



Appeal Decision

Hearing held on 12 October 2022

Site visit made on 12 October 2022

by Paul Dignan MSc PhD

an Inspector appointed by the Secretary of State

Decision date: 7 December 2022

Appeal Ref: APP/H2265/C/21/3280661

Land Opposite The Paddocks, Birling Road, Leybourne, West Malling, Kent, ME19 5HZ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Thomas Smith against an enforcement notice issued by Tonbridge and Malling Borough Council.
 - The notice, numbered 21/00225/USEH, was issued on 16 July 2021.
 - The breach of planning control as alleged in the notice is Without planning permission the:
 - Unauthorised change in use from agricultural land to land used as a residential caravan site
 - The stationing of mobile washroom and toilet facilities
 - Construction of a septic tank
 - Construction of hard surfaces
 - Erection of fences and gates
 - Construction of shed buildings used as dog kennels.
 - The requirements of the notice are: A) to cease the residential occupation of the site and to remove from the site all caravans; both touring and static; B) to remove all means of enclosure, the toilet facilities, wash room and shed buildings (as shown on photo TMBC 1); and C) to break up and remove to an authorised place of disposal all hard surfaces and to restore the land to its former condition before development was undertaken by the levelling and seeding of the land with grass seed (as shown on Plan TMBC 2).
 - The periods for compliance with the requirements are: Requirement (A), 7 days; Requirement (B), 14 days; and Requirement (C), 28 days.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (e), (f), (g) of the Town and Country Planning Act 1990 as amended. The application for planning permission deemed to have been made under section 177(5) of the Act also falls to be considered.
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Decision

1. It is directed that the notice be corrected by substituting the description of the Breach of Planning Control Alleged with the following: "Without planning permission, the material change of use of the Land to use for the stationing of caravans for residential purposes, and associated development including the stationing of mobile washroom and toilet facilities, construction of a septic tank, construction of hard surfaces, erection of fences and gates, and construction of shed buildings used as dog kennels", and amended by the replacement of the plan dated 14/07/2021 attached to the notice with the plan annexed to this decision.
2. Subject to the correction and amendment, the appeal is allowed in part, the enforcement notice is quashed, and temporary planning permission is granted

for a period of 5 years for the material change of use of the Land to use for the stationing of caravans for residential purposes and associated development including the stationing of mobile washroom and toilet facilities, construction of a septic tank, construction of hard surfaces, and the erection of fences and gates at Land Opposite The Paddocks, Birling Road, Leybourne, West Malling, Kent, ME19 5HZ, subject to the conditions set out in the Schedule attached to this decision.

Preliminary Matters

3. For the purposes of the 1990 Act, development means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. The notice as issued identifies as alleged breaches of planning control both a change of use of the land and building or other operations on the land. However, the Council confirmed at the hearing that the notice is directed at a material change of use and not separately at the operations which have taken place, since works that facilitate a change of use can in any case be required to be removed within the requirements of a notice. I shall therefore amend the notice to more accurately describe the development comprising the change of use and to make it clear that the other works are associated with the making of a material change of use.
4. A notice alleging a material change of use must have regard to the planning unit, a concept which has evolved as a means of determining the most appropriate physical area against which to assess the materiality of change. The land against which the notice is directed is shown on the relevant plan attached to the notice as comprising two separate pieces of land, separated by other land. It was agreed at the hearing that the use enforced against is confined to the larger, and northernmost of the two parcels, which comprises the relevant planning unit. In these circumstances it is appropriate to amend the plan to identify the relevant planning unit only.
5. These corrections can be made without causing injustice to the parties.
6. The notice does not specify the quantum of development, but the notice is aimed at what was happening, or had happened, on the date it was issued. Although it has not been clear throughout the appeal process, it was confirmed at the hearing that permission was being sought for the stationing of 4¹ touring caravans and 2 mobile homes, to accommodate 4 households, all of whom were listed as occupants of the site in the response to the Council's Planning Contravention Notice of 21 June 2021, shortly after occupation commenced. I have determined the appeal on that basis. Dogs are no longer being kept on the site and the provision of dog kennels is not sought as part of the deemed planning application.

Ground (e)

7. An appeal on ground (e) is that the notice was not properly served. However, the basis of the appeal made on this ground was that Plan TMBC2, showing the location of hardstanding, was of poor quality or inaccurate. Since this has no relevance to ground (e), the appeal on this ground cannot succeed.

¹ 5 touring caravans are shown on the Layout Plan Drawing No. BP-LS-02-2021, but no justification for 5 touring caravans was argued at the hearing.

Ground (a) and the deemed planning application

Main Issues

8. The development for which planning permission is sought, a traveller site, is considered to be inappropriate development in the Green Belt and should only be permitted where very special circumstances can be established. The main issues in this case are:
- the impact on the openness of the Green Belt and the purposes of including land within the Green Belt;
 - whether the development is likely to harm the character and appearance of the area; and
 - whether the harm by reason of inappropriateness, and any other harm, would be clearly outweighed by other considerations. If so, would this amount to the very special circumstances required to justify the development, on either a permanent or temporary basis.

Policy

9. The development plan for the Borough includes the Core Strategy (CS), adopted in 2007, and the Managing Development and the Environment DPD 2010 (MDE). CS Policy CP3 establishes the extent of the Green Belt and applies national Green Belt policy, while CS policy CP14 restricts development in the countryside, the appeal scheme falling outside the categories considered acceptable. CS policy CP20 concerns provision for gypsies, travellers and travelling showpeople, either through land allocation or by reference to a set of requirements which must be met. Although out of date, referring to cancelled or superseded documents, the requirements are criteria relevant to the assessment of sites coming forward. CS Policy CP24 expects development to be of good quality that respects the site and its surroundings, while MDE Policy SQ1 aims to protect local distinctiveness, including biodiversity value.
10. A new local plan had been in preparation, but it was withdrawn at a late stage in July 2021. The Council is currently consulting on a new Local Plan, but it is at a very early stage and can carry little weight. However, as I understand it, the withdrawn and emerging local plans propose/d to meet the need for traveller sites by a combination of site turnover, regularisation of existing unauthorised sites and expansion of existing authorised sites. This approach is set out in the recent Gypsy and Traveller and Travelling Showperson Accommodation Assessment 2022 (GTAA), as it was in the earlier GTAA (February 2018) prepared in support of the withdrawn local plan.
11. National planning policy as set out in the National Planning Policy Framework (NPPF) and Planning Policy for Traveller Sites (PPTS) are important material considerations. PPTS, which must be read in conjunction with the NPPF, aims to ensure fair and equal treatment for travellers in a way that facilitates the traditional and nomadic way of life of travellers while respecting the interests of the settled community. Amongst other things, it expects local planning authorities to increase the number of traveller sites in appropriate locations to address under-provision and maintain an appropriate level of supply.

Openness and Green Belt purposes

12. Prior to the appeal development the land was part of what appears to have been a large agricultural field that had fallen out of active use. The development comprises a metalled access road leading to a substantial area of hardstanding upon which 2 mobile homes, up to 5 touring caravans, some small sheds and 2 sanitary facilities, one a trailer and the other a portacabin-type structure, have been stationed, along with other domestic paraphernalia. A sewage treatment plant has also been installed. Although most of the field remains undeveloped, both the fixed infrastructure and the mobile elements have the effect of reducing the openness of the Green Belt, visually and spatially, while the intrusion into formerly undeveloped open land conflicts with one of the purposes of Green Belts, that of assisting in safeguarding the countryside from encroachment. The harm in terms of loss of openness and conflict with the purposes of Green Belts are matters to which substantial weight must be given.

Character and appearance

13. The site is in the open countryside between Birling Road and the A228. Although the settlement of Leybourne is just to the east of the A228, the A228 is in a cutting in the vicinity of the site such that the character of the land to the west is little influenced by the A-road and the urban area beyond. Birling Road is a narrow tree-lined rural lane with little development along its eastern side and relatively dispersed, though frequent, development along the western side. The overall character though is semi-rural.
14. The development uses an existing field access from which parts of the development can be seen, but because of the relatively intact roadside hedgerows, and also the significant level of tree regeneration/colonisation on the wider site, it does not appear particularly prominent or noticeable in passing, aside from at the entrance, though it would be more noticeable in winter. Users of the bridleway running along the eastern site boundary would also be aware of the development, but overall the visual impact is likely to be limited. Further, caravans are not an uncommon sight in the countryside, and while semi-rural in character, there is other development along the lane, including another traveller site. There is also ample scope for landscaping around the site which would help the development integrate well with its surroundings. In this context I consider that the presence of the development would not be unduly discordant or incongruous, nor would it be materially harmful to local character or visual amenity.
15. In many ways, the location is suited to the development. The site is not in open countryside that is away from existing settlements, and it is of a scale that would not dominate the nearest settled community or place undue pressure on local infrastructure. It is also in accordance with the criteria set out in Policy CP20, being, among other things, reasonably accessible to shops, schools and other community facilities, and it also accords with those set out in the withdrawn local plan Policy LP38, which I am advised represents the approach the Council expects to take to proposals coming forward. So far as layout is concerned, I consider that there are not inherent difficulties with the site that might prevent a suitable layout being devised and implemented to meet the aspiration of a high standard of design. While I appreciate that the local community valued the undeveloped character of the site, the development is

not at odds with the local landscape or inconsistent with the local pattern of development.

16. Being outside of the types of development listed as permissible in the countryside means that there is conflict with CS Policy CP14, but I give this conflict limited weight in the light of the later PPTS which envisages that some sites will be located in the countryside, as did the now withdrawn local plan. Otherwise, I find no conflict with CS policies CP20 and CP24 and with MDE Policy SQ1 so far as the local distinctiveness is concerned.

Other considerations

The need for, and provision of, traveller sites and the availability of alternative sites

17. PPTS requires local planning authorities to make their own assessment of need for the purposes of planning, to set pitch targets for travellers which address the likely needs, and to identify a supply of specific deliverable sites sufficient to provide 5 years' worth of sites against their locally set targets. The most recent assessment found a need for 13² additional pitches over the period 2021/22 to 2026/27 for those who meet the PPTS definition, and 20 overall. Reconciling the overall need and supply, there is a shortfall of authorised pitches for the next 5-year period of 17 pitches, though this may be an underestimate given that 4 households occupy the appeal site but only 2 were recorded in the GTAA. Since the hearing a change in the PPTS definition made in 2015 (from the 2012 PPTS) has been the subject of a successful challenge on the grounds of unjustified discrimination against the elderly or those with a disability who have permanently ceased to travel (*Smith v SSLUHC and Anor* [2022] EWCA Civ 1391). It is possible also that this finding will add to the PPTS need that should be planned for in the Borough, albeit the overall GTAA 2022 need would likely be unchanged.
18. While the emerging local plan is at a very early stage, it seems that the intention is to seek to meet outstanding need, at least in the short term, by protecting the borough's permanently authorised sites and seeking opportunities for intensification and enhancement, and through granting individual permanent planning permissions on appropriate sites, by reference to local plan policy criteria. The GTAA suggests that this may involve the regularisation of existing unauthorised sites or granting permanent permission on temporary authorised sites.
19. However, there appears to have been unmet need for a number of years now. The previous GTAA in 2018 identified an overall need for the period 2017/18 to 2021/22 for 29 pitches, of which 13 were required for those meeting the PPTS definition, the same as now. This suggests that the development plan approach has not been successful so far as meeting the accommodation needs of gypsies and travellers is concerned. It is clear that there is a significant need now that is likely to go unmet for some time, and the Council cannot currently identify a suitable and available alternative site for the occupants.

² The GTAA 2022 identified a need for 20 gypsy and traveller pitches, of which they considered 13 would be required for those meeting the PPTS definition. The equivalent figures for the period 2012/22 to 2039/40 are 41 and 25.

20. These are matters that favour of a grant of planning permission, and I accord them considerable weight.

Personal circumstances

21. The households living at the site claim strong connections to the area, having lived in the general area for many years, relying mainly on transit sites and other people's sites when they were away travelling. They are all related and provide support to each other. A number of the occupants, including children, have significant health issues, and living at the site has been highly beneficial in this respect, not least in terms of the positive environment it provides for the children's upbringing. The children have been able to access education, including mainstream education, and the occupants have had good access to health care while living there. Notwithstanding the significant level of local objection, living at the site has enabled a degree of integration with the local community, including participation in local sports teams.
22. It is clearly in the best interests of the children to continue to live at the site, there being no identifiable alternative, and this is a primary consideration. Dismissal of the appeals would see the families having to leave the site which is their current home, which would also interfere with their rights under Article 8 of the European Convention on Human Rights, the right to respect for their private and family life and home. These are matters to which I accord substantial weight.

Intentional unauthorised development

23. It is government planning policy that intentional unauthorised development is a material consideration that should be weighed in the determination of planning applications and appeals. The written ministerial statement announcing this policy expressed concern that where the development of land has been undertaken in advance of obtaining planning permission there is no opportunity to appropriately limit or mitigate the harm that may have been caused. In particular in this case, the works that have taken place has prevented proper assessment of the ecological interests that may be, or have been, affected, and with which MDE Policy SQ1 is concerned, albeit most of the site remains physically unaffected. In the circumstances therefore I consider that the unauthorised nature of the developments should attract some adverse weight.

Planning balance

24. By definition, inappropriate development is harmful to the Green Belt, and further harm arises through the loss of openness and encroachment on the countryside. Each of these carries substantial weight. I have also found harm due to the intentional nature of the unauthorised development, which has undermined one of the aims of MDE Policy SQ1, and there is conflict with CS Policy CP14. These matters add further significant weight against the proposal.
25. The sum of this harm must be balanced against the factors in favour of the proposal. At present, the Borough has a significant level of unmet need for traveller sites, as is the case regionally and nationally, and the Council has not seen sufficient sites coming forward through the development plan process to meet its obligations. There is not a 5-year supply of sites, nor is there any alternative site at present, and a strategy for addressing the need has yet to be developed through the local plan preparation process.

26. The current lack of alternative sites and the unclear outlook for future provision have the potential to have very negative consequences for the well-being of the occupants, and the children in particular. By contrast, the beneficial aspects of the site for its occupants, particularly so when it comes to the interests of the children in terms of stability and access to healthcare and education, would assist in terms of the duty to advance equality of opportunity for the occupiers who, by virtue of their ethnicity, are at risk of discrimination, harassment, and victimisation. The needs of some of the proposed occupants are less pressing, but the living arrangements, whereby an extended family live together for mutual support, is characteristic of the gypsy way of life, and so the proposal would be consistent with the Government's aim of facilitating the traditional and nomadic way of life of travellers.
27. In balancing these opposing considerations and their respective weights, the harm to the Green Belt weighs very heavily against the retention of the development on a permanent basis, which would entail a permanent loss of openness and permanent encroachment on the countryside, and I consider that the considerations in favour of the appeal, while very substantial, do not clearly outweigh the totality of the harm. Accordingly, I conclude that very special circumstances to justify this development in the Green Belt on a permanent basis do not exist.
28. However, the Council is required to address under provision and maintain an appropriate level of supply, and this is a matter that will need to be considered in the local plan process which is currently under way. By necessity that will require further consideration of the needs of the occupiers, such that there must be a reasonable prospect of an appropriate alternative site coming forward through the development plan³ once adopted. In view of this, and considering the lesser harm to the openness of the Green Belt and the purposes of including land within it that would result from a time limited permission, I consider that the harm caused by a 5 year permission would be clearly outweighed by the other considerations. A temporary planning permission would not involve permanent harm to the Green Belt and would be reasonable and proportionate in the circumstances, having regard to the interests of the children, the appellant's rights under Article 8 of the European Convention of Human Rights, and indeed to the suitability of the location assessed against the available criteria, Green Belt considerations aside. Such a period should provide sufficient time for local plan preparation, examination and adoption, and for any identified site/s to proceed through the planning process. I conclude therefore that very special circumstances exist to justify a grant of temporary planning permission for a period of 5 years. There is some conflict with the development plan, but that is outweighed by other material considerations.
29. In view of the relevant planning policy considerations, and the nature of the development, I shall impose a condition restricting occupation of the site to gypsies and travellers. However, since the change from the PPTS 2012 definition to the PPTS 2015 definition has been found to be discriminatory to some, in restricting occupancy I shall frame the condition around the definition as it existed before the 2015 change. The permission is for a temporary period

³ PPTS Policy B.9.a sets out a requirement for local authorities, in producing their Local Plans, to identify and update annually a supply of specific deliverable sites sufficient to provide 5 years worth of sites against their locally set targets.

of 5 years and conditions shall be imposed to reflect this and to ensure removal of the caravans and other items, and to secure the restoration of the site, at the end of the period. Notwithstanding the layout plans submitted, in the interests of the character and appearance of the site and surrounding area, and to safeguard residential and visual amenity, I shall impose a condition requiring the submission of a Site Development Scheme, covering the internal layout of the site, including the position of the caravans, the extent of hardstanding, parking and amenity areas, external lighting, foul water drainage, landscaping and boundary treatment. For the same reasons I shall limit the number of caravans using the site, preclude commercial activity and the parking of larger commercial vehicles, and remove certain permitted development rights.

Conclusion

30. Having considered all other matters raised, I conclude that, insofar as it relates to the grant of a permanent planning permission the appeal should not succeed, but that planning permission should be granted for a temporary period of five years. The appeal succeeds to that limited extent.
31. The enforcement notice will therefore be quashed, so the appeals on grounds (f) and (g) do not fall to be considered.

Paul Dignan

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Joseph Jones	Planning Consultant
Thomas Smith	Appellant
James Maughan	Occupant
Theresa Smith	Occupant
Caroline Maughan	Occupant
Martin Casey	Occupant
Patrick Casey	Occupant

FOR THE LOCAL PLANNING AUTHORITY:

Robert McQuillan	Planning Consultant
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INTERESTED PERSONS:

Simon McKay	Planning Consultant, instructed by Leybourne Parish Council
Jack Smyth	Of Counsel, instructed by Leybourne Parish Council
Paul Boxall	Ward Councillor

DOCUMENTS SUBMITTED AT THE HEARING

- 1 Gypsy and Traveller and Travelling Showperson Accommodation Assessment 2022 – Final Report July 2022
- 2 List of proposed conditions - TMBC
- 3 Borough Map showing extent of Green Belt and other land designations - TMBC
- 4 Update on traveller site need and supply - appellant
- 5 Page 1 of planning permission TM/13/01369/FL
- 6 Representations – Sam Webb

SCHEDULE OF CONDITIONS

1. The use hereby permitted shall be for a limited period being the period of 5 years from the date of this decision. At the end of this period the use hereby permitted shall cease, all caravans, buildings, structures, materials and equipment brought onto, or erected on the land, or works undertaken to it in connection with the use shall be removed, and the land restored to its condition before the development took place.
2. The site shall not be occupied by any persons other than persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily or permanently, but excluding members of an organised group of travelling showpeople or circus people travelling together as such.
3. No more than 6 caravans, as defined in the Caravan Sites and Control of Development Act 1960 and the Caravan Sites Act 1968 (of which no more than 2 shall be a static caravan) shall be stationed on the site at any time.
4. 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 28 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 a scheme, hereafter referred to as the Site Development Scheme, including details of: proposed and existing external lighting on the boundary of and within the site; the internal layout of the site, including the siting of caravans; areas for vehicular access and turning and manoeuvring; the means of foul water drainage of the site; areas of hardstanding; fencing and other means of enclosure; hard and soft landscaping including details of finished hard surface materials, species, plant sizes and proposed numbers and densities, along with details of soft landscaping maintenance, shall have been submitted for the written approval of the local planning authority and the said scheme shall include a timetable for its implementation.
 - ii) within 6 months of the date of this decision the Site Development Scheme shall have been approved by the local planning authority or, if the local planning authority refuse to approve the 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 Site Development Scheme shall have been approved by the Secretary of State.
 - iv) the approved scheme shall have been carried out and completed in accordance with the approved timetable, and works comprised in the scheme shall be thereafter retained for the duration of the development.
5. No commercial activities shall take place on the land, including the storage of materials.

6. No vehicle over 3.5 tonnes shall be stationed, parked or stored on this site.
7. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any other order revoking and re-enacting that order with or without modifications), no sheds or amenity/utility buildings, or other buildings or structures, walls, fences or other means of enclosure other than those approved under condition 4 above shall be erected on the site unless details of their size, materials and location shall have previously been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details.

Annex 1 – Amended Enforcement Notice Plan

