



Appeal Decision

Inquiry commenced on 17 October 2023 and closed on 10 September 2024

by Nick Fagan BSc (Hons), DipTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 December 2024

Appeal Ref: APP/Y0435/C/21/3289543

Former Brook End Nurseries site, Brook End, North Crawley,

Newport Pagnell, Buckinghamshire MK16 9HH

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr M Connors against an enforcement notice issued by Milton Keynes Council.
 - The notice was issued on 9 December 2021.
 - The breach of planning control as alleged in the notice is:
 - i) Without planning permission, the unauthorised change of use of the site for the stationing of mobile homes and caravans for human habitation;
 - ii) Without planning permission, the unauthorised operational development in the form of the laying of tarmac and hard surfaces within the site;
 - iii) Without planning permission, the erection of a close board fence and concrete posts to the southern boundary of the site that are over 1 metre in height and adjacent to the highway;
 - iv) Without planning permission, the removal of in excess of 45 metres (approximately) of hedgerow along the southern boundary of the site (between points A and B on the Plan);
 - v) Without planning permission, the installation of a septic tank and waste pipes to the eastern side of the site; and
 - vi) Without planning permission, the installation of wooden poles (approximately 1.5 metres in height) for the purposes of electrical lighting along the eastern boundary of the site (south to north).All in the approximate positions as indicated on the attached site plan ('the Site Plan').
 - The requirements of the notice are to:
 - a) Cease the use of the Land for the stationing of mobile homes and caravans and for human habitation;
 - b) Remove all the mobile homes and touring caravans from the Land;
 - c) Remove the tarmac and all other hard surfaces from the Land;
 - d) Remove the close boarded fence over 1 metre in height and concrete posts adjacent to the highway from the Land so that it measures no more than 1 metre in height;
 - e) Remove the septic tank and associated waste pipes from the Land;
 - f) Remove the wooden poles (approximately 1.5 metre in height) for the purposes of electrical lighting from the Land; and
 - g) Plant a native mixed species hedgerow between points A and B on the Plan, comprising 50% Hawthorn (*Crataegus monogyna*) and 50% made up of Blackthorn (*Prunus spinosa*), Field rose (*Rosa arvensis*), Field Maple (*Acer campestre*), Hazel (*Corylus avellana*) and Cherry plum (*Prunus cerasifera*) within the first available planting season (November to April) after complying with requirement (d) above.
 - The period for compliance with the requirements is three (3) months after the date the notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f), and (g) of the Town and Country Planning Act 1990 (as amended). Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
-

Decision

1. It is directed that the enforcement notice is varied by the deletion of allegation iv) in the heading above and the consequent re-numbering of the other allegations in the notice.
2. It is also directed that the deletion of 3 months and its substitution with 9 months as the period for compliance.
3. Subject to these variations, the enforcement notice is upheld and the deemed planning application is refused permission.

Applications for costs

4. An application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.

Preliminary Matters

5. The Inquiry, originally scheduled for 4 days, took twice as long and had to be adjourned twice. The first adjournment was necessary because the Council insisted on introducing a new document (the Land Registry Title of Plots 32 & 32D Toddbury Farm, where the appellant previously lived) as it was allegedly likely to be central to the Council's interrogation of the appellant's witnesses, which the appellant argued he needed some time to consider, as well as some of the witnesses not being available. The second adjournment was necessary because the Further Flood Studies Report and Revised Sustainable Drainage Strategy produced by the appellant had not been passed onto the Council, which was necessary for the Council to fully understand the appellant's case on flood risk before it could properly contribute to the Round Table Discussion (RTD) on this issue.

The Notice

6. The Council agree that allegation iv) in the notice, that the removal of in excess of 45 metres (approximately) of hedgerow along the southern boundary of the site requires planning permission, is incorrect. Such removal is not a breach of planning control and this allegation is therefore excised from the notice, and all the remaining allegations re-numbered accordingly.

Description of Site and Background

7. The 0.9 hectare site was a former horticultural nursery on which sits a building for which permission was granted in 2001. The site is surrounded by agricultural land to its north, east and west. Opposite on the south side of the road is Rectory Farm, including a children's day nursery. Further to the east are a few houses, with the village of North Crawley including its church, primary school, pub and grocery shop just over one kilometre away.
8. There are currently 5 static mobile homes on the land and 8 touring caravans, although the deemed application seeks permission for 4 pitches (including 4 static caravans) for the current occupiers, who comprise a large related wider family group. The appellant and his family reside on Pitch 1.
9. In terms of the unauthorised development the following is a summary of what occurred when. The Council was notified that over the third weekend of November 2021 various works had been taking place on the site at night. A

site visit on 2 December 2021 revealed the site being cleared with machinery. Accordingly, a Temporary Stop Notice (TSN) was issued on 3 December 2021. On 6 December reports were received that at some time during the night of 3 December mobile homes and touring caravans were moved onto the site and occupied. Further works continued over the weekend of 4 and 5 December in breach of the TSN. The enforcement notice and a stop notice were served on 9 December. Subsequently, an injunction was obtained on 21 May 2022. The notices and injunction have not been complied with.

Reasons

Ground (c)

10. Ground (c) is that the matters alleged do not constitute a breach of planning control. The only issue raised under this ground is whether the close boarded fence with its concrete posts has been erected adjacent to the highway and therefore requires planning permission. The access to the site bridges over the brook adjacent to the carriageway of the road, behind which is a grass verge between approximately 7 and 10 metres deep. The original hedgerow adjacent to or part of this verge was removed by the current occupiers when they moved onto the site. It was replaced with an insubstantial spindly new hedge of what looks like laurel (or similar) immediately behind which is an approximately 2 metre high close-boarded fence.
11. Schedule 2, Part 2, Class A.1 (a) of the General Permitted Development Order states that the erection of a fence or other means of enclosure is not permitted development if it is above 1 metre high adjacent to a highway used by vehicular traffic. The appellant claims that the fence is not adjacent to the highway because it is separated by the brook and the verge. I disagree. The verge is of limited depth, the fence clearly performs the function of enclosing the site from the highway and is effectively adjacent to it. Planning permission is therefore required for the fence.
12. Consequently, the appeal on ground (c) fails.

Ground (a)

13. Ground (a) is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted.

Main Issues

14. The main issues in the deemed planning application are as follows:
 - Whether the site is situated in an accessible location to necessary facilities for residents.
 - Whether the residential use of the site harms the character or appearance of the area, including its effect on the local landscape and its rural open character.
 - Whether the development results in the loss of best and most versatile agricultural land (BMV).

- Whether the development would put residents, including children, at a serious risk of flooding and whether flood risk would be increased to nearby land and property.
- Whether the development has resulted in an irreversible net loss of biodiversity and if so whether this is capable of being compensated for on- or off-site.
- Whether the development has resulted in harm to protected species and their habitat (Great Crested Newts and bats) and if so whether this is capable of being compensated for.
- If there is identified harm by reference to any of the above issues, whether other material considerations, either in the case of each individual pitch or the site as a whole, would outweigh such harm, such considerations comprising but not limited to:
 - Whether there is an unmet need for Gypsy/Traveller pitches in the Council's area,
 - Whether there is a 5-year supply of such pitches,
 - Whether there is a failure of policy to provide for such pitches or sites,
 - Whether it is likely that alternative sites for Gypsies/ Travellers would be located within the countryside of the Council's area,
 - Whether there are available alternative sites for the appellant group to resort to,
 - The weight that should be attached to the personal circumstances of the occupiers, including the best interests of any dependent children,
 - And, if a grant of permanent permission is not justified, whether a temporary permission would be justified.

I consider each of these issues in turn below.

Accessible Location?

15. The site is close to North Crawley including its shop and primary school. There are bus stops a short walk from the site but no footways or street lighting to them or to the village on this busy road, which has a 40mph speed limit and only narrow verges. The site also lies on the inside of a bend in the road and the national speed limit applies to the west of this, making crossing of the road at this point somewhat hazardous. Consequently, I doubt whether the site's occupiers would regularly walk or cycle to the village or to the nearby bus stops, especially in the dark.
16. Nonetheless, the shop and school are close to the site, certainly compared to the countryside locations of many traveller sites, and the nursery school is opposite it on the other side of the road. I acknowledge the appellant's point that the nursery school claimed not to have a spare place for one of the occupier group's children but that may not always be the case, so at least in theory the site's location next to the nursery is beneficial in terms of its closeness to such a facility.
17. For these reasons, although the nearest large supermarket, secondary school and doctor's surgery are 6 or 7km away in Newport Pagnell, I consider that

the site is reasonably accessible to shops, schools, health facilities and other local services and community facilities, as required by Policy HN11 F.3 of the Milton Keynes Council Plan: MK 2016-2031 (the MK Plan).

Character and Appearance

18. There is no dispute that the site was used as a horticultural nursery. That appears to be the last lawful use of the site and consequently it could revert to such a use, with any impacts that such a use would have, including for instance by the re-establishment of polytunnels and similar structures.
19. Although there was undoubtedly some hardstanding and remnants of previous horticultural structures on the site, the laying of additional hardstanding and siting of the mobile homes and touring caravans on the whole of the eastern part of the site has changed its character and appearance. But the tall evergreen hedges to most of the eastern and western boundaries and the raised bund on the northern boundary effectively screen any views of the development from those directions. The front boundary fence screens any views from the road frontage, as did the former hedge prior to its removal.
20. The MK Plan's requirements are most relevantly expressed in Policies DS5 (Open Countryside) and HN11 (Gypsies and Travellers). Part A of DS5 states that planning permission within the open countryside will only be granted for development which is essential for agriculture and other appropriate rural uses. Part F.5 of HN11 requires traveller sites to be compatible with neighbouring land uses, and to minimise impact on adjacent uses, built form and landscape character.
21. Traveller sites do not have to be located in the countryside outside of settlement boundaries, which this site clearly is. Paragraph 25 of Planning Policy for Traveller Sites (PPTS) states that new traveller sites in the open countryside away from existing settlements or outside areas allocated in the development plan should be very strictly limited. But that does not mean that they are prevented by national policy and it is not uncommon for them to be located in the countryside, if only because of higher land/site costs in built-up areas.
22. Whether or not the site is in open countryside is a moot point. It is undoubtedly in the countryside, but it was last used for horticulture and its character and appearance, which is well screened from the adjacent agricultural fields to the north and west, is different to that use. Although outside the village, it is relatively close and next to its outlying houses.
23. So, although the development is contrary to Policy DS5 A., I consider its character and appearance, although clearly different to a horticultural use, has (as proposed for 4 pitches) no great impact on adjacent uses or built form. The site and adjacent land are flat and featureless, apart from the evergreen tree screen on the eastern and western boundaries, and the caravans and their residential paraphernalia have no significantly harmful impact on local landscape character. Consequently, the development does not significantly harm the character and appearance of the site or local area, and I therefore give limited weight to the above policy conflict in the development plan.

Best and Most Versatile Agricultural Land (BMV)?

24. MK Plan Policy NE7 states that development involving the loss of agricultural land should seek to use areas of poorer quality land (grades 3b, 4 and 5 of the Agricultural Land Classification or ALC) in preference to that of higher quality (grades 1, 2 and 3a) unless other sustainability considerations suggest otherwise.
25. Natural England's ALC Mapping indicates that the site is in a band of grade 4 agricultural land that stretches east to west between Newport Pagnell and North Crawley. This is reflected in the Council's own policy constraints mapping system ('MyMK'). Although the Council points out that the ALC Maps are not sufficiently accurate for use in the assessment of the quality of land on individual fields, it is not disputed that the site clearly lies within the boundary of this band of grade 4 (i.e. poor quality) agricultural land, and it would seem likely that this is indeed its true classification.
26. Arguments by the Council that the site's use for horticulture indicates that it was good quality land is debatable owing to the cessation of that horticultural use, which could also be a reflection of its true agricultural quality.
27. For all these reasons I consider that it is more likely that the land on the site is of grade 4 (poor) agricultural value. In these circumstances I agree with the appellant that it would be excessive and disproportionate to require him to commission a further survey and testing of the quality of the soil on the site by a professional agricultural expert. There is therefore no conflict with Policy NE7.

Flood Risk

Relevant Policy

28. Before embarking on an assessment of the specific flood risk issues in this case it is worthwhile setting out the relevant parts of national and local planning policy pertinent to this issue.
29. Incompatible development in areas at risk of flooding should be avoided by directing development away from areas at highest risk, as set out in NPPF¹ paragraph 165. Paragraph 168 and Planning Practice Guidance (PPG)² make clear that the aim of the sequential test is to steer development to areas with the lowest risk of flooding from any source³ (my emphasis), and that it shouldn't be permitted if there are reasonably available sites for the proposed development in areas with a lower risk of flooding.
30. If this is not possible, the exception test may have to be applied (NPPF paragraph 169). To pass the exception test it should be demonstrated both that a) the development would provide wider sustainability benefits to the community that outweigh the flood risk, and b) that it will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere (paragraphs 170 and 171). In terms of a), PPG⁴ makes clear that it is for local planning authorities to set out their own criteria for such community benefits, although the examples given suggest that such benefits

¹ National Planning Policy Framework (current, i.e. December 2023 version)

² PPG Reference ID: 7-023-20220825

³ Including from surface water flooding

⁴ PPG Reference ID: 7-036-20220825

are likely to be those that lead to an overall reduction in flood risk to the wider community or improvements to Sustainable Drainage Systems, rather than delivering other planning objectives such as satisfying housing need.

31. However, PPG Table 2⁵ (Flood risk vulnerability and flood zone 'incompatibility') makes clear that 'Highly Vulnerable' uses should not be allowed in Flood Zones (FZs) 3a or 3b. FZ3a is defined in PPG Table 1⁶ as having a High Probability of flooding, land having a 1% or greater annual probability of river or sea flooding. FZ3b is defined as The Functional Floodplain: where water from rivers or the sea has to be stored in times of flood, land having a 3.3% or greater annual probability of flooding. Annex 3 of the NPPF makes clear that caravans, mobile homes and park homes intended for permanent residential use are Highly Vulnerable.
32. MK Plan Policy FR1 (Managing Flood Risk) essentially incorporates this national planning policy approach. Policy FR2 (SUDS) requires new development to incorporate Sustainable Drainage Systems. Policy FR3 (Protecting and Enhancing Watercourses) requires new development to be set back at least 9 metres from all ordinary watercourses and resists proposals that would affect their natural functioning.

Assessment of Flood Risk

33. The appellant argues that none of this is relevant because the eastern part of the site on which the caravans are situated is in FZ1, defined as land that has a Low Probability (less than 0.1% annual probability of river or sea flooding), SUDS is incorporated, and the front fence is set back an adequate distance from the brook adjacent to the road. I accept that the caravans lie within FZ1 as shown on the Flood Map for Planning, and in principle that the development can be considered in terms of its component parts, as the Notes to Table 2 in the PPG state.
34. However, the Council disputes that this (or indeed any) part of the site lies within FZ1. Its case is that in reality the whole of the site is not only subject to significant risk of surface water flooding but that it lies in FZ3, and probably in FZ3b, the functional flood plain. The brook that flows adjacent to the road and front of the site (and from which presumably Brook End derives its name) flows from the south under the road just to the east of the site, and then across the site frontage heading west next to the road until it joins the wider Chicheley Brook about 530 metres to the west, which in turn itself flows westwards to join the River Great Ouse near Newport Pagnell. The Council asserts that the brook's functional floodplain includes the site, or at least part of it.
35. The Council's evidence is that the upstream extent of identified FZs2&3 terminate within the site only because the local watercourse (the brook) was simply not modelled beyond this point – because the brook had a catchment of less than 3km² –, hence the (incorrect) classification of the eastern part of the site and the land to its east as FZ1. This is confirmed by the Environment Agency (EA) in its email of 20 September 2022⁷ (the answer to the Council's first question in bullet point 1).

⁵ PPG Reference ID: 7-079-20220825

⁶ PPG Reference ID: 7-078-20220825

⁷ Appendix 2 of Mr Hadjivassiou's (Mr H's) Proof

36. Furthermore, the surface water flooding maps advise that the risk of flooding from this source is 3.3% annual probability or greater, a High risk of flooding. Even the appellant acknowledges a Medium risk of surface water flooding up to a depth of 300mm on the majority of the site⁸, although less frequent events could give rise to deeper surface water flooding. I accept the Council flooding expert's points that Surface Water Flood Maps are more accurate than the Flood Map for Planning because they use a more up to date digital terrain model, which is more likely to accurately reflect actual ground levels today than when they were first used for flood mapping. I also accept that such flood maps, because of this, are also likely to better indicate the flood plains of streams and be a better representation of fluvial flooding than the original Flood Maps. This is why the EA in its answer to the Council's second question (in bullet point 2 of its email of 20/09/22) confirms that the surface water flood risk maps currently give the best estimation of flood risk in this location.
37. The Council highlights instances of actual flooding that have occurred adjacent to the brook at the front of the site on various occasions in recent years⁹. Photographs of these events show the site frontage rather than the caravan site itself, but I consider them to be valid evidence of flood events that either have or could in the future result in flooding not only of the sole entrance and exit to the site but also of the site itself, because the site topographical survey shows that ground levels where the caravans are situated are lower than observed flood levels. I agree that this flooding was caused by nothing beyond a large but not rare depth/amount of rainfall and its effect on the brook. I do not accept the appellant's argument that this was a result of failure to maintain the channel of the brook; the photos show that the banks of the brook are clear of vegetation.
38. There is no doubt from these photos that the water is flowing west in conjunction with the brook. This indicates to me, beyond reasonable doubt, that such flooding was not a result just of high groundwater but because, effectively, it is fluvial flooding: the site itself is either in or adjacent to the floodplain of the brook, and hence is located in FZ3a or b.
39. In order to overcome the EA's above identified deficiencies of the National Generalised Modelling system (JFLOW, an application which dates back to 2004) used to produce the Flood Map for Planning, the appellant's flood risk expert (Tom Quigg of Flume Consulting Engineers) undertook additional fluvial modelling for the same watercourse, as set out in his Further Flood Studies Report (Version 2, February 2024). He claims that it uses the current industry standard flood model software (TUFLOW) and that it integrates the latest flood catchment information (from FEH22) with a suitable allowance for climate change and that this confirms the whole site lies within FZ1. He also argues that he has carried out additional surface water modelling using the same updated modelling and information, and new LIDAR data for a more accurate and detailed depiction of terrain and flood risks, which he says shows the site is less affected than suggested by the EA's current Surface Water Flood Map.
40. Mr Quigg asked the EA to review this additional information contained in his Report. But the EA did not consider it could do this without undertaking a full

⁸ As set out in paragraphs 9.6.5-9.6.7 and Appendix G of the appellant's Patrick Parsons Flood Risk Assessment, Revision 2.0 dated 17/05/2023, and in the combined Flood Map for Planning and Surface Water Flood Risk as given to me at Day 3 of the Inquiry

⁹ 23 December 2020, 5 March 2022, 2 & 4 January 2024, and 18 February 2024

hydraulic and hydrological review of the model (with all the relevant information on which it is based) to fully understand the nature of the precise flood risk on the site, as confirmed in its email to him of 16 February 2024¹⁰. I understand the appellant was not prepared to give the EA the full model data because the EA could not guarantee to review it in time for the third and final session of the Inquiry. That is understandable, not least because he could have incurred a substantial wasted fee for such a review by the EA, but the fact remains that there has been no such review by the EA, which means I cannot attribute the new hydraulic model in this Report significant weight.

41. Additionally, the Council's flood risk expert (Mr H) has raised criticisms of this new hydraulic model. The Report does not state that it complies with LIT56326, the national code of practice for fluvial modelling and mapping and is devoid of any specific detail such as watercourse flow and level gauging records and there does not appear to be any calibration of the model: adjusting it to take account of such observations. It has not been the subject of any independent audit.
42. Furthermore, the ground levels of the caravans are lower than the observed flood levels, so it is likely that the surface of the ground next to the caravans was flooded at the times the photos were taken of the frontage flood events and is likely to do so again within the next two years. This may explain why the Sustainable Drainage Strategy proposed by the appellant envisages raising the existing ground level by 500mm. But that in itself would be problematic, first because it would make the development more visible in the street scene increasing its harm to the character and appearance of the area and would likely increase run-off onto the highway from the site. But, more fundamentally, such raising of ground levels would present a raised obstruction to surface water flow across the site increasing flood risk to surrounding land, including by increasing its flow speed. It is also unclear (and counterintuitive) as to how the voided sub-base of the permeable paving can function as attenuation for flood water when it is likely to be higher than the surrounded flooded parts of the site.
43. In the absence of any obvious calibration of the model set out in the Further Studies Report, Mr H has carried out a sense check by comparing the rainfall at the nearest weather station at Newport Pagnell in the 24-hour period when the flooding events at the entrance to the site took place (recorded on the photos mentioned above) with that obtained from the FEH22 database. This shows that those flooding events were approximately one in two-year events. But the amount of rainfall, for instance on 23 December 2020 (as shown on the photo) was significantly less than that shown for a 1,000-year storm event, which the Report claims would not itself produce any fluvial flooding on the site. This sense check, which assesses the recent flooding events at (least at) the frontage of the site, and the other criticisms listed above, indicates to me that the conclusions of the Report are unlikely to provide a sound basis to conclude that the site is free of significant flood risk.
44. I also agree with the Council that there are additional problems with the proposed Sustainable Drainage Scheme. No adequate explanation has been provided in the Scheme to justify the suggested infiltration rate of rainwater from the site or the relevant area available for infiltration. The alternative

¹⁰ As set out in the full email trail between Mr Quigg and the EA, the expanded Appendix C of the Further Flood Studies Report provided by the appellant on 4 April 2024 (Document 6 in the List set out below)

option of providing a SUDS pond at the front of the site, between the brook and the close-boarded fence would not be acceptable because that would lie within an area subject to regular flooding, as clearly demonstrated by the photos of such flood incidents in recent years, and so it could not always attenuate any future floods. That pond would clearly contravene MK Policy FR3, as it appears would parts of the fence where it is within 9 metres of the brook because it would impede the natural function of this watercourse and therefore increase the risk of flooding to neighbouring land.

Conclusion on Flood Risk

45. To conclude, the site is at significant risk of flooding for the above reasons. The appellant considers that (if the site needs to), it satisfies the sequential test because there are no other reasonably available traveller sites with planning permission situated in the Council's area, let alone any that have a lesser flood risk.
46. The PPG¹¹ states: *'Reasonably available sites are those in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development.'* The development proposed here is unauthorised retrospective development, which is obviously required now for the site's occupiers and so, it is true, purely semantically, to say that there are no immediately available traveller sites that they could occupy.
47. But that PPG paragraph also states: *'The absence of a 5-year land supply is not a relevant consideration for the sequential test for individual applications'*. That makes sense because if it was, the majority of Councils would fail the sequential test for traveller sites, and many would also fail it for permanent dwellings, which would negate the very reasoning and purpose behind the sequential test in the first place: to steer development to locations with the lowest risk of flooding in order to prevent or lessen the possibility of flooding of residences in the future.
48. The appellant has not looked at other brownfield or greenfield sites in the Council's area including in the countryside that have a lower risk of flooding than this site. All he has done is a quick internet search of sites for sale with planning permission, which only revealed one site. What he should have done is look at similar sites to this one: brownfield or greenfield sites in the countryside near to settlements in the Milton Keynes Council area with a low flood risk. But since that has not been done, the sequential test has not been met.
49. Even if I decided that the sequential test had been met (in terms of the semantics of a 'reasonably available site'), it would in any case fail to meet the exception test because, although the development would provide required traveller pitches, it would not deliver wider sustainability benefits in terms of flood risk, it would not be safe for its lifetime taking account of the high vulnerability of its users and it would be likely to increase flood risk elsewhere. In any case, I have concluded that the site realistically lies in FZ3, where Table 2 of the PPG¹² makes clear that such development should not be permitted (my emphasis).

¹¹ PPG Reference ID: 7-028-20220825

¹² Ibid PPG Ref: ID: 7-079-20220825

50. For these reasons I conclude that the development would put residents, including children, at a serious risk of flooding and that flood risk would likely be increased to nearby land and property, contrary to the above development plan and national planning policies.

Biodiversity – Habitats and Plants

51. MK Policy NE3 A states that development proposals will be required to maintain and protect biodiversity and wherever possible result in a measurable net gain (BNG). Because of this policy and because the development occurred before the national requirement for 10% BNG, as long as there is no net loss of biodiversity, I accept that the development could comply with NE3. The policy also requires proposals of 5 or more dwellings to use the DEFRA metric to demonstrate compliance, which the appellant's EcIA, by Craig Williams of Arbtech) has done (notwithstanding that only 4 mobile homes are actually proposed in the scheme). The Council disputes the EcIA's conclusion on the baseline condition (before the unauthorised development took place) but I consider it to be realistic.
52. There is dispute between the parties as to which version of the metric should be used. The appellant's EcIA acknowledges that the proposed plan results in a loss of 1.23 area habitat units from a baseline of 3.12 (a 39.4% loss), although the Council maintains the actual loss, when using the correct BNG Metric (version 3 or 4) is at least 2.13 habitat units (a 68.3% loss), although in reality it is actually higher. Either way, there would be a significant biodiversity net loss. This is essentially because of the loss of much of the bramble scrub and grass areas on the site and its replacement with the hardsurfacing. The Council accepts that such net loss could in theory be compensated for off-site, by a financial contribution with the Council or a third (offsetting) party, but the appellant has not provided any means (such as a S106 agreement or unilateral undertaking) with which to do so.
53. A 45-metre length of species rich hedgerow¹³ (between points A and B as shown on The Plan attached to the notice) has been removed and replaced with the close-boarded fence in front of which has been planted a line of small non-native shrubs in an unconvincing attempt to plant a new hedge. It would appear that the original hedgerow was a JNCC Priority Habitat, protected by subsection B of MK Policy NE2. Its total removal was unnecessary to create the new access into the site: there was no reason for removing such a mature landscape feature and its replacement by an unsympathetic looking close-boarded fence, which also appears to increase flood risk to neighbouring land.
54. Whilst planning permission was not required for such removal, permission is nonetheless required from the Local Planning Authority to remove such a priority 'important' hedgerow under the Hedgerow Regulations 1997, and no such permission was sought prior to the hedge's removal. I accept that a species-rich native hedgerow can be replanted, that this can be required via a site development scheme condition and that there would be an overall increase in biodiversity linear (hedgerow) units on the whole site under the proposed landscaping scheme, but it would be likely to take some years to mature to the same condition as the one removed from the frontage, even assuming that the SUDS pond would not be provided in that area.

¹³ Acknowledged in the appellant's EcIA (Revision 2 dated January 2024), page 22

55. For these reasons I conclude that the development has resulted in a net loss of biodiversity. Although it is capable of being compensated for on- and/or off-site, no means are being suggested for the necessary off-site compensation required to compensate for the net loss of biodiversity on-site and the loss of the 'important' frontage hedge is significantly harmful and unjustified. Consequently, the development as it stands is contrary to MK Policies NE2 and NE3.

Protected Species – Great Crested Newts (GCNs) and Bats

56. The EcIA considers it unlikely that there would be any impacts on amphibians, including the European protected GCNs because there is only one known pond within 500m of the site, in the garden of the nearest house 70m to the northeast. The appellant, through the evidence of Mr McCarthy, says that this pond no longer exists. I am unclear how he knows that, given that the pond is or was on third party land and no field work surveys have taken place. I acknowledge that the closest GCN European protected species license relates to a site 2.3km away to the southeast, and that dates back to 2010, as set out in the EcIA. But the site falls within an Amber Risk Zone under District License Mapping, indicating the likely presence of GCN, and some of the former favourable grassland and scrub habitat remains in the north and west of the site, in addition to the riparian corridor on the southern boundary.
57. So, whilst this does not amount to evidence of GCN existing on the site, the killing or injury of individuals in any local population could have taken place. The lack of any field work surveys to prove the contrary fails to comply with the precautionary principle for such protected species, and the changes to the site by virtue of the large area of hardstanding has removed habitat favoured by GCNs.
58. In relation to bats, also a European protected species, the Council argues that the development has introduced external artificial lighting (including that strung out on the poles near the site's eastern boundary and affixed to the retained building), which could have had an adverse effect on roosting, foraging or commuting bats. That is because such external lighting could obstruct or disturb their access to the tree belts on the eastern or western boundaries for roosting, foraging or commuting, and the storage building remaining on the site for potential roosting.
59. The EcIA does not even acknowledge the external lighting currently on the site, yet does not suggest any bat surveys are required, even to establish the extent of the dark corridors it suggests are required to occur on the site, which could be the subject of a site development scheme condition. I agree with the Council's ecologist that nighttime bat surveys should have been done at different times of the year. This is necessary in order to establish which bat species are using the site, because some bat species (such as Brown Long-eared bats) are averse to crossing any light barriers. Consequently, a preliminary ecological appraisal (PEA) and preliminary roost assessment (PRA), done by the appellant's ecologist on 31 May 2023, is insufficient and, in any case, it was done post-development so it is unclear what the baseline situation was (and therefore whether the development has affected any prior presence of bats).
60. Whilst the EcIA records that a local records search revealed only a handful of generic bat records within 1km of the site, the lack of proper nighttime bat

surveys casts doubt on the suitability of its dark corridor mitigation measures, because it is unclear whether such corridors would be sufficient to protect the foraging and commuting routes of all bat species, which may well be present on the site and neighbouring land.

61. For these reasons I must conclude that MK Policy NE2 is breached in that subsection A states: *'Where there is a reasonable likelihood of the presence of statutorily protected species or their habitats development will not be permitted unless it has been demonstrated that the proposed development will not result in a negative impact upon those species and habitats.'* Policy NE6 is also breached in that it cannot be safely concluded, in terms of light pollution, that: *'There would be no unacceptable adverse effect on species, habitats or the wider natural environment.'*

Other Material Considerations and the Planning Balance

62. The development has resulted in considerable harm in that it has put residents, including children, at a serious risk of flooding and that flood risk would likely be increased to nearby land and property contrary to MK Policies FR1-FR3 and national policy set out in the NPPF and PPG. It has resulted in a biodiversity net loss on-site without any alternative compensation as well as failing to demonstrate under the precautionary principle that it has not harmed any local populations of GCNs and bats, both European protected species, contrary to MK Policies NE2, NE3 and NE6 and related national policies in the NPPF. As such there is a high level of harm contrary to the development plan as a whole and established national planning policy.
63. Nonetheless, other material considerations could of course outweigh this conflict with the development plan, as set out in s38(6) of the Planning and Compulsory Purchase Act 2004.
64. Turning now to these relevant other material considerations, the Council's most recent GTAA¹⁴ established the current need for 29¹⁵ gypsy/traveller pitches within the Borough, 17 of which should be provided up to 2027. However, the Council cannot demonstrate a 5-year supply of pitches/sites – indeed it appears to have a zero supply; the additional pitch allocations at Calverton Lane (4 pitches) and Newton Leys (8 pitches) as set out in MK Policy HN11 B have not yet been provided. There are no current alternative available pitches/sites for the occupiers of this site to move onto within the Borough. Hence there is a policy failure to provide for the needed pitches set out in the GTAA.
65. I consider it likely that at least some sites for gypsies/travellers would realistically need to be found within the rural area of the Borough, outside defined settlements, if only due to the current need set against the costs of sites for development within such areas.
66. In respect of the occupiers' personal circumstances, there are two children living on the site who attend North Crawley Primary School, just up the road. Two of the adults living on the site have physical disabilities. I accept that the best interests of these children, in terms of their education, and the best interest of these adults because of their health needs, would be to remain

¹⁴ Milton Keynes Council Gypsy and Traveller Accommodation Assessment Final Report, November 2021

¹⁵ i.e. that meet the current definition of gypsies/travellers as set out in current version of the PPTS (following the *Lisa Smith* judgement)

living on the site. A roadside existence, which the families living on the site may well have to resort to if planning permission is withheld, would be detrimental to their best interests, because of access for the children to school, and because the families, including these adults with disabilities, would find it harder to access their registered GP and other health facilities.

67. However, set against these considerations that weigh heavily in favour of granting planning permission, is the serious risk of flooding of the site and its entrance (and consequent danger to occupiers including children), and that flood risk would likely be increased to nearby land and property, as well as the uncompensated for loss of biodiversity on-site and the potential adverse impact on bats and GCNs contrary to the precautionary principle for such protected species.
68. In particular, given my conclusion on the flood risk issues set out above, and the fact that residential homes in caravans/mobile homes comprise a Highly Vulnerable use that should not be allowed in FZ3, flood risk is the determinative issue in this appeal.
69. I have considered whether a temporary planning permission would be warranted. But, because of the serious flood risk to the site, and the evidence of the recent flooding events in the last four years, I consider that even a temporary permission would be unacceptable.
70. Withholding permission would of course adversely affect the occupiers' human rights, in particular their rights of respect for family life under Article 8 and protection of property under Article 1 of the First Protocol of the European Convention on Human Rights. But the interference in these rights by denying planning permission would be necessary and proportionate because the flood risk to occupiers, including children, and to occupiers of nearby land would be serious and potentially dangerous to their welfare.
71. Gypsies/Travellers comprise a race and hence are protected by the Public Sector Equality Duty (PSED) set out in s149 of the Equality Act 2010; there is no dispute that the occupiers are ethnic Irish Travellers. Due regard must therefore be given to the three aims of eliminating discrimination, advancing opportunity and fostering good relations for this group. The PSED is engaged here, but failure to grant planning permission is proportionate given the serious risk of flooding, not least to this group of gypsy occupiers themselves as set out above, which outweighs the benefits.
72. For these reasons, the appeal on ground (a) fails and the deemed planning application is refused.

Ground (f)

73. Ground (f) is that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy the breach of planning control which may be constituted by those matters.
74. Under this ground the appellant challenges the requirement to plant a native mixed species hedgerow between points A and B on the Plan attached to the notice. However, as I set out above, I consider this requirement to be reasonably necessary in order to remedy the breach caused by the development.

75. The appeal on ground (f) consequently fails.

Ground (g)

76. Ground (g) is that the period specified for complying with the notice falls short of what should reasonably be required.

77. The compliance period set out in the notice is 3 months. The appellant considers this to be woefully short of what is considered reasonable in order for him and the other occupiers time to find an alternative site, failing which they would be forced into a roadside existence, with all the hardship that this would entail. He considers that at least 12 months would be needed in order to comply with the notice.

78. I accept that 3 months is insufficient for the above reasons. However, given the danger and vulnerability of the occupiers to the significant risk of flooding, I consider 12 months to be unacceptable. I consider that 9 months is the longest period that I could give whilst still minimising the possible risk of flooding and therefore danger to occupiers of the site.

79. The appeal on ground (g) succeeds to that limited extent.

Conclusion

80. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with variations, including in terms of the compliance period, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Nick Fagan

INSPECTOR

APPEARANCES

FOR THE APPELLANT: *Alan Masters* (of 1 Pump Court) instructed by Brian Woods called:

- Brian Woods, WS Planning & Architecture (WSPA)
- Miley Connors, Appellant & site resident
- Rose-Ann Nolan, site resident
- William Delaney, site resident
- John McCarthy, site resident*
- Craig Williams, Arbtech*
- Tom Quigg, Flume Consulting Engineers*
- Peter Brownjohn, WSPA*
- Thomas McCarthy, site resident*

*Personnel starred took part in the Round Table Discussions (RTDs) on Ecology (John McCarthy and Craig Williams) and Flood Risk (Tom Quigg, Peter Brownjohn & Thomas McCarthy).

FOR THE LOCAL PLANNING AUTHORITY: *Caroline Bolton* (of Radcliffe Chambers) instructed by Neill Whittaker of Ivy Legal Ltd called:

- Neill Whittaker
- Steve Jarman, Opinion research Services Ltd
- Kathryn Parson (née Rimmer), Milton Keynes Borough (MKB) ecologist*
- Chris Hadjivassiou (aka Mr H), Link Engineering (Birmingham) Ltd*

*Personnel starred took part in the RTDs on Ecology and Flood Risk respectively.

LIST OF DOCUMENTS RECEIVED DURING THE INQUIRY

1. LPA's (the Council's) Opening Submissions.
2. Statement of Common Ground signed by Mr Woods and Mr Whittaker dated 9/9/24.
3. Further Flood Studies Report by Flume dated February 2024 received by PINS 27/2/24.
4. Sustainable Drainage Strategy by Flume, same dates as above.
5. Photos submitted by Council of flooding at site including with flood depth figures from Newport Pagnell weather station.
6. Full email trail between Flume and the EA wrt the partial train set out in Appendix C of the above Further Flood Studies Report, submitted to PINS 4/4/24.
7. Comments on above flood risk documents by Mr H submitted to PINS by 19/4/24.
8. Combined Flood Map for Planning & Surface Water Flood Map submitted by appellant at Flood Risk RTD.
9. Map of wider river catchment from MK Strategic Flood Risk Assessment and relevant table from 'What is the Risk of Flooding from Surface Water map' EA document submitted by appellant at Flood Risk RTD.
10. LPA's Closing Submissions.
11. Notes to Oral Closing Submissions on Behalf of the Appellant.