



Neutral Citation Number: [2023] EWHC 3333 (Admin)

Claim Nos: CO/1622/2023; CO/1399/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

**In the matter of applications for permission to apply for statutory review under ss.288
and 289 of the Town and Country Planning Act 1990**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/12/2023

Before:

KAREN RIDGE SITTING AS A DEPUTY HIGH COURT JUDGE

Between:

NOEL MCGINLEY

Applicant

- and -

**(1) THE SECRETARY OF STATE FOR
LEVELLING UP, HOUSING AND
COMMUNITIES**

Respondents

(2) WYRE FOREST DISTRICT COUNCIL

Stephen Cottle (instructed by Public Interest Law Centre **Applicant**
Katharine Elliot (instructed by **Government Legal Department**) for the **First Defendant**

Hearing date: 14 November 2023

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 22 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Deputy High Court Judge Karen Ridge:

1. This is my judgment following an oral hearing into conjoined permission applications relating to planning appeal decisions made on behalf of the first Respondent in relation to land at The Beeches, Curslow Lane, Shenstone, Kidderminster. These two permission applications arise out of the same facts and relate to the same decision letter. That decision letter dismissed an appeal against refusal of planning permission and upheld an enforcement notice in relation to the land. The second Respondent is the Local Planning Authority for the administrative area in which the land is located, and it played no part in the hearing.
2. The application for planning permission was made by the applicant. It was an application for a change of use of land for the creation of 6 Gypsy and Traveller pitches. Some development subsequently took place, and the site became occupied resulting in the service of an enforcement notice which sought to address this breach of planning control.
3. The Applicant then appealed the refusal of planning permission and both Applicants appealed against the enforcement notice. All three appeals were heard at a hearing on 21 February 2023. By letter dated 22 March 2023 the first Respondent's Inspector dismissed the appeals and upheld the enforcement notice.
4. The First Applicant seeks to challenge the decision to dismiss the planning application appeal under section 288 Town and Country Planning Act 1990 (the Act) and there is an associated challenge under section 289 of the Act by the Applicant seeking permission to appeal the appeal decision made in relation to the enforcement notice. The permission stage is by oral hearing only in a section 289 challenge and therefore the Planning Liaison Judge, Mr. Justice Holgate, in pursuance of the overriding objective made an order directing that both matters be heard together at a single oral hearing.

HISTORY OF THE SITE

5. In 2006, the District Council granted planning permission at the site for the keeping of horses, stables and hay store, and other associated development. On 2 July 2021, the Applicant applied to the District Council for planning permission to develop the land. That application was refused on 21 September 2021. Sometime in October 2021, the Applicant and his extended family arrived on the land. On 27 October 2021 the Enforcement Notice was issued.
6. The Wyre Forest District Council Local Plan 2016-2036 (2022) (the Local Plan) was then adopted in April 2022, some months after the planning application was determined and the enforcement notice was issued.
7. The Applicant's appeals, pursuant to section 78 and section 174(2) of the Act, were heard by the First Respondent's appointed Planning Inspector on 21 February 2023. By decision notice dated 22 March 2023, the Planning Inspector dismissed the appeal against the refusal of planning permission and upheld the enforcement notice.

THE DECISION LETTER

8. In her decision letter (DL) the Inspector first identified the main issues to be considered: whether the development was inappropriate development in the Green Belt; the effect on openness of the Green Belt; the effect of the development on the landscape character of the area; whether the site was in a suitable location for a Gypsy and Traveller site being outside a settlement boundary; the effect of development on users of Curslow Lane; and finally the Green Belt balancing exercise, namely whether any harm by reason of inappropriateness and other harm would be clearly outweighed by other material considerations such as to constitute the very special circumstances required to justify the proposal.
9. The Inspector then set about her task of analysing each of the identified main issues and other factors.
10. The Inspector found that the development was inappropriate development. She found there was harm through loss of openness and encroachment (DL 32-42), and she agreed that there was additional local harm to the appearance and character of the countryside (DL 43-61).
11. In relation the question of the site location, the Inspector determined that, whilst the proposed development did not accord with the Local Plan (including Policy SP.14) because it was located outside the settlement boundaries of Kidderminster and Stourport-on-Severn, its proximity to shops and services meant that it was suitable for a Traveller site in accordance with the National Planning Policy Framework (NPPF) and the Planning Policy for Traveller Sites (PPTS).
12. In relation to issue 5: highway safety and convenience, the Inspector held that, subject to proper planning conditions being in place, the development did not give rise to conditions which were harmful to the safety and convenience of users of Curslow Lane (DL 68-71).
13. Under the heading “Other considerations” the Inspector embarks upon her analysis of other material factors. She first finds that the development constituted intentional unauthorised development which attracted moderate weight against the grant of permission.
14. At DL78 the Inspector starts to consider the need for and supply of Gypsy and Traveller sites, first setting out the factual basis:

“The Local Plan has been adopted recently and in Policy SP.14 it sets out that there is a need for 13 pitches over the plan period of 2020/1 to 2035/6, 3 of which need to be provided by 2024/5. This is the need in terms of gypsies who meet the definition set in the PPTS. In addition, 22 pitches are needed to address the need of gypsies who do not meet the definition set out in the PPTS. ”
15. Paragraph 79 of the DL acknowledges the judgment in *Lisa Smith v Secretary of State for Levelling Up, Housing and Communities [2022] EWCA Civ 1391* and its guidance upon interpretation of the definition of Gypsy and Travellers in the PPTS. Paragraph

80 of DL goes on to set out the appellants concerns about pitch numbers. The Inspector records:

“The [Applicant] is not convinced that the Council’s approach to turnover, intensification and creation of new pitches will realistically bring down the need for pitches to the level set out in Policy SP.14. He also points out that given his need for 6 pitches and those resulting from another unauthorised site, the need for only 3 sites by 2024/5 is also unrealistic. However, the figures in Policy SP.14 have been through the Local Plan process recently and it is reasonable for me to rely on them.”

16. The final sentence appears to be an indication that the need and supply figures in the Local Plan, which was adopted in April 2022, could be relied upon given that they had been through an examination and adoption process. I shall return to this matter. At paragraph 81 the Inspector says this:

“[81] In terms of supply, Policy SP.14 sets out a list of sites which are safeguarded to meet the needs of gypsies and travellers over the plan period. The majority of these are sites which are already in use and the parties refer to two sites as being of relevance to the appeal. These are Wilden Land and Land to the rear of Zortech Avenue, Kidderminster (the Zortech Avenue site).”

17. At paragraph 82 the Inspector notes that the parties agreed that the Wilden Lane site is in private ownership, it is in use a scrapyard and therefore records that there is no guarantee that it will be available. This is a material finding, given the reliance placed upon this site in meeting need.
18. Paragraph 83 goes on to explore the position with the Zortech Avenue site. The Inspector notes that this site is available for purchase but says that there is no evidence that planning permission has been sought or that potential access problems are being dealt with. No firm conclusions are reached at this point, the Inspector notes that the site is allocated and says that she will revisit the site when considering whether it is suitable for the appellant.
19. At paragraph 84 the Inspector sets out her final conclusions. She says it is likely that the approach is likely to require being revisited but ‘as it stands the Council can identify a 5-year supply of deliverable sites against the locally set target in the LP’. Those findings are carried forward into the Inspectors final conclusions in her Green Belt balancing exercise.
20. At DL105 the Inspector concludes that the argument in terms of unmet need had not been established. Her conclusion, at paragraph 106, is that the matters weighing in favour of development do not clearly outweigh the substantial harm arising to the Green Belt in combination with other identified harms.

THE CHALLENGES

21. It is the Applicant's case that the Inspector fell into error in her approach to her analysis and conclusions in relation to the individual sites and unmet need and the 5-year supply of sites. The s288 Statement of Facts and Grounds sets out a number of complaints and alleged errors in the Appeal Decision. Those grounds are replicated in the section 289 claim.
22. The allegation is that the Inspector has made an error in her conclusions regarding the existence of a 5-year supply of Gypsy and Traveller sites or alternatively that the reasoning leading to a conclusion that the Council could identify a 5-year supply of deliverable sites was inadequate, having particular regard to her prior conclusions about the Wilden Lane site and comments about the Zortech Lane site.
23. The Secretary of State resists the claim and contends that all grounds advanced are not arguable and that permission should be refused.

DISCUSSION

24. National policy for Gypsy and Traveller sites is found in the PPTS which contains a definition of Gypsies and Travellers for planning purposes (the PPTS definition). In the plan making section of the PPTS, paragraph 10 advises that, in producing their Local Plan; authorities should identify, and update annually, a supply of specific deliverable sites sufficient to provide 5 years' worth of sites against their locally set targets. Footnote 4 contains guidance on what constitutes deliverability as follows:

“To be considered deliverable, sites should be available now, offer a suitable location for development, and be achievable with a realistic prospect that development will be delivered on the site within five years. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within 5 years”
25. Policy E of the PPTS (Traveller sites in the Green Belt) provides - as relevant - as follows at ¶16:

“Inappropriate development is harmful to the Green Belt and should not be approved, except in very special circumstances. Traveller sites (temporary or permanent) in the Green Belt are inappropriate development. Subject to the best interests of the child, personal circumstances and unmet need are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances.”
26. Policy H of the PPTS (Determining planning applications for traveller sites) identifies (at ¶24) relevant matters planning decision-makers should consider when assessing planning applications for traveller sites, including: the existing level of local provision and need for sites; the availability (or lack) of alternative accommodation for the applicant; other personal circumstances of the applicant.

27. The relevant Local Plan policy is to be found in LP policy SP.14. That policy was adopted in April 2022. It was based on a GTAA dated 2020 which provided that the need throughout the 15-year plan period was 13 pitches under the PPTS definition, of which 3 pitches were required in the first five years to 2024/25. There was a further wider need for 22 pitches for those who did not meet the PPTS definition at that time.
28. Policy SP.14 contains a list of sites to be safeguarded for Gypsy and Traveller use. It further acknowledges that a new site at Zortech Avenue is allocated to contribute towards meeting the need over the plan period. The policy text says that:

“It is anticipated that the short-term and longer-term needs can be met through the allocation of [Zortech Avenue] and limited intensification/expansion of the existing safeguarded sites where proposals would comply with the other policies of the Plan.”
29. The need is set out in Table 7.0.4 which forms part of the reasoned justification to Policy SP.14. It contains two columns, differentiating between the need in PPTS terms and the wider ‘cultural need’. The PPTS column begins with the 5-year shortfall to 2024/5 which is determined at 14. That figure is reduced by 3 pitches to allow for potential turnover on existing sites and by a further 4 pitches to allow for expansion of existing sites. After taking account of the provision of 4 new pitches on a new site (Wilden Lane), the residual PPTS to 2024/25 is calculated at 3 pitches.
30. The approach to an Inspector’s decision is set out in *Bloor Homes Ltd v SoS [2014] EWHC 754 (Admin)*. Relevant guidance directs that Inspectors’ decisions must be construed in a reasonably flexible way, reasons must be intelligible and adequate enabling the reader to understand why the appeal was decided as it was; weight to any material considerations and all matters of planning judgment are matters for the Inspector and not the court, unless irrational.

All Grounds

31. The Applicant contends that the Inspector failed to take into account relevant considerations and fell into error when concluding that there was a 5-year supply of sites. Ms Elliot sought to persuade me that the Inspector, when looking at the question of whether or not there was a 5-year supply of sites, was entitled to rely on the newly adopted Local Plan. Mr. Cottle contends that that is the starting point but the figures on which the local plan and the five-year supply were based stand to be looked at in light of more recent information.
32. Whilst the Inspector was entitled to place reliance on the figures in the newly adopted Local Plan, she did go on to undertake the exercise that Mr. Cottle contends for. She went on to look at the deliverability of the Wilden Lane and Zortech Avenue sites which go to make up part of that supply in terms of the definition of footnote 4.
33. At DL82 the Inspector examines the two sites to see whether they were deliverable in policy terms. The Wilden Lane site is addressed in the first sentence of that paragraph when the Inspector records the agreement between the parties that the site was in private ownership and currently in use as a scrap yard and there was no guarantee that it would become available. That is the extent of the Inspector’s analysis of Wilden

Lane site. The Inspector appears to be concluding that the Wilden Site was not deliverable in footnote 4 terms and logically it follows that this site could not form part of the 5-year supply.

34. With regards to the Zortech Avenue site, the Inspector acknowledged that the site was available to purchase which would satisfy the 'available now' requirement in footnote 4. However, she went on to record that there was no indication that planning permission had been sought or that the limitations in terms of access 'are in the course of being dealt with'. I accept Mr. Cottle's point that the Inspector's analysis, when looking at this site in terms of its availability for the Applicant, also provides some indication as to the Inspector's thinking in relation to the Zortech Avenue site coming forward. At DL 86 she reiterates 'Moreover, it became clear at the Hearing that there are currently obstacles in terms of providing suitable access to the Zortech Avenue site from adjacent land...'. These observations run counter to any conclusion that the Zortech Avenue site is deliverable and able to make a contribution to the 5-year supply.
35. The above matters are potential barriers to the site being considered to be 'achievable and with a realistic prospect of being delivered within 5 years' as required by footnote 4. It is also relevant to note that consideration as to the question of deliverability of this site (or part of this site) within 5 years was being made in February 2023 (the date of the appeal hearing) which was well into the five-year supply period which ran to 2024/25.
36. Although the Inspector then goes on to say 'nevertheless the council has shown that it has taken positive steps towards making provision to meet the need through the allocation of land in the LP', it is arguable that there is no firm conclusion in terms of deliverability within 5 years or a firm conclusion that the site is able to make a contribution towards the 5-year supply. There is therefore a question as to whether the Inspector has reached a conclusion that the Zortech Avenue site is deliverable in terms of the requirements of footnote 4 such that it could count towards a 5-year supply. Paragraph 83 leaves a question mark over Zortech Avenue and therefore ground 4 is arguable.
37. The Inspector does not appear to go on to factor any prior findings about Wilden Lane and Zortech Avenue into her conclusions about a 5-year supply. Instead at paragraph 80 she says that the figures in policy SP.14 have been through the local plan process, and it is reasonable for her to rely on them. Without consideration of those matters, the conclusion that there was a 5-year supply was not based on firm foundations.
38. For all these reasons I am satisfied that the Applicant's contention that the Inspector has either failed to take into account relevant considerations in relation to the 5-year supply issue or has not provided adequate reasons for finding that there is a 5-year supply issue is arguable.
39. Whilst the claim is formulated in several ways, the nub of the Applicant's disagreement with the DL is that the question of a 5-year supply is not properly explained. The corollary of that is that there are questions about the existence of a current unmet need. Grounds 1 and 2 essentially go to the same issue and are arguable. They should be consolidated. Ground 3 is put in the alternative to grounds 1

and 2 and contends that there was alternatively an alleged failure to give adequate reasons for the 5-year supply decision. For the reasons above that too is arguable.

40. The conclusions about unmet need and the demonstration of a 5-year supply are findings which would have affected any final Green Belt balancing exercise. I do not accept Ms Elliot's submission that, even if the Inspector had proceeded to conclude that the 5-year supply target could not be met, this would not have resulted in the Inspector reaching the opposite conclusion in terms of the overall planning balance. Ms Elliot's contention is premised on policy E of the PPTS making it clear that (i) the starting point for the balancing exercise is that inappropriate development in the Green Belt (as in the instant case) should not be approved absent very special circumstances, and (ii) personal circumstances and unmet need are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances.
41. The Green Belt balancing exercise would have been different in the above circumstances and the outcome would have been a matter of planning judgment for the Inspector based on those different material considerations. I am not satisfied that the outcome would necessarily have been the same.
42. I therefore grant permission to proceed on all 4 grounds in relation to both the section 288 claim and the section 289 appeal. I would ask Counsel to draw up an Order to reflect the above.