

TOWN AND COUNTRY PLANNING ACT 1990

APPEAL UNDER SECTION 78

Final Comments prepared for Mr And Mrs Pratt against the refusal of application 25/00081/FUL by Hinckley & Bosworth Borough Council for the change of use of agricultural land to domestic garden land adjacent Paddock View, Twycross Road, Sheepy Magna, CV9 3RT.

Application 25/00081/FUL was received by the LPA 4th February 2025 and refused by notice dated 21st March 2025.

August 2025

Simon Cheshire BA(Hons) DipTP MRTPI

1. The starting point for the determination of any proposal remains the Development Plan, and Section 38(6) of the Planning and Compulsory Purchase Act 2004 confirms this statutory requirement and the NPPF (2024) reiterates the approach where planning law requires that applications for planning permission must be determined in accordance with the development plan, *unless material considerations indicate otherwise*.
2. The decision notice was issued on the 21st March 2025 and the policies the LPA relied upon were contained within 2009 Core Strategy and the Site Allocations and Development Management Policies Development Plan Document (SADMP) (2016). Since the NPPF was updated on 12th December 2024, all housing policies and settlement boundaries were out of date as the LPA were unable to demonstrate a 5YHLS meaning the 'tilted' balance as per Paragraph 11(d) was engaged.
3. Local Plan policy should follow the approach of the presumption in favour of sustainable development where such development should be approved without delay. On this basis the Government is committed to ensuring the planning system supports all sustainable development. It is noted the appeal decisions included in Appendix B to F were issued between 2017 and 2020 and are not directly comparable with the appeal proposal and Appendix G refers to a self-build dwelling where the decision notice was issued on the 12th December 2024.
4. Appendix 1 of the Grounds of Appeal contains an appeal decision issued on the 13th March 2025 for a development of 95 homes within the Green Wedge adjacent to the settlement boundary of Barwell under PINS reference APP/K2420/W/24/3348387, Land East of The Common, Barwell, LE9 8BR.

At paragraphs 12 and 41 the Inspector states:

“The lack of five-year supply, the continuing delay with previously identified sites coming forward and the uncertainty over the timescale of examination and adoption of the emerging local plan are factors to which substantial weight needs to be given. Consequently, the Core Strategy adopted in 2009 has to be regarded as out-of-date as the development strategy put forward has not been achieved. This reduces the weight that can be given to Core Strategy policies which restrict development including on sites in a Green Wedge.”

And

“On the main issues I have found that the principle of development in this area of countryside conflicts with SAMD policy DM4 but this only carries limited weight because of the Council’s HLS position. The proposal would cause some moderate harm to the rural landscape character of the area and to a limited geographical area but it would not result in a significant adverse effect which is the test set out in criteria (i) of Policy DM4 and criteria (a) of Policy DM10.”

5. The conclusions of the Inspector and the acknowledgement the entire 2009 CS and the policies contained within it are out of date, are significant material considerations that are directly applicable to *the very principle of the current appeal* and the weight given to policies DM4 & DM10, where it was concluded on the 21st March 2025:

“Consequently, the Core Strategy adopted in 2009 has to be regarded as out-of-date as the development strategy put forward has not been achieved. This reduces the weight that can be given to Core Strategy policies which restrict development including on sites in a Green Wedge”

6. The importance of The Common Appeal decision as a material consideration, is the fact the current appeal refusal was issued on the 21st March 2025. However, there was absolutely no reference within the delegated report to The Common Barwell appeal that was issued on the 13th March 2025, that confirmed the spatial objectives contained in the 2009 Core Strategy had ultimately failed and all policies contained within it and the associated related documents were out of date.

7. In terms of acting contrary to or not following well established case law, it is a well understood principle that when determining applications for planning permission the presence of a fall-back position should be specifically considered by the decision maker, and a direct comparison should be drawn between what has been applied for and what can be done if planning permission is not granted for it.

8. The associated legal principles relating to such a fallback position are set out in **R v Secretary of State for the Environment and Havering BC**, where Mr Lockhart-Mummery QC stated the below:

"First whether there is a fallback use, that is to say whether there is a lawful ability to undertake such a use; secondly, whether there is a likelihood or real prospect of such occurring. Thirdly if the answer to the second question is "yes" a comparison must be made between the proposed development and the fallback use."

9. When applying the above principles, it is then incumbent on the decision maker to conclude what weight is given to the material considerations in the overall planning balance and decision making process. In this particular instance, the LPA have persisted with an objection to the appeal scheme which the Secretary of State or an Inspector had previously indicated to be acceptable.

10. Appendix 2 of the Grounds of Appeal contains the appeal decision letter related to 12 Rodney Gardens, Sheepy Magna, Leicestershire CV9 3SY issued on the 13th September 2023 under PINS reference 3317828, where the accepted description of development is ***"the change of use of agricultural land to domestic garden."*** This description of development is then repeated in relation to the appeal proposal: *Change of use of agricultural land to domestic garden*. In allowing the 12 Rodney Gardens appeal, the Inspector confirmed the introduction of post and rail fencing and associated amenity grassland, is entirely in-keeping with the semi-rural setting and could be put in place in any event with the correct application of the fallback principles outlined above. In allowing the 12 Rodney Gardens appeal, the Inspector opined at paragraph 9 of the decision letter:

"I note the Council's concern regarding the potential for the siting of domestic paraphernalia, such as furniture, play equipment, hard surfacing or ponds in connection with the use of the land as garden, which would be more difficult to control. Nonetheless, in the event that this does occur, any such paraphernalia would be likely to be small scale and would not be permanent fixtures."

Furthermore, permitted development rights for any incidental building, or enclosure, swimming, or other pool as well as walls, fences and other means of enclosure can be controlled by planning condition. Subject to a suitably worded condition removing such rights the development would not give rise to any tangible harm to the visual qualities or open character of the rural area."

11. The allowed appeal related to 12 Rodney Gardens was issued on the 13th October 2023 and was cited in the applications at 14 Rodney Gardens approved on the 6th September 2024, that was followed by Holly Tree Cottage on the 11th November 2024. The case of

DLA Delivery Ltd v SoS highlights the critical need for consistency in decision making, in terms of following previous decisions or to give clear reasons for reaching a different view.

12. As noted above, acting contrary to, or not following well-established case law, can lead to an award of costs and the 12 Rodney Gardens appeal decision and the associated Marrons Grounds of Appeal (Appendix 2) clearly established there is a legitimate fallback position that the LPA failed to correctly weigh in refusing the current appeal. On this basis, it is important to consider the reasons for refusal carefully to ensure consistency in decision making and that all relevant material considerations are weighed in the planning balance.

13. The crux of the matter related to this appeal is the fact it is considered, the LPA failed to adequately weigh the applicable case law of **Secretary of State for the Environment and Havering BC and DLA Delivery Ltd v SoS** as the starting position when undertaking the required planning balance. There is no dispute the fallback position patently exists, and the appeal proposal is allowable under permitted development rights.

14. Paragraph 2.6 of the LPA statement confirms the appeal site measures 423 sqm, which contrasts with 6436 sqm of Holly Cottage detailed in Appendix 4 of the Grounds of Appeal, where the description of development is **“change of use of agricultural land to domestic garden.”** Here the scope and extent of the COU is significant where the delegated report at para 3.1 states:

“The 6,436sqm application site is a heavily wooded area that is to the north of and adjacent to, but outside of, the identified settlement boundary of Sheepy Magna in the designated open countryside. Sheepy Magna is classified as a rural village within the adopted Core Strategy (2009).”

And paragraph 8.13:

“It is noted that the change of use of the agricultural land to domestic garden was allowed at appeal on land to the west and rear of 12 Rodney Gardens via 22/00916/FUL and granted planning permission under delegated powers at 14 Rodney Gardens via 24/00655/FUL. Both properties are immediately to the south of the site. These areas of land cover the entire width of their respective associated properties. These permitted changes of use serve to separate the southern views of the application site from the wider agricultural landscape.”

15. This begs the question of how can an area of 6,436sqm that is a heavily wooded countryside area be granted permission to be used as a *“domestic garden”* at Holly Tree Cottage? The answer lies in the fact the LPA realised it could be done under permitted development rights as with the case at 12 Rodney Gardens, so they simply removed all PD rights as part of the approval. As the enclosed area subject to the appeal is allowable under permitted developments, the exact same logic applied by the Inspector in relation to the 12 Rodney Gardens appeal decision letter, could be equally applied in the current appeal, particularly in light of the subsequent approvals issued in relation to 14 Rodney Gardens and Holly Tree Cottage.

16. As noted in the Grounds of Appeal, the assumption appears to be that because the appeal proposal is to the side of Paddock View, it must be far more visible from the public domain and therefore could not gain the similar support given to 14 Rodney Gardens or 4 Holly Tree Cottage as a result. This matter was addressed within the current appeal Planning Statement at paragraphs 3 & 4:

“The proposed site would be visible only in localised views from Nos. 1 and 2 Cotton Fell, approximately 40 meters away. There would be no undue privacy issues or

impact on the adjoining agricultural land separated by a new post and rail fence along the new boundary.

The size and layout of the proposed garden reflect the line of development of No. 1 Cotton Fell. The site is enclosed by hedgerows, which provide containment and reduce the visual impact of the change of use on the surrounding countryside."

17. The LPA delegated report appears to agree with the above assessment where it would only be the occupants of Cotton Fell who could gain limited views into the site:

"8.27 The scheme does not include the provision of any built form and therefore the proposal is not considered to result in any significant adverse impacts to residential amenity in the immediate vicinity of the site in accordance with Policy DM10 of the SADMP."

18. Indeed, the limited views into the appeal site are confirmed by the third party representation made by Mr & Mrs Mason of 3 Cotton Fell, Twycross Road who are supportive of the appeal proposal as below:

"We live opposite the land in question and probably are the property most impacted by the view - it is directly opposite the front of our house.

We believe this change of use should be granted - the view has improved substantially as a result of the work done - neat hedges, properly maintained gate and instead of weedy edge of field we have a neat grass area. It has improved the image of the village and is a pleasure to see. What's more since it is for the benefit of a disabled child to give the child space to play it is a pleasure to see the games and delight and the area for his wheelchair.

For this to be rejected not only would reduce the quality of the view and the impression of a well kept and maintained village, it would directly impact the utility if land for a disabled child - and would run counter to the stated aims to support the less abled in the village. We see no good arguments not to grant it, and plenty of positive reasons to do so.

Thank you for considering this submission."

19. Mr & Mrs Mason are making reference to the fact the son of the appellant has a diagnosis of Duchenne Muscular Dystrophy, a degenerative and life limiting muscle wasting condition where the family need continually plan for the longer term and need to implement housing adaptations to make their home more accessible to meet his changing needs. Since last summer he has become wheelchair dependant and having some additional private amenity area would allow him to maintain some degree of freedom and independence whilst outdoors, by ultimately, making the area more accessible to him.

20. Paragraph: 049 Reference ID: 16-049-20140306 of the NPPG states that planning authorities should not prevent or delay development which should be clearly permitted having regard to the development plan, the Framework and other material considerations. This includes not imposing conditions on a grant of permission where conditions could have effectively overcome the objection identified, correctly weighing established case law in the planning balance, and applying a critical need for consistency in decision making in terms of following previous decisions or to give clear reasons for reaching a different view. On this basis it is considered the LPA has failed to properly exercise its development management responsibilities with respect to:

“Preventing or delaying development which should clearly be permitted having regard to its accordance with the development plan, national policy, and any other material considerations.

Acting contrary to, or not following, well-established case law.

Persisting in objections to a scheme or elements of a scheme which the Secretary of State or an Inspector has previously indicated to be acceptable.”

21. The enclosed and contained nature of the appeal site can be fully weighed during the appeal site visit, that will demonstrate the existing mature boundary hedging is highly effective in limiting public views into the site. The benefits to the scheme do have a personal element which is not strictly a material consideration, however by not following the findings of the Inspector in relation to 12 Rodney Gardens, the appeal proposal does not represent the type of harm suggested by the LPA in the reasons of refusal.

22. With regards to the consideration of a fallback position, **Mr Lockhart-Mummery QC** stated the below:

“First whether there is a fallback use, that is to say whether there is a lawful ability to undertake such a use; secondly, whether there is a likelihood or real prospect of such occurring. Thirdly if the answer to the second question is “yes” a comparison must be made between the proposed development and the fallback use.”

23. The fallback position was discussed and accepted with the issuing of the 12 Rodney Gardens appeal decision on the 13th October 2023, and was equally applied to the approvals at 14 Rodney Gardens and Holly Tree Cottage, meaning a comparison must be made between the proposed appeal development and the fallback use. This comparison however was never made, and it is considered unreasonable for the LPA not to make reference to it within the delegated report or LPA Statement.

24. By not accounting for the significant material considerations raised by the Inspector in the case of The Common appeal decision in relation to the failure of the 2009 Core Strategy to achieve its stated overarching spatial objectives, the LPA has by extension, failed to adequately provide cogent and compelling reasons to substantiate the reason of refusal or to clearly demonstrate the claimed significant harm, when the cited policies were greatly reduced in weight as from the 13th March 2025, and the associated planning history of the adjacent properties.

25. On this basis it is considered the appeal proposal can be respectfully allowed and costs awarded, as a legitimate fallback position exists and the proposal would only cause negligible (if any) harm to the local landscape character of the area, as it is limited to a very minor and small geographical area. It would therefore not result in a significant adverse impact in relation to Policies DM4 and DM10 or Policy S8 of the Sheepy Parish Neighbourhood Plan (2022) as mistakenly claimed by the LPA, by simply not acknowledging the lawful fallback position established by the 12 Rodney Gardens appeal decision, the full details of which are included in Appendix 2 of the Grounds of Appeal.