



Report To: Planning Committee
Lead Officer: Planning and New Communities Director

4 March 2015

Smithy Fen Cottenham (5 to 11 Orchard Drive and 14 to 18 Water Lane) - Proposed Variation of 2006 Injunction in Light of May 2014 Appeal Outcome (App/W0530/A/12/2181439 arising from Refusal S/0041/12/Ful)

Purpose

1. To inform committee of any significant residual breaches of development control now affecting the various pitches contemplated by the above planning appeal decision.
2. To seek authority for an application to the High Court to vary the Injunction granted by Mr Justice Mitting on 6 April 2006 (sealed by the Court on 7 April 2006 under claim reference HQ05X02057), to ensure the tolerations and prohibitions contained in that order ("the 2006 order") properly reflect the planning authorisations and refusals resulting from the May 2014 appeal decision.
3. To note the granting of an Injunction order, made by Mr Justice King on a without notice basis on 16 January 2015, that had the effect of removing the 2006 tolerations in respect of the following three named Defendants as relate to three particular pitches detailed in the proviso to paragraph 4a of the 2006 order:-
 - Michael O'Brien – 5 Orchard Drive
 - Margaret O'Brien – 5a Orchard Drive
 - Nora O'Brien – 6 Orchard Drive
4. This is a key decision because:
 - (a) it results in the authority incurring expenditure that is, or the making of savings that are, significant having regard to this Council's budget for the service or function to which the decision relates; and
 - (b) it is of such significance to the locality, the Council or the services it provides that the decision-maker is of the opinion it should be treated as if a key decision.

Recommendations

5. The Director (Planning and New Communities) recommends that application be made to the High Court under section 187B of the Town and Country Planning Act 1990, seeking variation of the April 2006 order such that:
 - (a) the **toleration** in respect of the following named Defendant as relates to that particular pitch detailed in the proviso to paragraph 4a of the 2006 order be **removed** entirely:-
 - Michael Hegarty – 11 Orchard Drive (also spelled 'Heggarty')
 - (b) The **toleration** in respect of the following named Defendant as relates to that one particular pitch detailed in the proviso to paragraph 4a of the 2006 order be **extended to also personally benefit** Jimmy O'Brien in similar terms:-

- Kathleen O'Brien – 15 Water Lane (n.b. this individual is a different person to that contemplated by recommendation (d) below).
- (c) The **toleration** in respect of the following named Defendant as relates to that one particular pitch detailed in the proviso to paragraph 4a of the 2006 order be **extended to also personally benefit** Kathleen Slattery and David Gammell in similar terms:-
- Nora Slattery – 10 Orchard Drive
- (d) The **prohibitions set out at paragraph 4 of the 2006 order be expressly and specifically extended** to contemplate and bind the following person as if a named Defendant without any toleration as relates to the one particular pitch detailed, or otherwise in respect of the Northern Area or the Southern Area as defined at paragraph 2 of the 2006 order and, further, **that the current and continuing breach of development control affecting that pitch as represented by its unauthorised use for the stationing and residential occupation of caravans and/or mobile homes be ordered to cease and the pitch be cleared of chattels associated with such unauthorised development:-**
- Kathleen O'Brien – 11 Orchard Drive (n.b. this individual is a different person to that contemplated by recommendation (b) above).

Reasons for Recommendations

6. Approval of the recommendations described above and securing the resulting further variations to the April 2006 Injunction will, should the Court be minded to exercise its discretions in the manner suggested, harmonise the current and now fully established planning authorisations for the affected pitches with the controls asserted by the Injunction. This harmonisation will increase certainty for all stakeholders as to the extent and nature of residential occupations that are now permitted, and as to the sanctions that might apply (i.e. committal to prison for contempt) if occupations occur or continue that are not permitted. The varied Injunction will complete a suite (in conjunction with a series of others relating to land at Victoria View and land at Pine View) that effectively reinforce the Council's ability to assert planning control at Smithy Fen in the face of a serious and extensive history of non-compliance there.

Background – May 2014 Appeal

7. Planning appeal APP/W0530/A/12/2181439, decided on 2 May 2014 after a local public inquiry held in March 2014, was made by Kathleen O'Brien of 15 Water Lane, following a refusal by the Council on 17 July 2012 of planning application S/0041/12/FUL, as submitted on 9 January 2012. The development proposed by this application and refused consent by the Council was a change of use of 5, 5a, 6, 10 and 11 Orchard Drive, and 15 Water Lane to six gypsy/traveller pitches; and the change of use of 7, 8, and 9 Orchard Drive, and 14,16, 17 and 18 Water Lane to a community garden.
8. Prior to the holding of the inquiry, the appellant amended the appeal proposal to a smaller site extent that excluded pitches 5, 5a, and 6 Orchard Drive due in part to those pitches having then been vacated and the absent occupiers/proprietors not wishing to pursue the appeal in respect of their holdings. The appeal was accordingly decided on the basis of a revised development description reflecting this reduced scope; these three pitches not being considered and the Council's refusal of consent for their development not being challenged.

9. The appeal decision in respect of the revised scheme issued on a split basis, with some elements of the reduced appeal succeeding and others failing.
10. The appeal was allowed insofar as it related to the change of use of 10 Orchard Drive and 15 Water Lane to gypsy/traveller pitches. Planning permission was duly granted for such use of each pitch for a temporary period of up to four years from 2 May 2014 for the personal benefit only of Nora Slattery, Kathleen Slattery, and David Gammell (10 Orchard Drive); and Kathleen O'Brien and Jimmy O'Brien (15 Water Lane), and their respective resident dependents.
11. The appeal was dismissed insofar as it related to the change of use of 11 Orchard Drive to a gypsy/traveller pitch; and for the change of use of 7, 8, and 9 Orchard Drive, and 14, 16, 17 and 18 Water Lane to a community garden.
12. A copy of the 2 May 2014 appeal decision is appended to this report as Appendix 1 and members are requested to especially note the detailed balancing exercise undertaken by the Inspector in weighing personal circumstances of occupiers against planning harm in arriving at the split outcomes arrived at (from paragraph 54), together with his description of the factual context for the appeal (from paragraph 9).

Background – June 2008 Appeal

13. A previous planning appeal APP/W0530/A/07/2049741, decided on 2 June 2008 on the basis of written submissions after a local public inquiry was opened in March 2008 but not conducted to conclusion due to withdrawal of the appellants' agent, was made by Michael O'Brien, Nora O'Brien, Margaret O'Brien, Nora Slattery, and Michael Hegarty, following a refusal by the Council on 19 April 2007 of planning application S/1631/06/F, submitted on 4 August 2006. The development proposed by this application and refused consent by the Council was the retention of a residential gypsy caravan site for a temporary period of four years at 5, 5a, 6, 10 and 11 Orchard Drive.
14. It is apparent from the retrospective nature of the development description at issue then that all of the pitches were in occupation at the time the appealed planning application was made. This is confirmed at paragraph 2 of the appeal decision, which is appended to this report as Appendix 2.
15. Once again, a reading of the Inspector's reasoning reveals that the personal circumstances and accommodation needs of the various occupiers were considered in detail and weighed against the planning harm resulting from the development that could then be seen; the balance of that exercise indicating that the appeal should be dismissed and permission for the development refused.

Background – Enforcement Notices and Enforcement Appeals

16. The south-eastern extent (broadly half) of each of the three pitches comprising 5, 5a, and 6 Orchard Drive, together with the entirety of the two pitches comprising 10 and 11 Orchard Drive, were all made the subject of individual enforcement notices issued by the Council on 22 June 2005. These notices addressed the unauthorised change of use of the affected land for the stationing of residential caravans and the ancillary laying of hard surfaces, erection of sheds and other ancillary structures.
17. The north-western extent (again, broadly half) of each of the three pitches comprising 5, 5a, and 6 Orchard Drive were collectively included (together with other land previously forming an orchard belonging to a third party) in a single enforcement notice issued by the Council on 22 December 2004. This notice addressed the

unauthorised use of the land for siting residential caravans with associated vehicles, sheds, steel containers, ancillary drainage, electricity and water supplies, and construction of accesses and hard-standings.

18. A further enforcement notice in similar terms was issued in respect of 15 Water Lane on 11 April 2006.
19. All of these enforcement notices were the subject of enforcement notice appeals that were duly dismissed with the result that, where not superseded by subsequent grants of planning permission as described previously in this report, their requirements to remedy the breaches of planning control variously addressed remain extant and continue to give rise to criminal offences where not complied with.

Background – April 2006 Injunction

20. The order made by Mr Justice Mitting on 6 April 2006 colloquially refers to two discrete tracts of the wider Smithy Fen area as the '*Northern Area*', and the '*Southern Area*' respectively; all the pitches subject to this report lie within the latter area, accessed from Orchard Drive and Water Lane.
21. At the time of its making, and in the light of the then rapidly evolving and increasingly complex planning, enforcement, and related litigation history affecting Smithy Fen generally as a result of a large number of unauthorised developments then occurring (and anticipated), the Council adopted through necessity a policy of underpinning regular planning controls with the mechanism of the planning injunction, sometimes on a pre-emptory basis so as to robustly deter breaches that might be in contemplation.
22. In respect of the pitches discussed in this report, and the interested individuals then named as Defendants to the proceedings resulting in the 2006 Injunction, it is clear from the witness statement of the then Deputy Planning Director of the Council, as filed in support, that although there were current and continuing breaches of development control represented by unauthorised residential occupations (as described at paragraphs 15 to 18 above), the relief being sought was not then focused upon evicting occupants without planning permission. Rather, the purpose of the proceedings was to prevent further unauthorised encroachments occurring whilst existing avenues of application, appeal and statutory challenge as then in train, or about to be, were seen through to conclusion.
23. A copy of the order of 6 April 2006 is appended to this report as Appendix 3. Members will see the proviso to the Injunction set out at paragraph 4a that tolerates certain development on certain pitches for the benefit of specific named Defendants, included for the reasons described at paragraph 22 above.

Background – January 2015 Injunction

24. Where the pitches at 5, 5a, and 6 Orchard Drive had been vacated as described at paragraph 8 above, and where their removal from the scope of the May 2014 appeal effectively rendered their planning status final in having no lawful basis for any resumed residential occupation, officers considered there was a necessity to separately address the residual tolerations of the 2006 order so far as they related to these three vacant pitches. Not least in informing this perceived necessity, was an identified risk of these pitches being brought back into unauthorised occupation without warning whilst enquiries were properly made into the personal circumstances of those who unlawfully remained in occupation elsewhere within the protected areas.

25. Accordingly, and after consultation with lead members, application was duly made to the Court in the New Year seeking to vary the 2006 order so as to remove the continuing tolerations in that order that related to these pitches only. The simple aim of this application was to complete the legal protection against these most vulnerable pitches being unlawfully redeveloped. As the whereabouts of the last occupiers was not known, and as no prejudice arose due to their not having been in active occupation since before the May 2014 appeal, this application was made without notice.
26. On 16 January 2015, Mr Justice King granted an Injunction order amending the 2006 order so as to remove the tolerations benefiting Michael O'Brien, Margaret O'Brien, and Nora O'Brien in respect of the pitches at 5, 5a and 6 Orchard Drive respectively. Those pitches may not now be brought back into unauthorised residential occupation without a contempt of court arising. A copy of the January 2015 Injunction is appended to this report as Appendix 4.

Regularisation with planning permissions - next steps

27. Given that the various avenues of planning application, appeal and statutory challenge then contemplated have now been exhausted or legally expired, and have crystallised in the outcomes described at paragraphs 7 to 26 above, it is considered appropriate that the terms and tolerations of the 2006 Injunction are revisited as described in this report. This is to ensure the continuing protections the Injunction affords in the public interest properly reflect the current planning permissions and extant enforcement notices attaching to the pitches under consideration, decided after detailed and transparent testing of relevant material considerations since the order was granted.
28. The variation application now recommended to committee will also enable the 2006 order to be refreshed to reflect, require, and secure with certainty the regularisation necessary at 11 Orchard Drive, where unauthorised development represented by the continued siting and residential occupation of caravans continues despite planning avenues to permit such use having been exhausted.
- ### **11 Orchard Drive – consideration of personal circumstances**
29. Of the pitches potentially affected by the recommendations to this report, 11 Orchard Drive requires especial consideration as it is subject to continuing residential occupation that approval of the recommendations at paragraph 5(a) and 5(d) will result in being brought to an end, if the proceedings suggested by it succeed.
30. 11 Orchard Drive presently sites one mobile home, a touring caravan, and a portable utility cabin. These together afford residential accommodation for Kathleen O'Brien and three dependent children. Michael Hegarty, a former resident partner of Ms O'Brien and the only person expressly tolerated to be in occupation of this pitch under the 2006 order (with one touring caravan and one day room only), no longer lives at the pitch – see the May 2014 appeal decision at Appendix 1 (paragraph 48). It has previously been suggested that Ms O'Brien and her children should benefit from the toleration currently enjoyed by Mr Hegarty in view of her past association with him.
31. Notwithstanding that the personal circumstances of the occupiers of 11 Orchard Drive were considered during the hearing of the May 2014 appeal, during the hearing of the June 2008 appeal, and also during the appeal against the 2005 enforcement notice, which were all dismissed, it is necessary for committee to now consider occupants' personal circumstances afresh in deciding whether anything in those circumstances today outweighs the public interest in exerting due planning control by the means that are now recommended.

32. Where Ms O'Brien has the benefit of legal representation in connection with this matter, her advisors have compiled information that updates the personal circumstances that were before the Inspector at the May 2014 appeal. Given this contains material concerning health and schooling matters, this information is appended for committee members (but not for wider publication) in exempt Appendix 5 to this report.
33. Committee will note that, relying on the authority of Supreme Court case *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, Ms O'Brien's advisors assert that the best interests of the children potentially affected by the decisions being sought be this report must be a primary consideration. As it may assist members in their deliberations, a full transcript of this judgment is appended to this report as Appendix 6.
34. The remedy of injunctive relief pursuant to Section 187B of the Town and Country Planning Act 1990 is a discretionary one. This means the Court will have to be satisfied that the Council as claimant should be granted the remedy on the facts as apply, balancing the interests of the Local Planning Authority (and the public interest by extension) against the personal circumstances of, and any other material considerations advanced by, the plot owners and/or occupiers as defendants. The remedy of an injunction will not lightly be granted where breach of any that is ordered will represent a contempt of court for which committal to prison is a possible sanction and where compliance will displace individuals from homes that have now been occupied for several years.
35. In seeking an injunction to bear against the occupied pitch especially, the Council will need to demonstrate that a breach of development control endures and that the public interest in remedying this outweighs considerations analysed under the following themes, considered in turn below, some of which are particularly engaged due to the potential defendants being Gypsies or Travellers:
- Health (including any disability impact)
 - Educational needs of children
 - Race impact
 - Availability of alternative sites
 - Homelessness (including aversion to bricks and mortar, and potential exceptional storage need for chattels)
36. Members will see and need to consider that certain occupants do present a variety of personal health needs, all stated as requiring treatment or other support that is presently provided locally.
37. The committee has been provided with education information that describes the position in respect of the three children as reside at 11 Orchard Drive. An update has also been requested from the Education Authority that will be reported verbally at the meeting if any material changes or additional facts are disclosed.
38. Councillors will note and need to consider the extent to which educational arrangements may be disturbed or disrupted at least to some extent by a successful injunction application if children are enrolled with and noted as satisfactorily attending local educational establishments.
39. Although the Court of Appeal and other authorities have held that a separate race impact assessment is not necessary to be undertaken by the Council in order to

discharge its duties under equalities legislation as long as such matters as would inform such assessment are addressed in substance, it is nonetheless prudent to remind members that in discharging its remit as Local Planning Authority (i.e. where contemplating enforcement proceedings), the Council does need to have due regard to the need to eliminate unlawful racial discrimination and/or to promote equality of opportunity and good relations between persons of different racial groups when making decisions.

40. In the circumstances here, it may be suggested that the Gypsy/Traveller status of the prospective defendants is likely to result in an inequality of opportunity to access authorised sites for their housing needs when compared with the wider community generally, as has been recognised by the historic acceptance by the Council that additional Gypsy and Traveller site provision is necessary locally and regionally.
41. The Council recognises that Gypsies and Travellers suffer amongst the worst health and education status of any disadvantaged group in England and there is, accordingly, a pressing need to promote equality of opportunity in these areas between Gypsies/Travellers and the general settled community to address this inequality. The Council also recognises, however, that this aim is supported by reducing the number of unauthorised developments, balanced by approvals being granted for sites in appropriate locations. The Council does have a track record of granting permanent and temporary consents when suitable sites are promoted, and consents have been won at appeal albeit, recently, in the acknowledged context of weaknesses identified by Inspectors as affecting the currently applicable Gypsy and Traveller Needs Assessment available to the authority.
42. Countervailing factors are the need to protect the countryside from development that impacts adversely on the area and cannot be assimilated into its surroundings, and also the imperative of upholding planning control in the wider public interest. This latter consideration may also be thought relevant from an equalities perspective in circumstances where the settled community can and sometimes do perceive unequal treatment if planning controls are selectively (dis)applied; whereas, conversely, their strict application could result in an otherwise locally established family being forced back onto the roadside.
43. Ultimately, the balance to be struck between and the weight to be afforded these competing considerations (and any others identified by members) is a matter for the committee, provided the duty described at paragraph 39 is discharged.
44. In respect of alternative sites that might be accessed by those at risk of being displaced if the recommendations now made are approved, the background papers cited as informing this report clearly demonstrate the lengths the Council has gone to over recent years to identify and promote alternatives to the continued occupation of unauthorised pitches within the areas protected by the 2006 order. At the date of publishing this report, 11 Orchard Drive remains the site of the only significant subsisting breach of development control within these areas, and one in respect of which it must now be regrettably concluded there is no realistic prospect either of regularisation occurring by future planning approval being secured or by voluntary compliance with the extant enforcement notice.
45. In discussions prior to the preparation of this report, those advising Ms O'Brien were specifically canvassed as to whether allowing further time for compliance would be of assistance and, if so, how long might be needed to avoid the requirement for contested proceedings being brought. In the event, and save for the information provided in Appendix 5, no engagement on this point has occurred and the Council

accordingly seems to be faced with having now to decide whether to finally enforce due planning control or look away whilst planning law is disregarded.

46. Although the proceedings contemplated by this report would be conducted by the Council in its statutory capacity as Local Planning Authority, members should be aware that the Council might need to react in another statutory capacity, as Housing Authority in the event individuals are displaced and present as being homeless as a consequence.
47. If such approaches are made, and assistance in meeting housing needs are sought, there may be challenges to address arising from the Gypsy or Traveller status of those likely to be seeking that assistance.
48. Whilst housing eligibility and needs fall to be assessed in the same manner as for any applicant, it may be necessary for any interim accommodation offered to be exceptionally accompanied by assistance in safely storing large chattels such as caravans or mobile homes. A duty to furnish such assistance, at least in the short term, may arise even if any interim accommodation offered is not accepted.
49. In addition to possessions of this nature, further specialist assistance may have to be offered for those applicants who present as own and wish to retain animals associated with their traditional lifestyle. Ponies are perhaps the most usual example of this but not necessarily exclusive to other animals that may well also be owned.
50. Experience of administering housing applications from displaced Gypsies or Travellers indicates that the storage of large chattels and/or the accommodation of animals can prove a limiting factor in respect of the suitability of any housing that may ultimately be offered in the event eligibility is established. If housing with sufficient space to store a mobile home or caravan, or appropriate for the keeping of animals is even identified as being available, it may well be the case that such is not located reasonably local to family, schools, or health infrastructure as has previously been relied upon.
51. Similarly, it is acknowledged that Gypsies and Travellers may well suffer a deep aversion to being accommodated in bricks and mortar housing. Although Housing Authorities are required to be mindful of this and the potential health consequences that might arise, it is settled that there is no duty to provide or facilitate caravan or mobile home based accommodation (whether from existing housing stock or by dedicated acquisition), provided regard is had to the likely availability of alternative accommodation in making any decision to enforce planning controls by requiring the cessation of residential occupation.
52. Whilst it is clear that the special circumstances of Gypsies and Travellers, as a minority with a traditional lifestyle different from the majority in society, mean that consideration must be given to those circumstances before making decisions that impact that way of life, there can be a legitimate, proportionate and balancing aim to uphold planning controls in the interests of society as a whole. This balance is considered to be reflected in the recommendations made by this report.

Options

53. As an alternative to the course recommended, members could resolve not to seek any amendment of the 2006 order at all, or prefer only such amendment as does not potentially interfere with the current use and occupation of 11 Orchard Drive.

54. The former alternative does not commend itself where the Injunction contained in the 2006 order, as varied in January of this year, would otherwise be out of kilter with the planning permissions that have now been both granted and refused in respect of pitches lying in the Southern Area contemplated by it. This can only perpetuate uncertainty for all stakeholders, particularly including those who have now secured and rely on planning permissions to occupy pitches in a manner that gives rise to a technical contempt of court (i.e. where contrary to the express controls of the 2006 order), and those who might consequently choose to query the legitimacy of that occupation.
55. The latter alternative, regardless of any other variation sought, would effectively be tantamount to the Local Planning Authority condoning the continuing commission of a criminal offence (i.e. the ongoing breach of the 2005 enforcement notice) represented by unauthorised development maintained in the face of serial refusals of consent that have confirmed the existence of planning harm that outweighs personal need. Again, it is suggested this course has nothing to commend it and cannot be viewed as being in the public interest.

Implications

56. In the writing of this report, taking into account financial, legal, staffing, risk management, equality and diversity, climate change, community safety and any other key issues, the following implications have been considered:-

Financial

57. The recommendations of this report, if approved, will result in legal costs being incurred that might, if proceedings are successfully defended, include those of defendants. It is considered the amounts at issue will be contained within existing budgetary provision however, regardless of outcome.

Legal

58. The recommendations of this report, if approved, will result in the Council commencing and pursuing legal proceedings against third parties under statutory powers.

Equality and Diversity

59. Equalities issues are engaged by this report and are as analysed in the main body.

Consultation responses (including from the Youth Council)

60. The report is informed by and appends information concerning the personal circumstances of the occupiers of 11 Orchard Drive, as provided by legal advisors for those affected.

Effect on Strategic Aims

61. The recommendations of this report are consistent with and support the statutory purposes of the Council acting corporately as Local Planning Authority.

Background Papers

Where [the Local Authorities \(Executive Arrangements\) \(Meetings and Access to Information\) \(England\) Regulations 2012](#) require documents to be open to inspection by members of the public, they must be available for inspection: -

- (a) at all reasonable hours at the offices of South Cambridgeshire District Council;
- (b) on the Council's website; and

- (c) in the case of documents to be available for inspection pursuant to regulation 15, on payment of a reasonable fee required by the Council by the person seeking to inspect the documents at the offices of South Cambridgeshire District Council.

In addition to the appendices to this report, the following previous committee reports, associated minutes, and other documents as listed have informed the recommendations now made:

Planning Enforcement Sub-Committee, 21 July 2010, Agenda item 6
Planning Enforcement Sub-Committee, 17 November 2010, Agenda item 4
Planning Enforcement Sub-Committee, 16 March 2011, Agenda item 4
Delegation Report for planning refusal S/0041/12/FL, 18 July 2012

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