



Appeal Decision

Hearing held on 14 February 2023

Site visits made on 13 & 14 February 2023

by Nick Fagan BSc (Hons), DipTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 March 2023

Appeal Ref: APP/V2255/C/18/3202648

Horseshoe Farm, Elverland Lane, Ospringe, Kent, ME13 0SP

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Alfred Willet against an enforcement notice issued by Swale Borough Council.
 - The enforcement notice was issued on 19 April 2018.
 - The breach of planning control as alleged in the notice is failure to comply with a condition imposed on a planning permission.
 - The development to which the permission relates is: Non-compliance of condition 2 of planning permission 15/505252/FULL granted on 30 September 2015 which required cessation of the residential use of the land as a caravan site and for all caravans, buildings, structures, materials and equipment brought on to the land, or works undertaken to it in connection with that use to be removed, all by 10 August 2017.
 - The requirements of the notice are to:
 - I. Cease the residential use of the Land including the stationing of any mobile homes or caravans in connection with that use.
 - II. Remove from the Land all caravans, mobile homes, structures, materials and equipment brought onto the land, or works undertaken to it in connection with that use.
 - III. Remove from the Land all materials, rubbish and debris caused by compliance with (I) and (II) above.
 - IV. Restore the Land to its condition before the residential use took place.
 - The period for compliance with the requirements is: 12 (twelve) months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) 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.
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Decision

1. It is directed that the enforcement notice is corrected by substituting the relevant section of the Act in paragraph 1 of the notice to read ‘...under Section 171A(1)(b) of the above Act,..’ rather than 171A(1)(a).
2. Subject to this correction the appeal is dismissed, 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.

The Notice

3. The above correction to the notice is necessary because S171A(1)(b) refers to the breach of a condition rather than carrying out development without the required planning permission. It was agreed that this correction would not prejudice either of the main parties, because it did not affect the purpose and requirements of the notice.

Main Issues

4. The following are the main issues in this appeal:

- The personal circumstances of the appellant;
- The accessibility of the site;
- The effect on the character and appearance of the area, having regard to the location of the site within the Kent Downs Area of Outstanding Natural Beauty (AONB) wherein the statutory purpose of an AONB is to conserve and enhance the natural beauty of an area;
- The Council's requirement for Gypsy and Traveller Sites, whether it can demonstrate a 5-year supply of sites, and the availability of alternative sites for the appellant;
- Whether any harm arising from bullet points 2 and 3 above are outweighed by bullet points 1 and 4, taking into account compliance or otherwise with development plan and national policy.

Reasons

5. Ground (a) is that planning permission should be granted for permanent residential use as a caravan site.

Personal Circumstances

6. The appellant is a married (or formerly married) man in his sixties, who lives in a static caravan (mobile home) on the site with his new female partner. He has two sons, three daughters and a total of 29 grandchildren all of whom live in the Borough or locality, although none of them reside on the site. He has occupied the appeal site since 2004.
7. He is a Romani Gypsy, his status being established by the 2012 appeal decision, which granted him a temporary 4-year permission.¹ There was some discussion of the *Lisa Smith*² judgement in relation to this. Mr Willet, who is registered with a GP in nearby Faversham, has some health conditions as described in a 2017 letter I have seen from Kings College Hospital, that have restricted the work that he is capable of doing and his nomadic lifestyle.
8. Although I have not seen any more recent correspondence regarding these health issues, I accept that they are likely to persist and be ongoing, given their nature and his age, and that they do in effect limit any nomadic lifestyle he may have previously chosen. Given the decision in the *Smith* case, that people of nomadic habit who have ceased to travel not just temporarily but also permanently because of their own or family educational or health needs or old age, there is no dispute that Mr Willet remains a gypsy/traveller although he has generally ceased to travel because of his health. Consequently, in this decision I apply government policy as set out in Planning Policy for Traveller Sites (PPTS).
9. I accept that a settled base on the site enables him to access health services easily, both attending his GP and Kings if necessary, and that this would be

¹ APP/V2255/C/11/2167577 dated 10 August 2012

² *Smith v SSHCLG & Ors* [2022] EWCA Civ 1391

more difficult if he did not have a settled base. Mr Willet breeds and grazes horses on the site and on another site nearby, and sells the horses he breeds at horse fairs. I accept that such activity would be helped by him having a permanent established residential base here, for example to be on hand when mares are foaling.

Accessibility of the Site in Relation to Services

10. It is at least 4 miles from the site to the centre of Faversham, with its GP surgeries, shops and facilities. It is 2.8 miles to the nearest primary school at Ospringe, the same to the nearest supermarket, the new Aldi on the southern outskirts of Faversham, and 3 miles to the butcher's in Doddington. Although relatively close, these facilities are only effectively accessible on a day-to-day basis by car, especially since the infrequent bus service running along Faversham Road at the bottom of Elverland Lane is shortly to be discontinued, as highlighted by Cllr Simmonds at the Hearing.
11. This Lane at its northern end is steep, very narrow and enclosed by high hedged banks. The whole of the Lane is too narrow for vehicles to pass each other, is unlit and has no pavement. The public footpath running northwards to Painter's Forstal and then onwards to Ospringe, and westwards to Newnham, runs across fields and is no doubt often muddy in the winter as it was when I walked it, as well as being unlit and is therefore no alternative to the car in accessing local services.
12. There are three other unauthorised traveller sites off the Lane immediately to the west but apart from these, no other houses are accessed from it. The 2018 appeal decisions in respect of these sites³ raised in evidence by the Council concluded that they were all located in an area of 'no' or 'few' services in terms of the Swale Borough Local Plan 2017 (LP) and that, essentially, they failed to comply with the spatial strategy of the LP set out in Policy ST3. Whilst Policy DM10 makes no specific mention of any required distance to services or modes of transport, it does specifically require gypsy and traveller sites to accord with Policy ST3 subject to three exceptions, none of which the development complies with. The 2012 appeal decision found that this site was not well located in terms of fostering social inclusion and was remote from all services and facilities, albeit it found that the appellant's horse keeping and breeding activities reduced the necessity for daily travel.
13. However, the Inspector in 2012 found that such benefits did not outweigh the disbenefits arising from the site's isolated location. I accept that traveller sites are often located in the open countryside and there is no bar in LP Policy DM10 or in national policy in the PPTS from them being located there. I also accept that this traveller pitch/site does not dominate the nearest settled community or place undue pressure on local infrastructure. But I agree with the 2012 Inspector and with the three 2018 appeal decisions that all the sites in Elverland Lane, including the appeal site, are in remote inaccessible locations contrary to LP Policy ST3 and the development plan as a whole. The site is also clearly contrary to the intention of paragraph 25 of the PPTS, which states that local planning authorities should very strictly limit new traveller site development in open countryside away from existing settlements or outside areas allocated in the development plan, albeit it doesn't prevent them per se.

³ Hill Top Farm, Meads Farm & The Retreat

14. I acknowledge NPPF paragraph 105, which states that opportunities to maximise sustainable transport solutions will vary between urban and rural areas and should be taken into account in decision-making. But, having done so, this does not outweigh the inaccessibility of the site by modes other than the private car and its consequent remoteness from services and facilities.

Effect on the Countryside and AONB

15. The site lies in the open countryside within the Kent Downs Area of Outstanding Natural Beauty (AONB). The static home is not readily visible from the site entrance at the sharp bend in Elverland Lane. I also acknowledge that the stable buildings, both the one that can be seen from the entrance and the twin stables immediately south of the static home are lawful buildings, as acknowledged by the 2012 appeal decision.
16. However, as the Inspector stated, there is an inappropriately designed entrance gate and piers, which I consider detracts from this quiet, attractive rural lane, and which is prominent when approaching from the east. LP Policy DM26 states that permission will not be granted for development that significantly harms the character of rural lanes. I consider these poorly designed entrance piers and gates to significantly harm the character of this attractive rural lane.
17. Although the static home is only visible having driven halfway down the access track, it has a prominent view over the Newnham valley to the west. It looks over the unauthorised development at Meads Farm in the valley bottom and can be seen from the static home(s) there. In this tranquil and isolated part of the AONB, notwithstanding its proximity to Faversham, this static caravan, in combination with the unauthorised caravans at Meads Farm, comprises an incongruous marring structure.
18. The Council identified four specific viewpoints from which it alleges harm to the landscape and scenic beauty of the area. The view of the site from Location A, the road bridge over the M2 to west, is now, even in mid-winter, largely shielded by trees close to the motorway. However, the view from Location B, at the high point on the farm track/public footpath off Homestall Lane closer to the site, is prominent: the static home looks particularly alien in the landscape from this location. Although it is further away from Location C, the junction between two public footpaths to the south, it is still an obviously alien residential feature in the landscape. It is also quite noticeable when travelling along the M2, in both directions but particularly on the London-bound carriageway. Its prominence arises because it sits on high ground and looks over the valley.
19. From all these locations the static home inhabited by the appellant fails to conserve or enhance the landscape and scenic beauty of the AONB landscape, contrary to Part A of LP Policy DM24 and NPPF paragraph 176, irrespective that it cannot be seen from Elverland Lane itself due to the slope of the topography and non-native species tree screening, which itself is an alien and incongruous feature in the landscape. Great weight should be given to such conservation and enhancement in nationally designated landscapes including AONBs, which have the highest status of protection in relation to landscape and scenic beauty. I note the AONB Team's objection to the deemed application on precisely these grounds and also note that the development fails to comply

with the AONB's 2021-2026 Management Plan, specifically Policies SD1, SD2, SD3, SD8 AND LLC1, which is a requirement of LP Policy DM24 Part A.

20. The appellant argues that there is a contradiction between LP Policies DM10 (Gypsy and Traveller Sites) and DM24 (Conserving and enhancing valued landscapes) in that DM10 Criterion 7 only requires that gypsy and traveller development causes 'no significant harm' to the AONB, whereas DM24 requires conservation and enhancement of its special qualities and distinctive character. I acknowledge the argument but consider the difference between these policies to be deliberate, hence there is no contradiction. Put simply, both policies apply: criterion 7 of DM10 must be met, but so also must DM24 Part A in order to comply with the development plan as a whole. For the above reasons, the development fails to do so.

The Requirement for Gypsy and Traveller Sites, the 5-Year Supply and the Availability of Alternative Sites for the Appellant

21. Paragraphs 9 and 10 of the PPTS require local planning authorities to set pitch targets for gypsies and travellers as defined in Annex 1, and to identify and update annually a supply of specific deliverable sites sufficient to provide 5-years' worth of sites against their locally set targets.
22. The Council's latest Gypsy and Traveller Accommodation Assessment (GTAA) was published in November 2018, based on fieldwork carried out in January-March 2018. It is intending to update this in the next few months for the Regulation 19 LP Review draft by the end of the year. Table 8.1 of the GTAA identifies a residual pitch requirement of 68 pitches based on cultural need (i.e., based on those identifying themselves as cultural gypsies and travellers), of which 51 met the definition in Annex 1 of the PPTS for the whole of the period from 2017/17 to 2037/38.
23. However, I agree with the appellant, for the reasons set out in his submitted Supplementary Statement on the Implications of the *Lisa Smith* Judgement, that a GTAA that relies on the now acknowledged discriminatory definition of a gypsy and traveller is likely, at least some extent, to underestimate the real scale of the need, given the Council's GTAA was prepared since the 2015 PPTS but before the very recent *Smith* judgement.
24. Table 3 of the Council's Supplementary Appeal Statement dated 10 February 2023 (SAS), which I saw for the first time at the Hearing, includes the PPTS definition figure of 51 as the residual pitch requirement up to 2037/38. Considering the completion of 33 pitches up to August 2022 (as detailed in SAS Table 1) leaves a residual requirement of 18 pitches or 5.6 pitches as a 5-year requirement (1.1 pitches per year). However, the supply of deliverable sites (i.e., those not implemented and occupied) is only 2 (two), which only provides 1.8 years of supply.
25. In reality the residual pitch requirement is likely to be higher because of the *Smith* judgement, as conceded by the Council at the Hearing. It is likely to lie between 51 and 68 pitches, and so there would be less than a year's supply. Either way, the Council cannot demonstrate a 5-year supply, as it acknowledges.
26. However, its position is that the LP Examining Inspector in 2017 accepted that it did not need to allocate potential sites in a development plan document

because its positive approach to windfall sites as expressed in Policy DM10 would enable a suitable and continuous delivery of sites. It claims that its record of approving such sites in the first five years of the GTAA, as set out in SAS Table 1 (which lists the 35 pitches granted, of which 33 have been implemented) backs that up, and that it does not regard the need figure to be a ceiling.

27. SAS Tables 4 and 5 set out respectively that either 68% or 47% of the PPTS defined need for pitches for the entire 20-year (LP and its Review) period have been granted in just the last 5 years (2018-2023), the first 5 years of the GTAA. The latter figure excludes the 11 new pitches granted in May 2018 at the site at Brotherhood Woodyard, which the appellant maintains is unavailable and is not really a gypsy and traveller site since it is predominantly occupied by single Romanian (not Roma Gypsy) men who do not and never will lead a nomadic lifestyle. Even excluding that site, 47% of the (admittedly) falsely low figure of 51 required pitches were delivered in just 5 years; if the figure was 68 pitches, it would be 35%, which is still a substantial amount.
28. The appellant argues that the need is always frontloaded and was obviously required urgently from 2018, and that fulfilment of such need in the first five years will inevitably generate an increased need in the future. I understand this, but that is why the Council are in the process of updating the GTAA now, though how they choose to address that need as part of the LP Review is unknown and therefore unclear.
29. I acknowledge the delivery of a substantial amount of new pitches with planning permission in the last five years, the ongoing review of the GTAA, and the 2017 LP Examiner's stance and reliance on windfall development. But there is no 5-year supply of pitches and there is evidence of unmet need for gypsy and traveller accommodation on the ground.
30. I am aware that there is no requirement in planning policy, or indeed within any case law, for an applicant to demonstrate that there are no other sites available, or that particular needs could be met from another site. But the appellant would have been aware from the temporary nature of the 2012 permission granted on appeal that a permanent permission on this site in the AONB was unlikely ever to be granted.
31. Nonetheless, the Council was unable to positively identify any alternative sites where he might go. The 2 unimplemented pitches at Keycol Farm are likely to be for the applicant of that permission and Mr Willet claims he would not be able or willing to occupy any of the pitches at Brotherhood Woodyard because he would not be permitted to bring his static caravan onto that site and would not feel welcome or at ease there because of its occupation by Romanian single men, even if any pitches were to become available. Consequently, I conclude that there are unlikely to be any currently suitable, available, alternative sites for him to move to.

Planning Balance taking into account the Planning History of the site

32. Article 8 of the European Convention of Human Rights (as incorporated by the Human Rights Act 1998) provides the right to respect for private and family life. It is clear that a refusal of planning permission would interfere with the Article 8 rights of the appellant. Indeed, the Courts have held that Article 8 imposes a positive duty to facilitate the Gypsy way of life, as defined by race

and ethnicity rather than planning policy. Any interference in this regard must be balanced against the public interest in upholding planning policy to protect the environment generally.

33. I have found conflict with development plan policies. In particular, the location of the appeal site does not accord with LP Policy ST3 or the criteria in Policy DM10 in that it does not contribute towards establishing a sustainable pattern of development as envisaged by the LP. The development fails to conserve and enhance the special qualities and distinctive character of the AONB, and as such it is contrary to Policy DM24 and NPPF paragraph 176. This harm to the Kent Downs AONB attracts great weight. The unsightly piers, gate and entrance to the site seen from Elverland Lane fails to comply with Policy DM25.
34. Turning to the factors that could outweigh this harm and conflict with local and national policy, the Council has no 5-year supply of sites, there is evidence of unmet need for gypsy and traveller pitches, and it is unclear whether the LP Review will allocate sites to address this need. There is unlikely to be any current alternative site for the appellant to go to now, if his appeal is dismissed. That could result in a roadside existence for him, in spite of the Council saying this would be unlikely to occur. That would make his access to healthcare including for his specific health conditions much more difficult and may put obstacles in his way to earning a living from horse breeding.
35. However, this should be considered in regard to the planning history of the site, which is set out in the Council's 2017 delegated report regarding application 17/503687/FULL. This application was refused in September 2017 essentially for the same reasons for issuing the current notice.
36. It was clear from the 2012 appeal decision (paragraph 34) that a permanent permission was not warranted because of the site's unsustainable rural location remote and inaccessible from services and its failure to conserve or enhance the natural beauty of the AONB. That remains the case now. The appellant has had plenty of time to look for an alternative site, knowing his permission to only ever likely to be temporary, but as far as I am aware he has not done so.
37. In considering the planning balance in this case I am conscious that the Council's planning permissions for new pitches are all outside the AONB and, more importantly, there are (or were in 2020 when its appeal statement was written) only six temporary or unauthorised sites in the Swale part of the AONB, four of which are at Elverland Lane.
38. All of the sites at Elverland Lane are now unauthorised. I was informed by the Council officer at the Hearing that there are current applications pertaining to The Retreat and Meads Farm. Nonetheless, the 2018 appeal decisions in respect of these sites and Hill Top Farm concluded that permanent permission was unacceptable due to their unsustainable location and harm to the AONB; the appeals at The Retreat and Hill Top Farm were dismissed and Meads Farm was only granted a temporary 4-year permission, which is now expired.
39. The Council cite intentional unauthorised development contrary to the Written Ministerial Statement (WMS) of 17 December 2015, arising from the appellant's unauthorised occupation of the site originally – in 2004. I have given this alleged intentional unauthorised development very little weight because, first, even if it occurred as the Council allege, it was way before the WMS was introduced; and, secondly, the appellant has attempted on several occasions

including via this appeal to secure permanent planning permission by paying the necessary statutory fees.

40. Also relevant to the consideration of the planning balance is paragraph 27 of the PPTS, which states: 'If a local planning authority cannot demonstrate an up-to-date 5-year supply of deliverable sites, this should be a significant material consideration in any subsequent planning decision when considering applications for the grant of temporary planning permission.' But there is also no presumption that a temporary grant of permission should be granted permanently. The PPTS also excepts specifically designated land including National Parks and AONBs from this presumption that failure to demonstrate a 5-year supply of sites should be a material consideration. But I agree with the appellant that the lack of a 5-year supply of sites still weighs in favour of the development.
41. Taking all these factors into account, I conclude that in the overall planning balance the appellant's personal circumstances, the lack of any available alternative sites for him to live, the need for sites in the District and the lack of a 5-year supply of gypsy and traveller pitches do not clearly outweigh the harm to the AONB, which attracts great weight, and the unsustainable location of the site. The development is therefore in conflict with development plan policies as well as with the NPPF.
42. The principal matter to bear in mind is the balance between the harm to the public interest and the degree of interference with the Article 8 rights of an individual arising from the dismissal of an appeal and whether the decision as a whole is necessary and proportionate in the circumstances. Interference with a person's right to respect for private and family life and the home may be justified in the public interest. The interference would be in accordance with the law provided that planning policy and relevant statutory duties are appropriately and lawfully applied.
43. The interference here would also be in pursuit of a legitimate aim. This is the economic well-being of the country which encompasses the protection of the environment through the regulation of land use. The means that would impair individual rights must be no more than necessary to accomplish that objective. I find that the legitimate aim of protecting the environment in the public interest attracts great weight and the location of the site is not in a sustainable location. Interference with the Convention Rights is therefore necessary and proportionate.
44. However, there is still a need to consider whether an additional temporary planning permission should be granted because of the appellant's personal circumstances, in particular because of his age and health needs, and taking into account that he has lived on the site for 19 years. But, as set out above, there have already been three previous temporary permissions when it was made clear that a permanent permission was not likely to be granted because of harm to the AONB and the site's unsustainable location.
45. It was not therefore unreasonable to have expected the appellant to search for and find an alternative site in the years since 2012. Additionally, the compliance period attached to the requirements of the notice is 12 months, which gives Mr Willett another year to look for such an alternative site. Furthermore, the PPG advises that it will rarely be justifiable to grant a second temporary planning permission; further permissions should normally be

granted permanently or refused if there is clear justification to do so, as there is in this case.

Conclusion

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

Nick Fagan

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

- Phillip Brown, Agent
- Alfred Willet, Appellant

FOR THE LOCAL PLANNING AUTHORITY:

- Paul Gregory, Area Planning Officer
- Aaron Wilkinson, Senior Planning Officer
- Paul Casey, Team leader, Planning Enforcement

INTERESTED PARTIES:

- Cllr David Simmonds, Ward Member

DOCUMENTS SUBMITTED AT THE HEARING

1. AONB Management Plan 2021-2026
2. The Council's Supplementary Appeal Statement regarding current gypsy and traveller pitch supply dated 10 February 2023

DOCUMENTS SUBMITTED AFTER THE HEARING

1. Appellant's Supplementary Statement – Implications of the Lisa Smith Judgement
2. Revised list of the Council's suggested Conditions