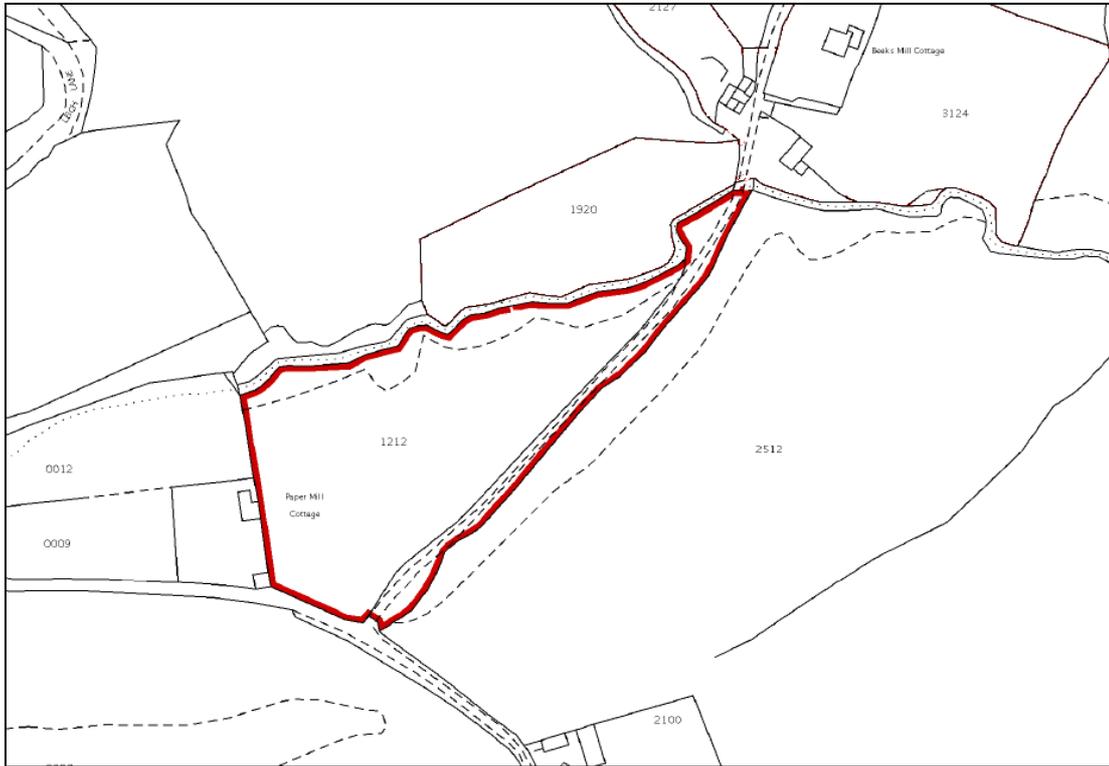


## **ENFORCEMENT COMMITTEE REPORT**

### **REFERENCE:**

15/00524/UNDEV



### **SITE**

Parcel 1212, Leigh Lane, St Catherine, Bath BA1 8AW

### **INTRODUCTION**

The purpose of this report is to seek authority from the Development Management Committee to use powers under Section 102 of the Town and Country Planning Act, 1990 ("the Act") to issue an Order requiring the removal of a timber panel screen/fence located on the eastern boundary of Parcel 1212 Leigh Lane (abutting the boundary wall with the adjacent site, Papermill Cottage).

### **BACKGROUND / ENFORCEMENT NOTICE**

The site is located in the green belt and the Cotswold Area of Outstanding Natural

Beauty. Immediately adjacent to the site is a residential property – Papermill Cottage. The adjacent property consists of two residential elements, the principal dwelling located to the north of its plot and an ancillary residential unit (holiday let) to the south.

In September 2015 Officers responded to a complaint that a timber screen/fence structure had been erected along the eastern boundary of the field, the entire length of the original field boundary wall and situated within a few centimetres of the windows of Papermill Cottage. The position of the fence inhibits the ability to fully open any of the ground floor windows on the east elevation of Papermill Cottage or the adjacent annex, significantly diminishes natural light ingress and significantly reducing outlook to the detriment of residential amenity.

Having investigated the case, and having regard to the development plan and national policy, Officers issued an Enforcement Notice on the 31<sup>st</sup> May 2016. The requirements of the Notice were to “*remove the screen in its entirety and restore the land to its former condition prior to the development*” within 6 months of the date of the Notice. The Council issued the Notice as it considered:

- 1) that the screen did not constitute permitted development in accordance with Schedule 2, Part 2 Class A of the General Permitted Development Order;
- 2) that the screen constituted inappropriate development in the green belt which was harmful to openness, contrary to saved policy GB.2 of the Bath and North East Somerset Local Plan
- 3) that the screen has a severe adverse impact upon the amenities of the existing occupiers of adjacent property Papermill Cottage.
- 4) that, by virtue of its size, materials and design, the screen contributes to a deterioration of the rural character of the surrounding area, contrary to saved policies D.2 and D.4.
- 5) that the screen does not respond to local context in terms of appearance, materials, siting, spacing and layout and is therefore considered harmful to the character of the public realm and special landscape character of the Cotswolds Area of Outstanding Natural Beauty in which the development is situated.

## **ENFORCEMENT APPEAL**

An appeal was lodged against the Enforcement Notice on grounds (a) – that planning permission should be granted - (c) – that there has not been a breach of control - (f) – that the steps of the notice are excessive - and (g) – that the time given to comply is too short.

The appeal was determined on the 3<sup>rd</sup> February 2017. The Inspector upheld the Notice (subject to variations).

With regard to the ground (a) appeal, the Inspector concluded that whilst the structure was not inappropriate development in the green belt, having regard to national policy and the development plan he found that it was unacceptable for the following reasons:

- 1) It *“does not either conserve or enhance the character and local distinctiveness of the landscape”* contrary to Policy NE.1 of the Local Plan.
- 2) It *“fails to respond to the local context in terms of its appearance and materials, and does not complement the attractive qualities of local distinctiveness”* contrary to Policy D.4 of the Local Plan.
- 3) It is *“a form of development which adversely affects the natural beauty of the landscape of the designated AONB”* contrary to Policy NE.2 of the Local Plan and contrary to Paragraph 115 of the NPPF
- 4) *“the structure harms the living conditions of the occupiers of Papermill Cottage by reason of loss of outlook and daylight”* contrary to Policy D.2 of the Local Plan, and contrary to Paragraphs 56 and 64 of the NPPF.

Overall the Inspector concluded that the “structure is unacceptable on its merits”

With regard to the ground (c) appeal, the Inspector found that the fence exceeded 2m in height in parts and therefore could not be permitted development however concluded that the Notice could be varied to require the structure be reduced in height to below 2m and thus within the scope of permitted development.

With regard to the ground (f) appeal, the Inspector concluded that this part of the appeal should succeed in light of the fall-back permitted development position. Rather than upholding the Council’s requirement to demolish the structure the Inspector varied the Notice to require the reduction in height of the structure.

With regard to the ground (g) appeal, in light of the variation to the Notice the Inspector found that 6 months was adequate time to carry out the required works.

## **SECTION 102**

Section 102 of the Act grants powers to the Local Planning Authority to issue “Orders requiring discontinuance of use or alteration or removal of buildings or works”.

Section 102(1) states:

*“If, having regard to the development plan and to any other material considerations, it appears to a local planning authority that it is expedient in the interests of the proper planning of their area (including the interests of amenity) –*

- a) that any use of land should be discontinued or that any conditions should be imposed on the continuance of a use of land; or*
- b) that any buildings or works should be altered or removed,*

*they may by order –*

- i. require the discontinuance of that use, or*
- ii. impose such conditions as may be specified in the order on the continuance of it, or*
- iii. require such steps as may be so specified to be taken for the alteration or removal of the buildings or works,*

*as the case may be”.*

S.102 powers are not frequently used therefore there is little guidance available as to their application however the recent case of the “candy striped” house in Kensington (Lisle-Mainwaring, R (On the Application Of) v Isleworth Crown Court & Anor [2017] EWHC 904) High Court judgement dated 24<sup>th</sup> April 2017) has examined and clarified the use of S.102 powers. In respect of the case at hand, Officers are satisfied that the use of S.102 would be appropriate given the level of public interest in this case, the significance of the harm caused both to the natural environment and the amenities of residents and the fact that a recent appeal has already considered and confirmed the Council’s concerns that the development is contrary to policy.

If it is agreed that a S.102 Order is made, in accordance with S.103(1) of the Act, the Order will need to be confirmed by the Secretary of State before it can take effect. The SoS has the power to confirm, reject or modify the Order. The person against whom the Order is made has not less than 28 days to request to appear before “*a person appointed by the Secretary of State*” (S.103(4)) – one would expect this to be a Planning Inspector - before the Order is confirmed in order to make any representations they so wish. The SoS would then make a decision whether or not to confirm the Order in light of any representations made. Whilst there is the opportunity for the owner to effectively appeal the recommendation, as an Inspector has already found the development to be harmful, unacceptable and contrary to policy Officers are of the view that it is highly likely that the Order would be confirmed having regard to the development plan and

other material considerations as it would be “*expedient in the interests of the proper planning*”.

## **RELEVANT PLANNING POLICIES**

In making this recommendation, consideration has been given to the following:

### Legislation:

Town and Country Planning Act, 1990

Town and Country (General Permitted Development) Order, 2015 (as amended)

### National Planning Policy:

National guidance in the National Planning Policy Framework (NPPF) is a material consideration. The following sections are of particular relevance:

- Section 9. Protecting Green Belt land
- Section 11. Conserving and enhancing the natural environment

### Development Plan:

The Council's Development Plan comprises:

B&NES Core Strategy, 2014

Saved Policies in the B&NES Local Plan (2007)\*

Joint Waste Core Strategy

The B&NES Local Plan policies that are replaced by policies in the Core Strategy are outlined in Appendix 1 of the Core Strategy. Those B&NES Local Plan policies that are not replaced and remain saved are listed in Appendix 2 of the Core Strategy.

The following policies of the Core Strategy should be considered as relevant:

CP6 - Environmental Quality

CP8 - Green Belt

Saved Policies relevant to this appeal in the Bath and North East Somerset Local Plan, including Minerals and Waste Plan, are:

D2 General Design and public realm considerations

D4 Townscape considerations

GB.2 Visual amenities of the Green Belt  
NE.1 Landscape Character  
NE.2 Areas of Outstanding Natural Beauty

The Placemaking Plan was formally adopted at the full Council meeting on the 13<sup>th</sup> July 2017. The following policies can therefore be given weight:

D1 General urban design principles  
D2 Local character and distinctiveness  
D3 Urban Fabric  
D6 Amenity  
NE2 Conserving and Enhancing the Landscape and Landscape Character.  
GB.1 Visual Amenities of the Green Belt

Supplementary Planning Documents (SPD);

- Rural Landscapes of Bath & North East Somerset: A Landscape Character Assessment SPG (2003)
- The Cotswolds Area of Outstanding Natural Beauty (AONB) Management Plan (2013-2018)

**CONSIDERATION**

The principal consideration in this case is whether it is expedient to issue a S.102 Order having regard to the harm of the development, the relevant development plan policies and whether such action would be in the interest of “proper planning”.

Notwithstanding the fact that the Inspector found the fence (subject to a reduction in height) to be permitted development he did conclude (on assessment of relevant planning policy) that “*the structure is unacceptable on its merits*”.

As stated above, part of the appeal against the Enforcement Notice was on ground (a) that permission should have been granted). The Inspector considered and assessed the planning merits of the case and made the following conclusions in considerations of both local and national policy:

In relation to the character and appearance of the Area of Outstanding Natural Beauty:

- The fence is contrary to Policy NE.1 because “*the structure is a development which does not either conserve or enhance the character and local distinctiveness of the landscape*”.

- The fence fails to comply with LP Policy D.4 (a) because it “*fails to respond to the local context in terms of its appearance and materials, and does not complement the attractive qualities of local distinctiveness*”.
- The fence is a form of development which “*adversely affects the natural beauty of the landscape of the designated Area of Outstanding Natural Beauty*”, which LP Policy NE.2 says will not be permitted.
- “*Paragraph 115 of the Framework [National Planning Policy Framework] requires the decision maker to give great weight to conserving landscape and scenic beauty in AONB. In my view, for all of the reasons set out above, the structure plainly fails to, at a minimum, conserve the scenically attractive landscape of the AONB in the vicinity of the appeal site. The structure is visible from a number of public vantage-points, including the lane and the permissive path. In these vistas Papermill Cottage is seen in close association with the structure but, because it is so close and the structure obviously cuts across architectural features such as the windows, its proximity only serves to emphasise the inappropriateness of the structure. Although the Appellant has offered to accept a condition to require hard and soft landscaping, such as a woven hazel or bark facing to give it a more rustic appearance and an indigenous hedgerow planted parallel to the permissive path, this would not address my concerns or achieve policy compliance*”.

Overall the Inspector stated: “*I conclude that the structure harms the character and appearance of the area, fails to conserve the landscape and scenic beauty of the AONB and conflicts with the LP Policies D.4, NE.1 and NE.2*”

In relation to residential amenity the Inspector concluded the following:

- In relation to national policy (the NPPF) the fourth core planning principle of the Framework is that “*planning should always seek to secure high quality design and a good standard of amenity for all existing and future occupants of land and buildings*”.
- LP Policy D.2 says development will only be permitted if: (f) it will “*not cause significant harm to the amenities of existing or proposed occupiers of, or visitors to, residential or other sensitive premises by reason of loss of light or other disturbance*”.
- “*Placing a structure in front of windows of a house cannot be said to represent good design, which paragraph 56 of the Framework says is indivisible from good planning; it requires development to contribute*

*positively to making places better for people”.*

- *“Paragraph 64 of the Framework is clear that permission should be refused for development of poor design that fails to take the opportunities available for improving the character and quality of an area and the way it functions”.*

Overall the Inspector stated *“I conclude that the structure harms the living conditions of the occupiers of Papermill Cottage by reason of loss of outlook and daylight. As such I find a conflict with LP Policy D.2 f) and the quoted advice in the Framework”.*

Having regard to the principle of “proper planning” (the test of S.102), in light of the Inspector’s findings Officers are satisfied that the timber structure is both unacceptable and harmful. It conflicts with planning policy and the majority of the Council’s objections to the structure have been upheld on appeal. In this regard Officers would consider that it would be in the interest of proper planning (having regard to the development plan and other material considerations) and in the public interest to consider the use of S.102 powers.

### **PERMITTED DEVELOPMENT AND S.102 POWERS**

As stated, the relevant test for S.102 is whether, having regard to the development plan and any other material planning consideration *“it is expedient in the interests of the proper planning... (including the interests of amenity)”* to pursue an Order.

The owner of the site confirmed to the Council on the 2<sup>nd</sup> March 2017 that the structure has been reduced to 2m from natural ground level (as per the variation to the Notice) and Officers are conscious that the structure now falls within permitted development in accordance with Class A of Part 2 to Schedule 2 of the GPDO.

The issue to consider therefore is whether the Council can seek an Order requiring the removal of a structure that is otherwise lawful – in this case having permission by virtue of the GPDO. Officers have had regard to the relevant case law, in particular the observations made in respect of the recent case in the Royal Borough of Kensington and Chelsea (“RBKC”) which related to a dwelling painted in red and white stripes in a Conservation Area. The judgement was published in late April 2017 and having considered the Judges’ comments within it has prompted a review of this subject case.

In the RBKC case, Mr Justice Gilbart clarifies that the requirements of S.102 apply to works that are permitted by virtue of the GPDO in his discussion in respect of

compensation. At para 79 he states *"It will be observed...that if a lawful use subsists, or a building exists, or if a planning permission is granted for development (whether expressly or by the exercise of GPDO rights) then removal of the building or discontinuance of the use can only be effected by the LPA if it accepts a liability to compensate...Similarly, rights given by the GPDO can only be removed by a direction which also involves the right to compensation"*.

At para 102 of his judgement Mr Justice Gilbart further confirms that *"an LPA has the power to limit permitted development rights or to discontinue lawful uses, but not without payment of compensation...Under section 102 it could have issued a notice requiring the repainting of the building. Were it upheld, the level of compensation would be the diminution of the interest in land (s 115 TCPA 1990). On the basis of its own case, that diminution in value must have been effectively nil. There would at worst be a claim for the cost of the repainting (s 115(3))"*.

Having regard to the Act, S.102 does not differentiate the type or nature of development to which it can be applied nor does it state that it cannot apply to development that is lawful; put simply it applies *"in the interest of proper planning"*. Having regard to the recent High Court judgement Officers are satisfied that the relevant issues have been tested and the High Court has confirmed that S.102 is applicable to development that benefits from permission be it expressed or by exercise of the GPDO rights.

Officers are satisfied therefore that S.102 can be applied in respect of the timber screen despite its lawful status.

### **COMPENSATION CONSIDERATION**

Members should be aware that if an Order is made under S.102, S.115 of the Act applies (*"Compensation in respect of orders under s. 102, etc."*)

S.115(2) states *"If, on a claim made to the local planning authority within the prescribed time and in the prescribed manner, it is shown that any person has suffered damage in consequence of the order—*

*(a) by depreciation of the value of an interest to which he is entitled in the land or in minerals in, on or under it, or*

*(b) by being disturbed in his enjoyment of the land or of such minerals,*

*that authority shall pay to that person compensation in respect of that damage"*.

Furthermore, and without prejudice to the above S.115(3) states “*any person who carries out any works in compliance with the order shall be entitled, on a claim made as mentioned in that subsection, to recover from the local planning authority compensation in respect of any expenses reasonably incurred by him in that behalf*”.

Members are requested to consider the following:

- 1) The removal of the timber structure is unlikely to reduce the value of the land given its removal can only improve the visual appearance of the site. The risk of damage being payable in the first category are therefore limited or non-existent.
- 2) Any damages in respect of disturbance to the enjoyment of the land are likely to be zero. The timber structure is not visible to the owners and its presence is not required for the land to be enjoyed. There is an argument that a level of separation between the wall and field is necessary to protect livestock however prior to the erection of the timber screen this function was adequately fulfilled by a post and wire fence arrangement. Enjoyment of the land by the owner for the purposes of grazing of livestock will not be disturbed by virtue of a S.102 Order requiring the removal of the timber structure.
- 3) Officers accept that there will be a cost involved in removing the current structure and replacing it with a post and wire fence or other appropriate means of enclosure however the cost will be limited solely to the removal works and the materials associated with the new means of enclosure. Officers are satisfied that compensation should not payable for the purchase of the original materials and labour costs to erect the timber structure in the first instance. As noted above in respect of the High Court Judgement, the judge commented in respect of the compensation risk had RBKC sought a S.102 Order that the compensation in that case would “*at worst be a claim for the repainting (s115(3))*”, i.e. the cost of complying with the Order not the initial works.

Overall, with regard to the compensation risk, whilst it is accepted that the recipient of the Order may seek compensation from the Council, officers are of the view that the financial risk to the Council would be minimal and would observe that financial reasons should not be a bar to considering the service of a S.102 Order.

## **CONCLUSION**

The justification for issuing a S.102 Order, as set out in the above report, is that the Local Planning Authority considers it to be in the interest of “proper planning”. In this case, it is clear that such an Order can be made despite the fact that the structure is

permitted development. The Council's position in respect of a S.102 Order has been supported by the Planning Inspectorate where the Inspector made clear findings demonstrating the incompatibility of the structure with local planning policies and other material planning considerations. Having regard to the Development Plan, the structure is considered harmful to the visual amenities of the area, harmful to the landscape character of this part of the Area of Outstanding Natural Beauty and harmful to the residential amenity of the residents of the adjoining Papermill Cottage.

### **RECOMMENDATION**

That authority is given under S.102(b)(iii) to serve an Order requiring the removal of the existing timber structure in its entirety and that the structure is replaced with a post and wire fence following the line of the previous post and wire fence to prevent any possibility of livestock injuring themselves on the building or doing damage to it. Details of the replacement fence shall be confirmed in writing by the local Planning Authority before works are undertaken.