

# DECISION ITEM



REPORT OF	MEETING	DATE	ITEM NO
RESOURCES DIRECTORATE	DEVELOPMENT MANAGEMENT COMMITTEE	15 JULY 2015	5

## ENFORCEMENT: LAND OFF FAIRFIELD ROAD, HARDHORN, POULTON-LE-FYLDE

### PUBLIC ITEM

This item is for consideration in the public part of the meeting.

### SUMMARY

The report invites the committee to reassess its decision to take direct action to secure compliance with an enforcement notice affecting land off Fairfield Road, Hardhorn. The report includes updated officers' assessments of the planning merits of two alternative schemes that have been the subject of planning applications on the site and takes account of the current personal circumstances of site residents.

The report concludes that circumstances have not changed sufficiently to affect the decision made by the Committee in June 2014 after consideration of all the factors relating to the site and the site residents.

### RECOMMENDATIONS

1. Note the matters set out in the report and its appendices (including the report of 6 June 2014).
2. Endorse the decision of the committee taken on 6 June 2014 to delegate power under Section 178(1) of the Town and Country Planning Act 1990 to enter the site and take the steps required by the enforcement notice (as amended by the Secretary of State) to the Director of Development Services.

### CORPORATE PRIORITIES

To Promote the Enhancement of The Natural & Built Environment ( <b>Place</b> )		To Encourage Cohesive Communities ( <b>People</b> )	√
To Promote a Thriving Economy ( <b>Prosperity</b> )		To Meet Expectations of our Customers ( <b>Performance</b> )	√

### SUMMARY OF PREVIOUS DECISIONS

Development Control Committee 2 June 2010: Refused the 2009 application.

Decisions were made under delegated authority to issue a temporary stop notice, seek an injunction

and issue the enforcement notice.

Development Management Committee 6 June 2014: Delegated power under Section 178(1) of the Town and Country Planning Act 1990 to enter the site and take the steps required by the enforcement notice (as amended by the Secretary of State) to the Director of Development Services, such power to be exercised not earlier than 21 July 2014.

Development Management Committee 1 April 2015: Refused the second application.

## REPORT

### PRELIMINARY

1. This report uses the following terminology:

*"appeal decision"* means the decision letter of the Secretary of State dated 18 August 2011, together with those parts of the inspector's report referred to in the decision letter and accepted by the Secretary of State

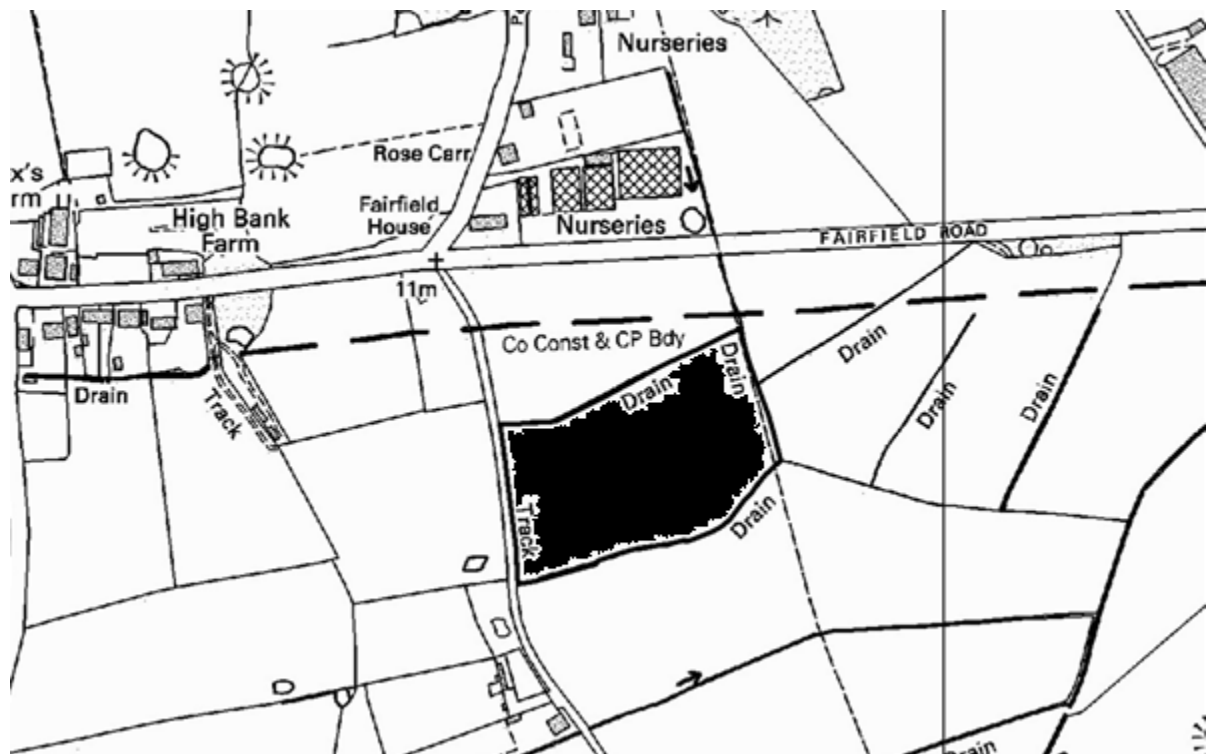
*"convention rights"* means rights under article 8 of, and article 1 of the first protocol to, the European Convention on Human Rights

*"enforcement notice"* means the enforcement notice relating to the site issued by the council on 27 July 2010, as subsequently varied by the Secretary of State for Communities and Local Government on appeal.

*"options"* means the six possible courses of action available to the council to deal with non-compliance with the enforcement notice set out in paragraphs 18 to 23 of the 2014 report

*"second application"* means the planning application reference 14/0490 considered by the committee on 1 April 2015 for change of use to establish a caravan site for occupation by gypsy travellers on part of the site.

*"site"* means the land off Fairfield Road, Hardhorn, shown in the plan below.



*“site residents”* means people living on the site

*“2009 application”* means the application the subject of the appeal decision reference 09/0830

*“2014 decision”* means the decision taken by the committee on June 6 2014 to authorise direct action under section 178(1) of the Town and Country Planning Act 1990 to secure compliance with the enforcement notice, as set out in paragraph 6

*“2014 report”* means the report to the committee meeting on June 6 2014, which the committee considered in making the 2014 decision

2. This report invites the committee to reassess the 2014 decision.
3. This report is supplementary to the 2014 report, which members must read and consider in conjunction with it. The council is under the same duties with regard to convention rights and equalities (including the public sector equality duty) as were set out in the 2014 report. This includes the important requirement that the best interests of children living on the site must be a primary consideration. Members should note that the likely effect of using direct action to force site residents to leave the site would be that the site residents, including children, would have to lead a roadside existence in at least the short or medium term, with the consequences set out in the 2014 report and its appendices.
4. The reassessment of the 2014 decision must have regard to all relevant matters and in particular to the present circumstances of site residents, current planning policy, the existence of the second application and the planning merits of the 2009 application in the light of these matters.

## **BACKGROUND**

### **THE 2014 DECISION**

5. The 2014 report set out the options open to the council to respond to non-compliance with the enforcement notice. The non-compliance was the use of the site as a residential caravan site. The notice required (among other things) those responsible to:

*“Cease using the land as a residential caravan site and remove from the land all caravans, sheds, containers and any other structures associated with the use of the land as a residential caravan site.”*

and to

*“Remove from the land all equipment, articles and other paraphernalia associated with the use of the land as a residential caravan site.”*

Other requirements of the notice related to the restoration and remediation of the site.

6. The committee made the decision to delegate power to the Director of Development Services to enter the site and take the steps required by the enforcement notice, such power to be exercised not earlier than 21 July 2014.

### **THE LEGAL CHALLENGE**

7. Solicitors acting for some of the site residents submitted a pre-action letter to the Council asking that the 2014 decision be reviewed. They then began judicial review proceedings in the High Court to challenge the 2014 decision on a number of grounds. A further ground was subsequently added to the proceedings concerning the Council’s failure to review the 2014 decision in response to the pre-action letter.
8. A judicial review can only go to a full hearing if the court gives permission. The court will only give permission for grounds it considers arguable. The court initially refused permission for any

of the grounds to go to a hearing, but granted permission when the application was renewed<sup>1</sup>. Permission was given only on some of the grounds<sup>2</sup>. The hearing will be in the High Court on 29 July.

9. The grounds on which the court gave permission were (i) that the council erred or misdirected itself in relation to its appraisal of the planning merits, particularly the extent to which planning considerations had changed since the appeal decision and whether the Secretary of State might differ with the council over its assessment of the merits of a temporary permission; and (ii) that the council erred or misdirected itself because the 2014 decision and/or its continuing refusal to review that decision is or are vitiated by reason of the council's failure to address the right question before deciding to use the section 178 direct action power in order to clear the site, namely how long further toleration or temporary permission might be required.
10. A number of the grounds for judicial review accepted as arguable by the judge concerned matters that the site residents (through their legal representatives) say the committee should have taken into account in reaching decisions about implementing the enforcement notice, but did not. The council does not accept those contentions and will argue against them at the hearing. Nevertheless, it is sensible and appropriate to review the 2014 decision in the light of those matters and any updated information in advance of the judicial review.

#### **REVIEWING THE JUNE 2014 DECISION**

11. Members are required to read or re-read the following:
  - This report
  - The 2014 report, together with the appendices (collectively, appendix 1 to this report)
  - The personal information about site residents previously made available to the committee at the meeting in June 2014 and made available again in relation to the previous agenda item; and
  - Any additional or updated personal information about site residents made available in relation to the previous agenda item.
12. The information in the 2014 report and its appendices continues to be relevant unless it is updated or amended in this report or its appendices or is obviously out of date.
13. The six possible courses of action set out in paragraphs 18 to 23 of the 2014 report continue to be available to the Council to deal with the non-compliance with the enforcement notice. The guidance in the 2014 report concerning the Council's duties under human rights and equalities legislation and, the primacy of the interests of children living on the site continue to apply as set out in the report.
14. Members are asked to consider the updated information in this report and its appendices in the context of the possible courses of action set out in paragraphs 18 to 23 of the 2014 report and either (i) endorse the 2014 decision, or (ii) rescind the 2014 decision and instead select one or more alternative compatible options for responding to the ongoing non-compliance with the enforcement notice and delegate appropriate powers to the Director of Development Services or other relevant officers to enable the selected options to be implemented.

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<sup>1</sup> The court takes its initial decision after looking at submissions on paper. A "renewal" of the application is effectively an appeal to a judge against a refusal on the papers.

<sup>2</sup> The grounds on which permission was not given argued that the 2014 decision was incompatible with the travellers' rights under article 8 of the European Convention on Human Rights or was irrational or based on a flawed balancing exercise.

## **POLICY**

15. Paragraphs 42-47 of the 2014 report should now be read in the light of the following updated information on planning policy:
16. Since the 2014 report was considered by the Committee, there have been no relevant changes in planning policy either at a national or a local level. The Council has, however, resolved to produce a comprehensive Fylde Local Plan to 2032 rather than produce a two part plan, the first of which was proposed to include a criteria based policy and the second part would have included any site allocations to meet identified need.
17. The latest assessment of need is contained within the Fylde Coast Authorities Gypsy and Travelling Showpeople Accommodation Assessment September 2014 (GTAA 2014). Whilst this is not local policy, it is an important piece of the evidence base that will inform the development of policy. Within Fylde Borough, the GTAA 2014 establishes a need for an additional 17 pitches between 2014 and 2019 and a total of 26 pitches in the period to 2031.
18. Whilst the GTAA 2014 was not available to inform the 2014 report, the draft findings of the GTAA 2014 were emerging and it was acknowledged at paragraph 45 of the 2014 report that *“Early indications are that the study may indicate a need to provide additional pitches in Fylde Borough.”* In addition, the appeal decision was taken in the knowledge of the unmet need for Gypsy and Travelling Showpeople’s sites in the sub region. As the 2014 decision and the appeal decision both took account of the under provision of Gypsy and traveller pitches within the borough, it is considered that the publication of the GTAA since those decisions were made merely confirms that assumed position at that time and does not materially impact upon the decision that was made. In his appeal decision<sup>3</sup>, the secretary of state considered that a temporary planning permission cannot be justified and that the planning balance would not alter even if substantial weight were given to unmet need.

## **PERSONAL CIRCUMSTANCES**

19. Paragraphs 48-55 of the 2014 report should now be read in the light of the personal information disclosed in relation to the previous agenda item. Those details are not reproduced in this report because of their personal nature. In summary, however, there appear to have been no material changes to the personal circumstances of the occupiers of the site since the June 2014 decision.

## **THE SECOND APPLICATION**

20. At its meeting of April 1 2015, the Development Management Committee considered the second application. The application site extends to 2.4 ha, however, the area to be occupied by the 6 proposed pitches would be 0.55 ha. The remainder of the application site is proposed to remain as “paddock”. In terms of pitches, the second application was for six pitches, compared to fifteen pitches on the existing site.
21. The committee refused the application, for the following reasons:

*The proposed development will result in an unacceptable level of conflicting traffic movements, with inadequate visibility splay requirements at the junction with Fairfield Road, thereby causing an additional risk to other highway users. Consequently, the development will have a detrimental impact on highway safety and is contrary to criterion 7 of policy HL8 of the Fylde Borough Local Plan*

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<sup>3</sup> See paragraph 26 of the Secretary of State’s decision letter and paragraph 131 of the inspector’s report.

*The caravans and travellers' vehicles including commercial vehicles would be visually intrusive and the development as a whole, including the provision of hard surfacing and fencing over part of the site would be harmful to the character and appearance of the area and contrary to the provisions of saved policies SP2 and HL8 of the Adopted Fylde Borough Local Plan.*

22. The applicants have appealed against the committee's decision. A planning inspector or the Secretary of State for Communities and Local Government will decide the appeal. Paragraph 23 sets out the planning officers' assessment of the likely outcome of the appeal insofar as a permanent permission is concerned. Paragraphs 24 to 26 set out the planning officers' assessment of the likely outcome of the appeal specifically in relation to the prospects of a temporary permission being granted.
23. When refusing any planning application, the local planning authority must have regard to any potential appeal against the reasons planning permission is refused and so should ensure that any reasons for refusal are robust and justified. If the local planning authority do not consider that it can defend its reasons for refusal, it should not refuse planning permission. Clearly there are occasions on which the decision of the local planning authority is overturned at appeal. In this particular case, regard was had to the appeal decision, which was made by the Secretary of State, in so far as it related to the material considerations appertaining to the second application. An assessment was made of the reduced site area, reduced traffic generation and of other impacts on the character of the area and amenity. Having addressed each of these matters independently and in light of the most up to date policy and evidence, it was considered that planning permission should be refused.
24. In refusing the second application, consideration was given to the merits of granting a temporary planning permission. The purpose of a temporary permission would be to make the proposed use lawful until the local plan process had identified and delivered potential permanent sites which would be available to site residents. In considering whether to grant a temporary planning permission, it is therefore necessary to consider the likelihood whether, at the end of such a temporary period, such sites would have come forward and to balance that likelihood against the harm that would result from the development over the lifetime of the temporary planning permission.
25. The officer recommendation was that planning permission should be refused, even on a temporary basis, and this recommendation was accepted by the Development Management Committee. Officers concluded, and the committee agreed, that the likelihood of the local plan process identifying and delivering permanent sites which would be available to site residents was outweighed by the harm to the character of the area and to highway safety and that as such, temporary planning permission should not be granted. This followed a careful assessment of the personal circumstances and needs of the site occupiers. As set out above, planning permission should not be refused if it is considered that a subsequent appeal could not be robustly defended. In addressing this matter regard was had to the previous decision of the Secretary of State to refuse to grant a temporary planning permission for 15 pitches despite his acknowledgement that unmet need was a significant material consideration weighing in the applicants favour and that the planning balance would not alter even if substantial weight were given to unmet need<sup>4</sup>. Whilst regard was had to the previous decision of the secretary of state, the decision to refuse planning permission was taken, having regard to the changes in relevant national planning policy since the secretary of state made his decision.

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<sup>4</sup> See paragraph 26 of the secretary of state's decision letter.

26. The applicants have now appealed against the committee's decision to refuse the second application. Officers consider that the decision-maker in the appeal will be likely to reach the same conclusion as the committee and dismiss the appeal for the reasons set out in paragraphs 27 -31 below.
27. The Fylde Local Plan to 2032 is currently under preparation with an anticipated adoption date of April 2017. The plan is to be a comprehensive development plan for the borough and will include policies relating to the provision of Gypsy and Traveller Sites which will have been informed by the GTAA 2014. A revised preferred option (RPO) of the plan was agreed by the Development Management Committee on 17<sup>th</sup> June 2015 which will be the subject of public consultation in Autumn 2015. In January 2015, the Council issued a "Call for Sites" which included sites suitable for the provision of Gypsy and Traveller pitches. The exercise returned no suitable sites for inclusion in the emerging local plan. Accordingly, the RPO is only able to identify sufficient land to provide up to 6 additional pitches and does not identify sufficient sites to meet the need for the plan period as set out in the GTAA 2014 and additional work will be required in order to identify sufficient sites. The Council has conducted a review of its own land holdings (which are limited) and concluded that it does not hold any land that would be suitable to bring forward as a Gypsy and Traveller site.
28. Those Gypsy and Traveller sites that have been identified in the RPO are not available for general occupation as they are privately owned sites that are/have been developed by the prospective site occupiers themselves. It anticipated that any further sites are likely to be promoted on a similar basis.
29. The Council will continue to explore ways in which to meet the identified need, including working with neighbouring authorities. However, experience to date indicates that if the local plan is adopted in 2017, it is unlikely that it will be able to identify and deliver sufficient sites to meet the identified need, and that such sites as are identified and delivered would not be likely to be available to site residents.
30. It is necessary to balance the likelihood of the local plan process identifying and delivering sites likely to be available to site residents and the personal circumstances of the site residents against the identified harm that would be caused by the continued presence of the site during a period of temporary permission. The appeal decision identified the areas of harm in regard to impacts upon visual amenity (moderate weight), impact on the scale of the nearest settlement (moderate weight), landscape (substantial weight) and highway safety (Considerable weight). In the planning balance, these impacts were considered to be so significant that they would outweigh any argument in favour of granting planning permission, including the grant of any temporary planning permission. Whilst a smaller scheme would have a lesser impact, in considering the second application, officers consider it likely that the appeal decision-maker would consider that the impacts would still be so severe that planning permission should not be granted. Whilst each of the impacts is significant in the overall assessment, it is considered that the impact on highway safety, which may result in injury or even a fatality to a site occupier or a member of the wider community is so significant that planning permission should not be granted. The absence of any recorded accidents over the period since the occupation of the site in November 2009 is not considered to be justification for the tolerance of a substandard access which is detrimental to highway safety.
31. For these reasons it is considered that the appeal against the refusal of the second application is unlikely to result in the grant of a full or temporary planning permission for the site or for any reduced scheme notwithstanding the lack of sites to meet the identified need, the absence of a 5 year supply of housing in general or gypsy and traveller sites specifically and the personal circumstances of the applicants.

32. It is considered that the Council has taken a position on the second application which takes full account of the current national and local policy position and local circumstances and that can be robustly defended on appeal. Accordingly, it is considered that the decision to take direct action should not be undermined by the submission of the second application and the appeal against the Council's refusal of it.
33. For similar reasons to those set out above which conclude that it would be inappropriate to grant a temporary planning permission, it is considered that it would not be appropriate to tolerate the continued unauthorised occupation of the site in the shorter or longer term.

#### **THE 2009 APPLICATION**

34. In reassessing the appropriateness of taking direct action to secure compliance with the enforcement notice, it is appropriate to consider whether or not the development struck at by the enforcement notice continues to be unacceptable in planning terms. Planning officers have revisited their assessment of the 2009 application and they have concluded that the development continues to be unacceptable.
35. The development at the site remains an unacceptable form of development in that the harm created to visual amenity, the character of the area and highway safety remain. Whilst there have been no reported accidents at the site entrance in the period of occupation of the site, that is not to say that the site access is safe or that there will not be an accident in future. The original decision to refuse planning permission was taken in the knowledge that there was an unmet need for gypsy pitches in the sub region and the secretary of state noted that the overall planning balance would not alter even if substantial weight were given to unmet need<sup>5</sup>. Accordingly, it is considered that the findings of the GTAA 2014 would not have materially impacted upon the planning balance and that, had the 2009 application been determined today, planning permission would still have been refused. The changes in planning policy between the determination of the 2009 application and the 2014 report are set out in paragraphs 43 to 47 of the 2014 report. The decision to take action to secure the clearance of the site was taken on the basis of this revised appraisal and there have been no changes in planning policy sufficient to result in a different decision being reached. The revised personal circumstances of the site occupiers have been taken into account and it is considered that they do not outweigh the harm that the development as set out in the 2009 application would cause.
36. Planning officers have also considered whether an inspector or the Secretary of State, on appeal, would be likely to take the same view as them in relation to a hypothetical reconsideration of the 2009 application in the circumstances prevailing today. They conclude that the decision-maker would be likely to take the same view, for the reasons set out above.
37. Again, having considered the weightings applied to various matters applied by the SoS, it is considered that the Secretary of State would not have come to a different conclusion.

#### **CONCLUSION**

38. Consideration of the planning merits of the 2009 application and the second application results in the conclusion that both remain unacceptable in planning terms, and that temporary planning permission would not be appropriate. Further, officers are of the view that the Secretary of State or an appeal inspector would reach the same conclusion now.
39. Relevant circumstances have not changed sufficiently to affect the balancing exercise that members carried out in reaching the 2014 decision. Accordingly, members are recommended to endorse the 2104 decision.

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<sup>5</sup> See paragraph 26 of the Secretary of State's decision letter and paragraph 133 of the inspector's report.



IMPLICATIONS	
Finance	A number of the options set out in the 2014 report will have associated costs, which are difficult to estimate at this stage. It is possible, depending on which option is chosen, that these costs could run into tens of thousands of pounds, and there is currently no specific budget provision within the council's approved revenue budget. The next iteration of the council's medium term financial strategy will be updated to reflect any estimated costs flowing from the decision made by the committee.
Legal	Considered in the body of the report.
Community Safety	Considered in the body of the report in relation to the increased anti-social behaviour and potential roadside existence.
Human Rights and Equalities	The Public Sector Duty requires the local authority to take account of equalities in the decision making process. The report, considered with the 2014 report, includes evidence that the duty is fulfilled in the factors considered when outlining and making clear the impact on protected characteristics of the options presented to members. The council received third party independent equalities advice in relation to the 2014 report, whose options are revisited in this report. The advice confirmed that the approach to the application of the public sector equality duty has been considered and the impact on protected characteristics from any available option is clear.
Sustainability and Environmental Impact	Considered in the body of the report and the 2014 report and included in the appeal decision.
Health & Safety and Risk Management	Considered in the body of the 2014 report in relation to the potential of roadside existence and sanitary conditions.

REPORT AUTHOR	TEL	DATE	DOC ID
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LIST OF BACKGROUND PAPERS		
Name of document	Date	Where available for inspection
Report to Development Management Committee, 6 June 2014 and attachments referred to in it.	June 2014	Town Hall, Lytham St Annes

#### Attached documents

1. The 2014 report and attachments referred to in it.