



WEST OXFORDSHIRE  
DISTRICT COUNCIL

## WEST OXFORDSHIRE DISTRICT COUNCIL

Name and date of Committee	Development Control Committee: Monday 13 September 2021
Report Number	<b>Agenda Item No. 4</b>
Subject	Consideration of Planning application to redevelop the Old Mill, Kingham as a 33 bedroomed Hotel and ancillary facilities
Wards affected	Kingham, Rollright and Enstone (but with implications for all wards within the Area of Outstanding Natural Beauty)
Accountable member	Councillor Jeff Haine Cabinet Member for Strategic Planning; Email: <a href="mailto:Jeff.haine@westoxon.gov.uk">Jeff.haine@westoxon.gov.uk</a>
Accountable officer	Phil Shaw, Business Manager Development Management Tel: 01993 861687; Email: <a href="mailto:phil.shaw@publicagroup.uk">phil.shaw@publicagroup.uk</a>
Summary/Purpose	To enable the Committee to re-consider the resolution of Uplands Area Planning Sub-Committee to approve the application.
Annex	Annex 1: Updated report in respect of application 20/01165/FUL
Recommendation	That the application be refused, in line with the recommendation in the annexed report.
Corporate priorities	<ol style="list-style-type: none"><li>1. Climate Action: Leading the way in protecting and enhancing the environment by taking action locally on climate change and biodiversity</li><li>2. Healthy Towns and Villages: Facilitating healthy lifestyles and better wellbeing for everyone</li><li>3. A Vibrant District Economy: Securing future economic success through supporting existing local businesses and attracting new businesses to deliver the economic ambitions of the Local Industrial Strategy</li><li>4. Strong Local Communities: Supporting and building prosperous and inclusive local communities</li></ol>
Key Decision	No
Exempt	No
Consultees/ Consultation	Consultation was undertaken on the planning application in accordance with usual guidelines and requirements

## **I. BACKGROUND**

- I.1. Members will be aware that under the scheme of delegation there is a provision that allows officers to refer a resolution of one of the sub committees to development control committee for final determination.
- I.2. The relevant provision sets out: Where recommendations on a planning application or proposal are not accepted by the Area Planning Sub-Committee, the right to withdraw the application or proposal for final determination by the Development Control Committee.
- I.3. Officers are mindful of the general principle that it is for Officers to 'recommend' and for Members to 'decide' and as such this right of referral is only exercised very rarely indeed. It has only been used twice previously by the current post holder in the period 1996 to date. However, in this instance, the intended decision to approve was already of concern in that it raised significant policy issues. These concerns were compounded when, on the day following the Uplands meeting, correspondence was received from a third party indicating that procedural and policy flaws were such that if the putative decision were followed through it could be challengeable by way of JR.

In light of the seriousness of the issues raised, and the potential impacts upon the reputation and finances of the Council, officers therefore sought separate advice as to both the planning merits of the case and a legal view on the intended decision. Both of these reports confirmed that the decision as intended and how it was arrived at were potentially seriously flawed/challengeable.

Thus, if the decision were allowed to be issued without the oversight of the full committee it could potentially set a precedent for an interpretation of policy that would not accord with the way the policy is intended to operate, which if allowed to stand would apply District wide (thereby potentially undermining the strategy that sits behind the policy) and which critically would be likely to be unable to withstand legal challenge - thereby involving the Council in considerable abortive legal costs and time and consequent reputational damage.

As such the consideration of the application has been referred to this Development Control Committee such that the parent committee can decide whether the scheme is policy compliant and/or whether there are sufficient material considerations to warrant setting policy aside in a way that will not lead to wider policy and legal implications; or whether the proposal should be refused as recommended

- I.4. Before making their decision Uplands undertook a site visit and the Chair of the committee has requested that Members who have not visited the site similarly undertake their own site assessment before this meeting. In that regard the site is visible from the adjoining roadway and from the public footpath that runs through the site. Any Member undertaking such a visit would need to ensure that all the usual rules in terms of probity and conduct when on site were observed if they are to avoid the risk of being seen to be prejudicially impacted and as such incapable of taking part in the meeting/decision.

## **2. MAIN POINTS**

### **Relevant Planning Balance**

- 2.1. Members will be aware that there is a key general principle set out in law and practice as to how any development proposal should be considered. The relevant advice from the NPPF sets out that the statutory status of the development plan is the starting point for decision making and that where a planning application conflicts with an up to date development plan permission should not normally be granted and decisions that depart

from an up to date plan should only be considered if material considerations in a particular case indicate that the plan should not be followed

- 2.2. In this instance we have a recently adopted Development Plan and a 5 year housing land supply. This in turn means that the policies of the plan have full/maximum weight and the expectation is therefore that where there is conflict with policy the scheme will be refused unless there are material considerations that could justify setting aside the weight of that policy objection
- 2.3. In turn material considerations are defined fairly widely but must be related to the purpose of planning legislation (i.e. to regulate the use and development of land in the public interest). They must also fairly and reasonably relate to the application concerned.
- 2.4. However, what is critical to a proper assessment of this particular proposal is that before these more general balancing exercises are undertaken there is an additional series of tests that must be demonstrated to be passed arising from the location of the site in the AONB and the scale of the development and that, if failed, mean that the assessment identified above does not come into play as the scheme will essentially be 'in principle' unacceptable unless exceptional circumstances apply. The correct balancing exercises are set out in the Officer report appended hereto.
- 2.5. The key wording that gives effect to this balance as set out in the NPPF states:  
*“ When considering applications for development within National Parks, the Broads and Areas of Outstanding Natural Beauty, permission should be refused for major development other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest. Consideration of such applications should include an assessment of:*  
*(a) the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;*  
*(b) the cost of, and scope for, developing outside the designated area, or meeting the need for it in some other way; and*  
*(c) any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated.”*
- 2.6. Whether an application is “major” is a matter for the decision maker, taking into account its nature, scale and setting, and whether it could have a significant adverse impact on the purposes for which the area has been designated or defined. In that regard the NPPF sets out that great weight should be given to conserving and enhancing landscape and scenic beauty in Areas of Outstanding Natural Beauty which have the highest status of protection in relation to these issues. The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas. The scale and extent of development within these designated areas should be limited, while development within their setting should be sensitively located and designed to avoid or minimise adverse impacts on the designated areas.
- 2.7. It is the combination of this advice that was not considered to be correctly followed as more clearly set out in the report below.

#### **Summary of the Concerns/Issues raised post meeting**

- 2.8. Following consideration of the application by Uplands an e-mail was received raising the following issues (in summary)
  - Applicants had not disclosed full land ownership
  - The viability study had not been updated to reflect the current proposals

- The applicants statement that there had been full consultation in the village was not correct
- There is a presumption in the AONB against approving such applications and no economic case had been demonstrated making the decision ultra vires
- The staff transport arrangements were undeliverable
- Service traffic from Daylesford will all come through Kingham
- Is the use sustainable if severed from Daylesford?
- Whilst the chronic car parking problems in the village were mentioned there was no informed discussion and options were variously dangerous, unsustainable, contrary to the duty to ensure adequate parking is available, would impact on the landscape, would adversely affect existing residents unable to park, would need further planning permissions, would affect the CA/AONB, would be illegal
- How will the transport arrangements be sustained?
- The suggestion that if not developed the site would be turned into a housing estate was misleading. There is a presumption against change of use to housing, there is no evidence that the existing use was not viable, if you pay too much for the site that is not a reason to build a larger development, the committee should not be held to ransom and would set an adverse precedent
- The Committee concluded that the size and massing were acceptable in spite of contrary officers' advice and contrary to the AONB requirement for a major development to enhance the landscape. It was misled by a photo-montage that showed the massing in relation to a tree that has already died and been removed (on the NW corner). The officers spelt out the inadequacy of existing landscaping and the lack of space in a crowded development to provide appropriate landscaping. A country footpath is now to go through a car-park overlooked by terraces of cottages/rooms and the hotel facilities. That can only be described as damaging the AONB.
- The Committee ducked the question of sewage disposal and left it to officers. However, the Parish Council has made it quite clear that existing facilities are already inadequate for the village (we have had two separate incidents of tankers blocking the road and pumping out in the past few weeks. Thames Water may consider this acceptable but it is not acceptable to local residents to have sewage in the streets (in Cozens Lane and near the Mill) and thence in to the river system through the brooks. Are the applicants going to pay for new pumping stations at the Mill and in Cozens Lane? Without a suitable agreement the application should not be approved.
- The Officers rightly relied on the presumption against development in the AONB as sufficient justification to refuse the application. To justify allowing a major development the Council has to show it is the interests of the area. There is no reason to assume that more jobs equals the interests of the area. This part of the AONB (Kingham and Daylesford) is already swamped by tourists. The settled residents are becoming yokels on display as tourists look in windows and up driveways; this proposal represents further 'Disneyfication' of the villages. The existing policy clearly needs further refining to show how the proposed economic interests are compatible with a) climate change targets, b) the local community interests so communities are not hollowed out, c) any extra employment is matched by housing and infra-structure contributions. Allowing a major development without any contribution for the local community or schools, or any

extra housing or accommodation for staff, or adequate parking for local staff, seems perverse.

- There is no need for any Daylesford vehicle to be on the path at the Kingham end of it. They appear to be trying to establish a vehicle right-of-way to the detriment of footpath and bridleway users. West End, a quiet cul-de-sac in which children play, with cars parked on both sides of the road has a pinch-point bend where it joins West Street. The idea that this should be turned into a vehicle route from the Mill and Wild Rabbit to Daylesford is totally against the interests of the settled residents of Kingham. To use Section 106 money to benefit the applicant's interests seems illegal.
- Seeking advice as to the Council's powers to ask the Committee to review the matter or whether the options are for locals (perhaps led by the Parish Council) to appeal the decision or seek judicial review. Confirm that a group are prepared to back the Parish Council (or take independent action) in seeking a judicial review should a decision as currently approved by the Uplands Committee be ratified.

### 3. PLANNING REPORT

- 3.1. In light of the threatened JR separate Planning and Legal advice was sought. This examined the case put by the applicants, the officer report and the minutes and determined that there was no evidence that the committee had found reason that the scheme was not a major development and the only reference to what "exceptional" reason may justify an approval in such circumstances was that there was a pandemic. In that regard no appeals were found that approved development on that basis although one was found that advised the need to promote economic development as a result of the pandemic "*did not justify allowing harmful development.*" The apparent consensus of the committee that if refused it would mean the site would be developed as a housing estate "*lacks the weight attached to the policy position relating to major development in the AONB and the rationale as to why they set aside the policy requirements.*" No public Interest justification had been raised and "*the Upland Planning Committee in setting aside the advice of the Officers then failed to make it clear what their planning reasons and material consideration were in reaching a contrary decision and over-turning the officer recommendation, nor did they set out how they had applied weight to particular considerations in the context of a presumption against major development in the AONB.*"
- 3.2. The report concluded that the courts will make an assessment on the soundness of this decision on the basis of what a reasonable decision maker, properly directed, knowing the relevant facts would have done in reaching a decision. On the basis of the lack of a clearly justified sound planning reasons for their decision it is questionable that the decision is properly made and as such puts the Council at risk of a legal challenge.

### 4. LEGAL REPORT

- 4.1. In light of this finding legal advice was sought. This supported the conclusions above advising that "*that the Council is at risk of an application for a Judicial Review of the Committee's decision made on the 26th of July..... The grounds upon which an application could be made are that the Committee:*
  1. *Misdirected itself in law – I believe that this is a potential ground as both the Officer's Report and the advice from the Business Manager – Development Management was extremely clear about the legal position in terms of the major development in the AONB and that permission should not be granted unless there were exceptional circumstances which, in this case, there were not;*

*2. The Committee's decision was irrational in that it took into account irrelevant matters and failed to consider relevant matters in reaching its decision.*

- 4.2. *Additionally the draft Minutes do not incorporate the Committee's reasons for its decisions. As there is no recording of the meeting it will be difficult to assess whether reasons were discussed and just not noted in the Minutes or that there were simply no reasons for the decision at all. In both cases the Council is not assisted and is further exposed to the risk of a legal challenge."*

#### **Planning Assessment and Summary**

- 4.3. AONB policy is deliberately and consciously designed to give the highest status of protection and to limit the scale and extent of new development. In that regard it sets a series of hurdles that need to be jumped before any such development can be allowed. Critical amongst these are the "major" test and the "exceptional" test. These are rehearsed in more detail in the appended and updated Officer report appended to this report. However, for clarity, your officers overall assessment is as follows:
- 4.4. Applying the tests of the NPPF your officer's conclusion is that there is no practical doubt that this is a major development. Looking at its nature (busy commercial operation in a relatively small village on a largely greenfield site) scale (buildings and circulation space substantially in excess of what is there presently) and setting (loss of openness, views from road and footpath) and whether it could have a significant adverse impact on the purposes for which the area has been designated or defined (not conserving and enhancing landscape and scenic beauty of Area of Outstanding Natural Beauty nor conserving and enhancing wildlife and cultural heritage) it is clearly in and of itself a major development. To argue otherwise risks setting the bar at a very high level in regards to which other developments may not be considered major (would 40 or 20 or 10 houses thus no longer be major?) and undermining the principle that in the AONB development should be limited and major development refused except in exceptional circumstances. It is noteworthy in this regard that the Planning Policy Manager also specifically identifies in his consultation response that this is a 'major' development.
- 4.5. Once it has been determined that the scheme is major the tests of exceptionality must be assessed and passed. The Covid situation has been looked at elsewhere at appeal and determined not to provide such a justification. The appended report runs through the need for it to be in the public interest, which again as identified earlier in this report includes assessments of the need for it and economic impact, the potential to meet the need outside the protected area and the harms and opportunities arising. As set out above, any assessment of these factors would need to be demonstrated (not merely implied or assumed) to the extent that to be considered sound the decision is one that would be reached on the basis of what a reasonable decision maker, properly directed, knowing the relevant facts would have done. The appended report sets out the reasons why Officers consider the relevant test are not met here.
- 4.6. The final factor relates to the previous planning decisions on the site. The history of the site is clearly material - but is not determinative. Valid planning permissions are a relevant fallback position that can be implemented were the current consent not to be implemented. However they have been determined to be in accordance with the relevant tests as applied when they were approved and so claiming 'betterment' (ie that by allowing application A it will stop application B) is problematic as it pre-supposes that B is in some way harmful - when the fact is that it secured planning permission. It also needs to be recognised that the law and policy as regards AONB and other protected areas has evolved considerably over recent years (e.g. causing the need to remove the housing allocations in the AONB as part of the last local plan process) Thus merely because a permission was granted in the past does not mean it would be granted today; as different

circumstances/policies/legal tests may apply. That is particularly the case for expired consents (which the applicants are claiming should be counted in an assessment of whether the scheme is bigger than what has previously been approved) Clearly these expired consents can no longer be implemented and indeed may not secure consent again if re applied for as policy has strengthened and additionally they may not have been acceptable in their own right if all built out together. The presence of expired consents is also not considered exceptional as it will apply to many commercial sites that have been subject to development proposals over the years.

- 4.7. Officers are not arguing that this is a terrible scheme. Indeed they have worked with the applicants over a long period to seek to get the application into its best possible state. This has however always been underwritten by the fact that the scheme was a major development and as such the applicants needed to demonstrate that the exceptional tests were passed or to reduce the scale to that which could reasonably be classed as not being major. They have not, in your officers' assessment, been passed, the scheme is of major scale and impact and as such refusal is recommended.

## 5. FINANCIAL IMPLICATIONS

- 5.1. Were the decision to be issued and then successfully challenged it would likely give rise to considerable legal and other costs

## 6. LEGAL IMPLICATIONS

- 6.1. Approval of schemes where it is considered that the correct legal balances have not been correctly applied could be subject to Judicial Review and the advice received in this case is that the putative decision is at risk of such a challenge

## 7. RISK ASSESSMENT

- 7.1. The key risks are with regard to the legal and other costs and the ongoing ability of the adopted local plan to guide and restrict development in accordance with the strategy that underpins it if a level of development not demonstrably proven to meet the relevant legal and policy tests is approved

## 8. CLIMATE CHANGE IMPLICATIONS

- 8.1. Promoting sustainable development and resisting it in unsustainable locations is the core principle of the planning system and the strategy of the adopted local plan

## 9. ALTERNATIVE OPTIONS

- 9.1. Members could decide to approve the scheme although that is not recommended for the reasons outlined above

## 10. BACKGROUND PAPERS

- 10.1. The following documents have been identified by the author of the report in accordance with section 100D.5(a) of the Local Government Act 1972 and are listed in accordance with section 100 D.1(a) for inspection by members of the public: **Application reference 20/01165/FUL and associated papers.**
- 10.2. These documents will be available for inspection at the Council Offices at Elmfield during normal office hours for a period of up to four years from the date of the meeting. Please contact the author of the report.