

**East Malling &  
Larkfield**  
East Malling

**569023 156904 6 October 2011**

**TM/11/02655/FL**

Proposal: Change of use of land for stationing of two caravans for residential occupation with associated development (utility shed, hardstanding, amended access, access track and septic tank)

Location: Land At Well Street East Malling West Malling Kent

Applicant: Mr Johny Fuller

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**1. Description:**

- 1.1 The application is retrospective and seeks to regularise the existing unauthorised development at the site. This comprises the use of land as a residential caravan site for one Gypsy family including the construction of a utility building, dog pen, hardstanding, access track and a septic tank.
- 1.2 This report does not relate to the application for the construction of stables and outdoor sand manege. This proposal is reported separately on this agenda.

**2. Reason for reporting to Committee:**

- 2.1 The application is of widespread public interest.

**3. The Site:**

- 3.1 The site lies to the south west of East Malling Village within the open countryside. The site is not within the Green Belt or Strategic Gap.
- 3.2 The site is accessed from Well Street with a track having been formed on the north side of the road. The mobile home is sited on land that falls away to the north and east so is visible from Stickens Lane and Broadwater Road. Limited views are gained through the trees on north side of Well Street. The site is separated from the adjoining land by a coniferous hedge. The wider area is characterised by orchards and open grassland.

**4. Planning History:**

TM/69/10418/OLD Refuse 27 August 1969

Erection of three detached dwellings, garages and vehicular accesses.

TM/75/10228/FUL Refuse 12 June 1975

Reconstruction of existing cottages to provide two dwelling houses.

TM/75/11221/FUL      Application Not                      10 March 1975  
                                 Proceeded With  
O/A Demolition of existing dwellings (4) and erection of two dwellings with  
garages.

TM/10/00502/FL      Refuse    19 August 2010  
  
New agricultural building and access

TM/10/01011/FL      Application Withdrawn                      8 February 2012  
  
Change of use of land for stationing of two caravans for residential occupation  
with associated development (utility shed, hardstanding, amended access,  
access track and septic tank)

TM/10/03441/FL      Refuse    25 March 2011  
  
New agricultural building and access

TM/11/03558/FL      Pending consideration  
  
Construction of stables and outdoor sand manege

## 5. Consultees:

- 5.1 PC: Strongly object on the grounds that the mobile home can be clearly seen from Stickens Lane, Well Street and Broadwater Road. It is on a high point and the surrounding open rural landscape as the land drops away from Well Street towards the village and in the other direction towards Broadwater Farm. It is in the "Green Wedge" of countryside separating the settlements of East and West Malling. Residential development is only allowed inside the village envelope. This development is in the countryside and contrary to Policy CP14. As to the applicants personal situation we understand relationships are not usually a planning consideration. However, it is noted that the children attend East Peckham Primary School and the applicant owns a house in Paddock Wood and we therefore question if they should be considered as having a nomadic lifestyle.
- 5.2 DHH: Holding Objection. No information has been provided about the drainage installed for this development. Full details should be provided, including size, location and maintenance regimes. Due consideration should be given to DETR Circular 03/99 *Planning Requirement in respect of the Use of Non-Mains Sewerage incorporating Septic Tanks in Development* and Building Regulations Approved Document H – Drainage and Water Disposal. The applicant may wish to know that there is a Southern Water main sewer less than 300m to the west-south-west of the site. There is a presumption that connection to the Public Sewer

should be the first considered method of sewage disposal, the applicant will thus need to demonstrate why this is not practicable in this specific case. Advice is also offered regarding the potential need for a caravan site licence under the Caravan Sites and Control of Development Act 1960.

5.3 KCC Highways: No objections subject to appropriate surfacing of the access and adequate vision splays to be retained.

5.4 EMCG: Object to the change of use. Policy CP14 is quite clear what type of developments will be allowed in the Countryside and none of those listed in CP14 cover the change in use required by the applicant. The Group believe that by granting permission for this type of change of use outside the confines of a rural settlement, from orchard to residential, would generate a dangerous precedent in this area.

5.5 Private Reps: 17/0X/11R/0S + site and press notice. 11 letters of objection received raising the following concerns:

- Site outside the village envelope.
- Site is agricultural land that formed part of the 'green wedge' between East and West Malling.
- Building is in open view and detrimental to the countryside.
- Building erected before permission was sought showing disrespect to neighbours and regulations.
- Orchard has been partially cleared.
- No details to support the use of a septic tank.
- Hedgerow partially removed to create the access.
- Increased traffic flow in the area along the single track lane.
- Noise pollution from barking dogs in a previously quiet area.
- Light pollution in a rural area.
- Insufficient protection in planning laws to prevent further development/alterations to the site should permission be granted.
- Potential use of the site as a Farriers business would further change the character of the area.
- Potential impact on grass snakes in the area.

**6. Determining Issues:**

- 6.1 The main issues relate to the principle of development in the open countryside and the impact of the application upon the rural character of the locality and the issues surrounding the accommodation needs of Gypsies and the provision of sites.

**Planning Policy**

- 6.2 Members will be aware that there was a recent fundamental change in national planning policy in late March 2012.
- 6.3 Relevant national policy is now the National Planning Policy Framework 2012 (NPPF) and the Planning Policy for Traveller Sites 2012 (PPTS). The former supersedes PPS7 which dealt with Sustainable Development in the Countryside and the latter supersedes ODPM Circular 01/2006 "*Planning for Gypsy and Traveller Caravan sites*". In terms of transitional arrangements, the NPPF states that until March 2013, decision-takers may continue to give full weight to relevant LDF policies adopted since 2004, even if there is a limited degree of conflict with the NPPF.
- 6.4 In terms of the countryside, the NPPF paragraph 17 (Core Principles) requires LPAs to recognise the intrinsic character and beauty of the countryside.
- 6.5 The national policy in the PPTS states in Paragraphs 3 and 4

*"3 The Government's overarching aim is to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life of travellers while respecting the interests of the settled community".*

*4 To help achieve this, Government's aims in respect of traveller sites are:*

- that local planning authorities should make their own assessment of need for the purposes of planning*
- to ensure that local planning authorities, working collaboratively, develop fair and effective strategies to meet need through the identification of land for sites*
- to encourage local planning authorities to plan for sites over a reasonable timescale*
- that plan-making and decision-taking should protect Green Belt from inappropriate development*
- to promote more private traveller site provision while recognising that there will always be those travellers who cannot provide their own sites*

- *that plan-making and decision-taking should aim to reduce the number of unauthorised developments and encampments and make enforcement more effective*

- 6.6 The definition in the PPTS of A Gypsy/Traveller is “*Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family’s or dependants’ educational or health needs or old age have ceased to travel temporarily or permanently, but excluding members of an organised group of travelling showpeople or circus people travelling together as such*”.
- 6.7 The application states that the mobile home (caravans) are occupied by a single Gypsy family. The application provides details of the ethnicity of the applicant, his way of life and that of his immediate family.
- 6.8 A number of objectors have questioned the validity of the claim by the applicant of Gypsy status. In light of the comments received as a result of consultation further investigations have been made into this matter during the processing of the application. The information received shows that the applicant and his wife are both traditional Kent Romany Gypsies with long Romany bloodlines in the area. The applicant was previously resident in a house in Paddock Wood to be near family in the area, however this was the only time that they have lived in ‘bricks and mortar’ and they could not adjust to the way of life in a non Gypsy community. There is a desire to stay in the area so the applicant’s children can attend school but retain their way of life. In this case I am of the opinion that the applicant has provided evidence to establish, on the balance of probability, and without any countervailing evidence, that he is a Gypsy in terms of the definition set out in 6.6 above.
- 6.9 The relevant policies in the TMBCS are CP14, CP20 and CP24. These have been adopted post 2004 and so can be given full weight in decision making.
- 6.10 The site lies within the open countryside. The application must therefore be determined with regard to Policy CP14. This policy seeks to restrict development in the countryside, only permitting development which falls within the specific listed criteria. The application does not, however, fall within these criteria and therefore constitutes development that would not normally be acceptable within the countryside.
- 6.11 The siting of the development on raised land in a location visible from Stickens Lane and Broadwater Road is also contrary to Policy CP24. This policy requires that development must respect the site and its surroundings through its scale, density, layout, siting, character and appearance. Given how visible the site is it is considered that the development would have an unacceptable impact on the open character of this area of countryside.

- 6.12 The location of Gypsy sites in the countryside is referred to in Paragraph 23 of the PPTS. This indicates that LPAs should strictly limit new traveller site development in open countryside that is away from existing settlements or outside areas allocated in the development plan. Local planning authorities should ensure that sites in rural areas respect the scale of and do not dominate the nearest settled community, and avoid placing an undue pressure on the local infrastructure.
- 6.13 Policy CP20 relates to Gypsies and site provision and states that permission will be granted if all of the requirements listed under this policy are met. Two of these requirements are that there is an identified need that cannot reasonably be met on an existing or planned site and that residential or rural amenity is not prejudiced as a result of visual intrusion, excessive noise, lighting, traffic generation or activity at unsocial hours.

### **Considerations in respect of Gypsy site provision**

- 6.14 The Borough Council carried out the Gypsy and Traveller Accommodation Assessment some time ago and that study revealed a need for additional accommodation by 2011. Subsequently the Council gave evidence to a Hearing aimed at reviewing the need for such accommodation in the context of a partial review of the South East Plan – that evidence accepted a need for 12 pitches but in light of the subsequent abandonment of this Partial Review that figure has not been confirmed. No subsequent or more reliable assessment of the level of need is available.
- 6.15 In light of the general acknowledgement of the justification for additional provision within the Borough, the Borough Council has continued to be committed to the provision of additional pitches at the Coldharbour site in Aylesford to assist in the housing of Traveller families. I can confirm that the necessary land has been purchased, funding has been achieved and contracts finalised and let for construction of the scheme as permitted by ref TM/11/02523/CR3 (*Provision of 18 new caravan pitches arranged around a new road, and renewal of 8 existing pitches already accommodating 8 Traveller families (total 26), semi detached utility blocks, a children's play area, erection of a 3m high acoustic barrier adjacent to the A20 London Road, amenity lighting, landscaping and resurfacing of existing access road (KCC Ref: KCC/TM/0393/2011)*).
- 6.16 In light of the fact that the recently adopted Government policy presumes against this type of development in the countryside and given that a new supply of pitches will be forthcoming over the next few months, the applicant has been invited to take steps to secure accommodation at Coldharbour by applying to Kent County Council, who will be managing the site. Any response will be detailed in a supplementary report.

6.17 In addition to referring to the existing level of local provision and need for sites, and the availability (or lack) of alternative accommodation for the applicants, paragraph 22 of the PPTS contains further criteria to be assessed:

- other personal circumstances of the applicant
- locally specific criteria used to guide the allocation of sites in plans or which form the policy where there is no identified need for pitches/plots should be used to assess applications that may come forward on unallocated sites
- LPAs should determine applications for sites from any travellers and not just those with local connections

6.18 Policy CP20 states that provision will be made (either through the LDF process or through specific planning permissions) for the number of plots specified in the South East Plan on sites that meet certain criteria, as set out in the policy.

6.19 The situation is that there is clearly still a present need for additional Gypsy accommodation within the Borough but it is intended that this is likely to be met within the next 8-9 months when the Coldharbour project comes to fruition. Any update will be included in a Supplementary Report.

6.20 The second section of CP20 requires residential or rural amenity to not be prejudiced as a result of visual intrusion, excessive noise, lighting, traffic generation or activity at unsocial hours. A number of objectors are concerned about the visual impact of the application. The site is located on a raised ridge that means the site is visible from surrounding roads. The development is therefore contrary to Policy CP20. As well as the objection on the grounds of this policy, given the prominent siting of the development it is also considered that the development would be contrary to Policy CP24 which states that development should respect the site and its surroundings.

6.21 A number of objectors have raised the issue of traffic generation and its impact upon the highway network. Policy SQ8 of the MDEDPD 2010 states that development will only be permitted where it would not significantly harm highway safety. The concerns are noted however Kent Highway Services has raised no objection.

### **Human Rights and Equalities Considerations**

6.22 A key issue in this type of case is the European Convention on Human Rights as applied by the Human Rights Act 1998 and the Council's requirement to act in accordance with the Equalities Act 2010.

6.23 The Applicant and his family occupy the site as a 'home'. Article 8 of the European Convention on Human Rights requires that "everyone has the right to respect for his private and family life, his home". In terms of a refusal of planning

permission and any subsequent enforcement action, the Courts have set a test to be applied: whether planning measures taken by a Local Planning Authority are necessary and proportionate, having regard to both the potential harm to the environment and the personal circumstances of the applicants. The UK planning system has been held to be an appropriate mechanism to balance these matters alongside all other planning considerations for the purposes of The Human Rights Act.

- 6.24 Inspectors in such cases have commented that the fact that a 'home' is established *unlawfully* can, to a degree, diminish the reliance that can be placed on the respect of that right. As mentioned above, the Convention also provides that interference by a public authority with that right may be justified in some circumstances. As the potential loss of a home would be an interference with the human rights of the applicants and their family, consideration must be given to whether the refusal of planning permission and associated enforcement action would be necessary and proportionate.
- 6.25 It is clear that in the current circumstances, while the Human Rights background is a very important consideration in all cases such as this, it is not in itself the sole or decisive factor nor is it the fact that such matters automatically override all other material planning considerations.
- 6.26 In terms of Equalities legislation, Romany Gypsies and Irish Travellers have 'protected characteristics' that must be considered in all decisions made by Public Authorities. The Council needs to coherently apply the new PPTS which itself has been subject to Equality Impact Assessment (EqIA) by the Government.

#### **Availability of Pitches at Coldharbour**

- 6.27 On the point of whether weight would be given to any future assertion by the applicants that the Coldharbour site was unsuitable because of the "ethnicity" of other occupants, Counsel's advice is that it is unlikely that this matter can be considered within the ambit of planning and development control. Indeed the EqIA carried out by Government mentions that for planning policy purposes the 'ethnic' characteristics of various traveller groups is not normally a consideration.
- 6.28 The Equality Act 2010 makes it unlawful for a public authority to discriminate in the exercise of any of its functions on racial grounds, including when considering housing and planning matters. S.149 of the Act places an obligation on public authorities to advance equality of opportunity between persons who share a protected characteristic and those who do not share it, and to foster good relations between the foregoing groups. Discrimination by planning authorities in carrying out their planning functions will be unlawful under S.149. In the course of determining a planning application, if the Council were to lend credence to subjective considerations put forward by an applicant with regard to their prospective neighbours' ethnicity, then the Council risks falling foul of the prohibition on discrimination in the Equality Act.



- 6.29 The Council, as Local Housing Authority, has a duty to assess any homeless applicants to determine whether it has a duty to secure alternative accommodation. Any homeless applicants who are deemed to be in priority need of accommodation, with a local connection to the Borough and who are homeless through no fault of their own, may be prioritised for rehousing in social housing or in the private rented sector. Priority need groups include those households with dependent children (or a pregnant member) and applicants who are vulnerable as a result of mental or physical illness or disability, old age or other special reasons.
- 6.30 For households seeking accommodation in bricks and mortar within the settled community, they will need to be assessed by the Council as to whether they are suitable to join its Housing Register. To assess a household for joining the Housing Register, they will be required to complete an assessment form and provide ID for every member of the household, along with proof of current address, financial verification and anything else as may be required for the particular given circumstances. They will then be placed into one of four priority bands and awarded points according to their housing need in accordance with the Council's housing allocations scheme.
- 6.31 Applicants will then need to check available suitable properties that are advertised through the choice based lettings system every two weeks and place bids (expressions of interest) on any they wish to pursue, with their points and banding influencing the likelihood of being housed. If/when they are the highest bidder for a given property, they will be subject to the housing association's usual verification checks before being offered the tenancy.
- 6.32 In contrast to this, members of the Gypsy & Traveller community seeking a pitch on a public site (such as Coldharbour) are assessed and assisted for accommodation through Kent County Council's dedicated Gypsy and Traveller Unit (GTU) and not by the local authority directly. Registration for accommodation and subsequent allocations are not through the same approach of choice based lettings described above (for the settled community) that caters to available housing association properties. Vacant Gypsy and Traveller pitches on public sites are allocated through a specialised approach that takes into account a wider spectrum of factors and the process for registering on the County's Gypsy and Traveller pitch waiting list reflects these requirements and is administered by GTU. However, the requirement for a local connection to Tonbridge & Malling before being considered for a vacant pitch at the Coldharbour site remains paramount, and this criterion is assessed jointly between the Council's housing officers and those of GTU.

### **Other planning considerations**

- 6.33 The Council's Environmental Protection Officer has raised a holding objection to the application noting that the application does not adequately address the means of foul water disposal. The application therefore fails to meet the requirements of

Circular 03/99: Planning requirement in respect of the Use of Non-Mains Sewerage incorporating Septic Tanks in New Development. The application is therefore unacceptable in terms of foul water disposal.

## **7. Conclusion**

- 7.1 The application introduces new development into the countryside is unacceptable because it constitutes a form of development that is not normally acceptable in the rural area generally. The application is therefore contrary to Policy CP14. The siting of the caravan does also not respect the site and its surroundings and so has an unacceptable impact on the open character of the countryside surrounding the site.
- 7.2 The proposal does not meet all the requirements of policy CP20, particularly the requirement to demonstrate an identified need which cannot reasonably be met on an existing or planned site. The provision of additional pitches for Travellers at Coldharbour will be in place by early 2013. This means that the application does not have any special justification which would override the identified policy objections.
- 7.3 The human rights of the Applicant and his family have been considered but will not be affected in the light of the potential to relocate to Coldharbour. Under Equalities legislation, the provision at Coldharbour will provide for suitable accommodation for the occupants, even if they may express a wish not to re-locate there.
- 7.4 The proposed means of foul water disposal does not accord with the requirements of Circular 03/99 and therefore has a potential adverse impact upon the environment and public health.
- 7.5 In light of the above, it is recommended that planning permission be refused. If Members are in agreement with this recommendation it will be necessary to consider the expediency of taking enforcement action to secure the cessation of the unauthorised use. The development conflicts with planning policy and causes demonstrable harm. It is therefore appropriate to take enforcement action.
- 7.6 However, it would be a disproportionate response to seek to force the applicants to leave the site before pitches at Coldharbour become available. In the circumstances of this case, there is therefore a reasoned justification to allow a compliance period in any Enforcement Notice which factors in the timescale of the Coldharbour pitches becoming available.

**8. Recommendation:**

**8.1 Refuse Planning Permission** for the following reasons:

- 1 The development is contrary to policy CP14 of the Tonbridge and Malling Core Strategy 2007 which states that development in the countryside will be restricted to certain specified categories, none of which applies to the development proposed.
- 2 The site is located on a raised ridge which results in the development being visible from surrounding public roads and thereby having an unacceptable impact on the open aspect of the countryside. This visual intrusion does not respect the site and its surroundings. The development is therefore contrary to policies CP14, CP20 and CP24 of the Tonbridge and Malling Core Strategy 2007.
- 3 The development is contrary to paragraph 22 of the Planning Policy for Traveller Sites 2012 and Policy CP20 of the Tonbridge and Malling Borough Core Strategy 2007 for the reason that the likely need for additional gypsy pitches within the Borough will be met by the proposed expansion of an existing gypsy site in the Borough.
- 4 The personal circumstances of the Application do not constitute sufficient justification to override the overall aims of paragraphs 22 and 23 of the Planning Policy for Traveller Sites 2012.
- 5 The proposed development fails to address the requirements of Circular 03/99: *Planning requirement in respect of the Use of Non-Mains Sewerage incorporating Septic Tanks in New Development* and therefore has a potential adverse impact upon the environment and public health.

**8.2 An Enforcement Notice(s) be issued** as set out below and copies **be served** on all interested parties.

The Notice(s) to take effect not less than 28 days from the date of service, subject to:

- The concurrence of the **Chief Solicitor**, he being authorised **to settle** the final wording of the Enforcement Notice(s) as may be necessary (including period for compliance) to reflect the circumstances at the time of service.
- In the event of an appeal against the Notice(s) the Secretary of State and the appellant to be advised that the Local Planning Authority is not prepared to grant planning permission for the development the subject of the Enforcement Notice(s).

### **Breach Of Planning Control Alleged**

The use of the land as a residential caravan site.

### **Reasons For Issuing The Notice(s)**

It appears to the Council that, from the evidence before it, the breach of planning control is not immune from enforcement action.

- 1 The development is contrary to policy CP14 of the Tonbridge and Malling Core Strategy 2007 which states that development in the countryside will be restricted to certain specified categories, none of which applies to the development proposed. The site is located on a raised ridge which results in the development being visible from surrounding public roads and thereby having an unacceptable impact on the open aspect of the countryside. This visual intrusion does not respect the site and its surroundings. The development is therefore contrary to policies CP14, CP20 and CP24 of the Tonbridge and Malling Core Strategy 2007. The development is contrary to paragraph 22 of the Planning Policy for Traveller Sites 2012 and Policy CP20 of the Tonbridge and Malling Borough Core Strategy 2007 for the reason that the likely need for additional gypsy pitches within the Borough will be met by the proposed expansion of an existing gypsy site in the Borough. The personal circumstances of the Application do not constitute sufficient justification to override the overall aims of paragraphs 22 and 23 of the Planning Policy for Traveller Sites 2012. The proposed development fails to address the requirements of Circular 03/99: *Planning requirement in respect of the Use of Non-Mains Sewerage incorporating Septic Tanks in New Development* and therefore has a potential adverse impact upon the environment and public health.

An application to retain the residential caravan site, hardstanding, utility building and dog pens could not be supported in principle and the imposition of conditions could not overcome all the concerns with the unauthorised development.

The enforcement notice is needed to overcome the harm to the amenity and character of the countryside.

### **Requirements**

To cease the use of the site as a residential caravan site by the re-instatement of permitted use of the original mobile home to that of incidental to the use of land for the keeping of horses and the removal of the second mobile home.

### **Period For Compliance**

The cessation of prohibited use of the land and removal of the mobile home, utility building, dog pens and hardstanding must be complied with by 31.01.2013.

Contact: Robin Gilbert