

PART 1 - PUBLIC

Decision Maker: **Plans Sub-Committee 2**

Date: **4th November 2010**

Decision Type: Urgent Non-Executive Key

**TITLE: 41 SUNNINGVALE AVENUE, BIGGIN HILL, WESTERHAM,
KENT, TN16 3BX - UNAUTHORISED WORKS**

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Chief Officer: Chief Planner

Ward: Biggin Hill

1. Reason for report

For Members to consider whether it is expedient to take injunctive action against unauthorised development.

2. **RECOMMENDATION(S)**

Given the continued activity on site and the fact that there are a number of fundamental planning matters yet to be resolved, Members are recommended to authorise injunctive action in respect of the unauthorised works.

3. COMMENTARY

- 3.1 Works have been undertaken at the above site and appear to be continuing. These appear to relate to the erection of a single detached dwellinghouse which was permitted at appeal in 2007, as part of a larger scheme, subject to conditions. At this stage it appears that site clearance has occurred, including the felling of trees and a concrete base has been constructed. However, no pre-commencement conditions have been discharged by the Council and it is considered that the works constitute unauthorised development.
- 3.2 There is extensive planning history associated with this site, which has been the subject of previous planning applications and appeals. The most relevant history is included below.
- 3.3 Under application ref. 06/04524 an application concerning the development of the sites at 41 and 49 Sunningvale Avenue with 18 houses (2 detached, 10 semi-detached, and 6 terraced houses) with associated parking and access from Sunningvale Close was refused but subsequently part allowed and part dismissed at appeal. The Planning Inspector considering the proposal dismissed the appeal in relation to plots 2 - 7 fronting Sunningvale Avenue (a part of the site which does not form part of the current application). The Inspector allowed the appeal insofar as it related to plots 1 (which is the one unit currently being implemented) and 8 – 18 (located towards the rear of the site).
- 3.4 More recently, under ref. 10/00909 an application concerning the adjoining site at 49 Sunningvale Avenue (which formed part of the overall development scheme for the 2006 application) for the erection of a terrace of six 3 bedroom houses and terrace of three 2 bedroom houses, and the formation of a new access road from Sunningvale Close was refused by the Council and is now the subject of an appeal. That application was refused on the grounds that the proposal would constitute an overdevelopment of the site, a cramped form of development with inadequate amenity space and would lack adequate off-street parking provision.
- 3.5 A further application regarding the site at No. 49 for 8 dwellings is currently pending determination by the Council.
- 3.6 None of the conditions set out in the Planning Inspector's Appeal Decision letter (ref. APP/G5180/A/07/2042988) have been agreed by the Council. The relevant details are set out below:
1. details of a scheme of landscaping, which shall included paved areas, other hard surfaces and boundary enclosures (Condition 2);
 2. condition 3 which requires that no trees on the site outside the footprint of the approved buildings shall be felled, topped, lopped or pruned before or during building operations except with the prior agreement in writing by the Council.
 - 3 details of tree protection barriers around the root protection areas of trees to be retained (Condition 4);
 4. details of materials to be used in the construction of the external surfaces of the building. I am in receipt of brick and tile samples, however I cannot consider these until the requisite fee has been submitted (Condition 8);
 5. details of a surface water drainage system (including storage facilities where necessary) (Condition 9);
 6. details of foul water drainage system (Condition 10);

7. details of the proposed slab levels of the buildings and existing site levels (Condition 15);
 8. details of an exclusion zone (fenced off using chestnut paling) around the badger sett on the site. The red mesh fencing which has been installed may not be provided in lieu of the chestnut paling and I understand that this current fencing has been installed to prevent debris being discarded beyond this point (Condition 16);
 9. details of a scheme for the management of any land on site outside the curtilage of the dwelling being constructed (Condition 19).
 10. condition 18 of the Planning Inspector's Appeal decision letter requires that at least four bat boxes shall be erected on trees to be retained before any work commences on site.
- 3.7 Following a written request to the developer to stop work and submit the required details, information has been received in respect of some of the Conditions. However, a careful assessment of the details is required, given the site gradients and relationship with adjoining properties, to ensure local amenity and character is safeguarded but in the meantime, work is continuing.
- 3.8 In the circumstances, Members will need to consider whether it is appropriate to take action, in the public interest.

4. CONSIDERATIONS

(1): Section 187B of the Town & Country Planning Act 1990 states:

“Where the local planning authority considers it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their powers under this part.”

(2): The case of **South Buckinghamshire DC v Porter (“Porter”)** is an important precedent as far as injunctions are concerned, being a case in which the impact of the Human Rights Act 1998 was taken into account. In this case, the court's approach to grant injunctive relief under section 187B is set out below in relevant part (emphasis added):

*“...but it seems to me no less plain that the judge should not grant injunctive relief unless he would be prepared if necessary to contemplate committing the defendant to prison for breach of the order, and that he would not be of this mind unless he had considered for **himself all questions of the hardship for the defendant and his family** if required to move, necessarily including therefore, the availability of suitable alternative sites. I cannot accept that the consideration of these matters is, as Burton J suggested was the case in the pre-1998 era, “entirely foreclosed” at the injunction stage. Questions of the family's health and education will inevitably be of relevance. But so too, of course, will be the **need to enforce planning control** in the general interest and, more importantly therefore the **planning history of the site. The degree and flagrancy** of the postulated breach of control may well prove critical. **If conventional enforcement measures have failed over a prolonged period of time to remedy the breach**, then the court would obviously be the readier to use its own, more coercive powers. **Conversely however, the court might well be reluctant to use its powers in a case where enforcement action had never been taken.** On the other hand, there might be some **urgency in the situation sufficient to justify the pre-emptive avoidance of an anticipated breach of planning control.** Considerations of health and safety might arise. Preventing a gypsy moving onto a site might, indeed, involve him in less hardship than moving him out after a long period of occupation. **Previous planning decisions will always be relevant;** how relevant, however, will inevitably depend upon a variety of matters, including, not least, how relevant they are, **the extent to which considerations of hardship** and availability of alternative sites **were taken into account**, the strength of the conclusions reached on land use and environmental issues, and **whether the***

defendant took the opportunity to make his case for at least a temporary personal planning permission”

Whilst certain elements of the Porter decision may not be directly relevant to the current case, it does contain very important elements which must be considered in reaching a decision in relation to applying for injunctive relief.

The Porter case furthermore regarded the local authority’s decision to seek injunctive relief as relevant in deciding whether to authorise an injunction, but reiterated the relevance and weight of the local authority’s decision will depend on the extent to which they (the local authority) can be shown to have had regard to all the material considerations and to have properly posed and approached the article 8(2) questions as to necessity and proportionality.

D (3): In reaching a decision to apply for an injunction, the Committee must therefore take various matters into account:-

The London Borough of Bromley is the Planning Authority for the area and as such has a duty to enforce planning control, taking into account relevant legislation, Government guidance and it’s own policies as set out in the Unitary Development Plan. It must, however, also demonstrate that the use of an injunction is in the public interest, and it must give consideration to all possible remedies and be convinced that no alternative means of enforcement would be effective, and that due consideration of the human rights of the defendant have been taken account of.

In considering an application for an injunction, the Court will apply various tests set out in the Porter judgement which must be satisfied and it will have to be demonstrated that, in reaching a decision to seek this form of enforcement, the Committee has also taken into account all material considerations.

(3) (a): Necessity – whilst the court will not question the correctness of the planning status, it is bound to come to a broad view as to the degree of damage resulting from the breach and the urgency or otherwise of bringing it to an end.

In this case, the breach has been the failure to comply with a number of pre commencement conditions which is in clear breach of planning control. Although the developer has submitted required details, such details have not yet been approved by the Council. Despite this factor building works are still continuing. Members may feel that injunction action is necessary in this case in order to prevent the works being completed without planning permission.

(3) (b): Proportionality – it is essential to demonstrate that the use of an injunction is appropriate and necessary for the attainment of the public interest objective sought but also that it does not impose an excessive burden on the individual whose private interests are at stake.

In this case, the developer was fully aware that the pre-commencement conditions would need to be met before starting works. Members will have to consider whether an application for an injunction would be a proportionate response to the action of the applicant, bearing in mind that an alternative of prosecution is possible. Members may, however, consider that securing a criminal conviction might not be as effective a way of enforcing planning control in this case as it is less likely than an injunction to secure compliance . Any breach of an injunction once granted may give rise to sanctions including imprisonment.

(3) (c): Planning history and degree of flagrancy –Requests including a written request has been made to the developer to stop work pending approval of the relevant pre-commencement conditions. However despite such factor works are still continuing in flagrant breach of planning control.

5. POLICY IMPLICATIONS

Policies BE1, H7, NE3, T3 and T18 of the Unitary Development Plan July 2006 are relevant in this case.

6. FINANCIAL IMPLICATIONS

In the event of a successful application for injunction, costs would be sought from the defendant. In the event of an unsuccessful application, the Council might be liable in costs to the defendant of an amount which cannot at this stage be quantified.

7. LEGAL IMPLICATIONS

Fully addressed in the report

Non-Applicable Sections:	Personnel implications
Background Documents: (Access via Contact Officer)	Enforcement and Legal files containing exempt information as defined by Schedule 12a of the Local Government (Access to Information) Act 1985 are not available for public inspection