable or priority habitats set out in the NPPF.”
22. Both the Environment Bill (which is emerging legislation) and the relevant parts of NPPG invoke BNG in respect of which a 10% net uplift applies. To the extent that it may be said that the Environment Bill is not yet enacted (which of course is correct) just as emerging policy is a material consideration in planning decisions so too is

emerging legislation, particularly where, as in this case, that legislation is highly likely to be on the statute books by the time the development being consent is built.

23. For these reasons MKC recommends to the Inspector the higher figure of £1,375,000.

Redway Contribution

24. The second matter which is not agreed as between the principal parties relates to the Appellant's contributions to MKC's network of cycle paths, or co-called Redways. This is defined within the Definitions and Clauses Section of Schedule 4 (Pedestrian and Cycle Contribution) (page 17 of 29 of [ID6]):

"Pedestrian and Cycle Improvement Contribution"

Means the contribution of seven hundred and fifteen thousand two hundred and fifty seven pounds (£715,257) [error – should be **£669,099**] Index Linked or sixty eight thousand three hundred and eighty four pounds (£68,384) Index Linked as determined by the Secretary of State or Inspector pursuant to his/her determination of the Appeal payable to the Council to be used towards the enhancement and expansion of the existing V10 Redway to a super route and/or new pedestrian and cycle improvements in the vicinity of the Land and which are necessary as a result of the Development.

25. The parties are therefore £600,715 apart in relation to Redway contribution.
26. The following explanation for MKC's position appears in the CIL Compliance Statement (at pages 4 & 5 of 8 of [ID8]):

Plan:MK policy CT3 'Walking and Cycling' states inter alia that the Council will support developments which enable people to access employment facilities by cycling and that the existing Redway should be improved and extended to the current Redway design standards

It is acknowledged that the development will be delivering [a] redway through the site and links outside of the site to connect into the existing redway network. However, this is not sufficient to mitigate the impact of the development and while the analysis of the proportion of cycle traffic on the surrounding key Redway routes generated by their development is useful, the conclusion is not accepted by MKC.

The proposed contribution to the wider Redway network will address widely acknowledged deficiencies with the current network including surface condition, underpass condition, lack of adequate wayfinding, poorly designed landscaping, missing and indirect Redway links, lack Redway priority at intersections with residential streets. The contribution would contribute to addressing these deficiencies, to a level proportionate of the future use of the Redways network by visitors to the development.

The contributions would assist in meeting the mode share aspirations of the Framework Travel Plan, which would be difficult to achieve with the existing deficiencies on the Redway network which will be used by visitors to the site.

The contribution would meet the CIL requirements of being necessary to meet the Travel Plan targets, directly relates to their submitted calculations showing use by projected visitors and is fairly related as it will be proportionate to the extent to which the Redways are used by their visitors.

The proposed contribution is as follows:

[See p17 Fig 4 of Framework Travel Plan CD A26 – see also Travel Plan 5.5 “The Interim Target of the FTP is to achieve a 10% reduction in single occupancy care travel for staff within five years following occupation”]

Contribution to the V10 [Brickhill Street, running alongside the Site] Super Routes works: V10 is approx. 8.32 km in length (excluding missing links) and the Super Route Upgrade costs have been calculated at £522,616.36

Bow Brickhill Crossing to H10 = 0.86km. Upgrade cost as a proportion of total $(0.86/8.32 \times 522,616.36) = £54,020$.

Development proportion based on usage 94.4%) = £50,995

H9-H8 (i.e. Groveway and Standing Way (e-w))= 1.11 km. Upgrade cost as a proportion of total $(1.11/8.32 \times 522,616.36) = £69,724$. Development proportion based on usage (33.8%) = £69,724 **[error – this figure should be £23,566]**

Missing Link costs (1,450m length) = [DfT Typical Costs of Cycling Interventions Analysis \(Jan 2017\)](#). Within this guidance the costings for a new cycle Super Highway are most applicable to those required for a new redway where there is no existing footway. This provides a cost range of £1.45m - £0.96m per KM. Using the lowest suggested rate of £0.96m the cost estimate equals £1.392m.

Development proportion based on usage (33.8%) = £470,496 [V10]

Contribution to the H10 Super Route works: Total cost estimate for H10 Super Route works = £283,847.95.

Development proportion based on usage (43.7%) = £124,042

Revised Suggested Total Contribution for off-site Super Route works= £715,257 [error – should be £669,099]

27. Evidence on the parties' respective figures and approaches was heard last Wednesday. The starting point is Table 8 of the Appellant's Framework Travel Plan **[A26]** which sets the ambition of 5% mode share travel by cycling by Year 4.
28. Because of Redway deficiencies this is unlikely to be achievable without sufficient investment in Redway improvement. The issues are quality and safety rather than capacity.
29. One of the key sections of the Redway network for which a contribution is sought is the V10 Super Route i.e. from Bow Brickhill Train Station northwards towards Newport Pagnall for approximately 8.32 km. The cost of necessary works to this part of MKC's Redway would be £522,616.36 in total but the contribution sought is only for the 3.5 km which is likely to be most heavily used by traffic to and from the Appeal Site.

30. A contribution is also sought for necessary works to the H10 Super Route.
31. The amount of contribution has been calculation by reference to the Appellant's own figures of total % usage which appear on its **[ID11]**.
32. The significant disparity in the parties' figures is due to a difference in approach. The Appellant has calculated its contribution by reference to a percentage of the theoretical capacity of relevant Redways. By contrast MKC relies on actual usage. MKC's real world approach (made all the more real by the welcome increase in cycling that MKC has observed in the course of the current pandemic) and resulting figures is recommended to the Inspector.

Hazard Alley Community Contribution

33. Whilst not a matter of disagreement between the principal parties, third parties have raised this morning whether this contribution meets the test at Regulation 122 of the CIL Regulations and suggest that this money would be better spent on the Community Centre at Bow Brickhill.
34. MKC, for the reasons given on page 8 of the CIL Compliance Statement **[ID8]**, considers that the contribution towards the Hazard Alley Safety Centre would be CIL compliant.
- ~~35. However MKC acknowledges that a contribution towards the Community Centre at Bow Brickhill would also meet the test at Regulation 122 of the CIL Regulations and therefore invites the Inspector to include an ability within the section 106 Agreement for the contribution to be spent on either facility or a combination of the two as MKC sees fit.~~

~~36. For the avoidance of doubt no additional sum is sought and it is therefore not anticipated that this change will illicit any objection on the part of the Appellant or otherwise.~~

Matters no longer in dispute

37. Matters no longer in dispute should be apparent from the summary of relevant facts contained above.

38. However, because of concerns expressed on Friday and this morning as to the nature and extent of involvement of the public in the process of agreement which has occurred during the course of this Inquiry it is right to explain and/or reemphasise the following points.

39. First, the decision to refuse permission **[D1]** was taken back in February of this year by MKC's Planning Committee on the basis of the scheme then before it. At that time there was no indication that an alternative scheme which addressed the reasons for refusal might be provided by the Appellant.

40. Second, in the course of the Inquiry an alternative layout was provided by the Appellant which addressed the reasons for refusal and had to be considered by officers. Given MKC's public law duty to review matters in the light of any relevant change in circumstances it was not open to MKC to decline to consider the amended scheme, no matter how regrettable one might consider the timing of the Revised Scheme.

41. Third, given that the Revised Scheme addressed the reasons for refusal (principally archaeology, but also given the overlap between Priority Habitat and the availability

of offsetting to compensate, ecology and therefore the overall planning balance too) having considered the amended scheme it was not lawfully open to MKC to reject it. It is noteworthy that no one, including third parties, had suggested otherwise. In other words, given the nature of the amended scheme, this was not a 'take it or leave it' offer. It was, if MKC was to act reasonably and therefore lawfully, a 'take it or take it' offer.

42. Fourth, whilst the decision to refuse permission was taken by the Planning Committee, the decision to accept an amended scheme was delegated to officers pursuant to the powers conferred on The Director of Growth, Economy and Culture and the Head of Planning or nominated officer to decide upon the conduct of a planning appeal (see Para 3(f) of MKC's Officer Scheme of Delegation for Development Management dated May 2019¹). Such delegated powers are found in most local planning authorities and enable the management of an appeal in real time without the delays which would result from reference back to planning committees.
43. Fifth, whilst it is regrettable that the Revised Scheme was received so late, MKC does not consider that it gives rise to the need for further consultation in either *Wheathcroft* or EIA terms.
44. Sixth, as a matter of fact the Revised Scheme, whilst late, has shortened the scheduled Inquiry and thereby reduced its overall costs.
45. Seventh, and most importantly, MKC does not consider that in the circumstances any prejudice or unfairness has resulted by the late submission of the Revised Scheme and/or by MKC's consequent withdrawal of its objection. The simple for this is that the Revised Scheme does not, as a matter of substance, introduce new or worse impacts than have been considered including through a full consultation

¹ [file:///C:/Users/rw/Downloads/Planning%20Scheme%20of%20Delegation%20May%202019%20\(2\).pdf](file:///C:/Users/rw/Downloads/Planning%20Scheme%20of%20Delegation%20May%202019%20(2).pdf)

process, as compared with the original scheme. MKC respectfully agrees with the comments of third parties made this morning as to the fairness of this Inquiry process.

Conclusion

46. MKC therefore withdraws its objection on the basis of the Revised Scheme, subject to appropriate conditions and section 106 terms including, so far as Redways and Biodiversity Offsetting are concerned, by adoption of MKC's position as set out above.

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