

# Forest Heath District Council

**DEVELOPMENT  
CONTROL COMMITTEE**

**2 SEPTEMBER 2015**

**DEV/FH/15/033**

**Report of the Head of Planning and Growth**

**PLANNING APPLICATION DC/14/1711/FUL – SMALL FEN FARM, SMALL FEN  
LANE, BRANDON**

## **Synopsis:**

Application under the Town and Country Planning Act 1990 and the Planning (Listed Buildings and Conservation Areas) Act 1990 and associated matters.

## **Recommendation:**

**It is recommended that the Committee determine the attached application and associated matters.**

## **CONTACT OFFICER**

Case Officer: Dave Beighton  
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# Committee Report

**Date** 07 November **Expiry Date:** 02 January 2015  
**Registered:** 2014

**Case** Dave Beighton **Recommendation:** Refuse  
**Officer:**

**Parish:** Brandon **Ward:** Brandon West

**Proposal:** Planning Application - temporary occupation of building as dwelling for a period of up to five years.

**Site:** Small Fen Farm, Small Fen Lane, Brandon, Suffolk

**Applicant:** Mr. and Mrs. D. Usher

## **Background:**

**This application is referred to the Development Control Committee due to the significance of this matter and due to the very extensive and detailed enforcement related matters arising here.**

**Members will note that this matter had been placed on the agenda for the August 2015 DC Committee meeting but was withdrawn from that agenda by Officers in an effort to clarify the policy assessment in greater detail and also to properly explore some alleged factual inaccuracies.**

**The report has therefore been updated, amended and, where necessary, corrected.**

**The application is recommended for REFUSAL.**

## **Proposal and Background:**

1. This matter arises following a longstanding planning enforcement investigation into this site. This investigation related to the erection of a dwelling on a site in the rural area where no dwelling was previously in existence. This matter was first investigated by the Authority in 2010 as works took place to erect the new building. After some detailed investigations (including the service, and then subsequent withdrawal on a technicality, of an Enforcement Notice in late 2010 early 2011) a formal Enforcement Notice was served again in 2012 requiring the demolition of the dwelling. This Notice was appealed and a public inquiry was held in April 2013.

2. Members' attention is drawn to the appeal decision letter included at Working Paper 1 to this report, which offers useful context. It is recommended that Members familiarise themselves with this. The decision of the Inspector, following the public inquiry, was that the Enforcement Notice served by Forest Heath should be upheld and that the terms of the Notice, which are to demolish the unauthorised dwelling, should be maintained. The Notice required demolition by 20<sup>th</sup> June 2014 but compliance with the terms of the Notice remain outstanding.
3. The Authority had been in the process of securing compliance with the outstanding terms of the Notice. This included procurement for 'direct action' whereby the Authority would appoint contractors to enter the site to effect compliance its terms. In summary, this includes the demolition of the unauthorised dwelling and the removal of all resultant material from the site. This procurement process is ongoing at the time of writing.
4. However, as these steps were reaching an advanced stage this application was submitted to the Authority. Independent legal advice received at that stage was that this application should be registered and determined before proceeding further with any direct action. Planning permission is hereby sought for the retention of a presently unauthorised dwelling for a temporary period of up to five years. This application has therefore had the effect of holding the progression of any direct action in abeyance pending its determination.
5. The applicants are presenting an argument that they consider is material to the Authority's assessment here. In his June 2013 appeal decision the appeal Inspector recognised that there may be changes in circumstances that the Council should take into account at the end of the enforcement notice compliance period. The compliance period has expired and the applicant argues that circumstances have changed during this period in that the planning policy position has moved on materially since the time of the service of the Notice and since the time of the decision of the Inspector.
6. This argument relates in summary to the possible allocation of land entirely surrounding this appeal site for mixed use development as part of the planned expansion of Brandon. If such an allocation and development came to fruition it might reasonably call in to question whether or not this site would remain 'isolated' with reference to paragraph 55 of the NPPF. This matter is discussed in greater detail within the report.
7. The applicant is also presenting personal circumstances which they consider offer justification for a further delay in the requirement to demolish the dwelling, for a period of up to five year or until the death of Mrs. Ellen Usher. This includes confidentially provided details about the medical condition of Mrs. Ellen Usher who is the mother / mother in law of the applicants, and who resides with the applicants at the site. It is argued by the applicant that the main change in circumstance is that Mrs Ellen Usher's physical and mental health has deteriorated considerably such that moving her from her home would pose a significant risk to her health.

8. A statement has been submitted in support of the application together with independent medical reports which demonstrate this deterioration. This includes a letter from Mrs. Ellen Usher's GP dated June 2014, a medical report from her consultant dated September 2014, along with a supplemental medical report from the same consultant dated February 2015. These will be referred and alluded to in as much detail as allows in the main section of this report. However, specific and full details of the letters and medical reports will not be presented before Members, noting the sensitive and confidential nature of the medical information.

**Application Supporting Material:**

9. Information submitted with the application is as follows:
- Application forms
  - Covering Letter
  - Planning Statement

**Site Details:**

10. The site is located to the north and west of the settlement of Brandon, Suffolk, within the northern part of Forest Heath District, close to the boundary with Norfolk. The site is accessed from Brandon via Chalk Road, a metalled single carriageway road without footpaths or street lighting.
11. The site itself is accessed along an unmade track off Chalk Road and Small Fen Lane. As the crow flies the unauthorised dwelling is approximately 270 metres from the edge of the defined settlement boundary of Brandon and, when accessed along the track, Small Fen Lane and Chalk Road, it is approximately 350 metres. The surrounding countryside is generally flat, open and undeveloped, with sporadic natural vegetation. To the immediate west of the site is a two storey dwelling known as West End House. Chalk Road is a rural lane with scattered and incidental residential properties, and Small Fen Lane is an unmade rural track.
12. The site contains a single 1.5 storey building within the centre of the site. This is the unauthorised dwelling which was subject to the enforcement action. The failure to comply with the terms of the Enforcement Notice mean that the building is presently illegal. A smaller outbuilding located along the northern boundary is lawful due to the length of time that it has existed on site. Concerns were raised previously about the prospect of this outbuilding being used residentially and such a use was also alleged in the previously served Enforcement Notices. However, the appeal against this Notice was allowed by the Inspectorate since there was no evidence in 2013 of there being any unauthorised use in this building. The previous appeal determined that this building was not being used residentially.

**Planning History:**

13. The site has no formal planning application history that is relevant to this matter presently before us.

14. The enforcement history is plainly of significant importance, and the decision letter of the Inspectorate in relation to this matter is included with this report.

**Consultations:**

15. County Highways: No objection subject to the imposition of conditions.

16. Suffolk County Council Public Rights of Way: No objection.

17. Natural England: The proposal will not have a significant effect upon Breckland SPA or SAC, nor upon the Breckland Forest, Breckland Farmland or Weeting Heath SSI's.

18. Environmental Health: Contaminated Land: No comment.

19. Planning Policy: The proposal would constitute an isolated dwelling in the Countryside, therefore contrary to the Forest Heath Local Plan and the NPPF. More detail on the policy related implications, including those arising from the emerging policy position, are included within the main body of the report.

**Representations:**

20. Brandon Town Council: Object on the following grounds – *'This property has already been built without planning permission in the countryside. Why has it not been knocked down by enforcement? This building has been erected for at least 3 years?'*

21. Correspondence was received from then Cllr. Bill Bishop. This states that *'I would very much like you to consider that this application is to ensure that Mrs. Usher can remain with her home and family and not have to be placed in some care home without constant contact with her loving family'*.

22. Eleven letters have been received (including two from the same author, and including two received since the publication of the August DC Committee report) which, between them, raise the following points –

- The site has been abused in many ways. *Officer Note – this is not a material planning consideration.*
- It seems that the applicant has his own law – there were no plans submitted for the change to residential. *Officer Note – this is not a material planning consideration.*
- There were no plans submitted for any business use on the site. *Officer Note – this is not relevant for the purposes of this proposal.*
- There is asbestos on the site and the owner has not paid Council Tax *Officer Note – Council tax has been claimed by the Authority, including being backdated accordingly.*
- Occupation by an elderly relative cannot be used as an excuse to accept this.

- The elderly resident previously lived elsewhere.
- There are enough grounds for a refusal.
- I supported FHDC at the Inquiry.
- The Inspector gave a generous 12 months to demolish.
- There are inaccuracies in the application forms.
- Any number of the Inspector's comments support refusal.
- The emerging local plan is far from settled. The preferred sites have many restraints and it is not a foregone conclusion so at this time there is little or no change regarding the development plan.
- Have sympathy for the state of Mrs. Usher's health.
- If this is approved we will go through the same situation again and again until the development plan allows him to get approval. *Officer Note – this is not a material planning consideration.*
- There is an Enforcement Notice against this property but the owner shows no regard for planning law.
- There are fences at the site that breach planning regulations. *Officer note – this is noted and will be considered further, but this point is not material to the consideration of this proposal.*
- The site still resembles a scrap yard and is used for business purposes.
- The decision of the Inspector should be adhered to regardless of any excuses for temporary occupancy. *Officer note – this is noted and will be considered further, but this point is not material to the consideration of this proposal.*
- The five year extension requested would seem to be being requested for the benefit of someone who was not even living at the property at the time of the enforcement appeal. *Officer Note – the agent has confirmed that Mrs. Usher Senior moved into the property in Autumn 2011. That is after the initial investigations into this matter had started. The agent has further confirmed that Mrs's Ellen Usher's own house was sold after the enforcement notice had been served but before the appeal decision was made, and before the stated further deterioration in the health of Mrs. Usher senior in April 2014 following a fall.*
- Raise questions about the veracity of the medical evidence presented.
- There is no way to make the dwelling blend it – it will still be an eyesore. It remains an intrusive and uncharacteristic form of development in this setting.
- The notice should be upheld and medical matters disregarded.
- The harm caused by the development is real and continuing.
- Object – Mr. Usher has had more than his allotted time to comply. He has done nothing.
- This application is simply about delay in the mistaken belief that the surrounding area will be selected for development. The surrounding area is merely suggested as an option and there is serious opposition to this as well as constraints.
- Question the legality of this application given that it relates to personal circumstances.
- The development remains a blot on the landscape.
- The applicant's claims are an outrageous abuse of the system. *Officer Note – this is not a material planning consideration.*
- The first letter reiterates the objection to the proposal and re-states comments previously reported.

- The second letter points out an ostensible discrepancy in the August Committee report in relation to the date of the sale of Mrs. Ellen Usher's house in Streatham. The letter claims this sale was May 2013, not July 2013 as had been reported.

**Policy:** The following policies have been taken into account in the consideration of this application:

23. Forest Heath Core Strategy (2010):
  - CS5 design quality and local distinctiveness
24. Joint Development Management Policy Document
  - DM1 Presumption in favour of sustainable development
  - DM5 Development in the Countryside
  - DM2 Creating Places
  - DM27 Housing in the Countryside

**Other Planning Policy:**

25. National Planning Policy Framework (2012).
26. The content of the National Planning Practice Guidance (NPPG) is also relevant.

**Officer Comment:**

27. The issues to be considered in the determination of the application are:
  - Planning Policy Considerations and the 'Emerging' Plan
  - The Personal Circumstances of the Applicant.
  - Way Forward
  - Conclusions

Planning Policy Considerations and the 'Emerging' Plan

28. The conclusion of the appeal Inspector was clear. This is an unacceptable location for a proposed dwelling. The Inspector's decision was made within the context of the National Planning Policy Framework and Officers advise that the conclusion reached remains relevant. This is a very important starting point for considering this matter.

29. At that time, policies within the 1995 Local Plan (Policies 9.1 and 9.2) remained extant and consideration was made by the Inspector against the provision of such, as well as the provisions of paragraph 55 of the NPPF. Since that time the 2015 Development Management Policies have subsequently been adopted. Policy DM5 relates to development within the countryside and Policy DM27 relates to housing in the countryside. When assessed against both policies the provision of a new build residential dwelling in this location would not comply as a matter of principle. DM5 sets out the limited circumstances where development will be permitted within the countryside and does not include new build residential development. DM27 establishes that residential development may be permitted in 'clusters' of dwellings within the countryside. Small Fen Farm

and any nearby dwellings are not part of a cluster for the purposes of DM27 and a dwelling in this location is still therefore unacceptable as a matter of principle, in line with the original conclusions of the Inspector in 2013.

30. The applicant has queried the actual level of harm, suggesting that since this is 'in principle' it justifies a further retention of this building. However, this ignores two important facts. Firstly, that this in principle harm has already continued for some considerable time and if confidence in the planning system is to be restored then action is needed at some stage. Secondly, and importantly, it also ignores the conclusion of the appeal Inspector, supporting the original and continued views of Officers, that the building is also visually obtrusive and uncharacteristic within this context.
31. It can be considered therefore that the wider planning policy position remains largely similar in scope to the situation when the appeal was dismissed, including the conclusion that dwelling as built is obtrusive and uncharacteristic in this particular countryside setting. This remains the position and therefore remains a matter which weighs substantially against the proposal.
32. However, in dismissing the appeal against the Enforcement Notice the appeal Inspector wrote:

*"...natural justice requires that I take some account not just of the Appellant's family circumstances but also of the obvious financial loss he would suffer through demolition and the effective cessation of the residential use. In these somewhat exceptional circumstances, I shall therefore extend the compliance period to one year, leaving it for the Council to review the position (if the Appellant asks them to do so) then or before in the light of any progress on the development plan or indeed of any other relevant changes in circumstances".*
33. In the intervening period there have been changes in the circumstances in relation to the development plan. It is therefore necessary to carefully assess these changes to understand how material they are to the conclusions drawn in June 2013 by the Inspector in the Enforcement Notice appeal. It should be noted however that the Inspector considered that 12 months would be sufficient to enable this review process to take place whereas over two years have now elapsed since that decision. This must be considered as being material at this stage to the assessment before us. It would not be reasonable to leave this matter open ended, noting the issues it raises and, at some stage, a decision must be taken on the facts as they currently exist.
34. As stated above, this application proposes the retention of the dwelling for a temporary period of up to five years. The National Planning Practice Guidance at paragraph 014 (Use of Planning Conditions) states *"Circumstances where a temporary permission may be appropriate include where a trial run is needed in order to assess the effect of the development on the area or where it is expected that the planning circumstances will change in a particular way at the end of that period"*.

35. Noting the wider planning policy position here it is important therefore to objectively and fairly assess the present planning policy situation. At the same time it is important to understand the weight that must be attached to the emerging position, as well as to speculate reasonably on where the planning policy position might end up within a definable timeframe. That said, timescales and outcomes are indeterminate at this stage and it is also very important that matters are considered based on the merits of the circumstances at the time the decision is made.
36. The Core Strategy Single Issue Review (SIR) is part of the principal Local Plan document that provides the overall strategic vision for Forest Heath and, specifically, sets the strategic policy for residential growth to 2031. The Site Allocations Local Plan ultimately identifies appropriate and adequate sites to deliver the number, distribution and phasing (of delivery) of new homes as identified within the context of the emerging SIR document.
37. The adopted Core Strategy (2010) identifies a Settlement Hierarchy in Policy CS1. This policy requires that most development will take place in the Market Towns, followed by the Key Service Centres. In line with national and local planning policy, these settlements are considered to be the most sustainable locations for new development, since they provide a range of existing services, facilities, shops and employment opportunities, and serve as public transport hubs.
38. Brandon is considered a Town and therefore growth and allocations are being considered as part of the emerging Plan. However, further development or expansion of the town is significantly constrained by European environmental designations for Stone Curlew, Woodlark and Nightjar. The Special Protection Area and its 'buffer zones' are described in the Core Strategy and the effect is that only very limited settlement expansion in Brandon is possible without first demonstrating mitigation for the presence of the various protected species.
39. Since the Inspector's decision in June 2013, the Authority has resolved to prepare the Core Strategy Single Issue Review and the Site Allocations Plan in tandem. Since the Core Strategy SIR Issues and Options consultation in July 2012 and the Site Allocations Issues and Options consultation in 2006, the Authority is in the process of consultation on both documents, commencing early August 2015.
40. Responses to this consultation will help inform another 'Regulation 18' consultation document, which will set out the Authority's preferred strategy for the allocation of sites across the District, and which will take place in late 2015. Following this, a final draft of the Site Allocations document will be prepared, which the Authority will submit to the Secretary of State for an independent planning examination.
41. At this stage therefore, and noting the uncertainty on both outcomes and timescales, the emerging Plans carry 'very limited' to 'no weight' in the decision making process as they are still at such an early stage in the preparation stages. That said, it is important to point out that of the four

possible housing distribution options set out within the Single Issue Review consultation document, none of these propose more than 55 dwellings in total within Brandon, and none of these propose development on or around Small Fen Farm.

42. In the consultation documents the area surrounding Small Fen Farm (B12b and B17) have been most recently identified as being 'deferred' by the Authority meaning that the Authority does not presently consider them to be deliverable, achievable or suitable for development at this time. This approach is supported by Natural England. The surrounding land sits within the SPA Buffer zone for Stone Curlew, Woodlark and Nightjar and no Habitat Regulations Assessment has been completed and agreed by Natural England to overcome this significant constraint. It is for these reasons that the four housing distribution scenarios set out within the ongoing Single Issue Review consultation document only propose a maximum of 55 additional homes for Brandon, and none within the immediate setting or context of Small Fen Farm. This fact must be highly material to the consideration of this present application and must significantly diminish the weight that can be attached to the emerging policy position in relation to the assessment of this present proposal.
43. While assessing this application a developer-led planning application relating to land to the north of Small Fen Farm but not specifically including Small Fen Farm has been submitted to this Council for some 1,659 homes, of which 1,270 are proposed within Forest Heath's area. If this major planning application was to receive planning permission from this authority or on appeal then it would have the effect of overcoming the planning policy concerns in relation to the isolated nature of Small Fen Farm as the site would in effect be subsumed within an expanded settlement boundary for Brandon
44. However it is not possible to assess the submitted wider planning application in detail at this time, noting that it has only recently been submitted and that consultations remain outstanding, nor, in any event, would it be appropriate to do so through this report. However, it should be noted that Policy CS2 states any development that lies within the 400m SPA component buffer must be able to demonstrate, through project level HRA, that the Woodlark and Nightjar interest features of the SPA will also not be adversely affected by the proposal. In addition to these environmental constraints for the wider scheme, the area includes a Scheduled Ancient monument (SAM), a Listed Building, and areas of Flood Zone.
45. Accordingly, the present context in relation to this wider potential allocation indicate very, very significant constraints that cast very strong doubt on the acceptability of such a development. This position must also be considered in the context of the already two year delay given in relation this matter since the appeal decision, and also in light of the fact that the Inspector considered 12 months to be a sufficient time to allow further consideration.

46. In responding to the August DC Committee report on this point the applicants' agent has circulated a letter to all members dated 2nd August 2015, and further comment is hereby offered in response.
47. The applicant's agent has questioned the robustness of the planning policy advice, noting the recent submission of a planning application for housing to the north of Small Fen Farm which is under consideration. The applicants' agent suggests that the reason for the Enforcement action may vanish if the planning permission for this housing development is granted. However, for the reasons mentioned in the earlier paragraphs of this report Officers remain of the opinion that little weight can be attached to this major planning application for housing in the context of this application for a temporary permission.
48. The agent's letter also indicates that the land around this site is a 'suggested allocation' in the emerging Site Allocations policy document. This is not the case. The site has been 'deferred' by the Authority in the Strategic Housing Land Availability Assessment. It should also be pointed out, as the Site Allocations consultation document makes clear, that the 'Land West of Brandon' site is only included in the Site Allocations document as a 'potential' option simply because the potential for allocation on sites with undetermined applications should be considered through the preparation of the site allocations document. None of this changes the facts of this wider site, and the very real and significant constraints that exist, and which have led the Authority to 'defer' this site in the SHLAA and to also only propose a maximum of 50-55 additional dwellings for Brandon over the coming plan period in the forthcoming Single Issue review consultation document. Put simply, there is no indication whatsoever of when, or even if, this wider site will ever come forward for development. Noting the already extensive delays in relation to this enforcement matter, it is important that decisions are taken, at some stage, on the merits of the case as they exist at that particular time.

#### Conclusion on Policy Matters

49. The Core Strategy Single Issue Review and Site Allocations are at the early stages of preparation and therefore carry 'limited' to 'no weight' in the decision making process. The documents will gain weight as they progress through the relevant stages but this is not expected until late 2016 when the Authority will have submitted its Local Plans to the Planning Inspectorate for an Examination in Public. Even at that stage there is still no certainty on either outcomes or timescales in relation to the allocation or not of the wider site, noting that, at present, the Authority are not satisfied as to its delivery in light of the significant constraints that exist and in light of the fact that the wider site is not therefore presently proposed for allocation. In fact, in all of the four possible distribution options that the Authority are proposing for Brandon, none of these propose more than 55 additional dwellings for the settlement, and none within the context of this site. These factors are considered wholly material, and a wholly more reasonable indicator of likely outcomes than the fact that a speculative application is presently before us on this wider site.

50. Therefore it is reasonable to suggest that even if these fundamental issues could be overcome (which is not considered a likely prospect at this stage in time) then this will not be until the Core Strategy Single Issue Review and the Site Allocations document is adopted in 2017. For the record, and noting the context set out above, Officers do not consider that there is a likelihood even then, of the planning policy position being favourable to this present application by 2017 in any event. Having already allowed two years since the date of the appeal decision to consider whether or not the planning policy position had changed materially it is not considered, noting the very real uncertainty still surrounding the potential for the allocation of the wider site, that any continuing delay and uncertainty is reasonable and that the present context points very firmly towards not allowing a further extension of time, which will only add to the uncertainty of the process as well as eroding faith in the planning process.
51. With so many issues outstanding in respect of the large developer-led planning application Officers do not consider the submission of this wider speculative application is sufficient reason for allowing a temporary permission for this otherwise unsuitable development
52. It must also be noted within this context that when considered in isolation the retention of this unauthorised dwelling would not be considered favourably due to its isolated and therefore unsuitable and unsustainable location.

#### The Personal Circumstances of the Applicant

53. The applicants are also arguing, in addition to the planning policy related arguments set out above, and even assuming that the wider site surrounding the land is not adopted for redevelopment purposes, that it is appropriate for a temporary planning permission to be granted to allow Mrs. Ellen Usher to remain in her home until she passes away.
54. Paragraph 015 (Use of Planning Conditions) of the National Planning Practice Guidance states that *"unless the permission otherwise provides, planning permission runs with the land and it is rarely appropriate to provide otherwise. There may be exceptional occasions where granting planning permission for development that would not normally be permitted on the site could be justified on planning grounds because of who would benefit from the permission."* Paragraph 015 also states that *'a condition used to grant planning permission solely on grounds of an individual's personal circumstances will scarcely ever be justified in the case of permission for the erection of a permanent building, but might, for example, result from enforcement action which would otherwise cause individual hardship'*
55. The applicants argue that this is precisely the situation in relation to this matter and that *'...in these circumstances there is a strong case for attaching weight to the exceptionally difficult personal circumstances faced by the Ushers. To refuse this application and proceed with the proposed direct action could have a profound and possibly life threatening effect on the health of Ellen Usher'*.

56. The personal circumstances which are promoted by the applicant as supporting their case relates to the health of Mrs. Ellen Usher, who is the mother of the applicant Mr. Usher, and the mother-in-law of the applicant Mrs. Usher. The degree of individual impact and hardship is based on a letter from Mrs. Ellen Usher's GP, plus a medical report and further supplemental update letter from her consultant.
57. Careful consideration of the provisions of this paragraph must be given at this stage. The tests set out above indicate that '*exceptional occasions*' is the relevant test for granting planning permission for something that would otherwise not obtain planning permission, solely on the basis of who would benefit from this situation. The test of '*scarcely ever be justified*' also set out with paragraph 015 is used in the guidance within the context of a proposal for the retention of a permanent building. This proposal is not for the retention of a permanent building. Rather it is for its further temporary retention for a period of up to five years. This guidance is therefore limited in its relevance to this matter, albeit it is acknowledged that the principle that where individual hardship might be caused is certainly capable of being a material consideration. Nonetheless, given the other test set out within paragraph 015, that limits approval of otherwise unacceptable developments to '*rarely*' and on the basis of who would benefit from such to '*exceptional occasions*', it is considered, firstly that this is the relevant and most applicable policy test in this context and, secondly, that it sets the bar at a high level in order to achieve approval.
58. Demolition of this dwelling will plainly cause individual hardship to the owner. However, the owners, in the words of the appeal Inspector, are victims of their own misfortune in this regard and this must severely limit the weight to attach to this point. However, Mrs. Ellen Usher, who is the applicants' mother and mother in law, presently resides with them. She suffers from dementia, Chronic Obstructive Pulmonary Disorder (COPD) and chronic osteoporosis and these are claimed as personal circumstances which justify a retention of the dwelling for a further temporary period, either for a period of up to five years (from the date of submission), or until the death of Mrs. Ellen Usher, whichever is soonest.
59. The Inspector concluded in his decision that in policy terms the dwelling was harmful, he was also clear that the dwelling is in no way harmful to the living conditions of neighbouring residents and that this reduced the urgency for compliance. "*The harm caused by the dwelling in its present context is real and continuing. It is not however a harm which impacts seriously upon for example neighbouring residents' living conditions (save perhaps for an outside light which the appellant could address if still necessary). That lessens the urgency of it being remedied though not its degree.*"
60. Officers accept that these personal circumstances can be considered capable of being a material consideration and in theory are of sufficient weight to satisfy the '*exceptional occasions*' test set out in paragraph 015 of the NPPG. Officers also note, and weight accordingly, the fact that the 'harm' is largely an in principle harm, as noted by the inspector. That said,

the appeal Inspector also concluded that the dwelling as built is visually obtrusive and uncharacteristic within this context and this is factor which increases the urgency for remedial action. For these reasons Officers consider that a very careful consideration of this point must be made.

61. Mrs. Ellen Usher was moved permanently into the property in October 2011 (following occasional overnight stays commencing in August 2011). This was before the present Enforcement Notice was served but some time after Officer investigations had commenced in 2010. The owner was aware of and involved in these investigations and whilst there had been some delay following the withdrawal of an earlier Notice on a technicality, Officers had written to Mr. Usher in June 2011 explaining that investigations were ongoing with a view to the consideration of reserving an Enforcement Notice. It was clear at this point in time therefore that the enforcement action was not concluded and any decisions made were done so in this context.
62. Mrs. Ellen Usher also retained a property elsewhere (Streatham, Cambs) until early 2013. This is before the date when the Enforcement Notice appeal was dismissed, but prior to what is suggested as being a further material decline in her health in 2014 following a fall. Officers have no details of the address of this property and are unable to verify this one way or another but a number of recent local representations indicate that this sale took place in May 2013, thereby before the enforcement notice appeal was dismissed in June 2013. Subsequent comments received from the agent confirm that the sale of this bungalow did take place before the appeal was decided, albeit the precise date is not offered. The balance of evidence and the confirmation of the agent leads Officers to favour that the Streatham bungalow was sold before the enforcement notice was upheld at appeal. This sale took place within the context of ongoing enforcement action and Officers are of the conclusion that the timing of the sale of the Streatham property is a material factor that limits the weight to be attached, in the balance of considerations, to any further proposal to retain this building.
63. That the owners sold a dwelling that might otherwise have been capable of occupation, at a time when they knew that the requirements of the Enforcement Notice required the complete demolition of their present dwelling, is a matter that cannot be ignored in the balance of considerations here. That they also elected to move Mrs. Ellen Usher into Small Fen Farm at a time when it was clear that the Authority had not concluded its enforcement investigations in relation to it is also material. To use the words of the appeal Inspector again, they are victims of their own misfortune. To what extent this circumstance justifies the retention of this dwelling therefore in a policy context where granting planning permission is, in the words of the NPPG, only ever done in '*exceptional occasions*' is plainly a moot point. Certainly Officers are of the view that this is factor which must inevitably diminish the weight that must be attached to this argument.
64. Plainly however, and on the other side of the argument, demolition will inevitably result in potential hardship for the occupants of the property,

and this must also be given appropriate weight albeit this weight must be considered more modest in this context given the conclusions of the preceding paragraphs.

65. However, before concluding on this matter it is important also to assess the very specific medical arguments presented, not least since it is presented on the basis that there has been a material decline in the health of Mrs. Ellen Usher in the time after she moved into Small Fen Farm and which might in principle be capable of being a weighty material planning consideration. It will thereafter be necessary to carefully weight and balance these arguments before reaching a conclusion.
66. Noting this it is important not to diminish the independent medical opinions reached by the GP and consultant, which are readily and reasonably accepted on their own face. This GP opinion received indicates that Mrs. Ellen Usher needs to be kept in a *'safe suitable environment and close to her family'*, which would not, in theory, change if the dwelling were demolished. This must be considered a further fact which diminishes the weight which can otherwise be attached to the personal circumstances.
67. The medical report prepared by Mrs. Ellen Usher's consultant in September 2014 (which supplements an initial GP assessment from June 2014, and is itself supplemented by a further consultant update report dated February 2015) makes general albeit professionally presented comments about Mrs. Ellen Usher's medical state, all of which officers accept, again at face value, to be fair and objectively, independently and professionally made. The crux here is the 'opinion and recommendation' section and in particular the conclusions that *'the impact of stress is likely to increase the occurrence of these challenging behaviours'* and *'I believe that if Mrs. Usher was to be placed in a different environment or away from her family, she would be more at risk of falls'*.
68. This statement is very much the crux of this matter. The Authority needs to decide the degree of weight to attach to this, and to then balance it against the planning policy situation set out above.
69. The test here is a balanced one, and needs some care, out of fairness and respect to the situation. There is no doubt that Mrs. Ellen Usher is suffering from a severe form of dementia, that has been identified and articulated by independent medical practitioners in their three written opinions with plainly no other motive in this matter than the health and wellbeing of their patient. Equally, the presented medical evidence indicates that any increased stress on Mrs. Ellen Usher, for example from being moved or separated from her family, would increase her risk. Objectively therefore we must recognise this as a 'personal circumstance' and decide how much weight we can attach to it. It is the opinion of Officers, having carefully considered and reviewed the independent medical information presented, that these circumstances must be given a reasonable amount of weight in support of this application.

70. However, the starting point must be one of recognising that the '*exceptional occasions*' test is a high one to meet in order to justify the approval of planning permission for a development that would not normally be permitted on the site, noting further the harm identified in visual terms and in principle by the appeal Inspector.
71. Officers are also unable to ignore the fact that the personal circumstances remain, to a degree, a result of the actions of the owners. That is not to necessarily override any weight that must be attached to the personal circumstances but it must be taken as limiting it. The condition of Mrs. Ellen Usher was identified in 2011 and she spent some time thereafter in hospital. At this stage she retained a bungalow in Cambridgeshire but for personal reasons which Officers do not seek to dispute, she moved into Small Fen Farm to benefit from the support of her son and daughter in law. At this stage it is advised that a further family member continued to reside in Mrs Usher Senior's property but this was still after Officers had advised Mr. and Mrs Usher in writing in June 2011 that investigations were ongoing in relation to the unauthorised dwelling.
72. Furthermore, a fact that Officers also cannot ignore, and which must be given material weight in balancing and considering this matter, is that Mrs. Ellen Usher's former home was sold in early 2013 (it is suggested May but this is unconfirmed, albeit it is accepted as being before the appeal decision was issued in June). This plainly indicates that the other family member who had resided there no longer needed it and that it was therefore capable of occupation. It was also plainly at a time when the health of Mrs. Ellen Usher was such that she needed and had become dependent upon the support of family members, noting that in the previous two years or so she had spent time in hospital as a result of her condition. It was also within the context when there can have been no doubt amongst all parties that there was at the very least some prospect that the dwelling at Small Fen Farm was to be demolished. This can at best be described as unfortunate on behalf of the applicants not, at the very least, to retain ownership of this alternative property whilst matters were resolved in relation to Small Fen Farm.
73. Members will have seen a letter from the agent dated 2nd August. An earlier letter, dated 31st July, containing similar content, was set to Officers. Clarification within this letter on the date of Ellen Usher's diagnosis is helpful, but does not add to or detract from the conclusions made, which must be made based on the circumstances as they exist at this stage.
74. Noting, in any event, the degree of weight that Officers conclude above must be attached to the medical evidence, and further noting the guidance within the NPPG that indicates that the '*exceptional occasions*' test is a high one to meet, Officers consider that the circumstances of the sale of Mrs. Usher Senior's former property must be taken to be a material factor here.
75. Regardless of this fact, the conclusion of Officers remains that respect must be offered to the latest up to date medical condition of Mrs. Ellen

Usher, noting the stated further decline in her health since 2014. However this weight itself must be further limited noting that there had been serious concerns about Mrs. Ellen Usher's health since at least 2011, and also noting that this was still when a number of alternative decisions about accommodation could have been made at that stage in light of the fact that, in June 2011, Officers advised that investigations were ongoing and, in June 2013, the appeal was dismissed and the Notice requiring demolition upheld.

76. The agent refers in his letter to Members (dated 2<sup>nd</sup> August 2015, and sent in response to the publication of the August DC Committee report) to this letter sent by Officers to Mr. Usher in June 2011 relating to this matter. The quote he provides is accurate but must be considered in context. The advice given in June 2011 was on the conditional basis of evidence being subsequently provided which proved that the building was not substantially different to that which it had replaced. No such evidence was provided, and this matter was tested robustly through the public inquiry appeal against the Enforcement Notice, with the Inspector agreeing with the Authority on this point and concluding that the dwelling built here was materially different to the former building it had replaced. Accordingly, notwithstanding Officers conclusion as of July 2012 that enforcement action could not be pursued, further material evidence subsequently came to light that caused a reassessment of this and this was pointed out to the owner. Therefore, with the exception of a short period between July and November 2012 when the owner might reasonably have anticipated that there would not be any formal enforcement action, all other decisions were taken within the context of potential action being brought against the unauthorised dwelling.
77. Setting aside however any circumstances surrounding the sale of her property and the, to a degree, self inflicted nature of the present scenario, the conclusion of Officers remains that the balance here between the increased health risks to Mrs. Ellen Usher as a result of her being required to move from the property, balanced against the ongoing harm that is caused by the unauthorised development, and considered also in light of the length of time that has been allowed for these further considerations to take place, and for, potentially, alternative steps to be arranged and even taken, is that the balance falls in favour of refusal. This conclusion must also be read within the context of the planning policy conclusions reached above.

#### Way Forward

78. Refusal of this application would mean that the Enforcement Notice upheld at appeal would remain outstanding. The continued failure to comply with the Enforcement Notice represents a criminal offence. Officers have the option of a prosecution in relation to this breach, with a fine of up to £20,000 being payable as well as imprisonment for up to six months. It is also possible that Proceeds of Crime legislation could be used if it is considered that the Usher's have benefitted financially.
79. In these circumstances however Officers are not satisfied that prosecution would serve the ultimate aim, which is compliance with the terms of the

Notice through demolition, and would simply lead to a further delay in addition to the two years that have already elapsed since the appeal decision upheld the Enforcement Notice.

80. The Authority is able to undertake works in default where a Notice remains uncomplied with. This is referred to as 'direct action'. In such a scenario the Authority would appoint contractors to undertake works to effect compliance with the Notice. The costs of this would be charged to the owner, with a legal charge placed on the land if payment was not otherwise forthcoming.
81. In these circumstances Officers consider that direct action remains the most appropriate solution.
82. If this planning permission is approved then Members should note that the existing Enforcement Notice will be superseded by such an approval. At such time as any temporary consent expires then the dwelling would again become 'unauthorised' (as opposed to 'illegal' which it is at present) albeit, if compliance with the terms of any removal condition attached to that consent was not complied with, reliance could not then be placed on the present Enforcement Notice and a new Notice would need to be served. Whilst in theory it might be possible to serve a Breach of Condition Notice in this circumstance the fines for non compliance are more modest than they are for failing to comply with an Enforcement Notice and, crucially, there is no provision for direct action to be taken in default where a Breach of Condition Notice is not complied with. Accordingly, a further Enforcement Notice would need to be served, against which there would be a right of appeal. Members are reminded that it is important not to let this fact influence their decision in relation to this application, which must be considered on its merits based on the facts presently before us.

### **Conclusion:**

83. In conclusion, Officers consider that at the very best 'little' and at the very worst 'no' material weight can presently be placed on the wider planning policy position in relation to Brandon. Regardless of this weight, no comfort whatsoever can be given to the prospect of any development coming forward surrounding this site given the continuing and very real uncertainty and constraints that exist. It has been over two years since the appeal Inspector allowed a period of 12 months within which to consider a review of the policy circumstances. If anything there is more uncertainty now in relation to the possible expansion of Brandon than there was in 2013. This conclusion remains valid notwithstanding the present planning application on the wider land in the vicinity of this site.
84. In this circumstance Officers are very firmly of the view that any continuing delay and uncertainty would be wholly unreasonable, given the balance of considerations, given the opportunity offered for review, and given the conclusions of that review process. If certainty and reassurance is to be given by the planning system, and if it is to remain a credible and respected process, then the balanced position here suggests firmly that

fair and reasonable opportunity has been offered and given, but that, when assessed objectively, the decision to proceed with enforcement action to secure compliance with the terms of the Notice is the only one that can reasonably be reached.

85. The personal circumstances are recognised and respected. These are quite plainly capable of being a weighty material consideration, and the medical opinions presented are accepted. However, the weight that must be attached to this must be considered in light of the NPPG guidance discussed above and Officers consider that this sets the bar at a very high level.

86. The medical opinions of the GP and consultant, whilst setting out the unfortunate condition of Mrs. Ellen Usher, are not considered by Officers to be sufficiently weighty so as to overcome the obvious harm identified by the appeal Inspector. Setting aside that this balanced assessment falls in favour of refusal, Officers are also of the view that this weight must reasonably be further diminished by the circumstances and timing of the sale of Mrs Ellen Usher's property and by the circumstances of the decision to move her into the property in October 2011.

87. However awkward and distressing any relocation would be for Mrs. Ellen Usher this distress is a situation of the applicant's own making, and whilst it is nonetheless still respected, Officers are simply unable to conclude that any distress caused would outweigh the manifest harm identified by the appeal Inspector, the need to bring this matter to as swift a resolution as possible, and the need to ensure that faith in the planning process is maintained.

88. Consideration has been given in assessing this matter to Article 1, Protocol 1 (Protection of Property), Article 6 (a right to a fair hearing within a reasonable time), Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) in relation to the Human Rights of those persons presently occupying the property.

89. It is considered, in light of this assessment, that the refusal of planning permission is necessary to achieve compliance with planning control. It is further considered that such action would be lawful, fair, non-discriminatory, necessary, and in the general public interest to secure the objective of achieving compliance with planning control, including with national and local planning policies which seek to restrict most forms of new residential development within the countryside in order to ensure sustainable development and also to protect the countryside for its own sake from unacceptable development.

90. The recommendation is therefore one of refusal.

**Recommendation:**

91. It is recommended that members **NOTE** the view of Officers that direct action to secure compliance with this outstanding breach of planning

control is considered appropriate, and also that planning permission be **REFUSED** for the following reason:

1. The dwelling proposed for retention remains an isolated dwelling contrary to the provisions of paragraph 55 of the NPPF and those of Policies DM5 and DM27 of the Joint Development Management Policies 2015. It is also the case that the building to be retained is significantly larger, higher and bulkier than the one it replaced and remains visible over a wide public area. In line with the conclusions of the previous appeal Inspector it is thus an obtrusive and uncharacteristic form of development in this setting contrary to the requirements of the NPPF in relation to good design and those of Policy DM2.

Very significant constraints exist in relation to the potential allocation of any sites within and around Brandon. There is presently no indication of when, or even if, these matters will or can be resolved. It is not therefore considered that any material weight can presently be attached to the emerging planning Policy position. In light of this fact, in light of the harm identified, and in light of the generous timeframe for review in relation to this matter that has already now been offered, firstly by the Planning Inspectorate in their appeal decision letter and secondly by the Local Planning Authority in the consideration of this application, it is not considered reasonable to allow a temporary approval for the further retention of this unauthorised dwelling.

In balancing and concluding on this matter it is recognised that weight can be attached to the personal circumstances of the applicant, and to the medical evidence confidentially submitted. The weight to be attached to this however is not considered sufficient to meet the high test set out in paragraph 015 of the NPPG. The weight that must be attached to this personal circumstance is also further limited by the circumstances surrounding the sale of Mrs. Ellen Usher's own property. In this context it is not considered therefore that the personal circumstances presented in the case are sufficient to outweigh the obvious and continuing harm presented by this unauthorised dwelling.

All background documents including application forms, drawings and other supporting documentation relating to this application (with the exception of the medical documentation and associated correspondence which is retained confidentially for Officer consideration) can be viewed online:

<https://planning.westsuffolk.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=NBQCM4PDLO500>