

**SUPPLEMENTAL REPORT TO DEVELOPMENT AND CONSERVATION CONTROL  
COMMITTEE**

**6 JULY 2005**

Append plan, enforcement notices, Inspector's report (copies to be made available to Members), decision letter.

**1. Government guidance on enforcement**

In making a decision on the exercise of enforcement powers, Members should consider relevant Government guidance on the use of enforcement. A summary of the guidance is detailed below.

***PPG 18 – guidance on enforcing planning control***

In this general guidance on planning enforcement, local authorities are reminded that the decisive issue is whether the breach of planning control would unacceptably affect public amenity or the existing use of land meriting protection of the public interest. Local authorities are also reminded that enforcement actions should always be commensurate with the breach of planning control to which it relates.

***Circular 1/94 – guidance on planning and gypsy caravan sites***

It is provided at paragraph 27 that local planning authorities "*have a range of enforcement powers available to them where the breach of planning control is sufficiently serious to justify taking action*".

Local Authorities are also reminded of their obligations under other legislation, and in particular to take account of the effects of any action on the education of children already enrolled in school, and any housing requirements.

Circular 1/94 is currently under review and the new circular "Planning for Gypsy and Traveller Sites" was published for consultation in December 2004. It is understood that the First Secretary has not completed his consideration of the consultation exercise. As such little weight can be afforded to the emerging guidance. However, para. 54 of the Consultation Draft should be noted:

"54. The provisions of the European Convention on Human Rights should be considered as an integral part of local authorities' decision-making - including its approach to the question of what are material considerations. Local planning authorities should consider the consequences of refusing or granting planning permission, or taking enforcement action, on the rights of the individuals concerned, both Gypsies and Travellers and local residents, and whether it is necessary and proportionate in the circumstances. Before considering the question of proportionality, authorities are reminded that it is also necessary to establish that the chosen remedy is the one which causes least interference with the rights in question, in order to serve an overriding public interest. Any facts that may be relevant should be established and considered before determining planning applications. Gypsies and Travellers should co-operate by responding to requests for relevant information..."

## **Circular 18/94 – guidance on gypsy sites policy and unauthorised camping**

Although this Circular is primarily directed at the unlawful occupation of sites belonging to others and to the provisions of the Criminal Justice & Public Order Act 1994, it is relevant to note that local authorities are reminded not to use their power to evict gypsies needlessly and they should use their powers in a *“humane and compassionate way, taking into account the rights and needs of the Gypsies concerned, the owners of the land in question, and the wider community whose lives may be affected by the situation”* (paragraph 9).

When deciding to evict, local authorities are reminded that they are expected to liaise with other local authorities who may have statutory responsibilities to discharge in respect of those being evicted. When deciding to proceed with an eviction, local authorities should liaise with the relevant statutory agencies, particularly where pregnant women or newly-born children are involved, to ensure that those agencies are not prevented from fulfilling their obligations towards those persons (paragraphs 12 and 13).

### **OPDM Managing Unauthorised Camping (March 2004)**

Local authorities are reminded that decisions about what action to take in connection with unauthorised encampment must be made in the light of information gathered and decisions must be lawful (in line with local policy and procedures), reasonable, balanced (taking into account the rights and needs of both the settled community and Gypsies and Travellers) and proportionate.

The guidance also provides that local authorities should always follow a route which requires a court order and must have regard to considerations of common humanity and ensure that the human rights of unauthorised campers are safeguarded (para 6.5)

## **2. The development plan**

The development plan consists of the Cambridgeshire and Peterborough Structure Plan 2003 and the South Cambridgeshire Local Plan 2004. Structure Plan policies P1/2 and Local Plan policies deal with development in the countryside. Structure Plan policy P5/4 states that local plans should make provision to meet the locally assessed housing needs of specific groups, including travellers and gypsies. Local plan policy HG23 deals with the provision of gypsy caravans sites outside the Green Belt and states:

*“Outside the Green Belt, proposals for caravans for gypsies and travelling show people on a site consisting of a single or more pitches, will only be considered when the need for a site is shown to be essential to enable the applicants to continue to exercise a travelling lifestyle for the purpose of making and seeking their livelihood. Occupation would be restricted to gypsies or travelling show people (as the case may be) and may be limited to a temporary period and/or for the benefit of named occupier(s)”*

HG23 lists 9 criteria to be met where the need is proven including that the site have minimal impact on the amenities of existing local residents and would not have a significant adverse effect on the rural character and appearance, or the amenities of the surrounding area.

## **3. The site**

The site, plots 1-17, Pine View, Smithy Fen is part of the wider Smithy Fen gypsy encampment, a mixture of authorised and unauthorised sites (see attached plan). The development is within the countryside and the landscape is open. The plots lie to the north

west of Pine View. A detailed description of the immediate vicinity and of local views is given in paragraphs 2.3 and 2.5 of the recent Inspector's report. At the present time plots 1-5 are occupied.

#### **4. Planning status of site**

Members will be aware that the Secretary of State has recently upheld an enforcement notice (E461C) in relation to plots 7-17. The enforcement notice thus upheld requires cessation of use as a caravan site by 11 June 2005. At the same time s78 appeals in respect of plots 7-17 were dismissed.

Plots 1-6 are covered by enforcement notice E459. This was upheld on appeal on 18 November 2003. This enforcement notice required the cessation of use as a caravan site by 18 February 2004. The Secretary of State's recent decision dismissed s78 appeals seeking planning permission for use of plots 1-6 for gypsy caravans with the result that enforcement notice E459 continues to be effective.

Earlier episodes in the complicated planning history of the Pine View area are set out in section 3 of the Inspector's report.

The Secretary of State accepted that the occupiers of the site should be treated as gypsies. Members should do likewise.

The Secretary of State found that the present usage causes very considerable planning harm, in particular:

- It harms the amenities of existing local residents by reason of activities taking place outside the site, in breach of criterion (2) of local plan policy HG23;
- It prejudices enjoyment of local rights of way in breach of criterion (9) of local plan policy HG23;
- It has a significant adverse effect on the open fen landscape, in breach of criterion (3) of local plan policy HG23;
- Highway access is not acceptable in breach of criterion (5) of local plan policy HG23;
- Allowing the appeals would create a harmful precedent for further development at Smithy Fen.

The Secretary of State recognised that there was a significant need for additional gypsy sites both nationally and in Cambridgeshire, that there was no immediately available alternative accommodation for the present residents of Pine View and that finding such alternative accommodation would not be easy. However, so far as the appellants before him were concerned, he considered that it was not essential that they should live together, nor that any alternative site should be in the Cambridge area. Further the Secretary of State accepted that the allocation of land at Chesterton Fen in South Cambridgeshire could help to reduce the unmet demand for gypsy sites.

The Secretary of State considered evidence about the personal circumstances of the appellants and concluded that this did not outweigh the harm occasioned by the use of the site.

The Secretary of State considered that the interference with the appellants' Article 8 rights (right to respect for private and family life) that would be involved in refusing planning

permission and upholding the enforcement notice was necessary within Article 8(2) and would be proportionate. The Secretary of State considered that there would be no violation of the appellants' rights under Article 1 of Protocol 1 (protection of property). In respect of Article 2 of Protocol 2 (right to education), the Secretary of State considered that any claim of violation of rights under Article 2 would be unfounded as the decisions recommended did not seek to deprive any person of the right to education nor would they have the effect of doing so.

It is significant that the Secretary of State did not extend the original 3 month time limit in enforcement notice E461C. Further, as the Secretary of State had before him s78 appeals relating to plots 1-6, he had it within his power to override the requirements of enforcement notice E459 by granting a temporary or permanent planning permission. He did not do this.

## **5. Personal circumstances and human rights**

In deciding whether to take further enforcement action, Members must form a judgment on the planning merits of the offending development as they exist at the present time. Apart from the additional information that has been gathered about the personal circumstances of some of the occupiers set out below, there have been no material changes in planning circumstances since the time of the Secretary of State's letter.

In particular it remains the case that the Council cannot point to any suitable alternative site for the occupiers and that there is a need for gypsy sites in Cambridgeshire.

As for the harm caused by the development, officers endorse the assessment of the Secretary of State set out above.

As the Council is unable to provide any alternative site for the occupants, any eviction will involve interference with the occupants' rights under Article 8 and will cause hardship. Article 8 is a qualified right and an interference with it can be justified if this is necessary in a democratic society for the protection of the rights and freedoms of others and is proportionate. Upholding planning policy and protecting the environment are relevant to this. Members must reach their own view on the degree of hardship involved in any eviction (as to which see the information presented below following inquiries into the needs and personal circumstances of the occupants) and on whether the interference with Article rights involved with any eviction would be necessary and proportionate.

Some time has elapsed since the Inspector's decision and the Members must reconsider the personal circumstances and human rights of the Pine View occupants.

Officers have conducted interviews with the occupiers and updated needs audit forms have been completed. The needs audits forms have been sent to Members in advance of the meeting for their consideration. Members will need to consider the updated needs assessment for all of those who would be subject to enforcement action before weighing the evidence against the harm. In particular, Members should remember that a decision to proceed with enforcement action is likely to result in the removal of the occupants from the site which may result in an interference with homes, private and family life and education. That interference must be balanced against the public interest in pursuing legitimate aims.

Officers consider that there have been no significant changes to personal circumstances since the Inspector's decision. In particular, there have been no new arrivals or changes to the personal circumstances of each plot occupant.

Officers consider that the planning and environmental harm and the public interest in pursuing legitimate aims (such as the economic well-being of the country, public safety and protecting the rights and freedoms of others) outweighs the interference with the occupiers homes and private/family life and the hardship which enforcing planning control and evicting will have. Officers consider that enforcement action is necessary and justified and would not involve the violation of Article 8 rights.

## **6. Legal (including equality) implications**

### **Racial discrimination**

Racial discrimination occurs if a person is treated less favourably on racial grounds than another person would be in the same circumstances or in circumstances which are not materially different. It also occurs where a policy or procedure that is applied to all has a disproportionate and negative impact on a racial group and which cannot be justified.

The Race Relations (Amendment) Act 2000 places local authorities under a “general statutory duty” requiring that, in carrying out their functions, including their planning functions, they must have due regard to the need:

- to eliminate unlawful racial discrimination;
- to promote equality of opportunity; and
- to promote good relations between people of different racial groups.

In carrying out this general duty, the Council is obliged to have a Race Equality Scheme which is to be a “timetabled and realistic plan, setting out the Council’s arrangements for meeting the general statutory duty.” The Race Equality Scheme must state the functions and policies of the Council that have been assessed as relevant to its performance of the general statutory duty. The Council has such a Scheme. The Commission for Racial Equality has issued a Statutory Code of Practice on the duty to promote race equality.

If the Council fails to have “due regard” to the three race issues identified above, it may have failed to comply with a statutory duty.

### **Relevant racial groups**

The meaning of “gypsy” as a racial group is not the same as the meaning given to “gypsy” in the planning legislation. Romany gypsies have been identified as a racial group (*Commission for Racial Equality v Dutton* [1989] QB 783). Under the race relations legislation “racial group” also includes “national origin”. Therefore “Irish” would be a racial group. “Irish Traveller” is reported as having been identified as a racial group.

### **The present case**

Two main issues arises in the present case because the occupants of land at Pine View appear to be of Irish descent and may be Irish Travellers: they thus belong to a distinct racial group.

First, that racial group is different from the racial group occupying the Chesterton Fen site which is populated principally by English travellers and gypsies. It has been suggested that a discrimination issue could arise out of the Council’s different treatment of these two sites. In the case of Chesterton Fen an enforcement notice requiring the removal of gypsy caravans was upheld on appeal by decision letter dated 29 April 1998. Twenty nine s78

appeals against refusals to grant planning permission were dismissed by the Secretary of State on 1 July 2004. The period for compliance with the enforcement notice thus upheld expired on 29 April 1999. At the present time there are 34 plots at Sandy Park (Chesterton Fen), 23 of which are occupied. Although the Council is far from tolerating the unlawful development at Chesterton Fen, it has not decided to prosecute for failure to comply with the enforcement notice, nor to take direct action, nor to seek an eviction injunction. If Members were to decide to take such action in respect of Pine View, it would undoubtedly be the case that more vigorous action was being taken against that site. However the planning circumstances of Pine View are wholly different from those of Chesterton Fen. In particular:

- The present unlawful development at Pine View has been found to have an adverse impact on the amenities of nearby residents, whereas the Chesterton Fen site has not.
- A principal objection to the Chesterton Fen site is that it is in the Green Belt. While this is plainly a very important objection, delay in removal does not involve *increased* injury in the way that delay in remedying harm to residential amenity does.
- The Chesterton Fen site is very self-contained and the unlawful development does not create the risk of encouraging occupation of other nearby land.

Secondly, the Council must consider whether its policy and the application of that policy has a disproportionately greater impact upon one racial group rather than another.

Assuming for present purposes that the policy does have such a disproportionately greater impact, the Council may consider that the policy and its applications are justified and that there are no sufficient reasons to depart from that policy principally because the development has been found to have an adverse impact on local authorities and the presence of the site creates the risk that others will be encouraged to occupy adjoining land.

Prompt action at Pine View is justified by the circumstances of the site and is wholly unrelated to questions of the racial origin of the occupants. The circumstances of the two sites are materially different and it is this which accounts for the difference in approach. Officers therefore consider that the different approach does not involve racial discrimination and that a decision to take eviction action at Pine View could be taken consistently with the Council having due regard to the three matters identified above.

## **7. Enforcement options available to the Council**

The occupiers are in breach of the enforcement notices which is a criminal offence under s179 of the Town and Country Planning Act 1990.

Members have already been advised of the different enforcement options open to them and the Cabinet agreed a preference for taking injunctive action in the first instance (as opposed to direct action under s178 TCPA) at the meeting on 28 April 2005.

Officers consider that it may be helpful to remind Members of the different enforcement options open to them as follows:

### **Direct action under s178 TCPA**

Where any steps required by an enforcement notice are not taken within the compliance period, the Council may enter the land and take the steps and recover from the person who is the owner of the land any expenses reasonably incurred in doing so.

The Council would have to give 28 days notice before taking direct action under s181(4)TCPA.

Once notice is given of the proposed direct action, plot occupiers may apply to the High Court for judicial review of the decision and also obtain an injunction to stop the direct action taking place pending the determination of the judicial review.

### **Prosecutions**

Non-compliance with an enforcement notice is an offence under s179 TCPA. If found guilty of an offence under this section, the plot occupiers would be liable to (a) on summary conviction to a fine not exceeding £20,000 and (b) on conviction on indictment, to a fine.

### **Injunction proceedings**

The Council could apply for an injunction under s187B TCPA against the current owners/occupiers requiring compliance with the enforcement notices.

The court has considerable discretion as to how it deals with the application. If an injunction is granted and breached, the ultimate sanction is committal to prison.

In deciding whether to grant an injunction, the court has to decide whether it would be prepared to commit a defendant to prison for contempt if the injunction is breached. The court has to weigh the public interest in securing compliance with planning legislation against the private interests of the plot occupiers. The court will consider human rights and any issues or hardship which arise should the plot occupiers be evicted.

The Court will take into account whether the LPA has properly considered questions of hardship and the necessity for and proportionality of eviction.

It is likely that injunction proceedings would be opposed by the plot occupiers and the matter would be dealt with at trial when the court will decide whether or not to grant the final injunction. If the injunction is granted, a date will be fixed for compliance before enforcement action to evict can be taken.

### **Compulsory purchase**

The Council has compulsory purchase powers under s226 TCPA. This provides:

"(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area

(a) if the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land, or

(b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.

(1A) But a local authority must not exercise the power under paragraph (a) of subs.(1) unless they think that the development, redevelopment or improvement is likely to contribute to the achievement of any one or more of the following objects

(a) the promotion or improvement of the economic well-being of their area;

(b) the promotion or improvement of the social well-being of their area;

(c) the promotion or improvement of the environmental well-being of their area.”

Guidance on this power is found in ODPM Circular 06/2004. In order to justify the compulsory acquisition of land a compelling case in the public interest would have to be demonstrated (para. 17 of the Circular):

“17. A compulsory purchase order should only be made where there is a compelling case in the public interest. An acquiring authority should be sure that the purposes for which it is making a compulsory purchase order sufficiently justify interfering with the human rights of those with an interest in the land affected. Regard should be had, in particular, to the provisions of Article 1 of the First Protocol to the European Convention on Human Rights and, in the case of a dwelling, Article 8 of the Convention.”

The Government’s guidance on managing unauthorised camping specifically recognises the ability to use compulsory purchase against unauthorised development in order to restore land to its lawful use for agriculture. There are various stages for a Council to follow including establishing who the owners/occupiers are and publishing press notices. There is also a period for objections.

If a Council starts the CPO process and an order is made, it still has to obtain vacant possession of the land. Members should be aware that the recent Court of Appeal case of *Price v Leeds City Council* [2005] EWCA Civ 289 has called into question the absolute right of a local authority to evict trespassers from its land. The case has gone to the House of Lords who will decide whether Article 8 of the Human Rights Act (right to respect for private and family life) is engaged where a local authority takes possession action.

In dealing with the CPO process, a Council should make it clear that it has properly considered Article 8 and that the decision to purchase compulsorily has been made only after taking this into account.

The Council would need to demonstrate that it had the funds to carry out the acquisition.