Claim No. CO/870/2018

IN THE HIGH COURT OF JUSTICE
PLANNING COURT

IN AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
ON THE APPLICATION OF MARDEN PARISH COUNCIL

Claimant

-v-

HEREFORDSHIRE COUNCIL

Defendant

MR HARRY SMITH

Interested Party

STATEMENT OF FACTS AND GROUNDS

Preliminary

Reading time: 4 hours

Time estimate if permission granted: 1 day

Essential Reading:

1) These Statement of Facts and Grounds dated [27th February 2018]
2) Committee Report dated 6 December 2017; particularly paragraphs 6.1-6.49 [tab. 9]
3) Committee Report dated 17 January 2018; particularly paragraphs 6.1-6.50 [tab. 4]
4) Letter before action by the Claimant and Response from Defendant [tabs. 29 and 30]
5) Witness Statement of Alison Sutton, Clerk to Claimant, dated [26th February 2018] [tab. 10]
6) Committee Update Sheet [tab. 20]

INTRODUCTION

1. This is a judicial review of Herefordshire Council's ("**the Council's**") grant of planning permission for "*proposed two additional mobile homes, two touring caravans and the construction of a day room, associated hard standing drainage and re-aligned access track"*. Reference Number: 172552 ("**The Permission**")

2. The challenged decision was taken on 17 January 2017, with the vote being five votes for the proposals and five votes against. There were three abstentions – the application was approved by the casting vote of the chairman.

3. This matter relates to an original planning permission granted in 2005 ("**the original permission**"). The permission was in relation to a change of use from agricultural to a one family gypsy caravan site. The permission was retrospective and subject to conditions which made it a personal permission,

   "This permission shall enure for the benefit of Mr Roland Jones and Mrs Dorothy Jones ***only and not for the benefit of the land*** *or any other persons interested in the land."* [emphasis added]

4. The original permission explained the need for this condition to make what would otherwise be an unacceptable development, acceptable in personal terms,

   "*The nature of the development is such that* ***it is only considered acceptable in this location*** *having regard to the applicant's special circumstances."* [emphasis added]

5. A new personal permission was granted on the site by approval a variation of condition application to transfer the benefit of the permission to Mr Harry Smith and Mrs Shirley Smith. The 2006 permission contained the same conditions, simply substituting the names of Mr and Mrs Smith and the reason given for the condition was again that "***it is only considered acceptable in this location*** *having regard to the applicant's special circumstances."*

6. The proposals granted permission with the permission under challenge are to add two *additional* mobile homes, two touring caravans and the construction of a day room,

associated hard standing drainage and re-aligned access track. One of the additional static caravans proposed is to enable the applicant's elderly mothe-in-law to occupy the site and to create additional space for the applicant's teenage children. The second static caravan and touring caravan are proposed for the adult son of the applicant (Hamby Smith) and his family. This is significant further development of the site.

7. The Planning Policy for Traveller Sites (**"PPTS**") of 2015 applies to these proposals, which the Council accepts it needed to take into account.

8. The planning committee's resolution to grant planning permission was in accordance with the Officer's Report ("**OR**") and, in the absence of any contrary indication, it should therefore be presumed that the committee adopted the reasoning set out in the OR which supported the Officer's recommendation.

9. The principal dispute surrounding the interpretation of the PPTS, as set out below, has not been tested in the courts.

10. The Claimant challenges the decision on four grounds;

    a) Members were materially misled as to the correct interpretation of the PPTS;

    b) The misconstruing of the 2005 original planning permission and the 2006 variation as to whether these created a lawful use for a one family gypsy site;

    c) Members were misinformed and/or there was a failure to properly consider the implications of the inaccurate plans submitted by the Interested Parties;

    d) There was failure to properly investigate and ascertain the Interested Party traveller status for the purpose of the PPTS 2015.

11. Had the Council not erred in law in the above respects, there is every likelihood that the decision would have been different. The Claim is made within the 6 weeks of the date of the decision. A pre-action protocol letter was sent by the Claimant on 14 February 2018 and a response received 21 February 2018 [tabs. 29 and 30].

12. These issues and the questions raised around them, as recorded in the witness statement from Alison Sutton on behalf of the Parish Council, show that the legal and planning implications were never properly explained to the Committee.

BRIEF FACTUAL OVERVIEW

The 2005 original planning permission[1]

13. The relevant passages, for present purposes, contained within the original 2005 planning permission are above. This original permission was a retrospective one and was for the use of the land for the benefit of one named gypsy family, permission to have 2 caravans and stable stock. Various conditions were attached to this permission, including to deal with visual amenity, drainage and highway safety. In the 2005 Officer appraisal, the following passages are critical to understanding the Council's reasoning behind granting the original planning permission,

"6.6 Therefore key issues for consideration are the acceptability of the location of the application site in terms of sustainability and the associated visual impact of the residential caravan and associated structures on the character and appearance of the locality."

14. The Council satisfied itself of the status of the applicants and their family,

"6.7 While outside the settlement boundary, the site is located within reasonable proximity to Bodenham, which provides access to local services including a shop, public transport and a school which is attended by the applicant's younger daughter. Approximately 3 kilometres to the south Marden offers a similar range of services. The applicant's three elder children attending Minster School in Leominster, travelling via the school bus service which serves Bodenham and its surrounding area."

[1] Tab. 5

15. The limited nature of the permission for this site and how the Council would seek to control and limit its impact is also carefully stated,

"*6.8 The application seeks consent for the stationing of one static and one mobile caravan and is therefore considered to be of a limited scale in terms of its effect upon the character and visual amenity of the area, the impact of which can be further reduced by conditions requiring the provision of a comprehensive landscaping scheme."*

16. At this moment, there is little doubt that, the spirit and the purpose of the permission is granted in exceptional circumstances, for the benefit of Mr and Mrs Jones *only* and not for the benefit of the land *or* any other persons interested in the land.[2]

The 2006 variation application[3]

17. In February 2006, there was an application to vary the original planning permission. The permission varied the benefit for whom it now belonged, namely from Mr and Mrs Jones, to Mr and Mrs Smith, the current occupiers. It was repeated that the nature of this permission was that it was granted in exceptional circumstances. The permission makes clear that it relates to the siting of one mobile home and one touring caravan only.[4]

18. The variation application did not seek to amend anything on the ground, namely add to the nature of the development on Site. The specific nature of the personal permission is also reinforced. At paragraph 3 of the permission it is stated that the stables '*shall be used to accommodate the applicant's own horses* ***only****'* [emphasis added]

19. In applying for permission, the applicants had requested on the application form that the permission be granted for either the benefit of Mr and Mrs Smith "*or for another traveller family*." The Council did not accept this proposal and made the permission personal to Mr and Mrs Smith.

20. All the previous conditions in relation to the rest of the Site and to safeguarding amenities of the area and the interests of the highway were similarly repeated. The only issue at

[2] *See* paragraph 2 of the 2005 permission; see also paragraph 6.9 of the Officer Appraisal.
[3] Tab. 6
[4] *See* paragraph 2 of the 2006 permission

large was that the Smiths met the definition of gypsy/traveller community. Similar to the 2005 planning permission, the Officer Appraisal to the 2006 permission is also important to understand the context.[5]

"Consequently, having consideration for the supporting information, it is considered that Mr and Mrs Smith satisfactorily meet the exceptional criterion, which is required to occupy the property in accordance with the spirit of the original planning permission, and as such approval of the variation of condition 2 is recommended.

To avoid any doubt as to the exact nature of the approved development, it is considered expedient to re-impose all the conditions, *whilst simultaneously amending the relevant condition to permit the occupation of the site by Mr and Mrs Smith."*

21. Three broad matters to note here. First, the personal nature specific to a particular family remains critical, and that here the scale of the development was not changing. Second, the Council needed to satisfy itself that Mr and Mrs Smith met the relevant criterion, without which refusal would surely have followed. Third, the re-imposing of the previous conditions can only be read to mean that keeping this development to a limited scale was a materially significant consideration.

The Committee Report dated 6 December 2017[6]

22. The Council issued a report to the Planning and Regulatory Committee dated 6 December 2017. This report was subsequently superseded by another one on which the challenge of permission before the court is based. The following passages from the previous report are worth noting, giving insight into the Officer's thinking which led to the recommendation to approve permission.

23. At paragraph 6.1 of the report, the Council had argued that a lawful use of the site as a gypsy site had been established through a failure to comply with conditions on the 2006 permission (although these were not conditions precedent):

[5] Tab. 8
[6] Tab. 9

"The 2006 permission imposed conditions requiring certain details to be submitted and approved within 2 months of the date of the permission, including amongst other things the resiting of the caravans to the eastern side of the site. No details were submitted and the caravans were not relocated. Permission was granted on 6th April 2006, so the breach of the planning permission commenced after 6th June 2006, namely two months after the permission was granted. No enforcement action was commenced before 10 years had elapsed. As a consequence, by virtue of section 171B(3) of the Town and Country Planning Act 1990 (as amended), the use of the land as it has been operating as a one family gypsy site is now lawful, as 10 years has elapsed since the breach."

24. Following representations on behalf of a local community group, The Vauld Community Group, this line of argument was not pursued in the January committee report.

25. At paragraphs 6.3-6.19 of this report the Council sets out the relevant policies in relation to gypsy traveller sites, including the question of definition. At 6.20, it is said,

"6.20 ***Firstly, this is an application for additional caravans and not a new gypsy site.*** *In terms of assessment the key issues are whether the proposed occupiers of the caravans meet the definition of gypsies, highway impact, landscape and ecological impacts, affect on amenity and drainage."* [emphasis added]

26. Later, appraising the application of the PPTS, the Officer states, at 6.21,

"*…It should be noted that the permission granted in 2006 for the applicant did not impose a condition restricting occupation to gypsies or travellers, but rather only limited it to the applicant and his wife as a personal permission.* ***Nevertheless, the use is lawful by way of the passage of time****, during which the applicant and his family…"*

27. At paragraph 6.46 of this report, the Council states the following,

*"****The site is considered to be acceptable to accommodate two additional static caravans and two touring caravans for gypsies and the occupation should be restricted to the definition for gypsies and travellers set out in Appendix 1 to the PPTS.*** *There is no requirement to limit both of the static caravans' occupation solely to the applicant or*

Hamby Smith, by way of a personal permission, because in light of the shortfall in deliverable sites these personal circumstances have not been a determining factor." [emphasis added]

The Committee Report dated 17 January 2018[7]

28. The Council Officer re-wrote fundamental parts of the committee report, abandoning the argument relied on in the December report that the breach of conditions had created a lawful use of the site as a gypsy site through the passage of time. The OR now took the view that the 2005 and 2006 permission in themselves had created a lawful use of the site as a one family gypsy site.

29. The Council's understanding of the temporary nature of the 2005 and 2006 planning permissions is telling. At 6.1 of the Officer's Appraisal,

"…Although the proposal description was for the change of use from agricultural land to a one family gypsy site neither the original planning permission […] nor the subsequent amendment […] imposed a condition that restricted the site or caravans' occupation to gypsies or travellers. The restriction imposed on occupancy of the site related to the permissions being for the applicants only, with the reason for this being their 'special circumstances."

30. Later the Council goes on to explain its reasoning, at 6.2,

"*In the case of the application site, permission was granted for the change of use from agricultural land to a one family gypsy site and the proposal also falls within this use.* ***On this basis it is reasonable to conclude that the use of the site is for a one family gypsy site for the area of land outlined in red on the original application,*** *which is the same extent of land subject to this application.* ***The extant permission is subject to a restriction that the change of use is for the applicant's benefit and limits the number of caravans to two (one static and one touring caravan).***"* [emphasis added]

[7] Tab. 4

31. The Council states the sizeable increase of the site with the proposals.[8] Seemingly mindful of the additional caravans and construction of a day room sought on the site, the Council had the following to say on the implications of the application,

"*6.21…The planning permissions in 2005 and 2006 granted a change of use of land to a one family gypsy site, as per their proposal descriptions. The absence of conditions limiting the occupation of the site to those that meet the definition of a gypsy (or traveller)* ***only affects the way the permissions are exercised and not the extent of the use that has been granted.*** *This application does not seek a change of use, but rather* ***permission is sought for additional caravans, a dayroom and modifications to the access along with associated*** *hard and soft landscaping, which together* ***amount to development requiring planning permission.*** *In terms of assessment the key issues are whether the proposed occupiers of the caravans meet the definition of gypsies, highway impact, landscape and ecological impacts, affect on amenity and drainage."* [emphasis added]

32. The way in which the Council understood the personal permission is also telling. At paragraph 6.22 of the report, the following is stated,

"The applicant and his wife's compliance with the revised definition of a gypsy or traveller in the PPTS have been questioned in the objections. ***It should be noted that the permission granted in 2006 for the applicant did not impose a condition restricting occupation to gypsies or travellers, but rather only limited to the applicant and his wife as a personal permission.*** *This restriction was however imposed due to their 'special circumstances', which as set out previously was derived from their gypsy status."* [emphasis added]

33. This passage suggests that the Council's understanding is that there is no connection between the gypsy status of the Applicant, which gave rise to particularly exceptional circumstances, and the reason why a personal permission was necessary. In the same paragraph it is noted that Mrs Smith appears to have stopped her travels to care for dependent relatives, but that this for the moment temporary.

[8] 6.3 of the Committee Report dated 17 January 2018

34. On the status of Mr Smith's mother in law, the Council reasons in the alternative. Considered against the new requirements, either Mr Smith's mother-in-law has ceased to travel due to health reasons and old age, or she is considered to be a dependent relative.[9]

35. It is accepted that in landscape terms there is a 'modest degree of harm'.[10]

36. As part of the Council's conclusions, the following is stated at 6.47 of the Report,

"The site is considered to be acceptable to accommodate two additional static caravans and two touring caravans for gypsies and the occupation should be restricted to the definition for gypsies and travellers set out in Appendix 1 to the PPTS. There is no requirement to limit both of the static caravans' occupation solely to the applicant or Hamby Smith, by way of a personal permission, ***because in light of the shortfall in deliverable sites these personal circumstances have not been a determining factor****…."* [emphasis added]

37. Later, the Council states that it does not consider that the Applicant's mother-in-law falls within the definition of gypsy traveller for planning purposes, but it considers her nonetheless a dependant relative in order to meet that requirement.[11]

LEGAL AND POLICY CONTEXT

38. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise: section 38(6) Planning and Compulsory Purchase Act 2004.

39. It is for the courts to decide whether a matter is a relevant consideration; but it is for the decision-maker to attribute to the relevant considerations such weight as he thinks fit. The courts will not interfere unless the decision-maker acts unreasonably in the

[9] 6.23 of the Committee Report dated 17 January 2018
[10] 6.39 of the Committee Report dated 17 January 2018
[11] 6.50 of the Committee Report dated 17 January 2018

Wednesbury sense (*Tesco Stores Ltd v Secretary of State for the Environment and others [1995] 1 WLR 759*

40. Lord Millett in *Begum v Tower Hamlets London Borough Council [2003] 2 AC 430* at [99] had the following to say:

"A decision may be quashed if it is based on a finding of fact or inference from the facts which is perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant factors. It is not necessary to identify a specific error of law; ***if the decision cannot be supported the court will infer that the decision-making authority misunderstood or overlooked relevant evidence or misdirected itself in law.*** *The court cannot substitute its own findings of fact for those of the decision-making authority if there was evidence to support them; and questions as to the weight to be given to a particular piece of evidence and the credibility of witnesses are for the decision-making authority and not the court. But these are the only significant limitations on the court's jurisdiction, and they are not very different from the limitations which practical considerations impose on an appellate court with full jurisdiction to entertain appeals on fact or law but which deals with them on the papers only and without hearing oral evidence."* [Emphasis added]

41. In *Hopkins Homes v Secretary of State for Communities and Local Government [2017] UKSC 37*, Lord Carnwath said, at [26]:

"Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the Tesco case. In that exercise the specialist judges of the Planning Court have an important role. However, the judges are entitled to look to applicants, seeking to rely on matters of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy; and not to elide the two."

Committee Reports

42. The Courts have settled the question of how committee reports ought to be read. They should not be construed as enactments but should be read as a whole and in a common-sense manner bearing in mind the fact that they are addressed to an informed readership, namely planning committees.[12] Nor should the courts impose "*too demanding a standard on such reports, for otherwise their whole purpose will be defeated; the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved.*"[13]

43. As to how comprehensive a committee report ought to be when addressing matters the following should be noted,

"*It is important that the* ***principal issues and key information are put to them,*** [Committee Members], *but it is not necessary, or indeed desirable that the report should be exhaustive. Plainly there will always be room for dispute as to whether the report should in certain respects have been fuller, or whether certain guidance should have been expressly referred to, particularly in a development which is as large and significant as this one, but it is not for the court to second guess the officers…"*[14] [Emphasis added]

44. The duty of an Officer is much broader than the duty not to actively mislead. The duty of an Officer is a positive duty to provide sufficient information and guidance to enable their Members to reach a decision applying the relevant statutory criteria. But in the end the decision is a matter of fact and degree for the Members.[15] Accordingly, applications for judicial review based on criticisms of an Officer's Report will "*not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which are thereafter left uncorrected at the meeting of the planning committee before the relevant decision is taken*".[16]

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[12] (Siraj) v. Kirklees MDC [2010] EWCA Civ 1286 per Sullivan LJ at paragraph 19
[13] Per Baroness Hale at paragraph 36 in R (Morge) v. Hampshire CC [2011] 1 WLR 268
[14] BT Plc v Gloucester County Council 2001 EWHC (Admin) 1001 per Elias J at paragraph 117
[15] *See* comments by Pill LJ at paragraph 98 in R (Lowther) v Durham County Council 2001 EWCA Civ 781
[16] R (Oxton Farms) v Selby DC (1997, transcript) per Judge LJ

45. The National Planning Policy Framework ("**the Framework**") is a material consideration which provides guidance for local authorities when determining planning applications. It reiterates that the purpose of the planning system is to contribute to the achievement of sustainable development. In order to deliver on this, there is a presumption in favour of sustainable development, which is considered the "*golden thread running through both plan-making and decision-taking"*.

Planning Policy for Traveller Sites

46. For present purposes, the Planning Policy for Traveller Sites ("**PPTS**"), published in August 2015, provides guidance and policy approach for traveller sites. Policy A of the PPTS requires that planning authorities should "*use a robust evidence base to establish accommodation needs to inform the preparation of local plans and make planning decisions"*.

47. Policy C: Sites in rural areas and the countryside, paragraph 14 provides,

"14. When assessing the suitability of sites in rural or semi-rural settings, local planning authorities should ensure that the scale of such sites does not dominate the nearest settled community."

48. Relevant to this application, when determining planning applications for traveller sites, Policy H of the PPTS states at paragraph 25,

"*Local planning authorities should very strictly limit new traveller site development in open countryside that is away from existing settlements or outside areas allocated in the development plan. Local planning authorities should ensure that sites in rural areas respect the scale of, and do not dominate, the nearest settled community, and avoid placing undue pressure on the local infrastructure."*

49. Paragraph 26 goes on to add,

"*When considering applications, local planning authorities should attach weight to the following matters:*

a) Effective use of previously developed (brownfield), untidy or derelict land,

b) Sites being well planned or soft landscaped in such a way as to positively enhance the environment and increase its openness,

c) Promoting opportunities for healthy lifestyles, such as ensuring adequate landscaping and play areas for children,

d) Not enclosing a site with so much hard landscaping, high walls or fences that the impression may be given that the site and its occupants are deliberately isolated from the rest of the community."

50. Annex 1: Glossary section of the PPTS provides the following as to the meaning of 'gypsies and travellers':

"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, but excluding members of an organised group of travelling showpeople or circus people travelling together as such."

51. How local authorities should interpret this policy is provided for,

"2. In determining whether persons are "gypsies and travellers" for the purposes of this planning policy, consideration should be given to the following issues amongst other relevant matters:

(a) whether they previously led a nomadic habit of life
(b) the reasons for ceasing their nomadic habit of life
(c) whether there is an intention of living a nomadic habit of life in the future, and if so, how soon and in what circumstances.

CLAIMANT'S GROUNDS

*GROUND 1 – Members misled by the misinterpretation of the Planning Policy for Traveller Sites ("**PPTS**")*

52. The interpretation of this particular provision relating to the PPTS is yet to be tested.

53. The passages cited above are significantly misleading statements put to the committee, wrongly interpreting the PPTS, leading to a recommendation to approve. At the heart of the mistake made by the Council is the fact that they treated this Site as one with a 'lawful private gypsy site use established', which has led to the wrong assessment being taken to specific issues and to the proposals as a whole. This analysis has underpinned much of the Council's reasoning to overcome a number of clear objections. The following submissions are made.

54. First, the Committee Report gives the impression that the principle of development has been established on this site by virtue of the 2005 planning permission. Personal permissions, specifically restricted for the benefit of an individual, cannot go on to establish the principle of development as the Committee Report seeks to suggest to Members. To that end, the proper engagement required with paragraph 25 of the PPTS was never undertaken. Instead, there was failure to ensure that Members were clear that the circumstances remained, throughout, that this permission was previously granted for specific reasons where it would have otherwise been refused. The Council's protocol response has similarly missed the point on this. By viewing this site as one which is effectively an established lawful gypsy site, not one which enjoys the benefit of a personal and therefore limited permission, the following are examples of how the Council has used this assumption to overcome policy constraints.

55. At 6.9 of the report: "*permission is sought for additional caravans on a lawful gypsy site.'* At 6.13 the constraints imposed by policy RA3, on the countryside. At 6.33, to address landscape impacts. At 6.34, to address the use of BMV land. At 6.40, to address the impacts on amenity. At 6.44, to address the impact on drainage. At 6.45, to address the conflict with the PPTS. These are all examples of when the Council's mistaken understanding of the personal permission contaminated its reasoning.

56. Further to this, the protocol response compounds this error by suggesting that this site sits on land which is previously developed land, for the purpose of the NPPF. It is not, this is a caravan site being a use of the land and not operational development. To that end, it is important to note the permission under challenge would provide for operational development, including the construction of a day room.

57. Second, the consequence of this failure has resulted in officers not properly informing Members of the need to limit the impact of this proposal on the open countryside. This is because the Council's Officer understood the policy to *only* apply to '*new traveller sites'* when in fact that is the incorrect reading of the policy, which applies to '*new traveller site development'*. One of the consequences of this is not only to have granted permission to something substantially larger than what was already on site, the net effect is that it has no relationship with the spirit or purpose of the original planning permission granted in 2005, and as varied in 2006.

58. Third, the overall implication of this misinterpretation is quite serious. The proposals are to add *two additional mobile homes, two touring caravans and the construction of a day room, associated hard standing drainage and re-aligned access track.'* This cannot be said to be a *de minimis* change or addition to what, for all intents and purposes, is akin to a temporary planning permission granted in special circumstances. It is submitted that this is clearly a significant further encroachment on open countryside, something which the policy explicitly states should be *very strictly limited.* The PPTS clearly bites and Members were not informed of this crucial element that ought to have been part of their assessment.

59. What the Officer Report ought to have done is to turn the minds of the Members to how much increase there would be on the site, what impact this is likely to have on the countryside (judged against the PPTS) and whether this is in line with the original permission and its core purpose. Instead, it is simply accepted that this is a site with a use that is established, with the Council's focus then turned elsewhere.

60. These questions were on the mind of Members. They were troubled by the reasoning contained in the Officer Report and had many questions needing answers. For further

information, consider the witness statement of Alison Sutton on behalf of the Claimant for further details.

61. The Committee Report's assessment was therefore fundamentally flawed, and the judgement formed leading to the decision taken was significantly affected. Further, this was not simply about the limitation of the personal nature of the permission, but also about making something which would otherwise have been unacceptable, acceptable.

62. It is therefore highly likely that had Members been given more information about this context, the proper interpretation of the PPTS, they may not have approved this application. This ground is untested and at the very least arguable. The Court is respectfully invited to give permission.

GROUND 2 – Members were misled by the misconstruing of the 2005 original planning permission, and the 2006 variation application, as having created a lawful use for one family gypsy site.

63. Further to Ground 1 above, the impression given to Members by the Committee Report is that the previous permission (2005) and variation (2006) established the principle of development, such that there was no real need to assess the impact of these proposals properly. The very fact that there is a permission of this kind, on this site, is exceptional. This fact has been lost on the Council. Any scaling up of what is already on the site needed to be properly assessed, and it was not.

64. The 2006 variation reinforces the limited and necessarily limiting purpose of the imposed condition. Namely the clear need to,

(a) determine that the individual(s) is member of the gypsy / traveller community;

(b) that they meet the exceptional criteria;

(c) reject the application proposal to extend the permission to 'another traveller family'; and

(d) that occupation must therefore be in 'the spirit of the original permission'.[17]

This, therefore, should have been the process undertaken in relation to the 2017 application. It was not.

65. On any fair reading of the permission and variation, this personal permission has never run with the land and it has not established a use. The Council's protocol response appears to accept this fact at the very least. However, because the Council's underlying reasoning in the Officer Report is based on this assertion, none of the proper checks and assessments has been undertaken. Instead, as stated above, a misconstruing of the permission has only led to policy constraints being side-stepped.

66. The interpretation and therefore the understanding of the 2005 permission and 2006 variation were incorrect. This remains a material error.

GROUND 3 – Failure to properly consider the implications of inaccurate plans

67. The Council has undertaken an assessment of these proposals using inaccurate and unreliable plans. The drawings relied upon were not to scale and/or accurate to take a proper assessment, despite the Council being alerted to this fact. The Council's protocol response seeks to explain this away by stating that these plans are '*typical of the sort provided for small family Gypsy sites and the Defendant was entitled to consider these adequate for the purpose of determining the application.'* This may be what the Council thinks it is entitled to do but here again it falls into error.

68. These proposals are seeking to extend the Site in such a significant way that were this permission to be implemented, it would make the Site unrecognisable, and certainly not in any way in line with the original planning permission. It is also ironic because had the Council undertaken the assessment the Claimant has maintained was necessary, namely a proper engagement with paragraph 25 of the PPTS, it would have required proper and accurate plans to assess the material impact that is likely to take place with the further encroachment on the countryside.

[17] Doc 8: Delegated Decision Report, 1 March 2006

69. The assessment undertaken with the benefit of inaccurate plans has had the following implications.

a) The caravans and the day room proposed are unlikely to fit into the area shown on the inaccurate plans;

b) The proposals with the additional units will go beyond what is already established as the boundary site, causing more harm to the open countryside;

c) There is the likelihood that the proposals would take up additional Grade 2 agricultural land;

d) The current layout is based on the wrong plans, as a result of which there is likely to be a higher degree of harm from the proposals;

e) The sustainability of the proposals as a whole is in question if the site is incapable of accommodating additional units within the current boundaries.

70. The Council seeks to answer this by simply stating that 'no agricultural land would be taken' and there would be no encroachment into the open countryside. This is impossible for the Council to say based on the current inaccurate and unhelpful plans.

71. In sum, the failure to provide and/or properly assess the inaccurate plans submitted with the proposals is likely to have serious ramifications for this Site. This failure stems from the incorrect interpretation of the PPTS and acceptance that this Site need not have been properly considered, because it was *not* a 'new traveller site'. This is erroneous.

GROUND 4 – Failure to properly investigate and ascertain the Applicant and family's traveller status for the purpose of the PPTS 2015

72. In its assessment of the present proposals, the Council was under an obligation to ascertain the gypsy status of the Applicants. As cited above, this was a personal permission granted in exceptional circumstances and indeed even when the variation of condition application was considered, the appraisal in 2006 stated,

"*The primary consideration in determining this application, is whether or not the applicants are members of the Traveller/Gypsy community, whereby their may claim the exceptional circumstances to occupy the site…"*

73. The application to vary the condition was made pursuant to the need to ascertain whether the applicants qualified in order to change the name on the permission. Again, this was indicative of the exceptional nature of the permission.

74. The same issue arises here where the Council was furnished with critical information calling into question the traveller status of the applicants; and in particular that Hamby Smith had a pitch on a council site in Shropshire. One of the static caravans on the present permission is for his benefit. Again, the Council needed to undertake its own investigations to properly ascertain whether the exceptional criterion had been met, as was done in 2006, when the appraisal stated,

"*…it is considered that Mr and Mrs Smith satisfactorily meet the exceptional criterion, which is required to occupy the property in accordance with the spirit of the original planning permission."*

75. The failure to undertake this proper assessment can only be put down to the Council's mistaken understanding that there was a principle of development established on this Site. There can be no other explanation. To that end, given the nature of this personal permission, there was always an ongoing obligation to ensure that the traveller status was monitored, ascertained and clarified as necessary.

76. Indeed, had they undertaken such an assessment, the result may have been different.

77. Further, the Committee Report's mistaken understanding that the 2006 assessment goes further, by suggesting that the '*applicant and his wife were gypsies and they intend to continue living a nomadic habit of life in the future when the circumstances allow greater travel to horse fairs.'*

78. The 2006 report only concerned itself with whether the applicants were from the gypsy and traveller community. Members were misled by this understanding of what the 2006

report *actually* concluded. The protocol response once again misses this point. To simply state that 'reasonable' investigations were done is not good enough. This element remains fundamental to the permission, and the Council failed to act on information provided to it which could have changed its conclusions.

79. In sum, this failure to properly assess the status of the Applicants is against the spirit of what the original planning permission intended. To have failed to do this, with the consequences of allowing permission to a development that is going to be a significant further encroachment to the countryside is a material error. Members needed to be better informed through the better interrogation of the evidence.

CONCLUSION

80. For all of the above reasons, it is respectfully requested that permission is granted to bring this judicial review.

MR HASHI MOHAMED

Barrister

No5 Chambers, London

27th February 2018

Claim No: CO/870/2018

IN THE HIGH COURT OF JUSTICE
PLANNING COURT

B E T W E E N :-

THE QUEEN
ON THE APPLICATION OF MARDEN
PARISH COUNCIL

Claimant

And

HEREFORDSHIRE COUNCIL

Defendant

MR HARRY SMITH

Interested Party

STATEMENT OF FACTS & GROUNDS

Marden Parish Council
7 John Davies Place
Westcroft
Leominster
HR6 8JD