



Appeal Decision

Hearing Held on 6 August 2019

Site visit made on 6 August 2019

by Katie Peerless Dip Arch RIBA

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 24 September 2019

Appeal Ref: APP/D0515/C/18/3196061

Land South of junction of New Drove and Bevis Lane, Wisbech St Mary, Cambridgeshire

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr Stephen Upton against an enforcement notice issued by Fenland District Council.
 - The enforcement notice, numbered ENF/183/17/UW, was issued on 15/01/2018.
 - The breach of planning control as alleged in the notice is the material change of use of land to a residential use of touring caravans and associated container unit, hardstanding and fence.
 - The requirements of the notice are a) Permanently cease the use of the land for residential use, b) Permanently remove the touring caravans and container unit from the land, c) Permanently remove the fence and hardstanding from the land.
 - The period for compliance with the requirements is 6 months for items a) and b) and 9 months for item c).
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g). of the Town and Country Planning Act 1990 as amended.
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Decision

1. I direct that the notice be varied by the deletion of the allegation and the following wording substituted therefor: *'The breach of planning control as alleged in the notice is the material change of use of land to a use for the stationing of caravans for residential purposes and associated container unit, hardstanding and fence.'*
2. I also direct that the notice be varied by the deletion of requirements a) and b) and the following wording substituted therefor: *'a) Permanently cease the use of the land for the stationing of caravans for residential purposes, b) Permanently remove the caravans and container unit from the land,'.*
3. Subject to these variations the appeal is allowed and the enforcement notice is quashed. Planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the development already carried out, namely the use of the land for the stationing of caravans for residential purposes and associated container unit, hardstanding and fence subject to the conditions listed in Annex A to this Decision.

Procedural matters

4. The appellant questioned whether the Council Officer who issued the Enforcement Notice had the authority to do so. At the Hearing, the Council submitted a copy of the signed authority of the Corporate Director and Chief Finance Officer to delegate the matter to the Head of Planning and referred to the relevant paragraph in the Council's constitution¹ that allowed him to do so. It was then agreed that the notice had been issued with the correct authority.
5. The appellant also submitted that the wording of the notice is defective in that 'residential use of touring caravans' is not a recognised use of land in planning terms. The Council agreed that the wording of the allegation and the requirement relating to it should be varied and both parties agreed that I had the authority to do this.
6. It is also the case that there are now two touring caravans and a static caravan on the site and it was agreed that any revised wording should reflect this situation.
7. Since the appeal was lodged, the Council has withdrawn the reason for issuing the Enforcement Notice relating to the need for gypsy and traveller sites and confirmed at the Hearing that does not have a 5 year supply of such sites and that it was not suggesting there were any suitable alternative sites to which the appellant and his family could presently move. The extent of the shortfall in the number of sites available is a matter of dispute between the parties but it is agreed² that the Fenland Gypsy and Traveller Accommodation Needs Assessment (GTANA) methodology is flawed and that there is an underestimation of need in the District. There are no policies in the adopted Development Plan that identify specific sites for travellers.

Main Issues

8. I therefore consider the main issues in this case are now:

On ground (a):

- (i) whether the location of the site meets the tests for sustainability in the development plan, the National Planning Policy Framework (the Framework) and Planning Policy for Traveller sites (PPTS).
- (ii) the effect of the development on (1) the character and appearance of the surrounding countryside and (2) flood risk.
- (ii) in the event of non-compliance with the development plan, whether there are any material considerations in favour of the development that outweigh this conflict.

On ground (c): whether the fence and hardstanding benefit from planning permission granted by the Town and Country Planning (General Permitted Development) Order 2015 (GPDO).

On ground (f): whether the requirement to remove the fence in its entirety goes beyond what is necessary to remedy the breach of planning control.

If these grounds fail:

On ground (g): whether the time for compliance with the notice is reasonable.

¹ Paragraph 59

² Statement of Common Ground paragraph 16

The Site and Surroundings

9. The appeal site is a small parcel of land located outside the village of Wisbech St Mary, on a corner plot between Bevis Lane, a two lane country road and New Drove, a single track road. The site has been hard-surfaced and surrounded by a timber panel fence of varying height. As noted previously the site contains a static caravan, two touring caravans and a container used as a dayroom.
10. The land in the ownership of the appellant extends beyond the appeal site to the west and the whole plot has a ditch to the east which separates it from the orchards beyond. In the vicinity of the site there is sporadic residential development including a number of other gypsy sites, all but one of which I was told by the Council were authorised, either through the grant of planning permission or through having gained a lawful use over time.

Reasons

Ground (c)

11. This ground of appeal relates to part of the boundary fence around the site. Most of it is below 1m in height where it is adjacent to the highway on New Drove and Bevis Lane but there is a section, about 16m in length, that is higher than this. This section would not meet the requirements for permitted development as set out in Class A of Part 2 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2015 (GPDO).
12. The appellant submits that whilst it is accepted that some of the fence would not be permitted development the majority of is and that this part should be allowed to remain in any event. The case for the retention of the higher section is made under the appeal on ground (f).
13. I consider that there is nothing to indicate that the erection of the fence was undertaken in anything other than a single operation. Since the GPDO does not grant retrospective planning permission, for the appeal to succeed on ground (c) (that planning permission has already been granted) the fence as a whole would need to have been permitted by the GPDO as in force at that time. As it was not, the appeal on ground (c) consequently fails.

Ground (a)

Sustainability of the site location

14. The Council consider that the site is poorly located in terms of access to services and facilities and that it would encourage the use of the private car. However, the appellant points out that it is just over 1km to the nearest convenience store in Wisbech St Mary, where there is also a primary school, a public house and various other facilities, including bus stops with limited but regular connecting services into the larger town of Wisbech, some 3 miles away and March, which is just over 9 miles away.
15. Although the walk into Wisbech St Mary is mainly along Bevis Lane, which has no footpaths, the road is well surfaced, flat and straight. Visibility is good and the road is only lightly trafficked. I consider that there would be no safety concerns or other problems that would discourage occupants of the site from undertaking the journey into the village by foot or on a bicycle. Indeed, the appellant confirmed that this route is used by two of his children, aged 13 and 16, who walk to the village shop.

16. PPTS which, together with the Framework, sets out the Government's policy for locating traveller sites, envisages that gypsy sites may be located in rural areas, whilst noting that new traveller sites in open countryside away from existing settlements should be very strictly limited. In this case, I consider that the proximity of the facilities available in the village mean that the site is suitably close to an existing settlement and would not conflict with the advice in PPTS. It would also meet criterion (b) of policy LP5 D of the Fenland Local Plan 2014 (LP) which requires gypsy sites to be within reasonable travelling distance of a settlement offering local services, including a primary school.

Flood risk

17. The site lies within Flood Zone 3 as defined in the Environment Agency's flood maps, in a defended flood plain, where highly vulnerable development, such as caravans, would not normally be permitted, as set out in LP policy LP5 D (a), PPTS paragraph 13 g) and the Framework. It was agreed at the Hearing that development on this site would be contrary to policy. This would consequently be a significant factor weighing against the proposal.
18. In this case, the appellant has commissioned a Flood Risk Assessment (FRA) as required by national policy, the findings of which have not been challenged by the Council. The FRA demonstrates that in the 1 in 1000 year flood event (i.e. the worst case scenario), the maximum velocity of the water likely to reach the site in the event of the flood defences being breached would be 0.3 metres/sec or less, the maximum depth would be 0.25m and the areas of Bevis Lane immediately adjacent to the site would be above the water level. There would be no risk from flooding if the current defences were to be overtopped. The FRA concludes that the site is not in a functional flood plain, it is protected to the minimum standards required by the Framework and the actual risk of it flooding is less than 0.5%.
19. Even so, national policy requires the sequential test to be undertaken before planning permission could be granted. This must show that there are no other reasonably available sites at lower risk of flooding in the District. PPTS notes that to be considered developable, traveller sites should be in a suitable location and that there should be a reasonable prospect that they are available now. As noted above, any such sites must be at a lower risk of flooding than the appeal site, which means they would have to be in Flood Zones 2 or 1.
20. Whilst there are areas of undeveloped land within Flood Zones 1 and 2 nearby, the appellant notes that much of this is prime agricultural land that is part of wider and substantial agricultural holdings, and it would be unlikely that a small parcel would be sold off for a private gypsy site. The appeal site is limited in size and, as previously noted, bounded by roads and a drain, so that it is not likely to be suitable for any of the large scale agricultural purposes that are typically carried out in the vicinity.
21. The Council agreed that it could not identify any sites in Flood Zone 1 and 2 that would be currently available to the appellant, either with or without planning permission. It was also confirmed that some of the Council's own gypsy sites are located in Flood Zone 3. In these circumstances, I consider that the sequential test has been met.

22. Following on from this, the Government's Planning Practice Guidance (PPG) refers to the 'Exception Test', as also set out in the Framework which would need to be passed if the development were to be classed as 'more vulnerable'. The PPG explains that it is a method to demonstrate and help ensure that flood risk to people and property would be managed satisfactorily, while allowing necessary development to go ahead in situations where suitable sites at lower risk of flooding are not available. However, caravans are classified as 'highly vulnerable' and the advice is that such development should not be permitted. The Exception Test is not therefore normally relevant to proposals such as this.
23. Nevertheless, the appellant has submitted an example of a case, determined by the Secretary of State³, where a similar conflict occurred but where it was consequently found that failure to meet the policy on the location of development at risk of flooding was just one of a number of material considerations that needed to be weighed in the planning balance. In the case cited, the Exception Test was found to have been met as the benefits of the development were found to outweigh the presumption against it and that it would be safe for its lifetime, without increasing flood risk elsewhere. I consider that this finding consequently confirms that there can be circumstances where development in Flood Zone 3 can be permitted.
24. In this case, given the short distance to the land which would be above the 1 in 1000 year flood risk level and the considerable distance from the River Nene, which would be the source of any possible flooding, I am satisfied that the development could, through the imposition of conditions, be made safe for its lifetime. Such conditions would require the tethering of the caravans and ensuring that flood water could flow freely through the site. The second limb of the Exception Test will be considered in the overall planning balance.

Character and appearance

25. Policy LP12 of the LP requires that development in rural areas should not harm the wide open character of the countryside. The site is, in my view, not located in a 'wide open' location; as noted previously the site is a small corner plot that is not isolated from other development. It is seen in the context of a bungalow on Bevis Lane and is close to the other gypsy sites in the road. PPTS notes that gypsy sites in rural areas should not dominate the nearest settled community and the development complies with this requirement.
26. There is no requirement that gypsy sites should be hidden from view; on the contrary, the advice in PPTS is that a site should not be enclosed with so much high fencing that the impression is given that it is being deliberately isolated from the rest of the community. The site is large enough to accommodate the current development without appearing cramped and the section of fence that is higher than 1m, if softened by a landscaping scheme, would not result in any overly dominant impact. The lower sections of fence give clear views onto the road junction and allow traffic to enter and leave the site safely.
27. This site is typical of many gypsy pitches and is not particularly prominent and does not appear out of place in its surroundings. I therefore find that there is no harm to the character of the surroundings sufficient to indicate that planning permission should not be granted.

³ Ref: APP/Z2505/V/09/2119176

Planning balance

28. As previously noted, the development fails to comply with some local and national policies on the location of development in areas at risk of flooding. Nevertheless, any harm caused by this has to be weighed in the planning balance against any benefits of the proposal.
29. In this case, the site meets all the relevant criteria set out in paragraph 13 of PPTS including section g) on flood risk, which notes that caravans should not be located in an area at high risk of flooding including functional flood plains. The FRA has concluded that the site is in the passive, not the functional, flood plain and that it is at a low risk of flooding.
30. The benefits of the proposal in planning terms include the provision of a gypsy site in an area where there is an established need for such development. Although the extent of the need is disputed, with the Council saying that the shortfall is presently 10 sites and the appellant claiming it is more likely to be 55, the provision of even one site would be of considerable benefit in an area where it has clearly proved difficult to find suitable locations for traveller development.
31. The appellant is a local resident and therefore wishes to stay in the area where other members of his family are also resident. Planning permission for the site would allow the children of the family to have a settled base close to a village where the youngest child is due to start at nursery early next year.
32. I consider that, whilst there is a policy conflict with respect to the location of the site in Flood Zone 3, I consider that the actual harm caused by this would be slight, provided suitable conditions are put in place. I conclude therefore that the benefits of the proposal are material considerations sufficient to outweigh any conflict with local and national planning policy and that planning permission for the development should be granted.

Conditions

33. As previously noted, I will impose conditions relating to tethering of the caravans and the provision of raised floor levels for the static unit. There is an opportunity to provide landscaping, particularly to soften the appearance of the boundary fence and I will require such a scheme to be submitted for approval. I will also require a lighting scheme to be submitted for approval in the interests of the amenity of the occupiers of nearby properties. There is no need for a commencement condition as the use has already begun but I will also impose conditions that ensure that the site is retained for use by travellers who meet the definition set out in the Annex 1 to PPTS.
34. I have considered whether the permission should be a temporary one, to allow the Council more time to identify and allocate sites through the LP process. However, this is a single site in a location that I have found to be suitable on a long term basis, so I conclude that a temporary permission is not necessary. Similarly, although there are personal benefits to this particular gypsy family, these benefits would be likely to apply to many other such families and I therefore find there is no requirement for a personal permission.

Conclusions

35. It is clear from the representations, and from my inspection of the site, that the description of the development in the enforcement notice is incorrect in that there are now 2 touring caravans and one static caravan on the site. The appellant and the local planning authority agreed at the hearing that it was open to me to correct the allegation in the notice. I am satisfied that no injustice will be caused by this and I will therefore correct the enforcement notice in these respects in order to clarify the terms of the deemed application under section 177(5) of the 1990 Act as amended.
36. For the reasons given above I conclude that the appeal should succeed on ground (a) and I will grant planning permission in accordance with the application deemed to have been made under section 177(5) of the 1990 Act as amended, which will now relate to the corrected allegation. The appeal on grounds (f) and (g) do not therefore need to be considered.

Katie Peerless

Inspector

APPEARANCES

FOR THE APPELLANT:

Matthew Green	Green Planning Studio Ltd.
Stephen Upton	Appellant
Geoff Beel	Flood risk consultant

FOR THE LOCAL PLANNING AUTHORITY:

David Rowen	Fenland District Council
Gareth Martin	Fenland District Council
Lee Walsh	Fenland District Council
David Bailey	Fenland District Council

DOCUMENTS

- 1 Record of Authorisation to delegate the issue of Enforcement Notices to the Head of Planning at Fenland District Council
- 2 Statement of Common Ground
- 3 Map showing Flood Zone designations in vicinity of the appeal site
- 4 Update statement of Mr Upton

Annex A

Conditions

- 1) The site shall not be occupied by any persons other than gypsies and travellers as defined in Annex 1: Glossary of Planning Policy for Traveller Sites (or its equivalent in replacement national policy).
- 2) No more than 3 caravans, as defined in the Caravan Sites and Control of Development Act 1960 and the Caravan Sites Act 1968 as amended (of which no more than 1 shall be a static caravan) shall be stationed on the site at any time.
- 3) The use hereby permitted shall cease and all caravans, structures, equipment and materials brought onto the land for the purposes of such use shall be removed within 90 days of the date of failure to meet any one of the requirements set out in i) to iv) below:
 - i) Within 3 months of the date of this decision schemes for (a) the proposed method of tethering the caravans, raising the floor level of the static caravan to at least 500mm above existing ground level and providing a route for any flood water to pass below the static caravan; (b) the provision of any external lighting on the boundary of and within the site; (c) landscaping of the site, including details of planting species, plant sizes and proposed numbers and densities; (hereafter referred to as the site development scheme) shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation.
 - ii) If within 11 months of the date of this decision the local planning authority refuse to approve the site development scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
 - iii) If an appeal is made in pursuance of ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.
 - iv) The approved site development scheme shall have been carried out and completed in accordance with the approved timetable.

Upon implementation of the approved site development scheme specified in this condition, that scheme shall thereafter be maintained/retained/remain in use.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.