

## Planning Committee – Wednesday 28 October 2009

### Report of the Head of Legal and Democratic Services

#### Enforcement Item

1. **File/Complaint Number** E/0283/38/06
2. **Location of Site** Land at Sherford Bridge Farm, Sherford Road, Taunton
3. **Names of Owners** Mr Alan Parris, Mr Richard Parris and Mrs Sylvia Parris
4. **Nature of Contravention** Non-Compliance with the requirements of an Enforcement Notice dated 12 April 2007

#### Background

1. The owners of the Site are Mr Alan Parris, Mr Richard Parris and Mrs Sylvia Parris.
2. With reference to the Environment Agency Online Flood Map, the Site is located in an area Zone 3b:Functional Floodplain as defined in PPS25. Taunton Deane Local Plan policy EN28 seeks to locate development on land at little or no risk of flooding.
3. Planning Permission was granted in 2000 for a building to house livestock to replace an existing agricultural building at the Site (“the 2000 Planning Permission”).
4. The 2000 Planning Permission was not implemented. Instead, a building (“the Unauthorised Building”) and concrete yard was erected on the Site in 2006 and used for a commercial valeting business.
5. On 14 February 2007 this Planning Committee resolved that enforcement action be taken to secure the removal of the Unauthorised Building and concrete yard and cessation of the vehicle valeting business at the Site and institute legal proceedings should the enforcement notice not be complied with.
6. An Enforcement Notice dated 12 April 2007 was issued on the Owners with 2 requirements:- **1.** to stop using the steel framed, profile sheeted building as an agricultural workshop and machinery repair/store shed together with commercial vehicle valeting business; and **2.** to dismantle the steel framed, profile sheeted building, remove all the dismantled materials from the land and restore the land to the condition it was in before the breach of planning control occurred.

7. It has since become apparent that the concrete yard is not mentioned in the Enforcement Notice itself. The notice is only concerned with the use and dismantling of the steel building.
8. An appeal was made against the enforcement notice but was largely dismissed. The requirement to dismantle the building remained.
9. The Owners failed to dismantle the building within the time required and on 2 September 2008 the Council wrote to the Owners advising them that if they did not comply with the requirements of the Enforcement Notice by 16 September 2008 then it might commence legal proceedings in the Magistrates' Court for the offence of Non-Compliance with the Enforcement Notice.
10. The Council's Senior Planning Enforcement Officer visited the Site in October 2008 and reported that the unauthorised building had been demolished but the concrete base which formed the floor of the unauthorised building plus concrete yard in front of the unauthorised building, remained.
11. On 27 November 2008 the Council received a telephone call from Graham Foster who lives at Sherford Bridge House which is adjacent to the Site. Mr Foster was concerned because the Enforcement Notice required the Owners to reinstate the land to its former condition and this has not been done. Mr Foster explained that the Remaining Concrete has increased the risk of flooding to his property.
12. Legal proceedings were issued in the Taunton Magistrates' Court to prosecute for Non Compliance with the Enforcement Notice under Section 179(2) of the Town and Country Planning Act 1990 and the date of the first hearing was listed on 12 March 2009. The proceedings have subsequently been adjourned until the next hearing listed on Thursday 19 November 2009.
13. Subsequent to the Owners being advised of the commencement of legal proceedings, the Owners argue that the whole of the area where the Unauthorised Building was sited has always been concreted and the Remaining Concrete would also fall within Permitted Development rights because it is a concrete yard ancillary to agricultural use.
14. The Council has been in contact with the Environment Agency (EA). In January 2009 it wrote asking whether or not the Remaining Concrete could pose the threat of flooding. The EA replied in February 2009 and advised *"It is recommended that the entire building is removed and the ground is returned to its original level and composition i.e. green field. A concrete platform is likely to be impermeable and increase run-off into the watercourse, while in a greenfield state water would soak into the ground attenuating rainfall."*

15. Regarding the owner's contention that the Remaining Concrete is lawful because it is either established from long use (albeit that it has been repaired or renewed from time to time) and/or permitted development the EA commented "*If the platform can be shown to be in position for over 10 years then presumably we could not expect it to be broken up and removed*".
16. A Report went to this Committee on 30 March 2009 recommending that the legal proceedings in the Magistrates' Court be withdrawn because it was not considered to be in the public interest to continue with the prosecution. On conviction the penalty in the Magistrates' Court is a fine, there is no power to order the Remaining Concrete to be removed so the legal proceedings would not achieve the required result, i.e., removal of the Remaining Concrete.
17. A letter dated 27 March 2009 was received from the EA on 30 March 2009 and was reported to this Committee. The pertinent comments within that letter were "*From reviewing your brief for the scheduled meeting, it is evident that the forecourt and slab of the illegal building still remains and you are classifying this as permitted development rights. For as it stands it has increased flood risk to the community. This is unfortunate and we would argue that the remaining concrete area is removed in its entirety, returned to its previous ground level and natural permeable state. Therefore we would respectfully request that the LPA fully enforce its enforcement notice and not just partially.*
- We can assist in providing some historic ground levels for the area. This survey information can then be compared with the appellant's current slab/forecourt level. Please contact at the earliest opportunity so that we can obtain this information on your behalf.*"
18. At the meeting of this Committee on 30 March 2009 the members deferred the matter as they required further advice from the EA to (i) identify the additional risk of flooding directly attributable to the Remaining Concrete and (ii) asking the EA if they would use their powers to regulate works if development was constructed in a flood plain under permitted development rights.
19. The Council wrote to the EA on 14 April 2009 and in its letter of reply dated 24 April 2009 the EA advised with regard to point (i): "*By removing the illegal building the main obstruction to out of channel flows has been removed. The remaining slab, if it is to remain, will have a minimal impact **provided** that its finished crest level is the same as the surrounding ground levels. This has still not been confirmed to this organisation. It is our opinion that the slab should be removed as part of the enforcement notice and returned to natural ground. In its current state runoff will occur much more quickly during short intense storms due to its impermeable composition*" and with regard to point (ii): "*I can confirm that we would use our flood defence powers to regulate works that fall under Permitted Development (PD) rights sited in the floodplain*

*of a Main River. As stated in our previous letter we cannot begin enforcement procedures on this illegal building. We would hope that TDBC would advise members of the public to contact us when reviewing PD applications sited in a Main River floodplain”.*

20. The Council sought further clarification from the EA as to how the finished crest level is determined and in an emailed response on 15 May 2009 the EA replied that *“The finished crest level is normally referred to highest level of a flood defence wall or earth embankment. In this case what is the highest level of the concrete slab? To achieve this they need to survey the yard area to gain a level to metres above ordnance datum. This spot level information can then be compared to our flood level data and historic ground level data.”*
21. The Owners claim that historically the ground level was at a much higher level than the concrete slab. However, Mr and Mrs Foster dispute this claim saying the hedge and bank were only recently built up by the Owners meaning the concrete slab is above ground level. The EA were asked to provide the historic ground level data mentioned in its email of 15 May 2009 so the data could be compared with the finished crest level and the Owners claim. The EA wrote back on 8 June 2009 saying *“Unfortunately we do not have historical ground information for this site prior to 2006. Please accept our apologies on this error”.*
22. In June 2009 an independent drainage engineers report was carried out by Mr Andrew Wilcox on behalf of TDBC to ascertain the impact of the Remaining Concrete on the flooding of the area. Both Mr Broom, acting for the Owners and Mr Foster met with Mr Wilcox at the Site on separate occasions during the course of him preparing his Report. In the Conclusion to his Report, Mr Andrew Wilcox considers the Remaining Concrete does not materially affect the levels of flooding.
23. In August 2009 Advice was sought from a senior barrister specialising in drainage and environmental issues in respect of the following:-
  1. Is the Remaining Concrete permitted to remain at the Site under the remit of long/established use and/or under Permitted Development rights? If so please confirm it is practical to put the matter before the Committee with a recommendation to withdraw the court proceedings in the Magistrates’ Court for Non-Compliance with the Enforcement Notice.
  2. Regardless of whether or not the Remaining Concrete could be permitted to remain under the remit of long/established use and/or under Permitted Development rights, are there any legal courses of action (e.g., Injunction, Direct Action) available to the Council to ensure the removal of the Remaining Concrete due its impact on flooding and if so, what are the Council’s chances of success of legal action?

3. Which is the most appropriate body to take responsibility for taking legal action to enforce the removal of the Remaining Concrete, the Council or the Environment Agency?
24. The barrister advised that the concrete slab is 'permitted development' under Schedule 2, Part 6, Class A(b) of the General Permitted Development Order, saying it is an engineering operation within the permitted size limits of A1(d).
25. With regard to the 3 points put to the barrister set out at para 23 above, a summary of the barrister's Advice is set out in italics below:-

1. *Withdrawal of proceedings*

- a. *My view is that the Council can only enforce to the extent of the enforcement notice. This means that the part of the concrete slab that formed part of the yard cannot be enforced against.*
- b. *In my view it would be disproportionate to enforce against the part of the concrete slab that formed the floor of the steel building, particularly as the whole has only a very minor effect on flooding.*
- c. *I would recommend that the court proceedings in the Magistrates' Court be withdrawn.*

2. *Other legal options*

- a. *In my view a judge is unlikely to grant an injunction. In Hart DC v Benford [2006] EWHC 240 (QB) the court found that the Defendant was in breach of the GPDO but declined to issue an injunction because it would not be just or proportionate to do so. I consider that if the Council applied for an injunction here the result would be the same as in Hart DC.*
- b. *The Council could use its powers under section 178 to enter onto the farm and remove that part of the concrete slab that formed the floor of the steel building. In my view such an exercise of power would be disproportionate to the breach.*

3. *Action to enforce removal of the remaining concrete*

- a. *If the stream did not become a main river until after the concrete was laid the Environment Agency has no power under its byelaws to remove it. Byelaw 28 is concerned with new works. There is no ability to control works already done before the byelaws entered into force.*

- b. *Section 109 of the Water Resources Act 1991 is only concerned with works in, on or over a main river – which the concrete slab is not – and would only apply once the stream had become a ‘main river.’*
- c. *While the Council may have had powers to prevent obstructions to the flow of the stream under the Land Drainage Act 1991 prior to it becoming a main river, in my view none of those powers could have been used to prevent it being laid or to require its removal thereafter.*
- d. *Section 259 of the Public Health Act 1936 would not apply here as it concerns obstructions to artificial watercourses.*
- e. *DEFRA is considering adding a new form of ‘statutory nuisance’ to tackle the risk of run-off flooding – Consultation on the Draft Flood and Water Management Bill (April 2009), para. 488. This would be the responsibility of the Council. However, if the effect of the concrete slab is ‘very minor’ it is unlikely that it would be enough to constitute an actionable nuisance here.*

Conclusion (of Barrister’s Advice)

- 1. *In my view proceedings in the Magistrates’ Court would be considered disproportionate and should be withdrawn.*
- 2. *If Mr Foster is concerned about the flood risk to his home he has a private right of action in nuisance against Mr and Mrs Parris under the doctrine of Leakey v The National Trust [1980] QB 485.*

**RECOMMENDATION**

It is therefore RECOMMENDED that the Solicitor to the Council:-

- (i) be authorised to apply to the Magistrates to withdraw the current legal proceedings against the owners because it is not in the public interest to continue with the prosecution and
- (ii) in light of Counsel’s Advice no further action be taken to secure removal of the concrete base either by way of injunction or direct action.

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