
Appeal Decisions

Inquiry Held on 12 and 13 October 2021

Site visit made on 13 October 2021

by J A Murray LLB (Hons), Dip.Plan Env, DMS, Solicitor

an Inspector appointed by the Secretary of State

Decision date: 09 November 2021

Appeal A: APP/D0515/C/19/3233635

Appeal B: APP/D0515/C/19/3233636

Appeal C: APP/D0515/C/19/3233637

Appeal D: APP/D0515/C/19/3233638

Land at Elderberry Farm (formerly South of Rosemary Cottage), New Road, Manea, PE16 6XG

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr Eli Smith (appeal A), Mrs Margaret Smith (appeal B), Mr Eli Smith (son) (appeal C) and Siobhan Smith (appeal D) against an enforcement notice issued by Fenland District Council.
 - The enforcement notice, numbered 79/2017, was issued on 11 July 2019.
 - The breach of planning control as alleged in the notice is without planning permission, the construction of a dayroom shown purple on the attached plan¹.
 - The requirements of the notice are: (i) The dayroom shall be demolished and the resultant materials shall be permanently removed from the land.
 - The period for compliance with the requirements is within six (6) months of the date the notice becomes effective.
 - The appeals are proceeding on the grounds set out in section 174(2)(a)(appeal A only), (d) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeals on ground (a) and the applications for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed in relation to appeals B, C and D.
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Appeal E: APP/D0515/X/19/3230501

Land at Elderberry Farm, Byall Fen Drove, Manea, PE16 6XG

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Eli Smith against the decision of Fenland District Council.
 - The application Ref F/YR19/0037/CERTLU, dated 8 January 2019, was refused by notice dated 15 January 2019.
 - The application was made under section 191(1)(a) and (b) of the Town and Country Planning Act 1990 as amended.
 - The use and development for which a certificate of lawful use or development is sought is residential use of the land and buildings involving the siting of caravans and the construction of a shed, stable building, gravelled area, and day room.
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¹ Namely the plan attached to the notice.

Decisions

Appeals A - D: APP/D0515/C/19/3233635, 3233636, 3233637 and 3233638

1. It is directed that the enforcement notice be corrected in section 2 by the deletion of the words "New Road" and the substitution of the words "Byall Fen Drove". Subject to this correction the appeals are allowed, and the enforcement notice is quashed.

Appeal E: APP/D0515/X/19/3230501

2. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use and existing operations which are considered to be lawful.

Procedural, and Preliminary Matters

3. The inquiry sat for 2 days and all witnesses gave evidence under affirmation. The site address was stated on the enforcement notice as "New Road", but it was agreed that this should be "Byall Fen Drove", as per the LDC application and the notice plan. No confusion resulted from the error in the notice and the land was identified on the notice plan. I will correct the address on the notice, being satisfied no injustice will result.
4. The area edged red on the enforcement notice plan included the grassed paddock on the north-eastern side. However, the allegation and requirements only concern the building which lies outside that paddock and which is shown edged purple on the notice plan.
5. The paddock is owned by the appellant and is depicted on the 'Site Plan' section of drawing Ref 5324-PL01H, submitted as appendix 2 of the supporting statement for the LDC application. However, it is excluded from the area edged red on the 'Location Plan' section of that drawing, being shown edged blue instead. The plan attached to the Council's refusal of the LDC application also excluded that paddock area. I have determined appeal E on the basis that the application only relates to that smaller area edged red on the location plan Ref 5324-L01H.
6. The outcome of the enforcement appeals A – D is affected by my determination of the LDC appeal E. It makes sense for me to address that appeal first.

Appeal E (the LDC appeal)

7. Although I made a preliminary statement of the main issue in my pre-inquiry note of 4 October 2021, the full extent of the LDC application was clarified when the inquiry opened, having regard to the supporting statement submitted with that application. On that basis, the main issue is whether the Council's refusal of an LDC was well-founded, and this will turn upon whether the appellant has proved on the balance of probability that:
 - planning permission for residential use of the land and buildings involving the siting of caravans is deemed to have been granted by virtue of s173(11)

of the Town and Country Planning Act 1990, following compliance with the enforcement notice reference Ref 004/11 issued on 1 July 2011; and

- the day room building was substantially completed by 8 January 2015.²
8. Enforcement notice Ref 004/11 was originally dated 1 July 2010, but this was corrected to 1 July 2011 when the notice was upheld on 8 March 2012 in appeal Ref APP/D0515/C/11/2156783.³
9. Along with the day room, the LDC application concerns a shed (also referred to as a barn), a stable building, and a gravelled area/yard, all of which are identified as existing features on the site plan section of drawing Ref 5324-PL01H. However, it is common ground that these last 3 items were all substantially completed more than 4 years before the date of the LDC application⁴. I have no reason to take a different view. They are therefore lawful, as at the date of the LDC application, as the time for enforcement action had expired and those developments did not contravene the requirements of any enforcement notice in force at the time. Only the lawfulness of the day room building remains in issue, along with the residential use of the land and buildings.

Reasons

10. Dealing first with **the residential use of the land and buildings**, s173(11) of the 1990 Act states:

"Where—

(a) an enforcement notice in respect of any breach of planning control could have required any buildings or works to be removed or any activity to cease, but does not do so; and

(b) all the requirements of the notice have been complied with, then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities."

11. The allegation and requirements of enforcement notice reference Ref 004/11, (the 2011 notice), were respectively:

"Without planning permission, change of use of land for residential use involving the siting of 3 no. touring caravans, 1 mobile home."

"Remove the 3 caravans and the mobile home from the site."

12. It is common ground that the requirements were complied with.⁵ Mr Walsh's evidence for the Council indicates that visits made on 13 and 15 May 2015 revealed that the site had been cleared of the caravans and mobile home.

² This is the date 4 years prior to the LDC application. Although the application was not 'validated' by the Council until 15 January 2019, it was accepted during the inquiry that it was validly made on 8 January 2019.

³ Appendix 6 of the LDC application supporting statement.

⁴ Statement of Common Ground (SOCG), paragraph 6.

⁵ SOCG paragraph 4, bullet point 5.

13. The residential use alleged in the 2011 notice was one specifically "*involving*" the siting of caravans and a mobile home. The Council suggests this makes clear what constituted the breach. I acknowledge the general statement of Carnwath LJ in *Fidler v FSS* [2004] EWCA Civ 1295 that "*...an over-technical and analytical approach to enforcement notices...is inimical to the interests of justice.*" However, I accept the appellant's submission that "*involving*" is not an exhaustive concept: it means "*including*" rather than "*exclusively comprising of.*" This gives the words used in the notice their natural and ordinary meaning and this approach cannot be described as over-technical or over-analytical.
14. I have considered whether "*including*" should be construed as "*consisting of*" in this context. However, when I pressed this point in closing, Ms Buchanan pointed out for the appellant that the residential use of the land, as alleged, could have occurred without the need for caravans or a mobile home; there were buildings on the site when the 2011 notice was issued and, in any event, it would have been possible to reside on the land in a tent.
15. So, the 2011 notice effectively alleged a change to residential use which included the siting of caravans and a mobile home. It could therefore have required the cessation of residential use, in addition to the removal of the caravans, but it did not. Accordingly, when the caravans and mobile home were removed, securing compliance with all the express requirements of the notice, the effect of s173(11) was that planning permission was deemed to have been granted by virtue of section 73A in respect of the carrying out of the relevant activities, namely the residential use.
16. The appellant attached considerable weight to the Divisional Court judgment in *Williams v Herefordshire Council* [2010] EWHC 3617 (Admin)⁶, where it was held that a notice which required the removal of two linked mobile homes and a covered walkway area did not impliedly require anyone to cease residing in the home in the meantime. However, that judgment is of limited assistance, as it appears the allegation related purely to the construction of the overall home, rather than change of use of the land for residential purposes. Nevertheless, the court did indicate that "*...the obligation to cease living in the home for residential purposes is in principle quite distinct from the obligation to remove it*", and my approach is consistent with that, in that I am not persuaded that a requirement to remove existing caravans implies a requirement to cease all residential use of the land. Given that failure to comply with an enforcement notice can result in prosecution, reliance should not be placed on implication.
17. Having concluded that planning permission arose through the operation of s173(11), and the one-off requirement to remove the caravans and mobile home having been complied with, the subsequent re-siting of any caravans and mobile home would not result in a material change of use of the land, which then had planning permission for residential use.⁷ In any event, s180(1) of the 1990 Act provides that:

"Where, after the service of—

(a) a copy of an enforcement notice...

⁶ Mr Hargreaves' appendix MH19.

⁷ *Restormel BC v SSE* [1982] JPL 785; *Wealden DC v SSE* (1988) 56 P&CR 286)

planning permission is granted for any development carried out before the grant of that permission, the notice shall cease to have effect so far as inconsistent with that permission."

18. Planning permission was granted under s173(11) for residential use of the land. Of course, caravans come and go and can be changed. However, even if the requirement to remove "the (my emphasis) 3 caravans and the mobile home" could be taken to cover any caravans subsequently sited on the land, a requirement to remove the caravans and mobile home, in so far as they are sited for residential purposes, is inconsistent with the planning permission granted under s173(11). That permission was for residential use of the land. By virtue of s180(1), the notice therefore ceases to have effect, in so far as it requires the removal of the caravans and mobile home used for residential purposes. Whilst I would have reached the same conclusion anyway, this is consistent with the Inspector's reasoning in appeal Ref APP/W1145/X/14/3001461, which concerned a site at Winkleigh, Devon.⁸
19. This leaves the notice without any continuing effect and I do not take lightly the Council's submission that this is an absurd result; it is obviously not what the Council intended. It nevertheless appears to be the clear consequence of the legislative provisions and what the notice actually said. The Council has not advanced a different interpretation of the relevant statutory provisions and I cannot put a heavy gloss on them or the ordinary meaning of the words of the notice just because the result for the Council is unfortunate. Along with the result in the Winkleigh appeal decision referred to above, this merely underlines the importance of matching the requirements of an enforcement notice with the terms of the allegation, unless there is a conscious decision to 'under-enforce.' Indeed, it is standard practice to do so, as evidenced by several decisions referred to in closing by the appellant.⁹
20. I note that the Inspector who determined the appeal against the 2011 notice did not draw attention to the potential consequences of the drafting. I cannot speculate as to why. I do not know what if any representations were made about the terms of the notice, though I note that the appeal was only on ground (a), so the focus would have been on planning merits.
21. The LDC application seeks to establish the lawfulness, as at the date of the application, of residential use of "the land and buildings", as well as the siting of caravans as part of the residential use. The shed and stables are sited within the area edged red on the 2011 notice plan, and "land" is defined in s336(1) of the 1990 Act as meaning "...any corporeal hereditament, including a building..." It follows that the planning permission granted under s173(11) for change of use of land to residential use included permission for change of use of those buildings. Furthermore, even if the day room building was only completed after the grant of planning permission under s173(11), if the construction of the building is lawful and its removal cannot be required, its use for residential purposes would not constitute a material change of use requiring planning permission. That would be part of the lawful residential use of the land.

⁸ (Appendix 19 of the LDC application supporting statement, at DL10).

⁹ ID7, paragraph 39.

22. Although this contention was somewhat tentative, the Council suggested it might be possible for me to conclude that the 2011 notice was a nullity, because of the difficulties to which it gives rise. Even if it might be legitimate for me to declare, in these proceedings, that this decade old notice is a nullity, I am not persuaded that it is. Though the consequences of the drafting are unpalatable to the Council, in terms of *Miller-Mead v MHLG* [1963] 2 QB 196, the 2011 notice was not "*hopelessly ambiguous and uncertain*"; it told the recipients what they had done wrong and what they were required to do, even though what they were required to do was not enough.
23. Turning to the construction of **the day room building**, it is clear from the House of Lords' judgment in *Sage v SSETR* [2003] UKHL 22 that a "*holistic*" approach should be taken to the question of whether a building has been substantially completed. Lord Hope said, "*regard should be had to the totality of the operations which the person originally contemplated and intended to carry out*", and Lord Hobhouse said what was required was "*a fully detailed building of a certain character*." Lord Hope added that where, as here, planning permission was not applied for, "*evidence as to what was intended may have to be gathered from various sources, having regard especially to the building's physical features and its design*."
24. Mr Smith's sworn evidence is that he and his family moved onto the appeal site between March and April 2015, but they first saw it in August 2014, when it was occupied by another Gypsy family. At that point, he says the day room building was fitted out with a washroom behind an internal stud wall. The area behind that stud wall had a toilet, bath, and wash basin, but there was also a washing machine/dryer in the building, just to the left of the front door, and this was plumbed in. Mr Hargreaves has submitted a plan depicting that layout.¹⁰ Mr Smith said the building had window openings, though these were boarded up at the time to make the building watertight, and there was electric lighting inside. Mrs Smith confirmed Mr Smith's account under oath.
25. For the Council, Ms Seaman's written proof of evidence indicated that, when she visited on 22 March 2016, the appellant's then agent showed her inside the day room, and she noted that it had yet to be fitted out internally. The Council's Statement of Case suggested these observations were in fact made on 25 November 2015 but, in any event, the appellant says Ms Seaman never actually went inside, but merely looked through a window. This would have been glazed by that stage, as Mr Smith fitted the windows in a single day in June 2015. Ms Seaman would not therefore have seen the bathroom behind the stud wall. In any event, her evidence is unsworn; there are no contemporaneous notes of her visit; there is some confusion over the date of her observations; and she was not available to be cross-examined at the inquiry.
26. On the other hand, whilst the Council's own records refer to a visit on 26 May 2015, when the officer said it "*looks like they are working on the "day room" to bring it into habitable use*", the record of an earlier visit on 30 June 2014¹¹, revealed the "*existing brickbuilt [sic] outhouse being used as a toilet/washroom/utilities for the family*." This accords with what Mr and Mrs Smith said they saw in August 2014 and it is a key and compelling piece of

¹⁰ Mr Hargreaves' appendix MH15.

¹¹ ID3.

evidence. Mr Smith added that the toilet/washroom facilities in the day room were the only facilities on site at the time and, as the occupiers were Gypsy people, they would not have used the facilities in their caravans for cultural reasons.

27. Furthermore, drawing TEM 003X received by the Council on 28 January 2011 in connection with application Ref F/YR11/0091/F for "*Change of use of land for residential purposes including the siting of three mobile homes, and associated works (dayroom, barn, stables, post and rail fencing and gravelled area for parking) retrospective*" (the 2011 application) depicted a toilet on the day room floor plan. The application indicated that construction of the day room started prior to 2006 but was incomplete as of 28 January 2011. Notwithstanding the description "day room", which Mr Walsh says is more appropriate to a kitchen/living room facility, the floor plan indicates that it included a toilet facility, even at that early stage, and the evidence is that the occupiers added a bath and sink.
28. Mr Smith said his family used the day room as a bathroom and washroom after they moved in between March and April 2015. There were also items such as tiles, tile paste, and a ladder stored in the building, but this kind of domestic storage would not be inconsistent with a part utility room function, having regard to the Council officer's description of what they saw in June 2014. Some of the internal walls were plaster-boarded and the rest were bare breeze block. They continued to use this building as a bathroom and washroom until Mr Smith completed a new washroom in one of the stable block stalls around July or August 2016. He carried out works to convert the day room building into a kitchen and sitting room over a period up to November 2017, but you can still see where the toilet waste pipe once exited the rear wall.
29. The draft committee report for application F/YR15/1002/F¹² relating to a proposal for a traveller site with 3 x chalet style homes and retrospective permission for a large shed, stables and a day room said, "*The stable block, day room and shed (used as a hay store) have been in situ for some time but the day room has yet to be fitted out internally.*" This draft was sent to the appellant's then agent for comment. Whilst he made a few remarks on 20 June 2016, he did not challenge the statement that the day room had yet to be fitted out internally.¹³ However, I attach little weight to that, as it would have had no significance to the application under consideration and Mr Smith indicated that, by that stage, he planned to convert the building to a kitchen and sitting room anyway.
30. On the evidence before me, I am satisfied on the balance of probability that, by the time the appellant saw it in August 2014, the building described as a day room had all its external walls, its roof, an external door, and window openings (albeit boarded up). Internally, it had a plumbed-in toilet, bath and sink behind a stud wall. A washing machine/dryer was also in the building and plumbed in. There was plasterboard on some of the internal walls and the building had an electricity supply, including lighting.
31. By that time, the building was in use as a bathroom/washroom/utility room, and had been so used for some time, as the only such facility on the site,

¹² Ms Seaman's appendix B.

¹³ Ms Seaman's appendix C.

outside a caravan. It was also used to some extent to store items, such as tiles, tile paste and a ladder. The windows were not glazed, but rather boarded up until, on Mr Smith's evidence, he installed them in June 2015, probably on 26 June. Notwithstanding the lack of glazing, this was a viable building by August 2014. Indeed, some 2 months earlier, its physical features, design and use had enabled a Council officer to recognise a fully detailed building of a certain character, when he described it as an *"existing brickbuilt [sic] outhouse being used as a toilet/washroom/utilities for the family."* This is very different from the factual position in *Sage*, where the building was classified as an unfinished dwellinghouse because:

"It was unfit for habitation. The floor at ground level consisted of rubble. There were no service fittings. There was no staircase. The interior walls were unfinished, without lining or plaster. None of the windows, including that on the upper floor, was glazed."

32. Although the lack of glazing was mentioned in *Sage*, Lord Hobhouse noted that this was *"not critical to the inspector's decision nor to those of the judge and the Court of Appeal"*. If glazed windows may not be necessary to complete a dwellinghouse, then it follows with greater force that they are not crucial to a toilet/washroom/utility room building, which was in actual use as such.
33. The fact that, over the course of some 2 ½ years after moving onto the appeal site, the appellant converted the building to a kitchen/sitting room, for which the term "day room" may be more apt, is irrelevant. Aside from the "day room" terminology used in the 2011 application, there is no evidence that the building was originally intended to be anything other than a toilet/washroom/utility room especially since, prior to the appellant installing those facilities in one of the stables, there were no other such facilities on the site. The plans submitted with the 2011 application showed a toilet, and nothing indicates that, prior to the conversion by the appellant, the building was in the course of construction as a kitchen/sitting room. The appellant confirmed that Gypsy people would not have intended to have bathroom/toilet and kitchen facilities together.
34. I am satisfied on the balance of probabilities and, as a matter of fact and degree, that the building described as a day room was substantially completed by 8 January 2015. Its construction was therefore lawful and the subsequent internal works to convert it to a kitchen/sitting room and its use as such did not constitute development requiring planning permission.
35. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of residential use of the land and buildings involving the siting of caravans and the construction of a shed, stable building, gravelled area, and day room was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Appeals A to D (the enforcement notice appeals)

Ground (d)

36. To succeed on this ground, the appellants needed to prove on the balance of probability that the day room building was substantially completed by

25 June 2015. Given my conclusion on appeal E that it was substantially completed by 8 January 2015, ground (d) must succeed. I will therefore quash the notice, having first corrected the site address as discussed above, and the remaining grounds of appeal do not fall to be considered.

J A Murray

INSPECTOR

APPEARANCES

FOR THE APPELLANT: Tessa Buchanan of counsel

They called	Eli Smith
	Margaret Smith
	Geoff Beel BA, CIWEM
	Michael Hargreaves BA BTP MRTPI

FOR THE LOCAL PLANNING AUTHORITY: Philip Petchey of counsel

They called	Lee Walsh ONC, HNC, Senior Planning Officer, Fenland District Council
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DOCUMENTS SUBMITTED DURING THE INQUIRY

- 1 Fenland Local Plan Policies LP3 & LP5
- 2 Appellants' opening submissions
- 3 Planning Compliance Case Summary Ref ENF/104/14/UW
- 4 Idox system extract/screenshot
- 5 Suggested conditions
- 6 Council's closing submissions
- 7 Appellants' closing submissions



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 8 January 2019 the use and operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged with a heavy black line on Plan 1 (the 'Location Plan') attached to this certificate, were lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reasons:

- (i) The residential use of the land and buildings involving the siting of caravans has the benefit of planning permission by virtue of section 173(11) of the Town and Country Planning Act 1990 because the planning enforcement notice Ref 004/11 issued by Fenland District Council on 1 July 2011 and which alleged, without planning permission, change of use of land for residential use involving the siting of 3 no. touring caravans and 1 mobile home was complied with when the caravans and mobile home were removed by 13 May 2015; and
- (ii) The shed, stable building, gravelled area, and day room were each substantially completed before 8 January 2015, this being at least 4 years prior to the lawful development certificate application, and they did not contravene the requirements of an enforcement notice in force at the time.

Signed

J A Murray
Inspector

Date: 09 November 2021
Reference: APP/D0515/X/19/3230501

First Schedule

Residential use of the land and buildings involving the siting of caravans and the construction of a shed, stable building, gravelled area, and day room, these buildings and gravelled area being identified on Plan 2 (the 'Site Plan') attached to this certificate, and all of which lie within the land edged black on the Plan 1 (the 'Location Plan') attached to this certificate.

Second Schedule

Land at Elderberry Farm, Byall Fen Drove, Manea, PE16 6XG

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

Plan 1

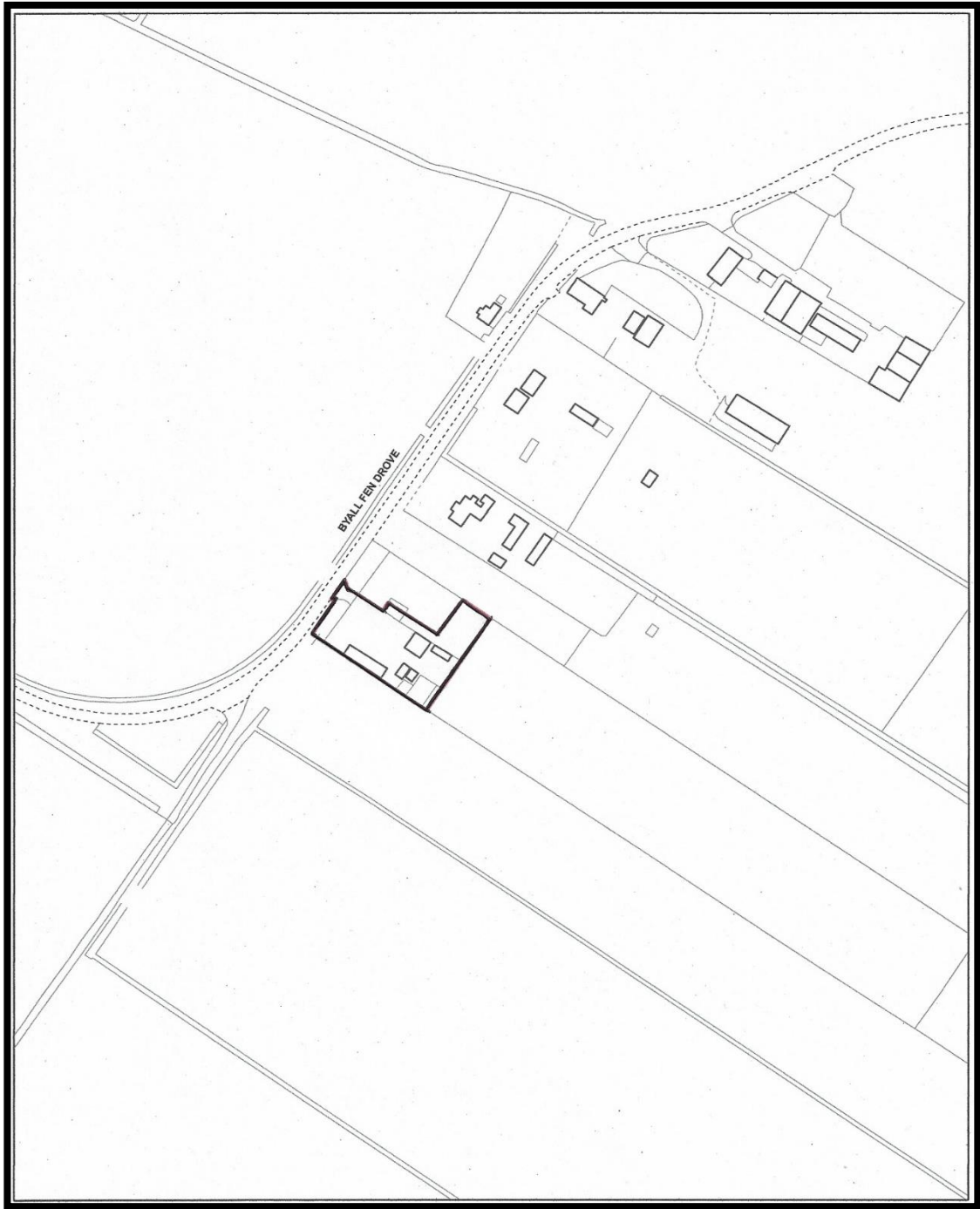
This is the '**Location Plan**' referred to in the Lawful Development Certificate dated: 09 November 2021

by J A Murray LLB (Hons), Dip.Plan Env, DMS, Solicitor

Land at: Elderberry Farm, Byall Fen Drove, Manea, PE16 6XG

Reference: APP/D0515/X/19/3230501

Scale: DO NOT SCALE





Plan 2

This is the '**Site Plan**' referred to in the Lawful Development Certificate dated: 09 November 2021

by J A Murray LLB (Hons), Dip.Plan Env, DMS, Solicitor

Land at: Elderberry Farm, Byall Fen Drove, Manea, PE16 6XG

Reference: APP/D0515/X/19/3230501

Scale: DO NOT SCALE

