Planning Committee – 29 September 2009

Report of the Head of Legal and Democratic Services

Miscellaneous Item

Application no 24/09/0030 Change of use of land to use as a small gypsy site to site one mobile home and one touring caravan at Plot 15, Greenacres, Oxen Lane, North Curry

On the 26 August 2009 an application was received as above in respect of Plot 15 at Oxen Lane. The application was registered and consultees and neighbours were notified.

Given the history of the Oxen Lane site set out below, Members are asked to consider whether to exercise their power under s70A of the Town and Country Planning Act 1990 to decline to determine the application. If the Council declines to determine the application there is no decision on the application and there can be no appeal to the Secretary of State. A decision to decline to determine can be challenged by way of judicial review.

The relevant parts of s70A provide -

(1) A local planning authority may decline to determine a relevant application if-

(a) any of the conditions in subsection (2) to (4) is satisfied, and
(b) the authority think there has been no significant change in the relevant considerations since the relevant event.

(2) ...

(3) The condition is that in that period the Secretary of State has dismissed an appeal-

(a) against the refusal of a similar application, or
(b) under section 78(2) in respect of a similar application

(4) ...

(5) A relevant application is –

(a) an application for planning permission for the development of any land:

(b) an application for approval in pursuance of section 60(2).

(6) The relevant considerations are –

(a) the development plan so far as material to the application;
(b) any other relevant considerations

(7) The relevant event is-

(a) for the purposes of subsections (2) and (4) the refusal of a similar application;
(b) for the purposes of subsection (3) the dismissal of the appeal.

(8) An application for planning permission is similar to another application if (and only if) the local planning authority think that the development and the land to which the applications relate are the same or substantially the same.

C8/05 gives guidance on the exercise of this power. The relevant extracts are as follows -

> 4. These new powers are intended to inhibit the use of repeated applications that are submitted with the intention of, over time, reducing opposition to undesirable developments. They are not intended to prevent the submission of a similar application which has been altered in order to address objections to the previous application.
>
> 8. Local planning authorities should use the power to decline to determine repeat applications only where they believe that the applicant is trying to wear down opposition by submitting repeated applications. If an application has been revised in a genuine attempt to take account of objections to an earlier proposal, the local planning authority should determine it.
>
> 12. Where an authority considers that an application is similar, it is not automatically obliged to decline to determine the application. However, local planning authorities should be mindful of the intention behind this power. It can be a major cause of frustration to members of the public and the local community to have to deal with a repeat application when they have already dealt with the original application and seen the development be refused.
>
> 13. Local planning authorities should decide what constitutes a “significant change” in each case. An authority may consider that a change in a Development Plan Document or other material consideration will be “significant” for the purpose of this section if it is likely to alter the weight given to any planning consideration in the determination of an application.
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> 14. In considering whether to exercise its power under sections 70A ... an authority will sometimes be faced with a doubtful case. In such a case, the authority should generally give the benefit of the doubt to the applicant and

determine the application.

Introduction

The site is a field on the edge of the village of North Curry. It is just under 6 acres in area and immediately adjoins a residential property, 6 Oxen Lane, to the north. There are several other residential properties further along Oxen Lane. The site slopes, with plots 1 and 9 being at the top (and being therefore the most prominent) and 8 and 16 being at the bottom. Plot 15 adjoins plot 16.

Over the weekend of 23/24 October 2004 a gypsy caravan site was created on the site involving 16 pitches, in breach of planning control. A number of pitches were occupied at that time, including one by Mr and Mrs Loveridge, the present applicants. There has been a lengthy planning history since then, involving 8 separate refusals of planning permission by the Council, an enforcement notice and three appeal decisions, as set out in more detail below. In April 2007 the Council secured an injunction to restrain further development on the site. Mr and Mrs Loveridge presently reside on plot 15, in breach of the enforcement notice and the injunction. Contempt proceedings against them have recently been started.

Planning history and previous decisions

In October 2004 an application for planning permission for use of the entire site for 16 pitches for gypsy caravans was submitted and refused and the Council issued an enforcement notice. This required the cessation of the caravan use and the restoration of the site to its previous condition.

Following the lodging of appeals against the enforcement notice and the refusal of planning permission, a first inquiry took place in June 2005. The appellants included Mr Loveridge. The Inspector recommended the refusal of planning permission and the upholding of the enforcement notice. The Secretary of State agreed, by decision letter dated 25 September 2005. The deadline for compliance with the enforcement notice, as upheld and varied by the Secretary of State, was 26 September 2006.

Shortly before the deadline expired the occupants of six plots (1, 7, 8, 12, 15 and 16) submitted further applications seeking planning permission to remain. The applicants in relation to plot 12 were Mr and Mrs Loveridge (application 24/08/2006). The Council refused the applications in March 2007 and appeals were made in relation to plots 1, 7, 8, 15 and 16, but not in relation to plot 12. The Loveridges in fact left the site in early 2007.

The appeal in relation to plot 1 was later withdrawn.

A second inquiry was held in December 2007 and March 2008, to consider the appeals in relation to plots 7, 8, 15 and 16. The Inspector dismissed the appeals by decision letter dated 3 June 2008.

The appellants in relation to plots 8 and 16 then challenged the Inspector's decision. This challenge was dismissed on 19 June 2009.

In January 2008, while the second inquiry was adjourned, a Lena Wilson bought plot 1, stationed 2 caravans there and started to live there. On 14 February 2008 she applied for planning permission. The Council refused her application on 27 May 2008 and she appealed. A third inquiry was held in January 2009. By a decision letter dated 20 April 2009 the Inspector dismissed her appeal.

All three decision letters are available to Councillors for inspection.

<u>Issues for decision</u>

In order to decline to determine the present application Councillors must address the following questions/issues.

Q1. In the period since 26 August 2007, has the Secretary of State dismissed an appeal against a refusal of an application which is 'similar' to the present application (s70A(3)).

Q.2 If so, do Councillors think that there has been no significant change in the 'relevant considerations' since the Secretary of State's decision (s70A(1)).

Q.3 If so, do Councillors consider that the guidance in C8/2005 suggests that the discretion under s70A should be exercised?

These questions are considered below.

Q1. In the period since 26 August 2007, has the Secretary of State dismissed an appeal against a refusal of an application which is 'similar' to the present application (s70A(3)).

An application is a 'similar application' for this purpose if Councillors think that 'the development and the land to which the application relate are the same or substantially the same' (s70A(8)).

There have in fact been five dismissal decisions by the Secretary of State in the period since 26 August 2007, each of which could be said to relate to land and development which are either the same or substantially the same as that involved in the present application. These are -

1. The decision of 3 June 2008 to refuse planning permission for use of plot 15 for the stationing of gypsy caravans.
2. The decision of 3 June 2008 to refuse planning permission for plot 7
3. The decision of 3 June 2008 to refuse planning permission for plot 8
4. The decision of 3 June 2008 to refuse planning permission for plot 16
5. The decision of 20 April 2009 to refuse planning permission for plot 1

All the decisions relate to development which (save only for the different intended occupier) is exactly the same. However decision 1 relates to exactly the same land as well, whereas decisions 2-5 only relate to land which is substantially the same. It therefore seems to officers that any decision under s70A is most properly based on this decision. This means that the date for the purposes of Q.2 is 3 June 2008.

Q.2 If so, do Councillors think that there has been no significant change in the 'relevant considerations' since the Secretary of State's decision (s70A(1)).

The 'relevant considerations' are the development plan (so far as is material to the application) and any other material considerations (s70A(6)).

The development plan

The development plan consists of the Taunton Deane Local Plan, the Somerset and Exmoor National Park Joint Structure Plan and RPG10. All were in force at the time of the second Inspector's decision on 3 June 2008.

The site in the countryside and the North Curry ridge landscape character area.

The relevant policies are EN1 of RPG10 (dealing with the impact of development on the countryside), policies 5, 36 and 49 of the Structure plan (dealing with the impact of development on the countryside, gypsy sites and transport requirements respectively) and policies H14, S1 and EN12 of the local plan (dealing with gypsy sites, general guidance for all development (including a requirement not to harm the landscape) and the need to respect the character and appearance of landscape character areas respectively).

There has been no change to these policies since 3 June 2008.

Other material considerations

Other policy

National policy on the provision of sites for gypsies is contained in C1/2006: this has not changed since June 2008.

There has been no change in other relevant national policy since June 2008.

At the time of the second decision letter the gypsy policy in the emerging RSS had just been subject to an EIP. The Panel report has now been published, and

proposed changes to the draft policy promoted, but no policy has yet been adopted. The implications of this are considered below.

Apart from this there has been no change in emerging regional or local policy which is material to this application since June 2008.

Precedent effect of granting planning permission for plot 15

The second Inspector dismissed the appeal in relation to plot 15 principally because of the precedent effect which granting planning permission for any one of the 4 plots before him would have. He considered that, if such planning permission were granted, it would be impossible for the Council to refuse planning permission for further pitches: a further individual pitch would not by itself involve *material* additional harm. He also considered that the circumstances of the Site were such that further applications were very likely.

Nothing has changed since 3 June 2008 in relation to this consideration. The entire site remains divided into 16 pitches, each of which is under gypsy control. A number of plots (8, 16 and 9 as well as 15) remain occupied by gypsies. In the period since 8 June 2008 the Council has been faced with two further applications - even without any planning permission having been granted for any part of the site. No part of the site is being put to an active, beneficial non-gypsy use. No physical works have taken place to make any part of the site unsuitable for the stationing of caravans.

Officers also consider that the harms which would arise if such a precedent were set and if further permissions had to be granted have not changed since 3 June 2008, as explained below.

Impact on the landscape of several pitches

The site is visible in the wider landscape, especially from the A378. The second Inspector considered that the development of only one plot at the bottom of the site would not cause material harm to the landscape, but that the development more than two pairs of parallel plots would.

Nothing has changed since 3 June 2008 in terms of the site or the surrounding land to change the physical effect which development of several plots on the site would have on the wider landscape. The landscape classification of the area has not changed.

Impact on the highway network of development of several pitches

The only access from the site is onto Oxen Lane. This lane connects to Windmill Hill at north and to Greenway at the south. The first and second Inspectors accepted that the junction with Windmill Hill was acceptable. However the junction with Greenway has severely restricted visibility in both directions (see paragraph 31 of second decision letter). The second Inspector found that material extra use of this junction would be unacceptable in highway terms. He found that the traffic generated by only one plot would be so insubstantial as not to involve material harm to highway safety at this junction, but that the traffic from 3 plots would be materially harmful (paragraph 37 of decision letter).

No improvements to the junction between Oxen Lane and Greenway have taken place since June 2008. Nothing has happened to reduce existing traffic flows on the relevant network materially since June 2008. There has been no change in applicable highway standards since then. In April 2009 the third Inspector also found that the traffic from 'several' plots would materially reduce highway safety.

Impact on residential amenity of development of the site

The second Inspector found that the use of plot 15 and the other plots before him would not have an adverse effect on the residential amenity of 6 Oxen Lane, given the intervening distance. However he found that development of higher plots (which would be impossible to resist if any one of the plots were granted planning permission) would have an adverse effect on the amenity of 6 Oxen Lane. Both the first and the third Inspectors (who were considering higher plots) also found that the impact of their use on 6 Oxen Lane would be/was severe and unacceptable.

6 Oxen Lane remains in residential use – indeed there has been no change of ownership since June 2008. None of the windows in 6 Oxen Lane overlooking the

site has been blocked up. No screening between 6 Oxen Lane and the site has been provided since June 2008.

Plots 1 and 9 have been occupied in breach of planning control at various times (indeed plot 9 is still occupied). This means that it has been possible to assess the *actual* effect on the residential amenity of 6 Oxen Lane of plots at the top of the site. Officers consider that the effect has been severely detrimental.

General need for gypsy pitches and implications of C1/2006

The second inquiry took place after the publication of C1/2006 and the decision letter takes full account of its implications.

The position at the time of the second decision letter was that -

a. An initial GTAA (the so-called Ark report) had been supplemented by further work which suggested that in the period 2006-2011 Taunton Deane should provide an extra 17 non-transit pitches. This was the figure suggested as a pitch requirement for Taunton Deane in the emerging RSS gypsy policy. This had just been considered at an EIP (the Panel report was awaited).

b. In the period since 2006 the Council had granted planning permission for an extra 11 pitches (see decision letter at paragraph 84).

c. The Council did not expect to adopt an allocations DPD for about 3 years. As a result the Inspector concluded that the remaining unmet need was not likely to be met by the development of allocated sites for some time (see decision letter at paragraph 82).

In the period since 8 June 2008 the Panel has reported and has recommended that the pitch requirement for Taunton Deane for 2006-2011 should be 20 non-transit pitches. This recommendation has been accepted by the Secretary of State but the intended gypsy policy has not yet been adopted.

Planning permission for 25 non-transit caravans (equating to 15 pitches) has now been granted by the Council in the period since 2006.

The adoption of an allocations DPD by the Council remains about 3 years away.

In the opinion of officers these changes simply reflect the passage of time and are not 'significant'. It could not be suggested that they mean that the weight of this consideration in the planning balance should change. The Council remains in the position of having made very good progress towards meeting what is likely to be its RSS pitch requirement. There remains no *adopted* RSS pitch requirement and no imminent prospect of the adoption of an allocations DPD.

The present position is in fact identical to that considered by the third Inspector.

6 monthly counts

The number of unauthorised caravans recorded in the district in the 6 monthly counts since January 2007 have been -

Jan 2007	21 (all at Oxen Lane)
July 2007	24 (of which 19 at Oxen Lane)
Jan 2008	23 (of which 15 at Oxen Lane)
July 2008	51 (of which 17 at Oxen Lane)
Jan 2009	15 (all at Oxen Lane)
July 2009	23 (of which 20 at Oxen Lane)

The second Inspector considered all but the last three of these returns. Officers do not consider that the last three returns, taken together, suggest any change in the broad level of unauthorised development/encampment in the district. The position remains that most of the unlawful caravans in the district are on the Oxen Lane site.

Level of provision of gypsy sites

At the present time in Taunton Deane planning permission exists for –

(i) 163 non-transit gypsy caravans;

(ii) 20 transit gypsy caravans; and

(iii) 6 further pitches at Otterford, to be used as an extension to the existing site, for periods of up to 6 months.

In June 2008 the figure in (i) was slightly less, since the 163 includes caravans on 4 pitches which have been permitted since that date. Also the planning permission in (iii) had not been granted in June 2008.

Again these changes are no more than would be expected with the passage of time and certainly do not represent a 'significant' change. The position remains that there is a high level of existing provision in Taunton Deane, the highest of any of the 5 authorities in Somerset.

Human rights and hardship caused by the refusal of planning permission

Plot 15 is the home of the applicants and a refusal of planning permission will interfere with their A8 rights. The same was true of the plots and appellants at the second inquiry. The Inspector found that the interference would be justified and proportionate, despite the fact that, at the time of the inquiry, there was no alternative site for the appellants to go to if they had to leave Oxen Lane.

At the second inquiry the occupants of plot 15 (Mr and Mrs Small) did not give evidence, but the other appellants gave evidence, based on their personal circumstances of the hardship they would suffer if they were made homeless (in fact pitches at the Tintinhull site had previously been offered to them but not accepted). The account of the personal circumstances of the other appellants can be found at paragraphs 86-90 of the second decision letter.

Plainly the second Inspector did not consider the personal circumstances of the present applicants, Mr and Mrs Loveridge. Their circumstances are set out in the application and can be summarised as follows –

They are gypsies;

Mr Loveridge suffered several seizures in 2008, affecting his ability to work and drive;

They have two children, one of whom is enrolled at North Curry Primary School. This child has eczema and asthma.

Officers consider that the personal circumstances of the present applicants are not especially remarkable and are comparable to the personal circumstances considered at the second inquiry. In any event, it seems to officers that issues of hardship arising from the likely effects of homelessness should be entitled to little weight in the planning balance as the Council is able to offer an alternative site to the applicants, namely a pitch on the Otterford site. It follows that the Loveridges do not have to become homelessness if they are unable to live at Oxen Lane and that any interference with their A8 rights arising from a decision to refuse planning permission (or to decline to determine the present application) would be less serious than the interference considered by the second Inspector.

Q.3 Do Councillors consider that the guidance in C08/2005 suggests that the discretion under s70A should be exercised?

The guidance quoted above is a material consideration which Members must take into account.

Officers comments on this are as follows.

There is nothing in the present application which represents an attempt to overcome the objections identified by the second Inspector. The physical development proposed is the same as considered in June 2008. There is no suggestion that the concern about the precedent effect of granting planning permission for one pitch has been overcome or can be avoided. Officers note that, far from seeking to address this concern, the applicants' agent suggests that the Inspector's conclusions are simply wrong.

As for trying to wear down opposition, it seems to officers that, given the planning history of the site since 2004, the applicants cannot entertain any hope that planning permission will be granted following a *genuine* consideration of the planning merits. There are now three appeal decisions in relation to this site adverse to them. Insofar as changes have occurred over this period, they reduce the prospects of the grant of planning permission. As time passes the Council grants more planning permissions and so comes closer to meeting the pitch requirement in the emerging RSS. The availability of an alternative site means that the applicants cannot claim that the effect of a refusal of planning permission will inevitably be homelessness and the hardship which this would involve.

As explained above, the Council is now seeking to enforce the enforcement notice and the injunction against the Loveridges. It seems to officers that the present application is a tactic designed to frustrate this, with the aim of securing continued residence on the site despite the enforcement notice and the injunction, in the hope that the Council will eventually simply give up. Whilst solicitors acting for the applicant had indicated in early May 2009 that they would be submitting an application on behalf of the applicants, no application was received until after it was confirmed to them that the Council intended to pursue committal proceedings for breach of the injunction. Officers expect that the Loveridges will rely on the application in the forthcoming committal application, perhaps to argue that the injunction should be varied to allow them to remain on plot 15. Likewise the existence of an undetermined application/appeal would probably be relied on to resist/challenge any decision by the Council to take direct action to enforce the enforcement notice under s178 or to prosecute for breach of the enforcement notice under s179. It seems to officers that this kind of behaviour is of a kind which can properly be met by the exercise of the power under s70A.

Officers do not consider that this is a ‘doubtful’ case within the meaning of the guidance. It seems to them that it is about as clear a case as it is possible to imagine.

Conclusion

Officers consider that the three issues identified above suggest that the discretion in s70A should be exercised and the application not determined. However it is important that members should themselves consider and answer the three questions posed.

RECOMMENDATION

It is therefore RECOMMENDED the local planning authority decline to determine application no 24/09/0030 in respect of Plot 15 at Oxen Lane pursuant to its powers under S70A Town and Country Planning Act 1990.

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