The Planning Inspectorate

Appeal Decision

Hearing Held on 22 November 2022

Site visit made on 22 November 2022

by R Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 January 2023

Appeal Ref: APP/A2525/C/20/3258547
Land on the east side of Baulkins Drove, Sutton St James

- 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 John Smith against an enforcement notice issued by South Holland District Council.
- The enforcement notice was issued on 22 July 2020.
- The breach of planning control as alleged in the notice is Without planning permission the change of use of the land from agricultural use to a caravan site.
- The requirements of the notice are (i) Cease the unauthorised use of the Land as a caravan site; (ii) Remove all caravans/mobile homes from the Land along with items not connected with the agricultural use, including but not limited to, the stable block, kennels, septic tank and all other domestic paraphernalia; and (iii) Remove all hard core from the land in its entirety; and (iv) On completion of steps (i) – (iii) return the Land to its previous condition.
- The period for compliance with the requirements is (i) Six (6) calendar months; (ii) Six (6) calendar months; (iii) Six (6) calendar months; (iv) Nine (9) calendar months after this notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Summary of Decision: The appeal is allowed, the enforcement notice is quashed, and planning permission is granted in the terms set out below in the Formal Decision.

Application for costs

1. An application for costs was made by Mr John Smith against South Holland District Council. This application is the subject of a separate Decision.

Preliminary Matters

2. During the course of the appeal the Council conceded that it no longer sought to rely on the original grounds for serving the notice, namely harmful impact of the development on the character and appearance of the countryside and that the site was not considered to be in a sustainable location due to distance from local services and facilities. When I specifically asked about this at the Hearing, the Council confirmed that these original grounds for serving the notice were withdrawn. However it maintained that the development was unacceptable because of vulnerability to flood risk, albeit that this was not cited as an original reason for serving the notice. Policy 20 of the South East

Lincolnshire Local Plan 2019 (LP) sets out the criteria against which planning applications for new Gypsy and Traveller sites are to be assessed. The Council confirmed that the development is only in conflict with Policy 20 due to flood risk.

3. The appellant says that the site area, as defined within the notice, is too large because the alleged residential use is focused only in the western part of the site. The site boundary should therefore be reduced accordingly, in his view. Alternatively the alleged breach should refer to a mixed use of land to include horse keeping, which is said to be taking place on the wider site. The notice is also said to be problematic in that it is unclear which of the two stables currently on the site is targeted by the requirement to remove 'the stable'.

4. The Council agrees, within the Statement of Common Ground, that the keeping of horses was taking place on the site at the time the notice was issued. However it confirmed at the Hearing that it considered this use to be ancillary to the residential use rather than a separate primary use. The stable targeted by the notice was identified on a plan presented at the Hearing.

5. From the information before me I am not persuaded that at the time the notice was issued the site was in mixed use comprising primary residential and horse keeping uses. I am satisfied that in the event the appeal is dismissed, the plan identifying the stable could be used to clarify which structure is targeted by the notice, without resulting in injustice to the appellant. However, the alleged caravan site is captured within the red line boundary shown on the plan attached to the notice and I am satisfied that there is no need for this plan to be amended.

6. The Council does not dispute the ethnic Gypsy status of the site occupiers.

The appeal on ground (a)

Main Issues

7. The appeal on ground (a) is that planning permission ought to be granted for the development alleged in the notice. Having regard to the above the main issue is whether the development is in an acceptable location having regard to flood risk. Should I find conflict with the development plan in this regard I need to assess whether there are other considerations indicating that planning permission should be granted. Other considerations include the need for Gypsy and Traveller sites and potentially the personal circumstances of the appellant.

Reasons

Flood risk

8. I have had regard to the flood risk policies as set out in the National Planning Policy Framework (the Framework) and the Government's Planning Practice Guidance in relation to flood risk and coastal change (PPG). The Framework is clear that caravans and mobile homes intended for permanent residential use are to be regarded as 'highly vulnerable' to flood risk[1].

9. In terms of that risk, land is classified into flood zones 1, 2 or 3 which relates to the probability of flooding. Flood zone (FZ) 2 is defined as having between a 1 in 100 & 1 in 1000 annual probability of river flooding or between a 1 in 200

[1] See Annex 3

& 1 in 1000 annual probability of sea flooding; FZ 3a as having a 1 in 100 or greater annual probability of river flooding or a 1 in 200 or greater annual probability of sea flooding; FZ 3b is the area where water is stored or flows in times of flood.

10. The Council's approach to flood risk is set out within Policy 4 of the LP. Amongst other things the policy states that caravans and mobile homes for permanent use will not be permitted in areas at risk of flooding. Policy 20 of this document sets out a range of criteria against which planning applications for Gypsy and Traveller sites will be judged. This includes not granting planning permission for sites for permanent residential use within Flood Zones 3a or 3b.

11. There are two pitches on the site which are occupied by the appellant and his son with their respective families. The site is part of a low-lying expanse of land and there is no dispute between the parties that it is shown on Environment Agency mapping as falling within FZ 3.

12. Where development is proposed in FZs 2 or 3 it is necessary to apply a so-called 'Sequential test' (ST). As set out in the Framework the aim of the ST is to steer new development to areas with the lowest risk of flooding. Under the ST development should not be permitted in areas known to be at risk now or in the future from any form of flooding, if appropriate sites are reasonably available in areas with a lower risk of flooding.

13. Neither of the parties were able to identify the availability of a potential alternative site anywhere else within the District, let alone in an area at lower risk of flooding. Where a site falls within FZ 3a or 3b, as in this case, the PPG advises that 'highly vulnerable development' should not be permitted even if the ST is passed, although paragraph 159 of the Framework states that where development is necessary in areas at the highest risk of flooding, it should be made safe for its lifetime without increasing flood risk elsewhere.

14. Despite its location, the appellant argues as part of the flood risk assessment provided that, because of flood defence measures, the site lies within a Residual Low Hazard Zone as identified within the Council's Strategic Flood Risk Assessment. As such the appellant argues that the site should not be treated as development within FZ 3. It was also argued at the Hearing that the Council's approach to flood risk, in Policies 4 and 20 of the LP, were inconsistent with the Framework which states that the Strategic Flood Risk Assessment should provide the basis for applying the sequential test[2].

15. However I am mindful that the PPG states "*Avoiding flood risk through the sequential test is the most effective way of addressing flood risk because it places the least reliance on measures like flood defences…*"[3]; also that when applying the sequential test "*Initially, the presence of existing flood risk management infrastructure should be ignored, as the long-term funding, maintenance and renewal of this infrastructure is uncertain…*"[4]. Nor have I been provided with any rationale for an argument that the Strategic Flood Risk Assessment provides the basis for determining flood zones.

[2] Para 162.
[3] Para 023
[4] Para 024

16. Therefore when the Framework and PPG are read as a whole I do not find the Council's policies on flood risk in its development plan to be inconsistent with national policy. Accordingly I find the proposed development to be in conflict with Policies 4 and 20 of the LP insofar as they seek to offset the impact of flood risk on highly vulnerable development.

17. However it is important to go on to consider the appellant's site-specific flood risk assessment (FRA) in more detail. As set out above the site is identified in the Strategic Flood Risk Assessment as being within a Residual Low Hazard Zone where, due to existing flood defences, there would be no residual depth of floodwater. The defences are designed to protect against a 1:200 year tidal event and a 1:100 year fluvial event. The FRA sets out the likelihood of overtopping or failure of flood defences to be small, whilst taking into account predicted rise in sea level; that the maintenance of existing tidal defences over a 50 year period has been demonstrated to be cost-effective; that the site drains to two pumping stations, discharging to the River Nene, in relation to which temporary pumping equipment would be used in the unlikely event of failure; and that main drainage is subject to a routine maintenance programme and designed to allow for water storage in an extreme flood event. The FRA states that in a very extreme event the rise in water level would not be sudden, thus allowing for precautionary action. It concludes residual flood risk to be very low (less than 1:200 years) and to adjoining properties not to be increased as a result of the development.

18. The FRA findings are an important material consideration. The Council accepted at the Hearing that the risk of flooding on the site was demonstrated to be low and did not dispute the findings of the FRA. I have no reason to disagree. I am also mindful that, according to the Council's statement, it has allocated a site in the LP to extend residential development at an existing travelling show persons' site elsewhere on Baulkins Drove, and at the Hearing it was unable to discount that it had granted planning permission for other Gypsy and Traveller sites elsewhere in FZ 3. When asked about this at the Hearing the Council sought to distinguish these sites on the basis that they involved expansion through reconfiguration rather than the provision of new sites. However in this regard I concur with the appellant that regardless of how the sites are physically provided, it still results in more people living within the area.

19. Drawing the aforementioned considerations together, I am satisfied that the effect of flood defence infrastructure on residual flood risk is capable of outweighing the default policy position. I shall return to this matter when considering the 'Planning Balance' later in the decision.

Need for Gypsy and Traveller sites

20. Paragraph 7(b) of the Government's Planning policy for traveller sites (PPTS) states that local planning authorities should prepare and maintain an up-to-date understanding of the likely accommodation needs of their areas over the lifespan of the development plan. The Council's most recent Gypsy and Traveller Accommodation Assessment (GTAA) was produced in November 2016. The GTAA identified the level of need for those that meet the definition of gypsies and travellers in Annex 1 of the PPTS to be four permanent pitches, but that there may be a need for up to 13 additional pitches for unknown

households (on the basis that a number were not covered by the survey), plus 'concealed' households or new household formation.

21. The PPTS states that local planning authorities should identify, and update annually, a 5-year supply of specific deliverable sites. When taking account of a local plan allocation and planning permissions granted since 2016 the Council's position prior to the Hearing was that it is able to demonstrate in excess of a 10-year supply of sites.

22. The appellant's position by contrast is that the GTAA cannot be considered a robust evidence base as there are a number of errors in its methodology which has led to the level of need being underestimated. Notably this under count, it says, involves households on 'doubled up' or overcrowded sites and living in bricks and mortar accommodation. The appellant also cites insufficient allowance having been made for future household formation rates.

23. However, it would appear that a recent Court of Appeal judgment has complicated the position further[5]. The thrust of this judgment is that the PPTS definition is unlawfully discriminatory against Gypsies and Travellers who have ceased to travel permanently on grounds of age or disability.

24. This judgment was discussed at the Hearing. The Council accept that the impact of including, in the assessment of need for sites in the District, Gypsies and Travellers falling within this category, who would previously have been excluded from the PPTS definition is unknown and will need to be reviewed. Accordingly, the Council is no longer able to say, in light of the Court of Appeal judgment, whether it is able to demonstrate a 5-year supply of specific deliverable sites.

25. I have also had regard to the assessment within the GTAA of current and future need in relation to all Gypsy and Traveller households in the District, as summarised in the table at paragraph 100 of the appellant's Updated Statement on Need. Taking into account that there is broad agreement between the parties regarding the level of supply of sites, I concur with the appellant that this summary table shows the Council to be some 13 pitches short of being able to demonstrate a 5-year supply, albeit that this would relate to all Gypsies and Travellers irrespective of the PPTS definition. This degree of shortfall would be based on the level of need to 2033, as discussed at the Hearing, and which was not disputed by the Council. It seems to me that applying the GTAA end date of 2036, instead of 2033, and dividing future need proportionately over the full GTAA period would only marginally influence the under-supply calculation and would not be significant enough to completely overcome the 5-year supply shortfall.

26. I consider that this reinforces the doubt identified above as to the Council's ability to demonstrate a satisfactory supply of specific deliverable sites, when also having regard to the ramifications of the Court of Appeal judgment.

27. Having regard to the above, also to the fact that the GTAA is a relatively aged document now and that the level of need in the District may have changed, I am not satisfied that the Council is able to demonstrate a five-year supply of deliverable sites in the District. Notwithstanding the position regarding the strategic supply of sites, a suitable and available alternative site for the families

[5] *Lisa Smith v SSLUHC & Ors [2022] EWCA Civ 1391*

currently occupying the appeal site cannot be identified by the Council at this time. This is indicative of an immediate unmet need for sites in the District. These factors therefore weigh in favour of the development.

Other Matters

28. There have been a number of issues raised by other parties. Whilst access to the site along Baulkins Drove is a via a single lane track, it was evident from my visit that there are periodic passing places allowing traffic conflicts to be avoided. When considering the limited scale of the development I am not persuaded that it would result in highway safety harm or lead to undue wear and tear on the physical condition of the road. I am satisfied that concerns regarding external lighting emanating from the site could be addressed by an appropriately worded condition.

29. Concern has been raised that the development results in visual harm. The site is within a rural location, surrounded by an essentially flat landscape of open agricultural fields. There is a small group of dwellings situated on the opposite side of Baulkins Drove to the west, and farm related buildings to the immediate south. The development is most prominent viewed from the north along Baulkins Drove, with the light colouring of the upper parts of the mobile homes visible. The scale of development is limited however, there being two pitches, and visual impact mitigated by boundary fencing and the setting of the development against a belt of tall trees. Whilst the upper parts of the static caravans are visible above boundary hedging, when seen from Bells Drove to the east, this view is from distance and the structures do not appear obtrusive. It would be possible to introduce planting to the northern and eastern boundaries of the site in order to further mitigate the visual impact of the development, viewed from these directions. This may also provide some benefits to wildlife. I am not provided with evidence that the development has caused harm to wildlife in terms of dependency on the site.

30. From my visit it was apparent that the site is well screened along its immediate frontage and at distance from the south by an existing belt of tall trees and from the west by existing buildings. Overall I am satisfied that the development may be satisfactorily assimilated into the surrounding landscape.

31. Residents reported being disturbed by barking dogs, also animals escaping from the site, causing damage to property and behaving aggressively. Whilst I acknowledge these concerns, I do not attribute such issues to the inherent characteristics of the residential use of the site. I consider it would be normal for such nuisances to be dealt with by other divisions of the Council, notably environmental health, or possibly the Police should such problems persist.

32. A further concern has been that the development has proceeded without authorisation. However I am mindful that the Act makes provision for a grant of retrospective planning permission and planning enforcement that is remedial rather than punitive.

33. I have considered the argument that the grant of planning permission would set a precedent for other similar developments. However each application and appeal must be determined on its own individual merits and a generalised concern of this nature would not in itself justify withholding planning permission in this case.

Planning Balance

34. I attach significant positive weight to the present unmet need for sites as demonstrated by the lack of any alternative site being available to accommodate the site occupiers. Significant weight is also attached to the apparent lack of an up-to-date 5-year supply of deliverable sites.

35. Had the site been located within FZ 2, and following the application of the ST, highly vulnerable development is then required to meet an Exception Test. For the Exception Test to be passed it needs to be demonstrated firstly that the development would provide wider sustainability benefits to the community that outweigh the flood risk and secondly that the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.

36. When taking account of the effect of flood defence infrastructure on residual flood risk I attach only very limited adverse weight to the development plan conflict in this regard. I am not required to apply the Exception Test as the site falls within FZ 3. However were I to do so I would conclude that the provision of a settled base for the site occupiers and the potential benefits that arise from this in terms of access to education and medical services, in the context of need for Gypsy and Traveller sites, is evidence of a wider sustainability benefit to the community. Furthermore I am provided with no evidence that leads me to doubt that the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere. The specific circumstances of this case are that the need for site provision outweighs concern regarding flood risk.

37. Therefore, I conclude that the proposed site would be in an acceptable location having regard to flood risk and in particular the management infrastructure that is in place. In this context I do not find conflict with Policy 1 of the LP which allows for sustainable development in countryside locations, clarifying in the reasoned justification to the policy that exceptionally this may include Gypsy and Traveller accommodation; nor with Policy 2 of the LP which requires sustainable development considerations to be met.

38. Given that I have found the development to be acceptable on the basis of the above considerations there is no need for me to go on to consider the significance of the appellant's personal circumstances. There is also no need for me to consider whether, as the appellant argues, paragraph 11(d) of the Framework, and the so-called 'tilted balance' is engaged in this case, as I have already found the development on balance to be acceptable.

Conditions

39. I have considered the conditions suggested by the Council and discussed with the parties at the Hearing. A condition confirming that planning permission is restricted for residential use by Gypsies and Travellers is required in order to safeguard the supply of the site for this purpose. However in light of the recent Court of Appeal judgment cited below[6], in order to avoid discrimination, the condition should include those Gypsies and Travellers who have ceased to travel permanently.

[6] *Lisa Smith v SSLUHC & Ors [2022] EWCA Civ 1391*

40. A condition limiting the number of pitches and caravans stationed is needed in order to protect the character and appearance of the area. A condition preventing commercial activity on the site is required in the interests of helping to safeguard the character and appearance of the area and the living conditions of residents.

41. A condition confirming the loss of the permission unless details are submitted for approval (including a timetable for implementation) concerning the site layout, boundary treatments, drainage details, external lighting arrangements and soft landscaping works, including their replacement, if necessary, is required in order to help safeguard the character and appearance of the area and the living conditions of the site occupiers and nearby residents.

42. The form of this condition is imposed to ensure that the required details are submitted, approved and implemented so as to make the development acceptable in planning terms. There is a strict timetable for compliance because permission is being granted retrospectively, and so it is not possible to use a negatively worded condition to secure the approval and implementation of the outstanding matters before the development takes place. The condition will ensure that the development can be enforced against if the required details are not submitted for approval within the period given by the condition, or if the details are not approved by the local planning authority or the Secretary of State on appeal, or if the details are approved but not implemented in accordance with an approved timetable.

Conclusion

43. For the reasons given above, I conclude that the appeal succeeds on ground (a). I shall grant planning permission for the use as described in the notice. The appeal on grounds (f) and (g) do not fall to be considered.

Formal Decision

44. The appeal is allowed, the enforcement notice is quashed and 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 change of use of the land from agricultural use to a caravan site at Land on the east side of Baulkins Drove, Sutton St James as shown on the plan attached to the notice and subject to the conditions in the schedule below.

R Merrett

INSPECTOR

SCHEDULE OF CONDITIONS

1) The site shall not be occupied by any persons other than Gypsies and Travellers, defined as 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.

2) There shall be no more than two pitches on the site. On each of the pitches hereby approved no more than two 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 one shall be a static caravan), shall be stationed on the pitch at any time.

3) The residential 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 and the land restored to its condition before the development took place 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 with details for:
(a) the internal layout of the site including the extent of the residential pitches, the location of the caravans and vehicle parking, any hardstandings;
(b) all boundary treatments and all other means of enclosure (including internal sub-division);
(c) the means of foul and surface water drainage of the site;
(d) proposed and existing external lighting on the boundary of and within the site;
(e) soft landscaping including existing planting, details of species, plant sizes and proposed numbers and densities and details of a schedule of maintenance for a period of 5 years;
(hereafter referred to as the 'site development scheme') shall have been submitted for the written approval of the local planning authority and the site development 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 site development 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 scheme specified in this condition, that scheme shall thereafter be retained.

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.

4) No commercial, industrial or business activities, including the storage of materials and goods, shall take place on any part of the site.

END OF SCHEDULE OF CONDITIONS

APPEARANCES

FOR THE APPELLANT:

Matthew Green	Planning Consultant
Geoff Beel	Flood risk Consultant
John Smith	Appellant
John Smith	Appellant's son

FOR THE LOCAL PLANNING AUTHORITY:

Mark Simmonds	Planning Consultant
Marie Asher	Planning Support Officer
Jess Francis	Planning Support Officer

INTERESTED PERSONS:

Jennifer Garbutt	Sutton-St-James Parish Council
David Gumbrell	Local resident

Documents received at the Hearing:

1. Plan identifying position of stable
2. Updated personal statement
3. Statement of Common Ground