CO/3346/2006

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Monday, 19 February 2007

BEFORE:

MR GEORGE BARTLETT QC
(Sitting as a Deputy High Court Judge)

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THE QUEEN ON THE APPLICATION OF DONCASTER METROPOLITAN BOROUGH COUNCIL

(CLAIMANT)

-v-

(1) THE FIRST SECRETARY OF STATE
(2) ANGELA SMITH

(DEFENDANTS)

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(Official Shorthand Writers to the Court)

MR CHRISTOPHER YOUNG (instructed by Doncaster MBC) appeared on behalf of the CLAIMANT
MR RUPERT WARREN (instructed by Treasury Solicitors) appeared on behalf of DEFENDANT (1)
MR ALAN MASTERS (instructed by Community Law Partnership) appeared on behalf of DEFENDANT (2)

JUDGMENT
(Draft for approval)

1 THE DEPUTY JUDGE: This is an application under section 288 of the Town and Country Planning Act 1990 by the local planning authority to quash the appeal decision of an inspector granting planning permission for the use of land at OS Field 5566, Hall Villa Lane, Toll Bar, Doncaster, as a private gypsy caravan site for ten plots.

2 The appeal site is situated in the Green Belt about 300 metres north-west of the village of Toll Bar, which itself lies just to the north of Doncaster. It is an irregularly-shaped plot of about 1.3 hectares, separated from surrounding fields by former sewage treatment works to the west, an access track to the south, a disused railway line to the north, and Hall Villa Lane to the east.

3 In her decision, the inspector, Lucy Drake BSc MSc MRTPI, said that until about five years earlier, the land had been in agricultural use. The previous owner had stationed two caravans and a shed on it, and had laid a hardcore access. Enforcement action had been taken against this use and there was an unsuccessful appeal. In the summer of 2004, land was sold to a group of ten gypsy families. They included the appellant in the appeal (the second defendant in these proceedings). They cleared the site of fly-tipped materials, laid down hardcore, divided the greater part of the land into ten plots separated by fencing and gates, erected a number of utility blocks and a stable, and over the following few months brought caravans onto the site and took up residence.

4. The gypsies' application for permission to use the land as a private gypsy caravan site was refused by the Council in January 2005, and the inspector held an inquiry over two days in January 2006. In her decision, she identified the main issues in the case as:

> "(a) The impact of the development on the character of the area, the openness of the Green Belt and the purposes of including land in it.
>
> (b) The consequences of allowing the appeal for the Council's approach to residential development on Greenfield sites.
>
> (c) The provision of and need for gypsy sites within the District.
>
> (d) The accommodation needs and personal circumstances of the site occupants.
>
> (e) Their alternative accommodation options were the appeal to be dismissed.
>
> (f) whether the harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

5 The inspector identified the relevant planning policies, which included UDP Policy ENV3 (Development in the Green Belt). She said that the development would be contrary to that policy unless very special circumstances could be shown to exist. She noted that paragraph 3.2 of PPG2: Green Belts provided that very special circumstances

to justify inappropriate development would not exist unless the harm was clearly outweighed by other considerations.

6 The inspector referred to a new Circular, Circular 01/2006: Planning for Gypsy and Traveller Sites, which had replaced Circular 1/94 just after the close of the inquiry. At paragraph 14, she said this about it:

> 'Circular 01/2006 recognises that the advice set out in 1/94 has failed to deliver adequate sites for gypsies and travellers in many parts of England over the last ten years. The most significant change in Government policy relates to the requirement of all local planning authorities to undertake a Gypsy & Traveller Accommodation Assessment and provide additional sites through the development plan process to meet assessed needs as determined in collaboration with Regional Planning Boards (RPBs). Development Plan Documents (DPDs) will be expected to identify specific sites to provide for identified needs on the basis of criteria set out in the Core Strategy and following community involvement. DPDs will additionally be expected to include criteria-based policies to meet unexpected demand."

7 The inspector then went on to deal with the six main issues that she had earlier identified. She concluded that the visual impact of the development could be mitigated by additional planting, but that even with this, the development would have a locally harmful effect upon the essentially rural character and appearance of the area and the openness of the Green Belt. It would not, however, conflict with the other purposes of including land in Green Belts.

8 The inspector said that allowing the appeal would have no material consequences for the Council's approach to residential development on greenfield sites. She went on to consider the evidence on the provision of, and need for, gypsy sites within the district. She referred to the Council's recent Draft Gypsy and Traveller Action Plan and the approach set out.

9 She went on at paragraph 24:

> "Regrettably this commendable approach has not yet involved a quantitative analysis of gypsy and traveller accommodation needs, either in terms of whether existing 'provision' meets existing needs, or whether and to what extent it is capable of meeting future needs. A needs assessment for both short and long-stay sites is included as item 4.4 of the Draft Action Plan, but the expected timescale is described as "Long" (on the spectrum of Immediate, Short and Long)."

10 In paragraphs 26 and 27 she said:

> '26. The picture built up from these various elements is of a limited availability of permanent residential pitches for gypsies on Council-owned sites with the total number of permanent pitches reduced

following the change of Gibbons Lane to a transit site and a substantial demand for any vacancies. There is a mixed picture with regard to private sites, with some of the larger ones no longer accepting gypsies and other family sites full to capacity 'Doubling up' of caravans on pitches on authorised sites and a steady increase in the number of caravans on unauthorised sites, with no additional authorised permanent gypsies sites provided in at least the last five years, or planned.

27. The Council's Gypsy Liaison Officer and his colleagues recently estimated an immediate need for between 25 and 50 additional pitches. This figure is based on their personal knowledge of need by individual families but excludes those on unauthorised sites, those doubled up on authorised sites and those travelling away from Doncaster. Setting aside any need arising from gypsies living in houses who would wish to live on a caravan site if one were available, I consider it likely that the number of authorised pitches required is considerably in excess of this estimate and that there is a substantial and growing mismatch between the provision of and need for gypsy sites within the borough. This factor weighs in favour of the development."

11 The inspector then considered the accommodation and personal circumstances of the site occupants: including their ties with the area, the fact that most of the children of primary school age had secure school places (none having previously had more than a very small amount of schooling), and that, since moving onto the site, the families had been able to register with GPs and dentists, often for the first time in their lives.

12 She said at paragraph 32:

> "The site occupants' need for a suitable site on which to live and from which they can have a normal family life with access to education and health care and the ability to integrate into the local community is an important consideration which has to be given considerable weight."

13 On the alternative accommodation options, the inspector said at paragraph 34 that the Council appeared to be a long way off commencing gypsy accommodation needs assessment and identifying alternative additional sites. She noted at paragraph 38 that Doncaster's Gypsy Liaison Officer was unaware of any suitable alternative site within the Borough or in other parts of Yorkshire and Humberside to accept any or all of the residents, and that he accepted that the only alternatives to the residents staying on the site would be "a return to the roadside".

14 The inspector concluded at paragraph 40:

> 'The absence of any alternative, available, affordable, acceptable, and suitable land to which the site occupants could move has to be afforded considerable weight in favour of the development."

15 The inspector then went on to consider whether the harm to the Green Belt by reason of inappropriateness and any other harm was clearly outweighed by other considerations Having referred to the harmful effect on the rural character of the locality and the openness of the Green Belt, she said at paragraph 43:

> "On the other side of the balance is the unquantified, but on the basis of the limited information substantial and growing, mismatch between the provision of and need for additional gypsy sites within the Borough; the site occupants' need for a suitable site on which to live and from which they can have a normal family life with access to education and health care and the ability to integrate into the local community; the absence of any alternative, available, affordable, acceptable and suitable land to which they could move; and the limited progress made by the Council in undertaking their responsibilities with regard to the assessment of the accommodation needs of gypsies and travellers and the identification of suitable sites."

16 The inspector went on to say that the disproportionate consequences for the families concerned that would arise from a dismissal of the appeal was a substantial factor weighing in favour of the development. She considered and rejected the option of a temporary permission -- a matter which is raised in the grounds of challenge and to which I shall return. Her conclusion was that the harm was clearly outweighed by the totality of the other considerations, and that very special circumstances existed that justified the development. She granted planning permission subject to conditions.

17 The first ground of challenge advanced by Mr Christopher Young, for the claimant, is a surprising one. It relates to the publication of the new Circular 01/2006. This was known to be imminent at the time of the inquiry, and following its publication a week after the inquiry, letters were written both to the appellant and the Council, inviting them, if they wished, to comment on any relevant matters arising from it. The inspector recorded that the decision was delayed to enable this to be done and that neither of the parties chose to make any further comments.

18 Mr Young's submission is that, despite the fact that neither of the parties wished to comment on the new Circular, the inquiry should have been reopened in order that they might do so. He says that the failure to re-open the inquiry meant that the procedure adopted for the decision was, as he puts it, "Woefully inadequate, procedurally unfair and Wednesbury unreasonable". Specifically, Mr Young says that the new Circular was radically different from the one that it replaced. What the Inspectorate should have done, he says, was either to re-open the inquiry or write to the parties, indicating that the inspector would be making a decision on the basis of the new Circular, and raising questions for the parties to address in respect of her proposed approach.

19 The complaint, however it is expressed, is of procedural unfairness, and I cannot begin to see how the Council could complain of unfairness They were given the opportunity to make representations on the Circular and they chose not to do so. They had the opportunity to request the re-opening of the inquiry, and they did not do so. It cannot

possibly be said in these circumstances that they have been unfairly treated The contention is palpably hopeless and should never have been advanced.

20 The second ground of challenge relates to the inspector's rejection of the option of a temporary permission. The application grounds asserted that the inspector's consideration of a possible temporary permission was wholly inadequate, perverse, Wednesbury unreasonable and or procedurally unfair in that she failed to relate it to the guidance in the new Circular.

21 Mr Young says that the challenge is on the grounds of perversity, and he recognises that a challenge on this ground faces a high threshold and is only very seldom accepted by the courts. He does not suggest that the inspector left out of account any relevant consideration. His argument is that the harm which the inspector identified to the rural character of the area and the openness of the Green Belt could have been avoided by the grant of a temporary permission, because at the end of the permitted period, an alternative site outside the Green Belt would have been identified in development plan documents (or DPDs). Not to impose a time limit was, therefore, he says, perverse.

22 The new Circular says this about temporary permissions at paragraphs 45 and 46:

> "45 Advice on the use of temporary permissions is contained in paragraphs 108 – 113 of Circular 11/95, *The Use of Conditions in Planning Permission*. Paragraph 110 advises that a temporary permission may be justified where it is expected that the planning circumstances will change in a particular way at the end of the period of the temporary permission. Where there is unmet need but no available alternative gypsy and traveller site provision in an area but there is a reasonable expectation that new sites are likely to become available at the end of that period in the area which will meet that need local planning authorities should give consideration to granting a temporary permission.
>
> 46. Such circumstances may arise, for example, in a case where a local planning authority is preparing its site allocations DPD. In such circumstances, local planning authorities are expected to give substantial weight to the unmet need in considering whether a temporary planning permission is justified."

23 The inspector dealt with the question of a possible temporary permission at paragraph 45 of her decision. She said:

> "45. The option of a temporary permission, perhaps for a period of three years was raised. This would lessen the longer term harm to the Green Belt and the character and appearance of the area, but is only justifiable where there is likely to be a material change in circumstances, in particular a realistic likelihood that suitable, affordable and acceptable alternative accommodation will become available before the end of that time The longer the occupants remain on the site, the greater their ties to the local area, and the more children will be enrolled at local schools ... I

do not consider a temporary planning permission to be an appropriate response in this case."

24 Mr Young submits that the inspector's reference in that paragraph to a realistic likelihood that suitable, affordable and acceptable alternative accommodation becoming available imposed a much higher threshold than the policy in which paragraph 45 referred to a reasonable expectation that new sites will become available, and made no reference to suitability, affordability or acceptability. This criticism is groundless, in my view.

25 Mr Alun Masters, for the second defendant, points out that there are references to what is suitable or acceptable elsewhere in the Circular, for instance in paragraphs 33 and 54, and paragraph 57, dealing with the relocation of gypsy sites due to major development projects refers to regard being had to the gypsys' social, economic and environmental needs. The ECHR case of Chapman v United Kingdom 27389/95, Mr Masters points out, in dealing at paragraph 104 with the evaluation of suitable alternative accommodation for gypsies says that this would involve a consideration of the particular needs of the person concerned, his or her family requirements and financial resources. It is, in my judgment, clear in the light of this that the inspector did not misrepresent the policy in what she said in paragraph 45. On the contrary, what she said appears to be entirely in accord with the policy as a whole and with Chapman. Nor do I think the inspector reached a conclusion on the option of a temporary permission that she was not entitled to reach. The new Circular enjoined her to give consideration to granting a temporary permission where there was a reasonable expectation that new sites were likely to become available at the end of the period. It did not require that there should be a time-limited permission if there was such a reasonable expectation. That would be a matter for the judgment of the decision-maker in the light of all the circumstances.

26 Mr Rupert Warren, for the Secretary of State, relies on the fact that the inspector had earlier addressed the timescale of identifying alternative sites in paragraphs 34 and 35. She said:

> "34. The Council appears to be a long way off commencing a gypsy accommodation needs assessment and identifying alternative additional sites. The Planning Officer's expectation that sites would be identified as part of the Housing Policy Preferred Options paper this summer, to be incorporated in the LDF by 2007, seems to me to be unrealistic, both in the approach and timescale, given the requirement to undertake a separate needs assessment in both PPG3, s225 of the 2004 Housing Act and the new Circular.
>
> 35. About half of the Borough lies outside the Green Belt, so it may well be possible to find suitable sites elsewhere to meet identified [needs]. But as the search process has not yet started, and there is no certainty of a suitable, available, affordable and acceptable site (or sites) being found outside the Green Belt to meet the needs of the site occupants within any firm timescale, this cannot be relied upon to meet their short or even

medium term needs."

27 I accept Mr Warren's submission that it is appropriate, since a decision must be read as a whole, to read paragraph 45 of the decision in the light of paragraphs 34 and 35, and indeed the earlier paragraphs that I have already quoted, and that it is clear from this that the inspector found on the facts that, in the terms of the Circular, there was no reasonable expectation of new sites becoming available within the period being considered. It is, I think, implicit in what the inspector said in paragraph 45 in relation to the ties that would be built up and the enrolment of children at local schools, that she considered that the longer the occupants remained on the site, the less suitable and acceptable any alternative would become. That was a view that was, in my judgment, reasonably open to her. I do not think that she misunderstood or misapplied the guidance in the Circular, or that her consideration of the option of a temporary permission is remotely open to the epithets that Mr Young attaches to it.

28 The third and fourth grounds of challenge related to two of the conditions in the planning permission. Condition 1 provided:

> "The occupation of the site hereby permitted shall be carried on only by the following and their resident dependants: Sandra Swales; Peter and/or Marina Wilson [and further listed individuals]."

29 Condition 2 was in these terms:

> "When the land ceases to be occupied by those named in condition 1 above, the use hereby permitted shall cease and all caravans, structures, materials and equipment brought on to the land in connection with the use shall be removed. Within three months of that time, the land shall be restored to its condition before the use commenced."

30 Mr Young originally submitted that each of these conditions was imprecise and unenforceable, even though each of them is one of the model conditions set out in the Planning Inspectorate's Guidance, Suggested Conditions in Gypsy Permissions. The challenge to condition 1 was in relation to the use of the term "resident dependant", which appears not only in the Gypsy Suggested Conditions, but also in Circular 11/95, in which both the agricultural workers condition (No 45) and the staff accommodation condition (No 46) include any residence dependants among those to whom occupation is restricted. Such words have been employed in countless permissions over many years. In the event, Mr Young withdrew this ground of challenge when it was pointed out that, in Fawcett Properties Limited v Buckinghamshire County Council [1961] AC 636, the reference in an agricultural condition to dependants had been held by the House of Lords to be valid.

31 I have to say that I do not understand the basis of Mr Young's contention that condition 2, the site restoration condition, is invalid. Circular 11/95, dealing at paragraph 115 with the restoration of sites, says:

> "Where the permission is for temporary use of land as a caravan site,

conditions may include a requirement to remove at the expiry of the permission any buildings or structures, such as toilet blocks, erected under Part 5 of the General Permitted Development Order "

32 If, as the Council would prefer, a temporary permission only were to be granted, they would presumably wish to have a site restoration condition attached. Why such a condition should be become invalid if attached to a permanent permission is unexplained. Mr Young said that it would be unenforceable because by the time it came to be applied, all the occupants would have left the site. The same would however go for many discontinued uses, as well as a terminated temporary use. But an enforcement notice would fall to be served on the owner of the land and any successor occupier that there might be, and the Council itself would have power, if the notice was not complied with, to carry out the necessary works and to make a charge on the land. The condition would not be unenforceable.

33. This ground, like the others, fails and the application is refused.

34 MR WARREN: My Lord, in those circumstances, I make an application for an order in those terms and for an order that the claimant pays the costs of the first defendant. There has been a schedule served. I do not know, my Lord, whether you have a copy of that.

35. THE DEPUTY JUDGE: Yes, I do have that.

36. MR WARREN: In terms of the figures themselves, I do not think there is a dispute.

37 MR YOUNG: I do not resist the principle or the figures.

38. THE DEPUTY JUDGE: Yes.

39 MR MASTERS: My Lord, I simply make an application for the second defendant's costs. my Lord, I do so for two reasons: firstly, I say that the contribution made by the second defendant in this appeal has been of assistance to the court, and it is important -- and in this case I think it has shown it to be -- that counsel who represented the second defendant at the original planning inquiry was here to add assistance to those matters. My Lord, there is a substantial great difference between the way that the case should be approached in terms of the first and second defendant's costs. The first and second defendant will have an entirely separate agenda. I point out that, in the case of the second defendant and the other claimants, of course there was a very real danger of their Article 8 rights being affected by any decision that was being made. Protecting those rights is very different from protecting a decision of the inspector appointed by the Secretary of State. My Lord, costs should follow the event, particularly having in mind passages in the White Book that say that -- reference in particular to part 48.12.5.

40 My Lord, the second point we make is that my instructing solicitors and I wrote to the Treasury Solicitors as long ago as 15 June 2005 to ascertain what the position of the Secretary of State was going to be in defence of this matter. The letter confirmed that they were seeking counsel's advice shortly and would respond substantially once this was to hand. My Lord, a further letter on 18 January 2007 says:

> "We note ... the last correspondence between ourselves was dated 15 June. In that letter you stated you received counsel's advice shortly ... you will respond to us substantially once counsel . we would be grateful if you could confirm as to whether or not you will be defending these proceedings ... if you could provide us with details of counsel instructed ... "

41. No response to either of those letters was received by the Treasury counsel. In fact, my instructing solicitor had taken the view that until the skeleton was upon us, we were not in a position to know whether the action would be defended and the basis upon which certain action would be defended. For all those reasons, it is entirely appropriate to say that the costs should follow the event and that our costs involved in this should be paid for by the Council.

42 THE DEPUTY JUDGE: Mr Masters, I am grateful for your contribution, but the circumstances in which it is appropriate for two sets of costs to be awarded in these proceedings are, as you know, very restricted, and whilst I hear what you have to say, I do not take the view that this is one of the cases in which a second set of costs should be ordered.

43. MR YOUNG: My Lord, if I cannot persuade you further, I cannot. I am grateful.

44 THE DEPUTY JUDGE: Very well. The application is refused and the claimant will pay the first defendant's costs in the sum of £6,254.