Planning Policy for Traveller Sites post-March 2013

Robert Walton

Introduction

1. *Planning Policy for Traveller Sites* ("*PPTS*") was issued separately from the simultaneously published *National Planning Policy Framework (*"*the NPPF*"). DGLG explained its decision in this way:

> "This will allow focus on this specific policy area, which causes a high degree of community stress. It will benefit those engaged in planning for traveller sites by clearly setting out specific traveller site policies in a separate document. The Government intends to review this policy when fair and representative practical results of its implementation are clear. It is intended to incorporate a version of this policy within the [NPPF] at that stage, having taken account of the results of its implementation"[1] (emphasis added).

2. We are now a year into the new regime. There is no indication as to when PPTS will be reviewed. As for the "fair and representative practical results of its implementation" it is clear that there has not been a sea-change in site provision over the last 12 months. No-one would seriously argue against the proposition that the previous policy regime (Circular 01/06) failed to deliver the number of sites that are required. Given the extent of the failure no-one could reasonably expect the PPTS to solve all the problems in the short term. But the year's grace given to LPAs in terms of the requirement to show a 5 yr supply of sites is about to expire and so we move into the next stage of the policy regime established by the PPTS. This time last year I said that widespread compliance with the new requirement to provide a 5 year land supply was unlikely, and that we would move post March 2013 into a system of planning by appeal. That appears now to be largely the case (see Richard Langham's paper).

[1] PPTS §5; see also *Planning Policy for Traveller Sites, Equality Impact Assessment, March 2012*

3. To judge the success of the PPTS we must look at its aims. These are set out in the document but an initial overview can be gained from what the Government said when the PPTS was launched:

> Eric Pickles put it this way:
>
> "Top-down planning diktats led to the worst of both worlds - more unauthorised sites and worsening community relations. It's time for fair play in the planning system - standing up for those who play by the rules, and tougher action for those who abuse and play the system.
>
> We are giving councils the power and discretion to protect the environment and help rebuild community relations. Clearer planning guidelines will make the planning system easier for all to understand".

4. The central question in any analysis of the new policy must therefore be – to what extent (if any) have the Government's aims already been realised; and to the extent that they have not yet been realised what is the likelihood that they will be in the short to medium term?

5. The Government's overarching aim is:

> "to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life of travellers while respecting the interests of the settled community.
>
> To help achieve this, Government's aims in respect of traveller sites are:
>
> - that local planning authorities should make their own assessment of need for the purposes of planning
> - to ensure that local planning authorities, working collaboratively, develop fair and effective strategies to meet need through the identification of land for sites
> - to encourage local planning authorities to plan for sites over a reasonable timescale
> - that plan-making and decision-taking should protect Green Belt from inappropriate development
> - to promote more private traveller site provision while recognising that there will always be those travellers who cannot provide their own sites

- that plan-making and decision-taking should aim to reduce the number of unauthorised developments and encampments and make enforcement more effective
- for local planning authorities to ensure that their Local Plan includes fair, realistic and inclusive policies
- to increase the number of traveller sites in appropriate locations with planning permission, to address under provision and maintain an appropriate level of supply
- to reduce tensions between settled and traveller communities in plan-making and planning decisions
- to enable provision of suitable accommodation from which travellers can access education, health, welfare and employment infrastructure
- for local planning authorities to have due regard to the protection of local amenity and local environment"[2].

6. The Government is clearly placing a heavy emphasis on the timely delivery of appropriate, permanent sites. The key points here are the requirements for LPAs to:

- Use a robust evidence base to establish accommodation needs;
- Set targets for site provision to address accommodation needs;
- Identify sufficient land to provide 5 years' worth of sites against their locally set targets.

Implementation: one year's grace

7. §25 of *PPTS* provides the clearest indication of the Government's position with regard to the timely delivery of sites:

> "Subject to the implementation arrangements at paragraph 28, if a local planning authority cannot demonstrate an up–to-date five-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".

8. The Government has not gone so far as to (e.g.) set up a presumption in favour of the grant of permission where a LPA cannot demonstrate an up-

[2] PPTS § 4

to-date supply of deliverable sites. Cf the stronger policy position in the NPPF where an LPA cannot show a 5 year supply for bricks and mortar housing. But §25 is plainly very important because it will now be easier for applicants to secure a temporary permission where the LPA cannot demonstrate the required 5-year land supply. Indeed, it may well be difficult for LPAs to resist the grant of temporary permissions in such circumstances.

9. The year's grace is set out in §28:

> "The policy set out in paragraph 25 only applies to applications for temporary planning permission for traveller sites made 12 months after this policy comes into force".

10. It is worth noting here that the Government originally proposed to give LPAs only 6 months to establish a five year supply of sites: see the consultation draft. That proposal was met with conflicting responses. Travellers rightly pointed out that the policy contained in Circular 01/2006 said that unmet need should be given additional weight, but that there would be nothing equivalent to this in the new *PPTS* until after the end of the implementation period. They also pointed out that there could be a short-term reduction in the provision of sites, until §25 comes into force. LPAs generally argued that they needed more time to establish their targets and to identify their 5-year land supplies, particularly if they were not well advanced on their local plan preparation[3].

11. The Government's decision to impose a 12 month deadline was based on the recognition that LPAs need sufficient time to put in place their five-year land supply if a long-term sustainable solution is to be implemented. The aim here is to two-fold:

- To ensure that planning for traveller site provision is plan-led; and

[3] *PPTS Equality Impact Assessment* p.18

- To ensure that permission is given for appropriate sites on a permanent basis.

12. The benefits of a plan-led system do not need restating. With regard to the disadvantages of temporary permissions the Government considers that these are "not ideal" as they "create uncertainty for those living on them". Perhaps the better point is that temporary permissions are only granted in cases where a permanent permission is not acceptable. In short, the best solution here is (obviously enough) to allow LPAs to plan properly and to identify sites that are suitable for traveller sites and thus the grant of permanent permission. The problem of course is that despite the year's grace, as was widely predicted (not least by the LPAs themselves) the year's grace has not ended in the way the policy envisaged.

13. Importantly, however, the Government's decision to allow only 12 months was based on its conclusion that "local authorities are already under a legal duty to assess needs and should, therefore, have a good idea of their requirements". In other words, LPAs should already have been assessing need and bringing forward land for sites and the new policy simply represents a continuation of this work. This does not in my view sit easily with the Government's own acceptance that (as is widely known) the Circular 01/2006 regime did not work. In short, there was a large dose of wishful thinking behind the conclusion that LPAs would be hitting the ground running here.

14. As of next month, paragraph 25 will come into full force:

> "if a local planning authority cannot demonstrate an up–to-date five-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"

15. But there are three key points here:

- The Council's inability to meet an existing need has always been capable of being a material consideration in the determination of any application or appeal. The year's grace did not change that;

- An absence of a 5 year supply will also be capable of being a relevant consideration in the determination of an application for a full permission.

- Paragraph 25 does not define "significant": and even though the policy says that a lack of a 5 year supply should be a significant consideration the weight to be given to the lack of a 5 year supply will remain a matter for the decision maker, subject to Wednesbury irrationality: see Tesco Stores v Secretary of State. So, for example, a decision maker is not prevented from applying very substantial weight to the absence of a 5 year land supply if the context so requires. Equally, it would be logical for an LPA to apply less weight where the is only a limited shortfall in the 5 year supply.

The five-year land supply

16. §9 of *PPTS* sets out the Government's requirements with regard to the identification of an appropriate land supply for traveller site provision:

Local planning authorities should, in producing their Local Plan:

- identify and update annually, a supply of specific deliverable sites sufficient to provide five years' worth of sites against their locally set targets;

- identify a supply of specific, developable sites or broad locations for growth, for years six to ten and, where possible, for years 11-15…

17. As can be seen, in terms of what must be done *PPTS* in fact requires the LPA to address the supply of traveller sites over a 10 year period and, where possible, for years 11-15.

18. With regard to years 1 – 5:

- This is a rolling requirement, to be updated annually; and
- The supply must be of specific, deliverable sites.

19. "Deliverable" is defined as follows:

> To be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that development will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans[4].

20. Thus, for a site to be categorised as deliverable, and therefore be capable of inclusion in the rolling 5-year land supply it must be:

- Available
- Suitable
- Achievable (i.e. deliverable within 5 years and viable)

21. There is clearly a lot of work to be done before the conclusion can be reached that a site should be categorised as deliverable. Taking just one of the requirements, viability assessments can be very complex and it may for example be very difficult indeed to show that a site will be viable given that there may well be competing land uses (n.b. *PPTS's* emphasis on sustainable development, repeated in the *NPPF*). It is difficult to see how a traveller site could be viable if the land is also suitable for open market housing. *PPTS's* requirement for the separate identification of land that is suitable for traveller sites will not detract from this.

22. With regard to years 5 – 10 the LPA must identify:

[4] *PPTS* footnote 7

- Specific, developable sites; or
- Broad locations for growth

23. "Developable" is defined in the following way:

> To be considered developable, sites should be in a suitable location for traveller site development and there should be a reasonable prospect that the site is available and could be viably developed at the point envisaged[5].

24. Thus, to be "developable":

- Sites must be in a suitable location; and
- There should be a reasonable prospect that the site (a) will become available; and (b) could be viably developed at the point envisaged

25. It is clear that although the Council will not have to go into so much detail in respect of the 6-10 year sites as it will in respect of the 1-5 year sites, the Council will clearly still have a significant amount of work to do to justify the inclusion of a site within the 6-10 year supply.

26. A rare piece of good news for Councils: with regard to years 6 – 10 the LPA has more flexibility in terms of the way in which it identifies the relevant sites (specific sites or broad locations). Importantly, the requirement to show developability only applies where specific sites are identified. So, if the Council opts only to identify broad areas of search (this may be more politically acceptable?) it will not have to go into so much detail (at least for a further year, when part of the 5-10 year supply will fall to be considered as part of the 1-5 year supply). That said, the Council will have to justify its inclusion of broad areas of search, not least because (a) the areas of search should be able to deliver the sites of the future; and (b) the Council's decision to identify broad areas may well be

[5] *PPTS* footnote 8

the subject of strong local opposition and thus give rise to potential legal challenge.

Criteria based policies and site selection process

27. §10 of *PPTS* makes clear that Local Plans should include criteria-based policies. This is to guide land supply allocations where there is an identified need and to provide a basis for decisions should applications come forward where there is no identified need.

28. Plainly then, in identifying the 1-5 and 6-10 year land supply the Council will need to consider whether the sites / areas in question will be deliverable / developable when judged against the relevant criteria. In other words, there is no point including a site in the 5-year land supply if the site would not get off the ground when assessed against the relevant local plan criteria-based policy. Thus, although §25 does not require the adoption of a DPD within a year, the Council will clearly have to make significant progress in identifying the likely criteria, so as to be able properly to identify the sites to be included in the 5 year land supply analysis. The Council will also have to bear in mind the policy restraints set out elsewhere in *PPTS* e.g. in relation to open countryside and the Green Belt.

29. The amount of work required makes it inevitable in my view that paragraph 25 is going to be operative across much of the Country this time next year. We will, in short, be back in the familiar world of 01/2006, with unmet need being a significant consideration in the determination of applications for planning permission. It will be for LPAs and Inspectors to decide how significant the fact that the LPA in question is unable to demonstrate an up-to-date five-year supply of deliverable sites should be to the determination of the application in question, but it is rare in my experience for unmet need to be given anything other than very significant weight. It also seems likely in my view that, as set out above, Applicants

will rightly scrutinise the progress that LPAs are making over the course of this year and will seek to rely on any significant delays.

Decisions

30. Given the Government's stated aims (for which see above) it is instructive to examine some post NPPF / PPTS:

Hill Crest Café, Peckfield, Leeds; Sec. State, 7th August 20012

- 20 caravans on 8 pitches
- Enforcement notice served
- Inappropriate development; harm to openness; harm to character and appearance of the area
- Immediate need for additional 20 pitches, unlikely to be met until late 2014. Inspector afforded this factor "considerable" weight; but no weight to absence of 5 year supply.
- Additional "clear failure of policy" by the Council to provide pitches in the past
- Personal circumstances (health, settled education)
- Very special circumstances not made out.
- 12 months to comply (Appellant's request for 2 years rejected.

- Temporary permission for Appeal B (change of use from Truckstop to caravan site) granted – on basis that same need but less harm

Hill View, Tickhill, Doncaster; DL 22nd October 2012

- Proposal for 2 pitches
- Inappropriate development, impact on openness not serious; no unacceptable harm on character and appearance
- Significant weight to need for additional pitches (59 required by 2016)

- No DPD to fulfil unmet needs or maintain a 5 yr supply – significant weight in favour;
- Personal circumstances: (education, family connections): significant weight.
- VSC made out. Personal permission granted.

One Tree Hill, Corringham, Essex DL 24th October 2012

- Proposal for 2 mobile homes and 2 touring caravans
- Inappropriate development, harm to openness, serious impact on neighbouring Country Park and the rural appearance of the area;
- No alternative sites; no up to date 5 year supply
- Personal circumstances: significant health problems
- No VSC
- Temporary permission refused

Guildford Rd, Ash, Surrey 25th October

- Enforcement notice case
- Council seeking to argue that 5 year supply would be in place by March 2013; Inspector observed that delivery would take time after that date; significant weight given to urgent unmet need;
- No alternative sites
- Personal circumstances (health and education): significant weight
- Moderate weight to failure of policy, despite LPA fast-tracking DPD
- Discrimination: provision for bricks and mortar but not G&Ts: moderate weight in favour
- Moderately harmful impact on the GB
- Harm to the SPA
- PP refused
- Temporary permission refused

Traveller's Rest, Underwood, Notts. Secretary of State DL, 2nd Nov. 2011

- Significant harm to the GB
- Extent of GB places constraints on the delivery of sites, but that delivery of sites should come forward through a "measured and systematic" approach.
- Lack of a 5 year supply is a material consideration
- Personal circs could be met elsewhere
- Permission refused

31. Case Law:

- Charmaine Moore v Secretary of State. [2012] EWHC 3192 Admin Inspector's decision quashed on the basis that decision *irrational* (see paragraph 74). Nb Permission to appeal to the CA has this week been granted by Sullivan LJ – concerns as to whether the Judge "entered the arena of the planning merits and thus exceeded her powers".

- AZ v Secretary of State & South Gloucestershire. [2012] EWHC 3660 Admin. Deals with application of s.11 of the Children Act 2004:

> "80 The article 8 rights of children inevitably require greater vulnerability and dependency and their many and varied social, health, education and welfare needs. The jurisprudence of the European Court of Human Rights has always recognised that the Convention provides greater and more intense protection for children than for adults and that the needs of children vary and alter as they are growing up and maturing.
> 81 Four milestones along this route of the development of Convention protection for children should be briefly mentioned:
>
> (1) In 1989, the United Nations Convention on the Rights of the Child , which the United Kingdom is a signatory to, came into force. This international Convention built on earlier work in both the United Nations and the European Union and it contains Article 3 which provides that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

(2) In 2004, the Children Act 2004 was enacted and section 11 gives effect in England and Wales to the United Kingdom's obligations provided for in Article 3 of the UNCRC . This provides, in what is for this case its most material of its provision, that:

> "Arrangements to safeguard and promote welfare
> 11 This section has no associated Explanatory Notes
> (1) This section applies to each of the following—
> (a) a local authority in England;
> (b) a district council which is not such an authority; …
> (2) Each person and body to whom this section applies must make arrangements for ensuring that—
> (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; …."

In principle, this duty extends to all sections and departments of SGDC including its planning department when undertaking planning functions such as granting planning permissions and issuing stop orders and enforcement notices.

(3) In 2010, in Neulinger v Switzerland [31] , the ECHR observed that:

> "…the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken … of 'any relevant rules of international law applicable in the relations between the parties' and in particular the rules concerning the international protection of human rights."

(4) In 2011, in ZH (Tanzania) v Secretary of State for the Home Department [32] , the Supreme Court, applied the principles extracted from the earlier developments that I have listed as well as from other developments in international, domestic and Commonwealth jurisprudence and from general principles now applicable to the application of article 8 . In doing so, it held that when a public authority in England and Wales is undertaking a proportionality assessment under article 8 in relation to a child, that child's best interests must be a primary consideration and that, in discovering what those interests are, the public authority must ask the right questions of the right people and must additionally give the views of the child due weight in accordance with the age and maturity of that child having, where possible, given consideration to hearing directly from him or her. It is clear from this decision, if it had not been clear previously, that the duty to give the best interests of the child a primary consideration and to consult the child as appropriate extends to every function undertaken by a public authority which engages a child's article 8 rights and which involves a proportionality assessment in relation to that child.

> 82 These inter-related duties are confirmed by the judgment of Baroness Hale. These extracts from her judgment confirm this with great clarity:
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> "25. Further, it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as "a primary consideration". Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration". … …This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first. That seems, with respect, to be the correct approach to these decisions in this country as well as in Australia."

- See also paragraph 76 of Hughes, supra

32. O'Connor v Secretary of State. Court of Appeal, 13th February 2013. Court of Appeal upheld decision of Deputy High Court Judge (John Howell QC, [2012] EWHC 942 (Admin). Case concerned Inspector's approach to policy (previous policy regime but analogous provisions). Useful guidance as to Inspector's (and therefore LPA's) decision making process.

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