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## Appeal Decisions

Hearing Held on 7 March 2023

Site visit made on 7 March 2023

**by D Hartley BA (Hons) MTP MBA MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 15 March 2023**

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### **Appeal A: APP/Q3115/C/21/3289658**

**Land at Primrose View, Roke, Oxfordshire, OX10 6JD north of Chapel Lane, Roke, Wallingford, OX10 6JE shown edged red on the plan at appendix 1**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the Act) as amended by the Planning and Compensation Act 1991.
  - The appeal is made by Mr Joe Wenman against an enforcement notice issued by South Oxfordshire District Council.
  - The enforcement notice was issued on 7 December 2021.
  - The breach of planning control as alleged in the notice is without planning permission, the undertaking of building, engineering and other operations, which are identified on the plan at attachment 2 ("the Layout Plan"), comprising of i) the construction of a concrete mobile home base, brick skirt and steps in the approximate location shown colour blue on the Layout Plan; ii) the erection of pillars and entrance gates exceeding 1m in height adjacent to the highway, in the approximate location shown coloured green on the Layout Plan; iii) the laying of a hardstanding in the approximate location shown hatched black on the Layout Plan; iv) the installation of outdoor lamp standards, in the approximate locations shown coloured purple on the Layout Plan; and v) the erection of three buildings, in the approximate locations shown coloured orange on the Layout Plan.
  - The requirements of the notice are i) demolish, dismantle or dig up, as the case may be, the mobile home base, brick skirt, brick steps, pillars, gates, hardstanding, lamp standards and buildings referred to in 3 above, ii) remove from the Land any waste resulting from step i) above and iii) reinstate all areas of the Land disturbed as a result of steps i) and ii) above by grading and levelling the soil to levels and a fall commensurate with immediately adjoining undisturbed lands and by the sowing of an MG5 grass mix to those areas.
  - The period for compliance with the requirements is 18 months.
  - 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.
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### **Appeal B: APP/Q3115/C/21/3289659**

**Land at Primrose View, Roke, Oxfordshire, OX10 6JD north of Chapel Lane, Roke, Wallingford, OX10 6JE shown edged red on the plan annexed**

- 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 Joe Wenman against an enforcement notice issued by South Oxfordshire District Council.
- The enforcement notice was issued on 7 December 2021.
- The breach of planning control as alleged in the notice is without planning permission the material change of use of the Land from unmanaged woodland to a residential caravan site, by the stationing of a static mobile home (in the approximate location shown edged blue on the Plan) and a touring caravan for residential use by persons claiming gypsy and traveller status.

- The requirements of the notice are i) stop using the Land for residential purposes, (ii) disconnect and dig up all services connected to the static mobile home referred to in 3 above, iii) remove from the Land the static mobile home and touring caravan referred to in 3 above together with all related residential goods and chattels, iv) remove from the Land any waste resulting from i), ii) and iii) above and v) reinstate all areas of the Land disturbed as a result of steps i), ii), iii) and iv) above by grading and levelling the soil to levels and a fall commensurate with immediately adjoining undisturbed lands and by the sowing of an MG5 grass mix to those areas.
  - The period for compliance with the requirements is 18 months.
  - 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.
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**Appeal C: APP/Q3115/W/21/3279605**  
**Land north of Chapel Lane, Roke OX10 6JD**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
  - The appeal is made by Mr Joe Wenman against the decision of South Oxfordshire District Council.
  - The application Ref P19/S2721/FUL, dated 23 August 2019, was refused by notice dated 13 May 2021.
  - The development proposed is change of use of land to use as a residential caravan site for the gypsy family including stationing of two caravans, laying of hardstanding, erection of stables and dog kennels and retrospective timber fencing and entrance gates and piers.
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**Decisions**

**Appeal A: APP/Q3115/C/21/3289658**

1. It is directed that the enforcement notice be varied by deleting the wording in paragraph 5 (iii) and replacing it with '*Restore the land to its condition before the development took place by grading and levelling the soil and by the sowing of an MG5 grass mix to those areas*'. Subject to this variation, the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

**Appeal B: APP/Q3115/C/21/3289659**

2. It is directed that the enforcement notice be varied by deleting the wording in paragraph 5 (v) and replacing it with '*Restore the land to its condition before the development took place by grading and levelling the soil and by the sowing of an MG5 grass mix to those areas*'. Subject to this variation, the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

**Appeal C: APP/Q3115/W/21/3279605**

3. The appeal is dismissed.

## **Appeals A & B on ground (a) and Appeal C (s.78 appeal)**

### *Main issues*

4. The development relating to the ground (a) appeals (appeals A & B) combined is largely the same as that being considered as part of the s.78 appeal (appeal C). The only difference between the former and the latter, is that the appeal A also includes the consideration of brick steps and lamp standards. Furthermore, unlike appeal C, the operational development in respect of appeal A includes a second dog kennels building.
5. The main issues in respect of the three appeals are i) the effect of the development on the character and appearance of the area, including landscape character and the setting of listed buildings; ii) whether the development has adverse flood risks; iii) whether the land is contaminated and, if so, its effect on the occupiers of the site; iv) whether intentional unauthorised development has taken place, and v) whether there is a need for the development and the personal circumstances of the occupants of the site.

### **Background**

6. The evidence indicates that the appeal site was previously undeveloped and included several mature trees and vegetation. The mature trees and vegetation have been removed and an area of tarmac hard standing, fencing and gates (with brick piers) have been formed/erected on the site. There is a static caravan (with steps) on the site coupled with a stable building, dog kennels, lighting, a touring caravan and other domestic paraphernalia. A laurel hedge (behind post and wire fencing) has been planted on the frontage of the site with Chapel Lane.
7. The site is in use by the appellant and his family. There is no dispute between the main parties that the appellant has lived a nomadic lifestyle and has been located at several roadside locations in the past. He runs a roofing company which requires travelling to find work and the family have attended Gypsy fairs for the purposes of trading horses. The appellant confirmed at the hearing that he currently owned two horses that were not for trading purposes and that these were kept in the nearby fields when the weather was suitable.
8. The Council finds that the appellant meets the definition of a 'Gypsy/Traveller' as contained within annex 1 of Planning Policy for Traveller Sites 2015 (PPTS) and, despite comments made by other interested parties, I have not been provided with any objective evidence to lead me to disagree with this conclusion.
9. In reaching the above conclusion, it is noteworthy that the definition of Gypsies/Travellers as contained within the annex 1 of the PPTS has recently been the subject of the Court of Appeal judgment of *Smith v SSLUHC & Ors* (2022) EWCA (Smith judgment). The definition of Gypsies/Travellers was found to be discriminatory in that it made it harder for elderly and disabled ethnic Gypsies and Travellers to obtain planning permission in so far that it does not include persons of nomadic habitat of life who on grounds of their own or their family's dependants' educational or health needs or old age, have ceased to travel permanently.
10. The PPTS itself was not the subject of litigation and has not been quashed or declared unlawful. Despite the judgment, it continues to set out the

Government's planning policy for Gypsy and Traveller sites, although the definition in annex A is discriminatory and has no legitimate aim. Prior to receipt of statements of case, the main parties were afforded the opportunity to comment on the implications of the above judgment in respect of the subject appeals including provision and need for pitches in the area. This has in fact not been a determinative matter given my reasoning later on this decision.

11. As part of the evidence, I have been referred to a planning appeal<sup>1</sup> for the erection of a detached two storey 4-bedroom dwelling, detached garage and retrospective close boarded fence, entrance gates and brick piers on the same site, dated 22 September 2020. The appeal was dismissed for accessibility, character and appearance and flooding reasons. While this proposal was for a different form of development, it is nevertheless a material planning consideration in respect of the determination of the subject appeals.

#### *Location and development plan policy*

12. The site lies to the north of Chapel Lane next to a detached dwelling known as Fairfield. It is located outside the identified settlement limits of Roke and Berrick Salome and in the countryside. There is a public right of way that runs immediately alongside the western boundary of the site.
13. Policy BER1 of the adopted Berrick Salome Parish Neighbourhood Plan 2019 (BSNP) states that '*proposals for development outside the boundaries will only be supported if they accord with development plan policies managing development in the countryside*'. In this regard, there is therefore no overriding objection in principle to the use of the appeal site as a Gypsy/Traveller site if the development accords with development plan policies managing development in the countryside. I deal with this matter below.

#### *Character and appearance*

14. There are a variety of styles of dwelling in the village. Some are traditional in appearance and others are more modern. In the immediate vicinity of the appeal site, the dwellings are two storeys in height and have pitched roofs. There are, however, some single storey houses further down Chapel Lane. There is an absence of footpaths and streetlights in the locality and this gives the settlement a less urbanised and distinctive village feel. There is a general sense of peace and tranquillity owing to the infrequently used main roads and low-level pedestrian activity.
15. The site is situated in the '*undulating semi-enclosed vale*' landscape of '*The Clay Vale*' landscape character area as identified by the South Oxfordshire Landscape Character Assessment for the Local Plan 2017 (LCA). The management strategy for this landscape area includes, amongst other things, minimising the visual impact of intrusive land uses at the fringes of towns, villages and farms, maintaining the nucleated pattern of settlements and promotion of the use of building materials to maintain the vernacular style and scale of development that are appropriate to the Clay Vale, and the maintenance of local distinctiveness by controlling the quality of built development, taking into account its scale, setting and use of local building materials.

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<sup>1</sup> Appeal ref APP/Q3115/W/20/3248420

16. The pattern of development in the immediate area is relatively uniform with linear properties set within spacious plots and surrounded by open and mainly arable land beyond. There are attractive open grass verges, low level frontage landscaping and mature trees along both sides of the main road. Dwellings have either no frontage fencing/gates, thereby emphasising the visibility and prominence of properties from the main road, or, where they do exist, they are generally of post and rail construction and therefore enable open views into the residential plots. Where residential plots do exist, the main dwellings and garages are generally closely aligned and contained and hence there is a relatively consistent sense of green and undeveloped space to the sides and fronts.
17. The village has a noticeably verdant character and appearance, and it is evident that prior to the unauthorised development taking place, the predominantly undeveloped and bosky nature of the appeal site also contributed positively and distinctively to the landscape character of the village/area as a whole. Indeed, the historic visual imagery demonstrates that the appeal site was previously seen as a more planted area marking a visual transition between the edge of the more built-up part of the village and the more rural character of the countryside on this side of Chapel Lane. I accept that the site to the west of the appeal site does include a building (referred to by the Council at the hearing as an '*agricultural building*'), but this is set well back from the road, has a more rural appearance, and unlike the appeal development is not as apparent in view when travelling along Chapel Lane.
18. While a new evergreen hedge has been planted on the frontage with Chapel Lane, it is nonetheless still possible to see the static caravan, stables, fencing and kennels from parts of the main road and the adjacent public right of way.
19. The new hedge that has been planted on the frontage of the site is laurel which is not indigenous to the area. Nonetheless, I was able to see on the site visit that there is at least one other laurel hedge in the immediate locality. I do not find that this has caused any material harm to the character and appearance of the area and in reaching this view I have taken into account the fact that none of the interested parties at the hearing could recall there being a hedgerow on the frontage of the site in the past. To this extent, policy ENV1 of the adopted 2020 South Oxfordshire Local Plan 2011-2035 (LP) is of no relevance as this only requires a replacement hedgerow to be native.
20. In respect of appeals A & B, the breaches of planning control do not refer to the close boarded fencing erected around the appeal site. Furthermore, Appeal B does not seek the removal of any fencing that facilitated the material change of use of the land. Appeal C does, however, include '*timber fencing*'. At the hearing, there was some discussion about whether it would be possible to soften the effects of the development by planting additional trees within the site. This is not certain given the flood risk matters that I deal with later in this decision.
21. Even if it were possible to undertake some additional planting, I find that owing to the position and appearance of the buildings on the site, coupled with the close boarded boundary fencing and gates, the development as a whole would still fail to be reflective of the pattern of the more spacious and less urbanised form of development in the locality and, furthermore, there would be conflict with paragraph 26(d) of the PPTS which states that weight should be attached

to not enclosing a site so that the impression may be given that the site and its occupants are deliberately isolated from the rest of the community. I accept that the appellant does want some security for his children, but that could be achieved in a more sensitive manner and such that the site was not seen as being as isolated from the rest of the community.

22. It is clear that a lot of trees/vegetation have been removed from the site and to the passer-by the site is now seen as being a much more urban and developed environment. The level of harm caused to the character and appearance of the area is exacerbated because of the height, appearance and position of the close-boarded boundary fencing, the height/width of entrance brick piers and the solid gates and the colour, position and design of the static caravan. The hardstanding area is significant in its extent and has a very urban appearance. This is noticeable when the gates are intermittently open and can be seen from first-floor windows of surrounding residential buildings.
23. When considered as a whole, I find that the development does not assimilate well into the surrounding environment. When the gates, piers and close boarded fencing is considered together, it has the effect of departing from the otherwise more spacious and softer/greener edges that prevail to each of the development plots in the locality. In these respects, the development appears as an intrusive and harmful form of development on the village fringe to the detriment of the landscape character of the area. I do not consider that the provision of additional landscaping, should that be possible, would suitably alleviate these concerns.
24. While the static caravan, stables and kennels are acceptable in terms of their single storey height, they are nevertheless all positioned on the outer edges of the site and are visible to the passer-by. Moreover, the static caravan is at 90 degrees to the main road which is not typical of the main dwellinghouses within most of the plots within the area. In addition, unlike most of the dwellings in the area, which owing to their position and width mainly screen back garden environments and associated development, a significant amount of development on the appeal site is highly conspicuous to the passer-by. The site includes a mixture of different styles, sizes and colours of building (including the static caravan) and, in this regard, the development as a whole is appreciated as being a haphazard collection of juxtaposed buildings at odds with the simpler and more contained pattern of development that exists elsewhere within most of the plots in this part of Chapel Lane.
25. As part of my site visit, I was able to walk the public right of way to the side of the appeal site. I note the representations made by interested parties about the effect of the appeal development on the enjoyment and amenity value of this public right of way. Prior to the unauthorised development taking place, the evidence is that the public right of way was experienced by walkers as being within a much more rural and planted landscape and in an area with lower levels of surrounding activity. In reaching this view, I noticed on my pre-site visit that some closed boarded fencing was in the process of being erected on land to the west of the public footpath. The Council confirmed at the hearing that this did not have the benefit of planning permission and that it would be separately investigated by its planning enforcement service.
26. The appeal development is very conspicuous from the public right of way. Some of the buildings, structures and the close boarded fencing are tight up to

it. Collectively, they appear as dominant, harsh and urban additions when viewed from this area. I find that the amenity value of the footpath is no longer appreciated as being rural and the environment is no longer perceived as being as tranquil. In these respects, I find that harm has been caused to the character and appearance of the area when appreciated from the public right of way.

27. For the collective reasons outlined above, I therefore find that even accounting for the potential for new or additional planting, moderate localised harm has been caused to the character and appearance of the area including landscape character. In this regard, I conclude that the developments that are the subject of appeals A, B and C do not accord with the design, landscape character and appearance requirements of policies DES 1, DES 2, ENV1 and H14 of the LP, policy BER1 of the adopted 2019 Berrick Salome Neighbourhood Plan 2019-2034 (NP), the LCA and paragraph 174(b) of the National Planning Policy Framework 2021 (the Framework).

*Effect on the setting of listed buildings*

28. The nearest listed buildings to the appeal site are Russets, The Cottage, Old Stone Cottage, Hicks Farmhouse and Lime Tree Cottage. All of the listed buildings are Grade II and taking into account the evidence that is before me their significance relates to their age and a mixture of internal and external architectural detailing.
29. Given the position, separation distances and intervening built form of the appeal site with The Cottage, Old Stone Cottage, Lime Tree Cottage and Russets, I do not find that the appeal site falls within the setting of these listed buildings. I find that the setting of these listed buildings is more contained and relates to the curtilage of the sites themselves as well as land within the immediate vicinity including properties either side and those opposite where there is no other intervening built form or vegetation. For these reasons, I am satisfied that the development that is the subject of appeals A, B and C causes no harm to the settings of these listed buildings and hence the significance of the heritage assets is preserved.
30. Hicks Farmhouse is located on Chapel Lane and is in very close proximity to the appeal site, albeit positioned at a slight angle to it. Prior to the unauthorised development taking place on the site, it offered a softer undeveloped landscaped setting to the aforementioned listed building. It enabled one to fully experience the architectural splendour of Hicks Farmhouse set within an immediate setting which was more verdant in character and where, in relative terms, the property did not compete with the same amount of other urban form. In other words, the appeal site formed part of the verdant setting of this listed building and hence prior to it being developed it contributed positively to the overall significance of it as a heritage asset.
31. However, on the basis that the appellant has planted a new hedge to the front of the appeal site, the Council no longer objects to the proposal based on harm to the setting of any listed buildings in the area. As outlined above, I find the harm that had been caused by the appeal developments related solely to Hicks Farmhouse. While the frontage hedge is non-native, it nevertheless provides a green and soft edge to the setting of Hicks Farmhouse. In this respect, I have no reason to disagree with the common ground position of the main parties

that no harm has been caused to the significance of any listed buildings in the locality from the point of view of their settings.

32. I therefore conclude that the development which is the subject of appeals A, B and C causes no harm to the significance of any listed buildings and therefore it accords with the conservation requirements of policies ENV7 and H14 of the LP and chapter 16 of the Framework.

#### *Flood risk*

33. The Environment Agency (EA) mapping shows that the appeal site includes flood zones 1, 2 and 3(b). The north and north-eastern part of the site falls within flood zones 2 and 3(b) whereas the south and south-western part of the site, where the static residential caravan is positioned, lies within flood zone 1. At the hearing, the EA representative confirmed that the flood zones were indicative as the EA did not hold any flood modelling data for the area. Furthermore, the flood map supplied by the EA does not provide any allowance or indication of the impact of climate change on the Flood Zones.
34. At the hearing, the main parties referred me to the South Oxfordshire Strategic Flood Risk Assessment 2019 (SFRA) which states that functional floodplain (Flood Zone 3b) is defined as *'the 1 in 20-year modelled flood extent wherever suitable hydraulic models are available'* or *'elsewhere, take a precautionary approach and assume that the Flood Zone 3a (1 in 100-year flood extent) represents the functional flood plain'*. In other words, and based on the agreed position between the EA and the Council, the default position relating to the appeal site is that it includes function floodplain (i.e., flood zone 3b). The appellant does not take issue with this definition.
35. Caravans intended for permanent residential use are classified in the Planning Practice Guidance (PPG) as a *'highly vulnerable'* form of development. The PPG states that planning permission should *'not be permitted'* for such development in flood zone 3 and that within flood zone 2 such development should only be permitted if the sequential and exception tests are passed.
36. While the static residential caravan is located within a part of the site that is shown as flood zone 1 on the EA mapping, the notes to table 2 of the PPG state *'some developments may contain different elements of vulnerability and the highest vulnerability category should be used, unless the development is considered in its component parts'*. The appeal site as a whole is being used primarily for residential purposes, i.e., as a Gypsy and Traveller site. This is a highly vulnerable use falling within a relatively small appeal site that contains flood zone 3. Internally the site is essentially open, and its various components are not physically separated from one another. Furthermore, it is reasonable that I factor in the possibility of some inaccuracies in the variations of any flood modelling in the area. In my judgment therefore, the highly vulnerable category should be applied across the whole of the site. I find that the development should not therefore be permitted considering the notes in table 2 of the PPG.
37. In addition to the above, the stables and kennels are, at least in part, positioned within flood zone 3 as shown on the EA flood risk maps. The appellant contends that in respect of the flood risk vulnerability classifications in annex 3 of the Framework, this development falls within the *'water compatible development'* classification. At the hearing, both the EA and the

Council's Flood Risk Engineer took the view that it fell within the 'less vulnerable' classification. Neither stables nor kennels are specifically mentioned in the vulnerability classifications.

38. It is noteworthy that most of the listed developments in the water compatible development classification are water based. Stables and kennels are not water-based uses. This classification refers to outdoor sports and recreation facilities and the EA representative commented at the hearing that this was likely to include the likes of football pitches and cricket fields. While stables may be deemed to be a '*recreation facility*', I do not consider that the water compatible development classification is aimed at stables or indeed kennels. Indeed, the inability to use a football pitch or cricket pitch for say a few weeks owing to flooding, is not the same as the risk to animals or the need for the evacuation of animals in the event of a possible flood. In my judgment, I find that the stables and kennels fall within the less vulnerable classification. In this regard, and applying table 2 of the PPG, it means that, based on the SFRA default position of function floodplain 3b, this development '*should not be permitted*'.
39. Even if one were to disagree with the above, it is of note that part of the site includes flood zone 2. The appellant has submitted a sequential assessment relating to a search for sites with a lower risk of flooding. This is limited to the three wards nearest to the appeal site and does not therefore extend to the wider local authority administrative area. The same area of search was chosen in respect of the planning application for a dwelling on the site. In respect of this matter, the previous Inspector commented that '*this is a constrained search area and fails to show a robust assessment of available sites. Furthermore, an exception test should only then be undertaken once it has been shown that it is not possible to locate development in lower risk areas of flooding*'.
40. At the hearing, I asked the appellant why he had opted for a limited area of search and as had been the case in terms of the planning application submission for a dwellinghouse on the site. None of the representatives acting for the appellant were able to provide a specific reason for doing this other than a comment made that there were no available Gypsy and Traveller pitches in the district and hence it was not clear what a search would achieve.
41. The provision of available Gypsy and Traveller pitches in the area is a matter that I weigh in the planning balance later on in this decision. However, for the purposes of undertaking a flood risk sequential assessment, it is of note that there is a criteria-based policy in the LP (i.e., policy H14) that supports Gypsy and Traveller sites in the district. In this context, it is possible that there might be suitable and available sites within the wider district that could accommodate the development that is the subject of these appeals and on sites that are not at the same risk of flooding.
42. Given the above, I have not been provided with any reasonable evidence to lead me to reach a different view of the previous Inspector in respect of the sequential assessment. The sequential assessment is not robust or suitably extensive and is not therefore passed. Given this finding, it has not been necessary for me to consider the exception test.
43. The appellant has submitted a Flood Risk Assessment (FRA) prepared by GeoSmart Information dated June 2020. The EA does not consider that the FRA adequately addresses the flood risks posed by the development. The appellant

has carried out hydraulic modelling of the watercourses within the site's vicinity to determine flood levels and the resulting flood extents. This information is contained within a Fluvial Flood Study Report prepared by Odyssey on behalf of the appellant and dated January 2021. This does not present a flood map for the 5% Annual Exceedance Probability (EAP) (1 in 20 year) event, nor does it consider lower order events that the 1% EAP (1 in 100 year) plus climate change (70%) event for the post-development condition. I agree with the EA that it does not demonstrate that the site lies outside Flood Zone 3b or that the development does not increase flood risk elsewhere.

44. I would also add that the computer modelling undertaken by Odyssey determined flood levels 57.21 m AOD for fluvial flood zone 3a and 57.18 m AOD for fluvial flood zone 3b. When this is assessed against the topographical survey completed by Survey Solutions, dated December 2018, the static residential caravan and entrance into the site is on land which is lower than 57.21 AOD. In this respect, the appellant's evidence does not support a claim that the land is not within functional floodplain 3b.
45. Even if one were to disagree with all of my findings above, any modelling of the area would need to include an assessment of flood risk posed by blockages of the existing drainage channels, including culverts, as any blockage of these channels could worsen flood risk to the subject appeal developments when considered as a whole. The appellant has not provided sufficient information to address this matter.
46. In addition, part of the site falls within the designated floodplain and development has already been carried out on the site. On the basis that the FRA does not provide suitably justified floodplain compensation, there is a risk of displaced water causing flood risk elsewhere. This is an important consideration as it is reasonable to conclude that the site is likely to be less permeable than it was even accounting for the use of porous tarmac. In reaching this view, I note the photographs submitted by Berrick Salome Parish Council showing areas of flooding in the area. I also note the comments made by Mr Frank Farquarson at the hearing. His evidence does seem to indicate that, in part, the site previously included a corridor of land that acted as a natural flow route for water.
47. In considering the above matter further, it is noteworthy that figure 5.6 of the appellant's Odyssey report (i.e., post-development 1 in 100 year plus climate change (70%) peak flood depths) shows that flood depths would be increased off-site relative to the baseline position. Even with the appellant's flood risk mitigation, I am not satisfied that it has been suitably demonstrated that people and property would be safe from flooding given the likelihood of increasing flood risk elsewhere. Furthermore, and, in any event, the PPG advises against permitting development on sites which include flood zone 3 and where both highly vulnerable and less vulnerable development is involved.
48. At the hearing, the appellant appeared to indicate that the Odyssey report should not be afforded weight in respect of the above findings given that the consultants were '*given a narrower brief*'. I do not accept this as paragraph 1.1.1 of the Odyssey report states, '*Odyssey was commissioned by ET Planning to assess flood risk associated with an unnamed ordinary watercourse for a proposed residential development*' and paragraph 1.2.1 states '*the primary aim of the modelling study is to identify the pre-development flood levels and*

*floodplain extents in order to determine the suitability of the proposed land uses'.*

49. Overall, I find that the siting of both highly vulnerable and less vulnerable development in an area of high flood risk has resulted in an unacceptable flood risk for occupiers of the site and, furthermore, there is real potential for flood risk to occur elsewhere given the loss of floodplain and without adequate floodplain land compensation. The appellant considers that floodplain compensation could be achieved on site and that a condition could be imposed to deal with this matter.
50. To impose a planning condition, I would need reasonable certainty that it would be possible to provide sufficient compensatory flooding attenuation on-site. I do not have that certainty, particularly as flood storage compensation volume data is not before me. In addition, I heard at the hearing from the Council's Flood Risk Engineer that pluvial water flows towards the site and that more information was needed about that from the point of view of whether there might be additional mitigation needed to address any such matter. Overall, conditional control would not be an appropriate mechanism to deal with the effects of flooding in respect of any of the subject appeals.
51. I conclude that while some flood risk mitigation measures have been submitted by the appellant to address flood risk for the lifetime of the development, I concur with the findings of the EA that the appellant's flood risk modelling does not adequately demonstrate that the development would be safe and resilient to flooding for its lifetime, or that the site should not be assessed based on being functional floodplain. Furthermore, and, in any event, the sequential assessment has not been passed.
52. The development that is the subject of the three appeals therefore conflicts with the flood risk requirements of policies EP4 and H14 of the LP, policy BER10 of the NP, the PPG, paragraph 13(g) of the PPTS and paragraphs 159 and 167 of the Framework. Given that the PPG advises against permitting development in flood Zone 3, this in itself means that neither a temporary nor permanent planning permission is appropriate in this case and is why I shall instead focus on the period for compliance in the enforcement notices under the ground (g) appeals.

#### *Contaminated land*

53. As part of the appeal, the appellant has submitted a Phase 1 Desk Top Study Report (Phase 1 Report) prepared by WDE Consulting and dated September 2021. This has been reviewed by the Council's Environmental Protection Service where it is stated that the heating oil tank on the site *'is of modern construction and appears to be in good repair'* and *'the incinerator drum is situated on a tarmacked area and appears to be a small domestic type incinerator'*. The Phase 1 Report confirms that there are no industrial, hazardous, petroleum, fuel or waste sites or electrical features within 250 metres of the appeal site and that the subject site remained undeveloped until 2019.
54. The qualitative risk assessment identifies a low to moderate risk to human health, low risk to controlled waters and a low risk from ground gas. Given the Phase 1 Report, the Council now raise no objection to the appeal developments

subject to imposition of a precautionary planning condition relating to risk from unsuspected contaminated land if encountered as part of the development.

55. The appeal developments are retrospective and so the above recommended condition would not meet the test of necessity. In any event, and based on the evidence that is before me, I agree with the Council's changed position in its statement of case which states *'those reasons underpinning the need for enforcement action and refusal of the planning application based on the likelihood of contamination contrary to policies ENV11 and ENV12 of the local plan falls away'*.
56. I conclude that in terms of land contamination, the evidence is that the site is suitable for the development that is the subject of the appeals and there is no evidence of any risk to human health. In this regard, the development accords with the contaminated land requirements of paragraph 183 of the Framework and policies ENV11 and ENV12 of the LP.

#### *Intentional unauthorised development*

57. The Department for Communities and Local Government policy statement dated 31 August 2015 introduced planning policy to make intentional unauthorised development a material consideration that would be weighed in the determination of planning applications and appeals from 31 August 2015.
58. In this case, the evidence is that the appellant carried out extensive works to the land to create a residential caravan site following the refusal of planning permission for a detached dwelling on the land. At the hearing, the appellant commented that they were aware that planning permission was needed for residential use of the site, but that they nonetheless carried out works including the laying of hard standing, the erection fencing and gates, the siting/use of a static residential caravan, and the erection of buildings and lights, as they had no other place to live.
59. It is noteworthy that the appellant says that he and his family were *'evicted'* from the site in Vale of White Horse District. At the hearing, I asked the appellant to elaborate on the circumstances which led to him being evicted. In response, he said that he was living at his father's house in a caravan and that it was not the case that he was evicted, but rather that it was time for him to leave as he wanted to live on his own site with his family. The evidence does not therefore persuade me that there was some urgency amongst the family from the point of view of needing to find somewhere else to reside.
60. Even if there was some urgency, however, this is tempered somewhat in so far that there is no evidence at this time that the appellant sought to check if there were any authorised Gypsy/Traveller pitches available, or, indeed, that attempts were made to occupy a bricks and mortar home. In respect of the latter issue, it is evident that the appellant applied for planning permission for a detached dwelling on the appeal site and so it could not reasonably be said that he has a particular aversion to bricks and mortar housing. Indeed, when questioned about this matter at the hearing the appellant responded, *'I would have built and lived in the dwelling on the site if I had got planning permission for it'*.
61. In the context of the above, the appellant nonetheless sought to develop the site in a very significant way. It is not the case, that a caravan was merely

brought onto the land and only a small amount of associated hardstanding created. The works went significantly beyond that. This was despite evidence from local planning authority notes on 27 August 2019 that the appellant was advised by the planning officer that no further works should be undertaken on the site. Furthermore, at the hearing the representative from the Parish Council also indicated that he had advised the appellant before this time that planning permission would be needed for development on the site. This was not disputed by the appellant.

62. While I acknowledge that planning permission has since been sought retrospectively for the development, and ground (a) appeals lodged in respect of the enforcement notice appeals, I find that intentional unauthorised development has taken place. For the reasons outlined above, I conclude that modest adverse weight should be afforded to this matter as a material planning consideration to be considered in the overall planning balance.

*The need for gypsy and traveller sites*

63. There is common ground between the main parties that the local planning authority (LPA) cannot demonstrate a supply of specific, deliverable sites sufficient to provide 5 years' worth of sites against pitch targets. Policy H14 of the LP sets the pitch requirements at 10 pitches over the plan period based on three strategic allocations. It also provides a criteria-based policy for proposals for Gypsies and Travellers on sites that are not allocated. The LPA has confirmed that the three strategic allocations are not anticipated to deliver pitches within the next five years. Furthermore, it also confirms that as of 31 March 2022, it had zero-year supply of specific deliverable sites in the next 5 years. I have not been provided with any additional information to indicate that this position has changed in the intervening period.
64. The LPA acknowledges that the Smith judgment means that that it must consider provision and need for pitches from those Gypsies and Travellers where owing to their own or their family's or dependants' educational or health needs or old age have ceased to travel permanently. In this regard, the LPA states that '*we do not have records of the household survey to confirm why individual households were excluded from the definition*'. The LPA cannot be certain if there is additional need for Gypsy and Traveller pitches in the area. They state that they are commissioning a new Oxfordshire wide Gypsy Traveller Accommodation Assessment to inform a replacement joint development plan for the area and that this will take place in the coming weeks. The joint development plan for the area is expected to be adopted in late 2025.
65. Paragraph 27 of the PPTS states that if a local planning authority cannot demonstrate an up to date 5-year supply of deliverable sites, this should be a significant material planning consideration in any subsequent planning decision when considering applications for the grant of temporary planning permission. I deal with this matter later on in the decision, but there is no doubt that the site makes a positive contribution to the pitch undersupply position and this weighs in favour of allowing the appeals.

*The personal circumstances of the appellant/family*

66. Article 8 of the Human Rights Act 1998 (HRA) states that everyone has a right to respect for private and family life, their home and correspondence. This is a

- qualified right, whereby interference may be justified in the public interest, but the concept of proportionality is crucial.
67. I am also mindful that Article 3(1) of the United Nations Convention on the Rights of the Child provides that the best interests of the child shall be a primary consideration in all actions by public authorities concerning children.
68. Furthermore, in exercising my function on behalf of a public authority, I have had due regard to the Public Sector Equality Duty (PSED) contained in the Equality Act 2010, which sets out the need to eliminate unlawful discrimination, harassment and victimisation and to advance equality of opportunity. The Act recognises that race constitutes a relevant protected characteristic for the purposes of PSED. Romany Gypsies and Irish Travellers are ethnic minorities and thus have the protected characteristic of race.
69. At the hearing, the appellant commented that he, his wife and his two daughters left his father's property in Vale of White Horse District, where they had been living in a caravan on his land. Upon leaving this site, I am told that the family had no other family to reside with or 'double up' with on other existing pitches. I do not doubt that the appellant and his family needed somewhere to live upon deciding to leave the site in the Vale of White Horse District. However, there is no evidence that the appellant attempted to ascertain whether there were any authorised vacant pitches available on an established Gypsy and Traveller site in the district. At the hearing, the appellant indicated that he did not do this as he thought that the waiting lists would be full and felt that those related to existing family members on sites would likely be offered an available pitch before him.
70. The evidence is that the appellant sought to apply for planning permission for a bricks and mortar dwelling on the site prior to the unauthorised appeal development taking place on the site. The evidence demonstrates that the appellant does not have a particular aversion to bricks and mortar housing. On this basis, I find that in this case the appellant could have also explored the possibility of purchasing or renting a bricks and mortar property in the area, either permanently or temporarily, at least until an authorised Gypsy and Traveller pitch became available for his family.
71. The appellant claims that if permanent planning permission is not given for the development, it would mean that the family would have to resort to a roadside existence. Section 60C-E of the Police, Crime, Sentencing and Courts Act, which came into effect 1 July 2022, introduces a criminal offence of residing or intending to reside on land without consent in or with a vehicle. This effectively prevents roadside and/or unauthorised camping and gives the Police powers to seize vehicles and caravans, and to arrest occupiers.
72. In this case, I do not consider that a roadside existence is an inevitable outcome arising from compliance with the requirements of the enforcement notices. Indeed, the appellant has not shown a particular aversion to bricks and mortar housing. While I cannot rule out the potential of a roadside existence, the compliance period in the enforcement notices is significant at 18 months and hence provides ample time to secure either bricks and mortar accommodation and/or a Gypsy and Traveller pitch should one come available in that time.

73. Furthermore, I heard at the hearing that the Council intends to prepare a joint replacement local plan to be adopted at the end of 2025. There is potential for this to include additional Gypsy and Traveller sites. Even at draft stage, and within the 18-month period, this may provide a degree of certainty for those wishing to secure planning permission on such sites, including possibly the appellant, thereby potentially providing an alternative home for the appellant and his family.

*Best interests of the children*

74. The needs of the children must in law be a primary consideration in the determination of these appeals. The appellant has two daughters who attend a local primary. He also has a baby. The appellant states that a settled base is necessary to enable a stable schooling and home environment for his children. I heard from the appellant that one of his daughters was '*top of the class*'. I do not doubt that his children are both settled and happy in their local primary school.

75. Without a settled base, the appellant claims that the education of his two daughters would be uncertain from a roadside existence. Furthermore, I am cognisant of the need for a settled environment in the early months of the life of the baby. However, and given my finding that I do not consider that the evidence indicates a particular aversion to bricks and mortar housing, I am not persuaded that a roadside existence is an inevitable outcome if the appeals were to be dismissed.

76. Notwithstanding the above, I do acknowledge that if the enforcement notices were to be upheld, it would, at least to some extent, disrupt the education and social well-being of the children. However, the best interests of the children also relate to their safety on the site. I have found that the evidence indicates that the appeal site is at risk of flooding and therefore both adults and children would be in danger if the appeals were allowed and planning permission granted either temporarily or permanently. Furthermore, on the evidence available to me there is a risk of flooding occurring off-site and this could have implications for people elsewhere in the locality, including possibly children.

77. While it is important that the children have a settled base for their wellbeing and education, there is no evidence before me as to why the education needs of the children could not continue to be secured from the same school should that be necessary. Indeed, it may be possible for the appellant to secure bricks and mortar accommodation in the locality, either temporarily or permanently, to ensure that the children continue to be taught in the same school and so that the family have continued access to a doctor and health care.

78. While the appellant indicated at the hearing that he no longer had the funds to buy a house in the area, there is no evidence to suggest that it would not be possible to rent a property. Overall, the weight that I afford to the best interests of the children is tempered by the fact the site is at risk from flooding and so is not a safe environment for them.

79. Furthermore, and despite the above, the time for compliance with the requirements of the enforcement notices is 18 months. I find that this strikes a very reasonable balance between the best interests of the children from an educational stability and social well-being point of view and the need for

children and adults to vacate the site to eradicate the very real risks of flooding both on and off the site and the other harms that I have identified.

*Planning balance and conclusion on ground (a) appeals (A & B) and s.78 appeal (C)*

80. I have concluded that the development that is the subject of the appeals does not cause harm to the significance of surrounding listed buildings or to the health of occupiers of the site from a contaminated land point of view. These are matters of neutral consequence in the planning balance.
81. The evidence is that the LPA cannot demonstrate a five-year supply of deliverable sites for Gypsies and Travellers. This is a matter which carries significant weight in favour of allowing the appeals. However, this must be weighed against the harm that has been caused to the character and appearance of the area, including to landscape character, which are matters to which I afford moderate weight in the planning balance. Furthermore, moderate weight is afforded to the fact that intentional unauthorised development has taken place. In addition, I have found that the occupants of the site, including the children, would be at risk of flooding. Furthermore, I cannot conclude on the evidence before me that the development would not give rise to flood risks off-site. Indeed, there is a lack of certainty in terms of whether appropriate mitigation would be possible on site. The risk of flooding is a matter to which I attach very significant weight in decision making terms.
82. For the reasons outlined above, I find that that the best interests of the children, personal circumstances of the appellant/family and a lack of a five-year supply of deliverable sites do not individually or cumulatively carry sufficient weight to outweigh the collective weight that I attribute to the above harms. In reaching this view, I have considered the recent evidence which does not appear to demonstrate that the appellant has an aversion to bricks and mortar housing and that the best interests of the children would not, overall, be best served by permitting temporary or permanent residence on the site given the risk and vulnerability of the use and land to flooding. Given this finding, and despite the need for Gypsy and Traveller pitches in the area, I do not find that it would therefore be appropriate to grant either a temporary or a personal planning permission on the site.
83. I conclude that the ground (a) appeals (appeals A & B) should not succeed and that planning permission should be refused for appeal C. I accept that in upholding the enforcement notices, it would result in the loss of a home for the appellant and his family. In this regard, there would be an infringement of rights under Article 8 of the European Convention on Human Rights as incorporated into the HRA. However, the collective planning harm that I have identified is of such weight that upholding the enforcement notices and refusing planning permission is a proportionate, legitimate and necessary response that would not violate those persons rights under Article 8. I find that the protection of the public interest cannot be achieved by means that are less interfering of their rights.

**Appeals on ground (f)**

84. An appeal on ground (f) makes the claim that the steps required by the notice to be taken exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.

85. The appellant makes the claim that requirements 5 (iii) (Appeal A) and 5 (v) (Appeal B) are not precise. The appellant says that to restore the land to adjoining ground levels cannot be required as the pre-existing level may not lie as the immediately adjoining '*undisturbed lands*'.
86. In the interests of precision, and without injustice being caused to any of the main parties, I shall vary requirement 5 (iii) and 5 (v) in the respective enforcement notices so that they read '*restore the land to its condition before the development took place by grading and levelling the soil and by the sowing of an MG5 grass mix to those areas*'. As the appellant carried out the unauthorised works, they are well placed to know the condition of the land before the development took place. Furthermore, the evidence is that such information is, in any event, available to both the appellant and the Council as a topographical survey, undertaken on 13 December 2018, was submitted to the Council in respect of planning application P19/S0703/FUL. The main parties agreed the above variations at the hearing.
87. For the above reasons, I conclude that the ground (f) appeals succeed.

### **Appeals on ground (g)**

88. An appeal on ground (g) makes the claim that the period specified in the notice in accordance with s173(9) of the Act falls short of what should reasonably be allowed.
89. The period for compliance with the requirements of both notices is 18 months. The appellant claims that in the event that the ground (a) appeals were to be dismissed he and his family would be made homeless and forced to adopt a roadside existence. The appellant therefore requests a compliance period of 24 months. He does not, however, provide any information as to why a roadside existence would not be likely if the compliance period were to be extended from 18 months to 24 months. Furthermore, I have considered the likelihood of a roadside existence in my reasoning elsewhere in this decision.
90. I find that the 18 month compliance period is reasonable in the context of the identified harms caused by the development and, in particular, given the very clear risk of flooding and hence the danger posed to both occupiers of the site and those that are off-site.
91. I find that the compliance periods of 18 months are a fair and justified balance between the need to remedy the breaches of planning control in the legitimate public interest and the interference with the Article 8 rights of the family. Therefore, I conclude that the ground (g) appeals should fail.

### **Conclusions**

#### **Appeal A: APP/Q3115/C/21/3289658**

92. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a variation and refuse to grant planning permission on the deemed application.

**Appeal B: APP/Q3115/C/21/3289659**

93. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a variation and refuse to grant planning permission on the deemed application.

**Appeal C: APP/Q3115/W/21/3279605**

94. For the reasons given above, I conclude that the development does not accord with the development plan for the area taken as a whole and there are no material considerations that indicate the decision should be made other than in accordance with the development plan. Therefore, the appeal should be dismissed.

*D Hartley*

INSPECTOR

## **APPEARANCES**

### FOR THE APPELLANT:

Brian Woods, WS Planning and Architecture

Joe Wenman, Appellant

Tom Quigg, Flume Consulting Engineers Ltd

Timothy Jones (Counsel), No. 5 Chambers

### FOR THE LOCAL PLANNING AUTHORITY:

Robert Cramp, Principal Planning Officer (Enforcement)

Leigh Travers, Flood Risk Engineer

Ryan Hunt, Planning Policy Officer

Ben Du Feu (Barrister), Cornerstone

### OTHER INTERESTED PARTIES:

Neil Landricombe, Partnerships and Strategic Overview Team, Environment Agency

Councillor David Turner, South Oxfordshire District Council

Councillor Ian Glyn, Chairman of Berrick Salome Parish Council

Mr Frank Farquarson, Water Resources Associates LLP

## **DOCUMENTS SUBMITTED AT THE HEARING**

- 1) Technical Note 1: Level for Level Flood Compensation
- 2) Extract from South Oxfordshire Strategic Flood Risk Assessment March 2019
- 3) Written statement from Ian Glyn of Berrick Salome Parish Council