

Report to the Cabinet

Report reference: C-065-2009/10
Date of meeting: 21 December 2009



**Epping Forest
District Council**

Portfolio: Leader

Subject: Counsel advice on progress with the Gypsy and Traveller Development Plan Document, and initial analysis of the Options Consultation responses

Responsible Officer: Ian White (01992 564066)

Democratic Services Officer: Gary Woodhall (01992 564470)

Recommendations/Decisions Required:

- (1) To continue with the preparation of the Gypsy and Traveller DPD, pending the outcome of further discussions with the Government Office for the East of England (GO-East);**
- (2) To agree that the Options consultation sites cannot be rejected without formal consideration of the responses;**
- (3) To authorise officers to continue discussions with Counsel and GO-East about sites which are within or in close proximity to settlements;**
- (4) To consider the need for a meeting with the relevant Minister to discuss the future preparation of the Gypsy and Traveller DPD;**
- (5) To note the initial results of the analysis of the consultation responses.**

Executive Summary:

Counsel has given a range of advice about the future direction for the preparation of the Gypsy and Traveller DPD which is considered in this report. Various options for action are rejected, and other options are discussed. Officers need to meet with GO-East in the light of the advice and because recent permissions and CLD decisions are making significant inroads into the Regional Spatial Strategy target set by the Single Issue Review. Members are asked to consider arranging a meeting with the relevant Minister to discuss the particular issues facing the District.

Members are also asked to note the initial quantitative results of the Options consultation responses.

Reasons for Proposed Decision:

Any significant extension to the timetable for preparing the DPD will have significant implications for other Forward Planning work, notably the Core Strategy of the Local Development Framework. Ignoring or rejecting Counsel advice could lead to the intervention of the Secretary of State with decisions being taken on the location of sites for new pitches

which are outside the control of this Council.

Other Options for Action:

To reject or ignore Counsel advice.

Report:

Counsel advice

1. At the meeting on 10 September 2009, Local Development Framework Cabinet Committee recommended that external legal and planning advice be sought by the Council about the process and risks still to be faced in continuing with the preparation of the Gypsy and Traveller Development Plan Document (DPD). This recommendation was agreed by Cabinet on 12 October 2009.

2. Mark Beard of Counsel was subsequently instructed to advise the Council on the following issues:

- The scale of resources needed (monetary and staff time) and the negative impact on other important forward planning work.
- The elongation of the timescale.
- Following Government guidance about sustainable locations in terms of proximity to services and public transport, especially with regard to sites within or adjacent to settlements which are causing friction locally.
- Two of the most commonly expressed concerns or questions at the consultation exhibitions were fear of crime and effect on property value. Crime and fear of crime are material to planning, but there appears to be very little Government research on this. Effect on property value is not a planning issue, but this obviously does not satisfy members of the settled community who are concerned about the proposals in the consultation. This issue is exacerbated by the current economic climate and the elongation of the timetable, leading to possible blighting of property sales.

3. Counsel was asked to advise specifically on the risks and costs to the Council of the following options:

- The Council advising GO-East that it wishes to cease any further work on the DPD and/or to reject all of the sites identified in the consultation document. The Government could intervene under s27 of the 2004 Act, with the Council being responsible for any related costs, but are there other default powers available to the Government?
- The Council agreeing a revised but not prolonged timetable with GO-East, although the latter is currently unclear in its guidance, despite discussions commencing in July.
- The Council seeking to challenge (with or without GO-East support) some of the guidance/criteria used to date. This would be with particular regard to circumstances applying in this District, ie with the rural area being entirely in the Green Belt with consequent high land values in the urban areas, and where low density, low-rise caravan sites are inappropriate neighbours to more densely developed areas.

- The Council attaching different weight to the criteria in Government guidance.
 - If either or both of the last two bullet points can be implemented, this would lead to the deletion of some sites, particularly those in close proximity to settled areas. Can this really be done without formally considering the public consultation responses? Would such a change in approach be likely to lead to judicial review concerning the consistency of approach, particularly regarding the consideration of omission sites?
4. In giving advice on the above issues and options, Counsel also considered:

(a) the Draft Delivery Strategy for Gypsy and Traveller pitches which has been prepared by Officers from the Housing, Environment and Street Scene, and Planning and Economic Development Directorates; and

(b) the draft Planning Advisory Service Diagnostic of the governance of the preparation of the Local Development Framework. The full version of Counsel advice and the draft PAS Diagnostic are restricted to Members and are listed as background papers but will be published as “pink copies”. A summary of the former has been prepared which is available for public use.

DPD Preparation

5. Counsel advises (paragraph 38) that abandoning the preparation of the DPD is not an acceptable option for the following reasons:

(a) the Secretary of State could intervene to prepare and approve the DPD and recover the costs from the Council;

(b) such intervention would reflect poorly on the Council, and could result in a complete loss of control over future pitch provision (eg through appeal decisions), public confidence in the Council would be undermined;

(c) the working relationship with GO-East could also be adversely affected, which could in turn affect the implementation of the Council’s Local Development Scheme (LDS);

(d) the requirement for additional pitch provision will remain even if the Council does not comply with the Direction, which could again lead to unwanted appeal decisions;

(e) abandoning the DPD now would lead to accusations of wasting public funds in terms of work that has been done to date; and

(f) cost and delay in the preparation of the DPD is primarily due to the controversial nature of the topic, and will have to be addressed somewhere in the Council’s LDF.

6. For these reasons Counsel concludes (paragraph 67) that it would not be appropriate or reasonable to abandon the preparation of the DPD. Officers concur with these findings, and Members will be aware that (a), (b) and (d) in particular repeat advice or comments that have been given previously.

Rejection of Options consultation sites

7. As regards rejecting all or most of the sites identified in the options document without formally considering responses to the consultation, (an idea raised at Cabinet on 16 November to address the issue of blight in relation to the extension of the timetable for preparing the DPD), Counsel again advises (paragraphs 52 and 53) against pursuing this

course of action. He concludes that this would render the DPD “unsound” as it would not be justified because its evidence base would not be robust or credible.

8. Officers accept this conclusion. Evidence is key to the new planning system, and consultation responses will constitute a key part of the evidence base for preparing a DPD. Ignoring or not using that evidence would be considered wholly unsound by the Inspector at an Examination in Public. Officers recognise, however, Members’ concerns about the continuing blight of affected properties, and hope that the proposals outlined below can address this, at least in part.

Revised timetable

9. Counsel concludes (paragraph 39) that the only sensible way forward in continuing to prepare the DPD is for the Council “to attempt to agree” with GO-East a revised timetable for the preparation of the DPD. The new timetable should be realistic and reasonable, taking into account, inter alia:

(i) the pressing need for the Council to make meaningful progress with other parts of the LDF, notably the Core Strategy; and

(ii) collaborative working with Harlow and East Herts Councils on urban extensions to Harlow.

10. Counsel notes the conclusions of the draft Planning Advisory Service (PAS) Diagnostic on the preparation of the LDF that the resources needed so far to deal with the Gypsy and Traveller DPD have had a serious and significant impact on other LDF work. His full advice suggests 8 issues that should be discussed with GO-East in attempting to reach agreement about a revised timetable.

11. Counsel rejects (paragraph 58) GO-East’s suggestion for linking consultation on the Sustainability Appraisal of the Options document with the period for receiving representations on the draft DPD (this suggestion was one of the catalysts for seeking independent legal advice).

12. GO-East officers are aware that the Council has contacted Counsel for advice. Depending on Member decisions on this report, officers will write to GO-East asking for a meeting to discuss a revised timetable, taking into account the issues raised by Counsel, and also considering the potential timetable for the Core Strategy preparation.

Criteria

13. Circular 1/06 (Planning for Gypsy and Traveller Caravan Sites) offers a range of guidance for identifying potentially suitable sites, and making land available:

(a) Paragraph 35 advises about:

- the disposal of public land for less than the best consideration;
- making full use of the registers of unused and under-used land owned by public bodies;
- the use of compulsory purchase powers; and
- co-operating with neighbouring authorities to provide more flexibility.

(b) Paragraph 49 acknowledges the difficulty of finding sites in the Green Belt – “Alternatives should be explored before Green Belt locations are considered. Pressures for development of sites on Green Belt land can usually be avoided if the local planning authority

allocates sufficient sites elsewhere in its area ...”

(c) Paragraph 54 states “Sites on the outskirts of built-up areas may be appropriate. Sites may also be found in rural or semi-rural settings. Rural settings, where not subject to special planning constraints, are acceptable in principle.”

(d) Paragraph 64 considers sustainability issues, which should include:

- transport mode and distance from services;
- peaceful and integrated co-existence between the site and the local community;
- the wider benefits of easier access to GP and other health services;
- children attending school on a regular basis;
- the provision of a settled base that reduces the need for long-distance travelling and possible environmental damage caused by unauthorised encampment; and
- not locating sites in areas at high risk of flooding, including functional floodplains, given the particular vulnerability of caravans.

(e) Paragraph 65 clearly states that local planning authorities “should first consider locations in or near existing settlements with access to local services, eg shops, doctors and schools.”

14. All these factors (and others) were taken into account in identifying potentially suitable sites for the purposes of consultation. There are, however, particular issues affecting the District which restricted the possible availability of land in terms of this guidance:

(a) Despite a Call for Sites exercise which included public authorities and agencies, and a check of the Council's Land terrier, very little public land was identified as being potentially suitable (only 2 sites on North Weald Airfield); and

(b) The entire rural area of the District is in the Green Belt (as indeed are all existing sites for Gypsies and Travellers and Travelling Showpeople). The Holmsfield Nursery decision of 2007 included the following statement from the Inspector (paragraph 25), which was endorsed by the Secretary of State: “Policy H10A of the Local Plan Alterations provides for gypsy sites within the Green Belt where very special circumstances are shown to exist. But all land outside the urban area of the District is in the Green Belt, and environmental and residential amenity considerations, and competing urban uses and land values militate against gypsy site provision in the built-up area. Consequently, additional gypsy site provision is likely to be in the Green Belt and the primary determining issues are likely to be the nature of the land and its suitability for purpose rather than its Green Belt designation.”

15. In paragraphs 42 to 50 of his advice, Counsel considers the case for re-visiting the criteria for site selection, based on officers' experience of the consultation exercise. His conclusion in paragraph 69 is “...any reconsideration of the criteria for identifying sites, or the application of those criteria, must comply with Government policy but can properly take account of the particular physical and planning constraints and circumstances which apply to the District.” His paragraph 46 is more specific about a particular feature of the site selection criteria, and is of particular relevance to the consultation: “However, the Council must not adopt an approach that does not comply with Government policy and must ensure that any reconsideration (*of criteria*) only takes account of material planning considerations and is based on evidence. Whilst opposition to the sites included within the Options Consultation may provide part of the justification for a reconsideration of the Council's approach, care must be taken to ensure that the opposition to the proposals for the DPD do not reflect a fundamental opposition to further site provision generally, or can be explained by opposition due only to the proximity of a site to respondents' properties.” (underlining by officers) This causes concern for the reasons outlined in the following paragraphs.

16. Officers are in no doubt that the considerable amount of concern expressed by the settled community during the consultation and in the questionnaire responses is at least partly, if not mainly, down to the proximity of some of the potential sites to properties or settlements. As far as this District is concerned, it would seem that two of the criteria for identifying potentially suitable sites are mutually incompatible – i.e. identifying sites in or near settlements, and peaceful and integrated co-existence between the site and the local community. A similar view has been expressed by some members of the travelling community in discussions with officers, but there is unfortunately no written record of this. Officers are of the opinion that, if the outcome of the DPD is to be the identification of suitable and deliverable sites, the criterion for proximity to settlements (and in turn to services) will have to be relaxed.

17. There is also the question of the efficiency of use of land. By their very nature, mobile homes and caravans are normally a fairly low density of development. Green Belt restrictions mean that the most efficient use of land should be made within or adjoining settlements to minimise the need to release more Green Belt land for development. This would indicate that rural settings are the most appropriate locations for Gypsy and Traveller sites in this District.

18. This suggests that sites in “less sustainable” locations are the only ones that may prove to be acceptable to the settled community, and this could raise reasonable and fair concerns about accessibility to services for the travelling community. In this context, it may be worth noting the findings of the Essex Gypsy and Traveller Accommodation Assessment (Final Report November 2009), in relation to the County Council owned site at Hop Gardens, Stanford Rivers. This is unquestionably a remote site which would not meet the standards for location of current Government guidance. Paragraph 8.8 of the report notes, however, that “....satisfaction levels were higher on some sites than on others: participants living in Hop Gardens, reported the highest levels of satisfaction”. Figure 8.2 indicates that 75% of participants were “very satisfied” and 25% were “satisfied”. While this is only one site, its residents’ attitudes would suggest that, at least to them, a degree of separation from services such as schools, doctors and shops is not a particularly significant issue.

19. Officers have concluded from the experience of the Options consultation that the requirements in paragraph 65 of Circular 1/06 about first considering locations in or near existing settlements, have been satisfied. The results of the exercise indicate, however, that sites distinctly separate from settlements are the only ones which are likely to be acceptable to both the settled and travelling communities, and therefore have more chance of being deliverable than any within or in close proximity to settlements.

20. Officers believe that the results of the consultation should be used as part of the filtering process described in the report to Cabinet on 20 April to identify sites which can no longer be considered to have any potential for use for pitches, on the grounds that they are too close to existing settlements. This may, at least in part, address the concerns of some members of the settled community who own property in close proximity to a site identified in the Options Consultation, but care needs to be taken in light of the advice given by Counsel (referred to in paragraph 15 above). This needs resolution as a matter of urgency, either through further consultation with Counsel, or discussion with GO-East. There is no point in proceeding with sites which are simply unacceptable to the local community, because this will not achieve peaceful co-existence, but the Council will need to be satisfied that this approach will be judged to be sound.

The need for further consultation

21. Members will be aware that responses to the options consultation included suggestions for 49 “omission” sites. Full details of some of these sites still need to be

finalised and officers will then need to assess them against the 21 criteria listed in Appendix 4 of the consultation document. The omission sites which have been accurately identified so far are separate from settlements, obviously reflecting the wishes of the settled community. Depending on the outcome of discussions with GO-East and/or the Minister, officers now believe that a second round of consultation on potential sites will be needed which could include:

- (a) original Options sites which are considered to be not too close to settlements;
- (b) omission sites which satisfy the 21 criteria; and
- (c) any appropriate sites in the north-east of the District, this area previously being excluded on the grounds that it was too remote from services.

22. All of these 3 categories would be subject to Sustainability Appraisal so that this was included as part of the consultation. This would address the issues raised in paragraphs 54 to 56 of Counsel's advice, and would also ensure that this consultation would be entirely separate from the requirement to publish the draft DPD to allow representations to be made direct to the Inspector (paragraphs 57 to 60 of the advice).

23. A second consultation exercise obviously has implications for the extension of the timetable, which in turn brings in potential clashes with other LDF work, notably the preparation of the Core Strategy. This should form a significant part of future discussions with GO-East and/or the Minister, because it is currently intended that consultation on Issues and Options for the Core Strategy should proceed in the summer of 2010. Officers are attempting to co-ordinate this stage with the Core Strategy programmes for Harlow and East Herts, so it is important that this programme is adhered to as closely as possible.

24. Officers wish to propose to GO-East that, given the reduction in the RSS target figure from 34 pitches to 20, because of recent permissions and CLD decisions, the Gypsy and Traveller issue should be subsumed into the Core Strategy as part of the wider housing agenda. Other applications for new pitches are outstanding and it is possible that the figure can be further reduced. Mainstreaming the travelling community's needs with broader housing issues would meet the intentions of current Government legislation. If this can be accepted by GO-East (and, in turn, the Minister), this should lead to the reconsideration of the purpose of the Direction.

Ministerial meeting

25. Counsel considers in his full advice the value of seeking a meeting with the relevant Minister to discuss the problems the Council has encountered in trying to meet the timetable set by the Direction. He feels that this should await the outcome of a further meeting with GO-East, but that, because of changes in CLG personnel since the Direction was made, there could be benefits on all sides from such a meeting.

Initial analysis of Options Consultation responses

26. The information discussed below (Appendices 2 to 4 of the report) is being presented simply for Members to note, and not for any decisions to be taken.

27. Appendices 2 and 3 of this report summarise, in a quantitative fashion only, the public responses to the consultation. They are being presented in this fashion now because of Member requests for some feedback. Officers stress that much more work needs to be done on the analysis of the responses, because many of the questions asked for reasons for answering "yes" or "no" and this information also needs to be presented to Members before a full qualitative interpretation of the results can be made. The views of the statutory consultees

also need to be considered. It is probably inevitable that some of these figures will be used by residents and groups to back up particular points of view about the principle of undertaking this work, and about specific sites, but officers stress that the figures being presented here do not give anything like the full picture, and should therefore not be used out of context. It is also important to take into account the following paragraphs.

28. Appendix 2 gives a very broad summary of the main conclusions of the quantitative analysis. Appendix 3 gives a more detailed breakdown of the yes/no answers to the consultation questionnaire. It includes the total number of responses received for each of these questions with this figure also being given as a percentage of the total number of people who replied. Responses were made either as individuals or as groups of widely differing sizes (eg the largest group included 2,102 signatures while there were 241 groups of 5 or less comprising 596 people). The total number of responses is therefore the sum of the individual responses plus the number of people associated with each group. There will be an element of double counting in these totals because some people will have responded as individuals as well as group members, but officers believe that this will be of little statistical significance. In all, therefore the total number of people who responded to the consultation was 10,601.

29. Appendix 4 contains the full text of all the consultation questions, to be used in conjunction with Appendix 3.

30. Officers are satisfied that responses to the consultation are overwhelmingly, if not totally, from the settled community. Despite the use of Myriad Consultants to try and engage the travelling community in the consultation process, it now seems very likely that no questionnaires have been returned. This is disappointing, but not wholly surprising, given the relatively restricted involvement of the travelling community in the planning process prior to this consultation. The number of applications for new pitches has increased in the last year, and this may be how Gypsies and Travellers have chosen to respond to the consultation. Any analysis of the (quantitative and qualitative) responses, and conclusions to be drawn from the findings, must therefore be viewed in the light of negligible input at best from the travelling community.

31. The questions broadly fall into two types: "general" dealing mainly with strategy or policy issues, and "site-specific" dealing with the potential suitability of individual sites or areas. There is a notable difference in the level of response to the two types, with the general questions attracting as much as a 96% response (eg question 1 on objectives), while the site questions can have a much lower level of reply (eg 77% no response for question 11 on two sites in Roydon and Nazeing). This obviously reflects residents' unfamiliarity with various sites in the District.

Resource Implications:

A budget of £1.3 million over a 4 year period was agreed for the preparation of the Local Development Framework, which includes this DPD, in December 2007. The costs of preparation of this DPD (currently estimated at about £180,000 exclusive of staff time) greatly exceed the original estimates. The Options Consultation, which ran from November 2008 to February 2009, effectively involved the whole Forward Planning team full time, with consequent significant adverse impact on other work. Continuation of the project, particularly if this involves another consultation exercise, will have similar impact on staff time and on other important Forward Planning work.

Legal and Governance Implications:

Preparation of the DPD, separate and in advance of the Core Strategy, is required by a

Direction made by the Secretary of State in September 2007.

Safer, Cleaner and Greener Implications:

The intention of the process is to identify sites which are safe and in a sustainable location, and which satisfy the needs and concerns of both the travelling and settled communities.

Consultation Undertaken:

This report has been considered by the Corporate Executive Forum.

Background Papers:

ODPM Circular 1/06 – Planning for Gypsy and Traveller Caravan Sites
Holmsfield Nursery Appeal Report to the Secretary of State (December 2007) – APP/J1535/C/06/2014682
The Council’s Consultation on Options document (November 2008)
Cabinet Report 20 April 2009 – Analysis of Gypsy and Traveller Options Consultation
Instructions issued to Counsel in September 2009
EFDC Gypsies and Travellers’ Sites Delivery Strategy 2009-2011 (Draft) November 2009
Essex GTAA Final Report November 2009 (Fordham Research)
Supplementary questions for Counsel issued in November 2009
Draft PAS Diagnostic on the LDF – restricted to Members
Full version of Counsel advice – restricted to Members
Summary of the advice received from Counsel in December 2009

Impact Assessments:

Risk Management

One of the main reasons for approaching Counsel was to request advice on the risks associated with a range of actions the Council could take. Consideration of that advice forms the main part of this report.

Equality and Diversity:

Did the initial assessment of the proposals contained in this report for relevance to the Council’s general equality duties, reveal any potentially adverse equality implications? Yes

Where equality implications were identified through the initial assessment process, has a formal Equality Impact Assessment been undertaken? Yes

What equality implications were identified through the Equality Impact Assessment process?
Impression by the settled community that the process of preparing the DPD is giving the travelling community an unfair advantage which is directly disadvantageous to the settled community.

How have the equality implications identified through the Equality Impact Assessment been addressed in this report in order to avoid discrimination against any particular group?

By proposing that sites within or in close proximity to settlements should no longer be considered for Gypsy and Traveller pitches, this is intended to:

- (a) reduce friction between the two communities;

(b) achieve a more obviously even-handed approach which recognises the needs of both communities; and

(c) result in more peaceful co-existence in the medium and long term.