RE: LAND AT CAROUSEL PARK, BASINGSTOKE ROAD, MICHELDEVER, WINCHESTER

CLOSING SUBMISSIONS ON BEHALF OF THE APPELLANTS

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1. These appeals represent that latest in the long running saga of enforcement at this site, the original enforcement notices issued in September 2010 finally being quashed on appeal in November 2019. In presenting closing submissions in 2019, having been involved with the Appeal Site since early 2011, I said that I did so with a mixture of joy and sadness, anticipating that the long running saga was close to a conclusion. I was mistaken, the initial notices being quashed, and the LPA having now issued further notices, but again continue to fail to adequately grapple with what is actually happening on the Appeal Site, and continue to fail to be realistic with regards to the accommodation needs of the travelling community in their district. The site represents the home of a great many adults and children from the travelling community, some of whom have only ever known this site as home. Many of the families on site moved here believing they were lawfully entitled to live on site.

2. The site is 2.7ha in area and has an extant planning permission for use as an extensive travelling showpersons' site ("**TSP**") comprising up to 27 residentially occupied caravans of any type, touring caravan storage limited only by the available space (providing for something upwards of 450 caravans), equipment storage and maintenance areas, a large vehicle workshop, fencing, roadways and other buildings. There are no conditions that would or could define the meaning of a TSP and the description of development is such that it is not a mixed use per se but a TSP use. If the permitted use was described as a 'mixed use for the stationing of caravans for residential purposes, business use, parking and maintenance of vehicles and storage', conditioned such that only those who met the definition of a TSP could use the site then

matters would be a great deal more simply. The inadequacies of the 2003 planning permission have always underpinned the planning problems on the Appeal Site.

3. The use of the phrase '*travelling showpeople*' in the description of permitted development, without more by which that use can be defined, provides for a very wide range of permissible uses, essentially focused on the identity of the occupier not the physical use of the land. Such a use does not have to be a mixed use, indeed it could be a use for residential caravans only, or residential caravans and any one or all of the variety of uses that might be associated with a TSP use. Unlike in a conventional mixed use case, where a change of use might occur when one permitted element is lost to the benefit of another, there are no explicitly permitted mixed use elements in this case and no requirement for any combination of uses to be present. In essence, if a person occupying the land can be considered to be a TSP, however that is defined, then there would be no breach of planning control.

4. It is entirely wrong to adopt the now rather archaic view the TSP sites must have areas for parking, storage and maintenance of large fairground rides. As demonstrated at the previous Inquiry, this is no longer a necessity, many TSPs resorting to smaller equipment such as food vans, hoopla's and coconut shys which can be used at school fairs and car boot sales, as well as the larger organised fairs.

5. This extant permission must underly all of the planning considerations in respect of the development enforced against, representing both PDL and a lawful fallback position (s.57(4) of the 1990 Act).

6. There are appeals against three enforcement notices before the Inquiry:

- **Appeal 1 – EN1 – MCU** – To a residential caravan site for approximately 100 caravans (Grounds a, b, d, e, f, g);
- **Appeal 2 – EN2 – BOC** – In respect of the limitation on the number of caravans on each pitch to 3 (condition 10), the limitation of the number of pitches to 9 (condition 11) and the limitation on the number of residents to 50 (condition 15) (Grounds a, c, d, e, f, g)

- **<u>Appeal 3 – EN4 – MCU</u>** – to a residential caravan site for 10 caravans (Grounds a, f, g)

7. Subsequent to the written and oral evidence before the Inquiry the Appellant is no longer pursuing appeals in respect of EN2 ground (b)[1] and EN4 ground (c).[2]

8. As has been an understandable theme of this site, there is some difficulty in aligning site residents with plots and the HM Land Registry records ("**HMLR**"), but what is beyond doubt is that the site comprises a number of individual plots or pitches occupied by individual families and wider family groups who do so independent of and separate to other plots/pitches such that the wider site cannot be considered to be a single planning unit but a number of smaller individual planning units.

<u>EN1 and EN2 – Ground (e)</u>

9. The site is made up of separate, identifiable, fenced and gated pitches occupied and/or owned by separate individuals. It is not one integrated site with a single owner. The Appellants will demonstrate that there has been a failure of service in respect of Appeals 1 and 2 and consequently a number of residents were not made aware of the notices and have not been able to lodge appeals. The obvious prejudice arising from this is that if the appeals fail then they will lose their homes, they are entirely dependent upon both notices being quashed in order to retain their homes.

10. There are no appeals from plots 3, 4, 5A, 5B, 5C and 7 and thus they, most importantly, cannot progress ground (a) appeals in circumstances where their personal circumstances maybe fundamental to these appeals, and where their Article 8/UNCRC rights are engaged.

[1] Confirmed by BW in XX on 28th September 2023.
[2] Confirmed at §9.0 BW PoE.

11. In ground (e) appeals it is often claimed that there is seemingly no prejudice arising, the claimed prejudice being illusory as the material issues in play are addressed by the single landowner appellant, but that is not the case here.

12. The 1990 Act at s.172(2) requires the LPA to serve enforcement notices upon the owner and occupier of land, and any other person having a material interest in the relevant land. The legal owner of land is the person or persons holding the freehold title absolute as registered with HMLR.

13. The relevant service provisions are set out at s.329 of the 1990 Act and provide as follows, in respect of the service of an enforcement notice:

    a. by delivering it to the person on whom it is to be served or to whom it is to be given (s.329(1)(a)); or
    b. by leaving it at the usual or last known place of abode of that person or, in a case where an address for service has been given by that person, at that address (s.329(1)(b));
    c. Where the name of the relevant person cannot be ascertained 'after reasonable inquiry', a notice is taken to have been served if it is addressed to "the owner" or, as the case may be, "the occupier" of the premises (describing them) and is delivered or sent in the manner specified above (s.329(2)(a)); or
    d. It is so address and marked in a manner so as to identify that it is a communication of importance, and it is sent to the premises in a prepaid registered letter or by the recorded delivery service and is not returned to the authority sending it, or it is delivered to some person on those premises, or is *affixed* conspicuously to some object on those premises (s.329(2)(b)).

14. With regards to land ownership, the following table summarises the ownership, service and factual position in respect of this Inquiry and the previous Inquiry held in 2019:

PLOT	LAND REG OWNER	NOTICE	SERVED	Evidence at this Inquiry	Evidence in 2019[+]
1	Darren Loveridge (722336 – 2009)[*]	1, 2		Freddie Loveridge – unclear if any connection.	M Wall appealed, evidence from Michael Wall.
2	**Beverley Black (655638 – 2011), Linda Black (648953 – 2004)**	1, 2	RETURNED – Posted to Plot	No	Maurice Black appealed and gave evidence.
3	Suzanne Wall (648947 – 2004)	2	On Site	On Site - No	Appealed and Felix Wall gave evidence.
4	**Michael Stokes, Francis Casey (648948 – 2015)**	1, 2, 4	RETURNED – Posted to Plot	No	No EN
5	**Maurice Cole (648956 - 2004)**	1, 2, 4	RETURNED – Posted to address in Yarely.	No	No EN
6	**Anna Lee (665606 – 2005)**	1, 2	RETURNED – Posted to Plot	No	No EN
7	Derek Birch (655142 – 2005)	2	On Site	On Site – No evidence	Appealed and gave evidence.
8	**Danny Carter, Joe Ripley, Jimmy Ripley (654472 – 2007)**	1, 2	RETURNED – Posted to Plot	No	Appealed and gave evidence, as well as WS from Joe and Jimmy Ripley.
9	**Valerie Carter, Shannon McDonagh, Caroline Stevens (681655 – 2017)**	1, 2	RETURNED – Posted to Plot	No	Appeal by Maurice James, WS provided to previous Inquiry.

[*] *Reference to HMLR entry and date of registration (see LPA6 (pg68-97).*

[+] *Reference to details in 2019 Appeal Decision at LPA15 (pg205)*

15. None of the current legal owners of the Appeal Site have a valid appeal against any of the Notices. Assuming Derek Birch and Suzanne Wall are aware of the Notices and have chosen not to lodge appeals, and assuming, benevolently, that there is a connection between Darren Loveridge and Freddie Loveridge on Plot 1, concern must arise in respect of the owners of Plots 2, 4, 5, 6, 8 and 9. Attempts to serve Notices upon them on the Plots (and a different address in respect of Plot 5) failed with the recorded delivery letters being returned, as plainly they are not living there.[3] The owners of Plots 2 and 8 were previously found following the Inquiry in 2019 to be Travelling Showpeople (as were the owners of plots 1, 3, 7 and 9), and the owners of Plots 5 and 6 are the original TSP owners. If the appeals succeed on ground (a) they will have lost their TSP planning permission, and in circumstances where it cannot be confirmed that they are aware of the Notices there would appear to be the strong potential for substantial prejudice arising out of the failure to serve the Notices upon them.

16. Further, evidence has been given by many occupiers of the appeal site that they were not initially aware of the Notices and had not received a copy. Notices wedged behind letter boxes and left on caravan steps do not satisfy the requirement of being "*affixed*", they need to be secure, for the obvious reason that a notice that is not secured or affixed can be blown away and not come to the attention of the intended recipient within the relevant appeal period. Most residents gave evidence of having gates on their plots and it would be normal practice for the Notices to have been affixed with cable ties to the gates in clear plastic envelopes. There are NO photographs demonstrating service was carried out by these means.

17. A significant number of residents who gave evidence confirmed under oath that they had not received a Notice, and only became aware of them at a later stage, and consequently a number do not have appeals under which their specific interests and circumstances can be considered. It is no answer to rely upon a loose assertion that residents would have become aware of the Notices regardless. The legal burden is upon

[3] It is unfortunate that the LPA did not disclose the fact the letters had been returned until the oral evidence of TW.

the LPA to service the Notices in accordance with the statutory provisions, not to haphazardly distribute the Notices to non-secure positions on the Appeal Site in the expectation that all relevant occupiers and owners are likely to become aware by virtue of any informal social network on the Appeal Site. That is entirely inadequate.

18. Taking these issues together, there would appear to be a real risk that substantial prejudice has been caused to a number of both owners and occupiers by a failure to adequately serve the Notices upon them, and the ground (e) appeals should succeed for that reason.

EN1 - Ground (b)

19. The ground (b) arguments as originally relied upon are set out in detail in the PoE of BW at §6.0 The principal problem for the LPA is that they have treated the site as a single planning unit and alleged a breach of planning control over that entire unit, which has not occurred, because the Appeal Site is not being used as a single "*residential caravan site*", it is a series of individual planning units all of which are, separately in use for the stationing of caravans for residential purposes for gypsies and travellers (c.f. ***Church Commissioners for England v Secretary of State for the Environment*** (1996) 71 P. & C.R. 73 where it was held that a number of individually leased retail units within a singularly owned indoor shopping centre at the Metro Centre in Gateshead comprised individual planning units). Each plot is individually occupied (the starting point for the determination of a planning unit applying the '*Burdle Principles*'),[4] and each plot is functionally and physically separate from the other plots, each plot being used for its own unrelated purposes. There can be no lawful finding that the Appeal Site is a single planning unit, the third '*Burdle Principle*' applying hereby each plot is an individual planning unit. This is not a communal G&T site with shared facilities leased out by a single owner.

[4] See Bridge J in ***Burdle v SSE*** [1972] 3 All ER 240 at [1213A] (for the starting point) and [1212C-G] (for the three broad criteria).

20. The concept of the 'planning unit' is a judicial construct intended to be used as a means of determining the most appropriate physical area against which to assess the materiality of any change of use. The relevant judicial authorities have adopted the general rule that the starting point for assessing the materiality of any change of use may be the whole of the land concerned, usually the whole of the area in the same ownership or the same occupation, but the courts have also stated that a smaller unit within a larger land holding may be taken as the planning unit for the purposes of assessing whether a material change of use has occurred, all of which is subject to the particular relevant factual circumstances.

21. Where pitches are subject to individual appeals those appeals should theoretically be determined individually, applying the relevant planning balance to the factors applicable to that pitch, considering the materiality of any change and applying the planning balance over the relevant planning unit. What has complicated this matter is that there are several pitches which do not have individual appeals because, although the occupiers have come to be aware of the Notices, and in some circumstances they have been able to give evidence to the Inquiry, they were not properly served and thus the occupiers do not have individual appeals.

22. Although the Appellants maintain that both correctly and in a general sense the ground (b) appeals should succeed as the Appeal Site does not represent a single "*residential caravan site*", applying a reasonable judgment in the circumstances and treating it as such would remedy the problem of the haphazard service of the Notices, in the event that the ground (e) appeals fail. The Appellants present this as a pragmatic solution to a 13 year old problem to allow the circumstances of all of the Appeal Site residents to be considered, by way of the ground (a) appeals.

EN2 – Ground (c)

23. The EN2 ground (c) appeal evidence is short and succinct, being set out at §8 of the PoE of BW and elaborated upon briefly in oral evidence. In essence, permitted development rights exist for the extant lawful development on the Appeal Site and the

Notices cannot attack that which has been constructed pursuant to those PD rights, no more so than they can attack development that has express planning permission.

EN 1 and EN 2 – Ground (d)

24. The original enforcement notices issued in 2010[5] sought to enforce on a plot by plot basis (recognising that each plot was a single planning unit), and sought the removal, amongst other things, of all sheds, areas of hardstanding, dividing walls and fences within each individual plot. Inspector Morden attached a number of plans to his subsequently quashed decision[6] identifying various buildings, structures, fencing and walls that were in place at the time of his site visits on 11th and 14th October 2011. All of this operational development has been in place for at least 10 years and 6 months prior to the issue of the current Notice and is thus immune from enforcement, applying the principles in established in ***Murfitt v Secretary of State for the Environment and East Cambridgeshire DC***[7] and ***Somak Travel Ltd v Secretary of State for the Environment***[8] and confirmed by the Court of Appeal in ***Kestrel Hydro v Secretary of State for Communities and Local Government***.[9] The ground (d) appeals must succeed to this extent at least.

EN1 – Ground (a)

25. Although the enforcement notice treats the site as a single whole unit the appeals are lodged in respect of the individual pitches occupied by the various Appellants and others who do not have appeals. The appeals should ideally be determined individually, by reference to the harm and material considerations relied upon specific to those pitches, and not addressed in a global sense, the folly resulting from the manner of enforcement adopted by the LPA in treating the Appeal Site as a single planning unit. However, BW has confirmed in oral evidence that the PU arguments are not pursued

[5] LPA9 pg114 - 146
[6] LPA 11 pg156
[7] (1980) 40 P. & C.R. 254
[8] (1988) 55 P. & C.R. 250
[9] [2016] EWCA Civ 784

(not that they were unmeritorious), in favour of allowing a pragmatic resolution to the long-term enforcement problem at the Appeal Site.

26. There are two preliminary matters to address; the submission of the LPA that a split decision on EN1 is necessary and, secondly, the consequential result of a successful ground (a) appeal on EN1, upon EN2 and EN4.

27. The LPA have requested that should the ground (a) appeal on EN1 succeed, then a split decision should be issued, allowing for a residential caravan site for G&T but maintaining the Notice in respect of non-G&T. This submission is predicated on the misunderstanding that an act of implementation is required for a retrospective planning permission to have commenced.

28. In the event that the ground (a) appeal succeeds then retrospective planning permission is granted for what has already occurred, that being a residential caravan site, albeit one conditioned to those who meet the terms of an appropriate condition. Anyone residing on the Appeal Site who did not meet the terms of that condition would be in breach of planning control, consequently, there is no justification for an unnecessarily complicated split decision.

29. It is incorrect to state that even a retrospective permission requires an act of implementation. By its very nature the development has already occurred, otherwise there can be no breach of planning control to enforce against. Occasionally the somewhat curious judgment of Mr Purchas QC sitting as a Deputy High Court Judge in the Queens Bench Division in ***Butcher v SSE***[10] is cited as authority for the assertion that even a retrospective permission must have a further act of implementation in order to be commenced, that is not what the court found. At [345] the court held as follows:

> *"…Whether in any particular case a permission has been implemented is in every case a matter of fact and degree upon the evidence for the decision maker….*
>
> *…Accordingly what occurs on the land in respect of building or other activity or in its use will be likely to be of particular weight…*

[10] (1996) 71 P. & C.R. 337, [1996] J.P.L. 636

> *...In that respect a particular problem arises when the development subject to the enforcement notice is the making of a material change of use. The effect of a planning permission under section 88B would be to legitimise that development and permit its continuance on the land. In my judgment, however, there remains the requirement for implementation of the permission for the reasons I have already given.* ***In such a case the continuance of the use, at least for a material period of time, would generally be sufficient to justify the conclusion that the permission had been implemented*** *and that any condition on the permission had accordingly become binding. However, there are other factors which may be material to that consideration, depending upon the circumstances of the particular case. That the use was by a licensee in the process of being evicted by the owners of the land in order to bring the use to an end might well be material….*
>
> *...Accordingly I do not accept the submission of Mr Harrison that the continuance of a use, the subject of a permission under section 88B, is* ***necessarily*** *conclusive that the permission has been implemented…" [emphasis added]*

30. The Court did not make a finding that an act of implementation is necessary, indeed, they found that ordinarily the continuation of the use said to comprise the breach of planning control would be sufficient. It would always be a matter of fact and degree, and the specific circumstances would apply to any subsequent determination as they did in ***Butcher***, matters such as where the use was in the process of being ended (eviction of a licensee) or where a deemed consent is granted for continuation of a single use while the use continued is a mixed use. It is for these reasons that a pre-commencement condition would not and could not be imposed on a retrospective planning permission.

31. The approach of the first instance court in ***Butcher*** is also entirely contrary to the binding judgment of the House of Lords in ***Newbury DC v Secretary of State for the Environment***[11] where the Court concluded in respect of subsequent permissions that a second permission for development already permitted and implemented was not capable of further implementation. In this case, in order for an enforcement notice to be issued and survive any ground (b) challenge, the claimed breach of planning control **must** have already occurred, it cannot occur a second time and thus there can be no further act of implementation of a retrospective permission, the permitted material

[11] [1981] A.C. 578 at [598H-599C] and [618C].

change of use having already occurred. For these reasons alone the approach of the first instance court in ***Butcher*** is to be rejected.

32. However, even applying the flawed judgment in ***Butcher***, the deemed application is for a single use that has already occurred and will continue, circumstances quite normal in these situations, there are no complicating factors, and even according to ***Butcher*** the continuation of that use would constitute the act of implementation considered to be required by Mr Purchas QC in contradiction to the House of Lords such that any condition relating to occupation would become binding, and there is consequentially no justification for the split design advocated for by the LPA. It would simply over-complicate matters on a site that has a very long history of over-complicated and failed enforcement action.

33. The second preliminary matter is that of the effect of a successful ground (a) appeal on EN2 and EN4. The Appellants consider that if the EN1 ground (a) appeal succeeds then EN2 is of no effect as the conditions said to be in breach are no longer binding, the use of the Appeal Site for a TSP use (save for Plots 3 and 7) having been potentially extinguished by a subsequent permission. In respect of EN4 the appeal becomes otiose as the material change of use enforced against would essentially have become lawful, subject to condition.

34. Turning then to the substance of the EN1 ground (a) appeal. The reasons for issuing the Notice are set out at §4 of the Notice (LPA2 pg45) and elaborated upon at §145 of the PoE of TW. In oral evidence it was established that the LPA consider all of the claimed elements of harm can be addressed by way of appropriate conditions, a position agreed by the Appellants, save for the following two matters, which are the only remaining elements of claimed harm to consider in the planning balance:

    a. Harm arising out of the loss of a safeguarded TSP site (TR1 and TR3 DPD 2019)
    b. Harm arising out of the location of the Appeal Site, being outside any defined settlement and subject to policy MTRA4 '*Development in the Countryside*' of the LPP1 (March 2013), which resists development in the countryside except in

specific certain circumstances, none of which include either G&T or TSP sites, contrary to the PPTS which acknowledges such sites to be acceptable in principle, subject to other constraints.

Safeguarded TSP Site

35. In reality, the principal, and in substance, only complaint of the LPA is that this is a safeguarded site for TSP and that there is a significant need for such sites. The relevance and weight to be given to any harm arising from the loss of 7 of the 9 permitted TSP plots must be assessed in the context of a number of matters:

a. The 2022 GTAA has determined a need for a further **200 G&T** pitches between 2022 and 2038[12] and only **33 TSP** plots;[13]
b. At Appendix D of the 2022 GTAA[14] the number of unauthorised plots, which is usually a measure of *immediate* need, is **69 for G&T**,[15] none of which are tolerated, and only **6 for TSP**,[16] all of which are tolerated;
c. Save for plots 3 and 7 the Appeal Site has not been in TSP use for many years;
d. If the ground (e) appeals fail on the basis that either the original TSP owners were served with the Notices, or they have not suffered any significant prejudice if not served, then it follows that as owners they have no desire in retaining the 7 plots for either their own use or TSP use generally, and are content for them the pass to G&T use, which calls into question whether the 7 plots will ever realistically be available for TSP use.

36. In these circumstances, although the GTAA has identified a need for 33 further TSP plots between 2022 and 2038, with the current unauthorised need all being tolerated, and with the current immediate need for up to 69 G&T pitches, currently on unauthorised pitches and at risk of enforcement, as demonstrated by the current appeals,

[12] Figure 24 and 25, pg67 GTAA Appellant Appendix 8
[13] Figure 26 and 27, pg68 GTAA Appellant Appendix 8
[14] Appellant Appendix 8 pg87
[15] Which includes 19 at Carousel Park.
[16] Excluding 2 located in the South Downs National Park.

and the lack of interest in the 7 TSP plots at Carousel Park being used as TSP plots, the weight to be given to the hypothetical policy harm is very limited, even taken at its highest.

Locational Harm

37. It is not entirely clear what is said to amount to locational harm, whether it is an in principle harm or whether there is an allegation of adverse character and visual impact. However, as accepted by TW in XX and in answer to questions from the Inspector, if G&T sites are acceptable in principle in the countryside, and consequently in this location, then there is no locational harm arising.

38. PPTS §25 provides that such sites are acceptable in principle in the open countryside that is away from existing settlements or outside areas allocated in the development plan, they just need to be "*very strictly*" limited. They are not expressly excluded, as they happen to be in LPP1 Policy MTRA4, which is consequently more restrictive than and thus inconsistent with national planning policy. TSP and G&T accommodation is provided for by the same national policy (the PPTS) and the same Development Plan policy DM4. It is logical that where an extant TSP site is considered to be acceptable and worthy of safeguarding the same locational principles would apply to a G&T site, and thus the Appeal Site should be found to be locationally acceptable with no Development Plan policy conflict and no harm arising in this respect.

39. If there is concern remaining in respect of adverse character and visual impact, that impact should be measured against the extant planning permission for a TSP site that allows for 9 family pitches comprising up to three twin unit mobile homes, extensive areas for the storage and maintenance of potentially very large and noisy vehicles and fairground rides and an additional number of touring caravans limited only by the space available. In these circumstances there can be no character or visual impact and a Site Development Scheme can be required by condition to address suitable landscaping requirements, which can include addressing the impact arising out of the rather fortuitous recent removal of the roadside hedging.

40. The site is considered suitable for TSP use and the LPA seek to safeguard that use. With a conditioned Site Development Scheme there is absolutely no reason why the Appeal Site would not be equally suitable in locational terms for current G&T use. There is no harm arising in respect of this remaining element of the LPA complaint.

Matters in Favour of Allowing the EN1 Ground (a) Appeal

41. Against what amounts only to a hypothetical harm in policy terms, if such a harm exists, must be balanced a number of relevant material considerations. These matters may constitute benefits in the tilted balance or material considerations in the traditional planning balance. Whichever balance is engaged, the benefits of granting planning permission outweigh the identified harm.

42. PPTS states at §24 that "*immediate need*" for sites is a relevant factor to be taken into account when determining these appeals. The substantial level of immediate and on-going need for further G&T pitches, as compared to the very limited need for TSP plots is a matter of significant weight in favour of allowing the ground (a) appeal.

43. The LPA claim that they can identify a 5yr HLS for G&T sites, this being predicated upon a 2016 GTAA and the current adopted DP. Indeed the LPA claim that they have an over-provision of 17 pitches, suggesting that there is no realistic likelihood of the residents of the Appeal Site being able to secure alternative lawful accommodation for some years. However, the reality is entirely different; the LPA cannot demonstrate a 5yr HLS of G&T sites if the most recent needs assessment is taken into account, which it must. It cannot simply be ignored.

44. For conventional housing, the need and supply position is often updated annually and relevant delivery trajectories amended accordingly. It would not be acceptable or credible for a local planning authority to ignore a very recent needs assessment in favour of one conducted in early 2016 (over 7 years ago), and that should not be the case here. It is an entirely false premise to do so, and one that places the LPA in breach

of the Public Sector Equality Duty. It should be uncontroversial that the LPA cannot demonstrate a 5yr HLS for G&T pitches, a matter which both weighs in favour of allowing the appeals and triggers the tilted balance, which I will address below.

45. Further, the PPTS at §26 provides that weight should be attached to effective use of PDL. The Appeal Site is PDL and it is rather puzzling why that is controversial. The LPA assert that it is not PDL, claiming that the TSP permission has expired by virtue of condition 13. That is a flawed interpretation of the 2003 permission. Planning permission was granted for the whole of the Appeal Site as a "…*travelling showpeoples' site*…", and by virtue of condition 13 only when "*the site*" ceases to be used for the permitted purpose it shall be restored to its former condition. As a matter of accepted fact "*the site*" has not ceased to be used for TSP and therefore condition 13 is not engaged. The condition does not provide for severable elements of "*the site*" to lose its permitted use when just those individual elements are put to either another purpose or no purpose at all.

46. Further, if the TSP permission has expired by virtue of condition 13 then there can be no on-going breach of conditions 10, 11, and 15 and thus EN2 must be quashed as the breach of planning control has not occurred. This is of course nonsense, the assertion of the LPA is entirely misconceived, the Appeal Site is PDL and this is a factor that weighs significantly in favour of allowing the appeals. If it is not PDL for the reasons asserted by the LPA then this is a factor that is then not taken into account but EN2 must be quashed as there is the alleged breach of planning control has not occurred.

47. The LPA accept (TW XX) that there are no alternative accommodation options for the Appeal Site residents. It is trite law that alternative sites must be available, affordable, acceptable and suitable (see ***Angela Smith v Doncaster MBC***[17]). That means they must be capable of identification and available <u>now</u>, not be unlawful and be suitable in the context of the families. This is a material factor (PTTS §24(b)) that weighs significantly in favour of allowing the appeals.

[17] [2007] EWHC 1034 (Admin)

48. As also accepted by TW in XX, any further G&T sites, and there will have to be many, are likely to be located in the countryside, a relevant factor in favour of these appeals, or alternatively a factor diminishing any residual weight that might be given to the claimed locational harm.

49. The first week of the Inquiry siting was spent hearing evidence on oath from various residents of the Appeal Site. Their family circumstances were explored in detail, with evidence given relating to the many children who call the Appeal Site home, who have been able to access both education services and health services from the Appeal Site, and who would find it difficult from the inevitable roadside existence that would follow from a dismissal of these appeals. Several of the adults also have pressing health circumstances, not least Ellen Marie Crumlish (Plot 9B), who gave very sincere and moving evidence of her personal serious health problems. It would be unconscionable to evict her and her family to a roadside existence.

50. The evidence of the residents of the Appeal Site was extensive and detailed and I do not seek to repeat it in these submissions, confidence being had that a detailed note has been kept by the Inspector. Those personal circumstances, the need for a stable and secure home and the need for access to health care and educational facilities are pressing and, should it be necessary to take personal circumstances into account, being given significant weight in favour of allowing the appeals.

51. Given there are many children on the Appeal Site who consider it to be their home, their best interests pursuant to United Nations Convention on the Rights of the Child ("**UNCRC**"), specifically Article 3 are engaged in the decision making process. The Supreme Court in ***ZH(Tanzania) v SSHD***,[18] as confirmed in ***Zoumbas v SSHD***[19] at [10], emphasised that the best interests of children are a primary consideration in cases such as this, that is where their interests are being adversely impacted upon and no other factor should be given more weight. Lord Kerr at [46] states, referring to the best interests of a child:

[18] [2011]UKSC 4
[19] [2013] 1 WLR 3690

> *"46. .... It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them.... What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."*

52. The Court of Appeal in ***Collins v SSCLG & Fylde Borough Council***[20] set out relevant principles to be considered in planning cases, and these do not differ particularly (for the purposes of this case) from the later assessment of the Supreme Court in ***Zoumbas***, in that they should be treated as a primary consideration. Any decision on these appeals must be one that takes into account the duty to safeguard and promote the welfare and well-being of the children resident on the Appeal Site (Children Act 2004, s.11(1) and (2) and Art 3 UNCRC).

53. It should also be noted that the court in ***Collins*** sought in the principles set out to align the best interests of children with the needs of their parents. This approach has now been deemed by the Supreme Court to be unlawful. Baroness Hale in ***Makhlouf v SSHD***[21] at [46] and [47] held that the rights of children must be considered separately from those of their parents and the public interest; children must be recognised as rights-holders in their own right and not as adjuncts to other people's rights. The phrase oft used by Baroness Hale is that "…*the sins of the parents must not be visited on the children*…".

54. The summary position now reached by the Courts is that what is in the best interests of a child is a primary consideration and must be determined first and kept at the forefront of the decision makers mind. No other factor should be given greater weight by virtue of its inherent characteristics.

[20] [2013] EWCA Civ 1193
[21] [2016] UKSC 59.

55. Considering the bests interests of the children and the engaged Article 8 rights, the judgment of Hickinbottom J in ***Stevens v SSCLG***[22] at [76] is of particular relevance, where he states:

> *"…As Lord Steyn indicated in Daly at [25]-[28], the jurisprudential basis for the principle of proportionality is very different from that of common law irrationality. To begin with, the criteria are more precise and more sophisticated than merely broad logical outrageousness and irrationality. The question required to be answered by the court is whether the impairment of the relevant right or freedom is more than necessary to accomplish the public interest objective (Daly at [27]). That too requires consideration of merits, but, as Lord Steyn identifies, compared with Wednesbury, it demands a somewhat more intense review of both the weight afforded to relevant factors and the balance which the decision-maker has struck.* ***The court's consideration of the article 8 rights, as with all human rights (but particularly those which involve family life) demands a review of particular intensity. If the interference with those rights would not only require children to leave a stable environment with access to schooling and health facilities, but also to camp with their families by the roadside, the level of intensity will of course be substantial*** *(if authority were required for that self-evident proposition, see R (Smith) v South Norfolk Council [2006] EWHC 2772 (Admin) at [62] per Ouseley J)…" [emphasis added]*

56. Critical to these appeals is the fact that if they are dismissed the resident families will be forced to resort to an unlawful roadside existence, for an indefinite period. A totally unacceptable and uncivilised position in the 21st Century, made more so by the LPA insistence that they have an overprovision of 17 pitches in the face of a potential immediate need of some 69 pitches. Hickinbottom J requires the assessment of the Article 8 rights of the resident families in such circumstances to be one of *particular intensity*.

57. A dismissal of the appeals would result in many young children being "…***require[d]…to leave a stable environment with access to schooling and health facilities…'.*** In these circumstances substantial weight should be given to what is in the best interests of these children, that is to secure a safe, stable home from which to thrive and develop.

[22] [2013] EWHC 792 (Admin)

Planning Balance

58. PPTS §23 requires these appeals to be determined in accordance with the PFSD and the application of specific polices in both the NPPF and PPTS. The only place where the PFSD is set out is at §11 of the NPPF and where the LPA cannot demonstrate a 5yr HLS the tilled balance is engaged.

59. The LPA assert, relying upon NPPF footnote 38 that the lack of a 5yr HLS for G&T sites can only result in that being a significant material consideration for the grant of temporary planning permission, pursuant to §27 PPTS. That is both a complete misunderstanding of what is provided for by the PPTS and NPPF and a clearly unjustifiable discriminatory approach; to allow the settled population to effectively reverse the planning balance where there is a lack of a 5yr HLS but limit a recognised ethnic minority to only being able to advance such a consideration for temporary permissions. The starkly discriminatory nature of such an interpretation of national policy is determinative of the fundamental mistake in such an interpretation, and further illustrative of the worryingly defective approach of the LPA towards G&T and TSP accommodation provision.

60. The PPTS (§23) requires these appeals to be determined in accordance with the PFSD (NPPF §11). The level of need is to be "***assessed***" pursuant to the PPTS, as expressly stated at NPPF footnote 27 and 38, rather than pursuant to the explicit provisions for "*Maintaining supply and delivery*" contained in the NPPF at §74 to §80, but the ***effect*** of any lack of a 5yr HLS is to be treated in precisely the same way as for conventional housing, as provided for by PPTS §23 and the §11 PFSD. The only additional detail is that in applications for temporary permission, the lack of a 5yr HLS must be treated as a significant material consideration, in addition to any resultant effect in respect of the balance to be applied.

61. The tilted balance is engaged in these appeals by virtue of the LPA being unable to demonstrate a 5yr HLS of G&T sites, and the limited residual harm identified by the LPA, even taken at its highest, does not and cannot significantly and demonstrably

outweigh the clear and substantial benefits flowing from allowing the appeals, even without considering the personal circumstances of the Appeal Site residents.

62. Even in the highly unlikely circumstances where the discriminatory approach is preferred and the tilted balance does not apply, the material considerations relied upon clearly outweigh any residual harm identified.

63. It follows that a non-personal permanent permission should follow. Alternatively, if the personal circumstances are required to be taken into account then a permanent personal permission is the only reasonable outcome.

64. Finally, as an undesirable fall-back position, in the event that the significant material considerations relied upon are found to not outweigh the limited residual permanent harm, or that limited residual harm is found to significantly and demonstrably outweigh those benefits, the lesser temporary harm resulting from a 5 year temporary permission is clearly outweighed by those material considerations, the weight to be given to which is not reduced merely because the resultant permission would be a temporary one, and a 5 year temporary permission should be granted.[23] However, such an outcome would not be satisfactory to any of the parties to the appeals.

65. Finally, in applying the planning balance, the Public Sector Equality Duty ("**PSED**") must be taken into account. The PSED provided for at s.149 EA 2010 establishes that a public authority or person exercising public functions must have due regard to the need to eliminate, inter alia, discrimination and to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not. The PSED requires actual consideration and "*evidence of a structured attempt to focus upon the details of equality issues*". Due regard must be had to the actual accommodation needs of the families who live on the Appeal Site. Those needs are for

[23] It should be uncontroversial that the balancing exercise to be carried out when considering a temporary planning permission is different to that of a permanent planning permission, temporary harm clearly being of a lesser degree – see ***McCarthy and Others v SSCLG*** [2006] EWHC 3287 at [33] and ***Moore v SSCLG and London Borough of Bromley*** [2013] EWCA Civ 1194

a permanent, safe and secure home, made more pressing by the lack of any alternate accommodation option and the lack of any foreseeable solution in the years to come.

66. The LPA are failing to engage with the PSED and failing to engage in any realistic way with the actual need for provision of accommodation for the travelling community. The LPA persist in seeking to diminish their need for pitches, claiming an over-provision of 17 in the face of an overwhelmingly contradictory GTAA, and seek to apply national planning policy in a discriminatory manner, thus denying adequate accommodation to the travelling community, particularly those currently in need such as the Appeal Site residents. The LPA have clearly failed, and are continuing to fail to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not.

67. That there are no alternative accommodation options, an unmet personal need and a substantial general need, both immediate and going forward, are all demonstrative of the historical and on-going failure of the LPA to realistically acknowledge and adequately address the accommodation needs of the travelling community, made more significant by the judgment of the Court of Appeal in ***Smith v SSLUHC***.[24] This is an approach that does not bear comparison with the settled population and a denial to the family, members of a protected ethnic minority, of a suitable and appropriate home would be a clear breach of the PSED.

68. It is respectfully submitted that in the circumstances set out, the ground (a) appeal on EN1 should succeed and permanent planning permission granted.

[24] [2022] EWCA Civ 1391, Lindblom LJ held that the PPTS 2015 definition excluding gypsies and travelers that are longer able to travel due to age or illness (disability) is prima facie discriminatory applying s.19 Equality Act 2010 and the ECHR. The PPTS 2015 definition did not include such exclusions and will presumably now represent the fallback position for GTAAs, pitch provision and relevant conditions. The current DP provides only for definitional G&T but, following the judgment in ***Smith***, the LPA must provide specific G&T sites for both definitional and non-definitional G&T, that comprising the entire cultural need.

EN4 – Ground (a)

69. The same arguments as relied upon in respect of EN1 ground (a) are advanced in respect of EN4 ground (a), but in any event, as already set out, a successful EN1 ground (a) appeal, subject to condition, would override EN4.

EN2 – Ground (a)

70. As already stated, a successful EN1 ground (a) appeal makes EN2 otiose as permission would be retrospectively granted for the use of the Appeal Site for the purposes of G&T, subject to condition, so conditions relating to the use for the purposes of TSP could only be binding on Plots 3 and 7, and neither plot, considered individually or cumulatively would be in breach of any of the three conditions relied upon. It is not clear what the LPA anticipate would occur in these circumstances, but there would be no breach of condition.

71. In the event that the EN1 ground (a) appeal does not succeed then it is submitted that the EN2 ground (a) appeal should succeed, subject to the submissions of the LPA that the Appeal Site is not PDL by virtue of the permitted use having ceased as a consequence of condition 13, which means there can be no breach of the other conditions contained in the 2003 planning permission.[25] The deemed consent under Appeal 2 will provide for a use of the site as a TSP site without compliance with some or all of the three conditions said to be breached, allowing for an intensified use of the Appeal Site for a use in conformance with the policy requirement to safeguard such uses, and in conformance with the policy suggestion of intensifying existing site use where the identified need arises, as claimed in this district. A successful ground (a) appeal in respect of conditions 10 and 11 will achieve the desired policy aims of the LPA, on an extant TSP site and the LPA can have no legitimate complaint over additional plots being provided.

[25] See ***Avon Estates Ltd v Welsh Ministers and Ceredigion County Council*** [2011] EWCA Civ 553

72. Further, the Appellants maintain that condition 15 is entirely unjustifiable in planning terms, it is indeed Kafkaesque in nature. It arbitrarily seeks to limit the number of people who can occupy a pitch, in the manner of an overbearing State. There is no place in a modern, humane world for such a restriction on the use of land and the condition should be discharged. It is unreasonable, unnecessary and most significantly, unenforceable, serving no proper planning purpose.

73. In the event that the EN1 ground (a) appeal fails then the Appellants submit that the EN2 ground (a) appeals should succeed.

EN1 1, 2 and 4 – Ground (f)

74. The ground (f) cases have been set out in the written and oral evidence of BW and, further, changes to the requirements of the Notices will be necessary in the event of the applicable ground (d) appeals succeeding.

EN 1, 2 and 4 – Ground (g)

75. The elephant in the room in this matter is that the site is a lawful TSP site, but on the whole no longer being used by, or required by TSPs, and a dismissal of the appeals will result in over 100 people, including over 50 children, being made homeless. The LPA pursue the case that 6 months is adequate time to remedy the breach of planning control, but must accept that is an inadequate period by which to find suitable alternative accommodation in an area where there is already an overwhelming need for more G&T accommodation. Such a compliance period is entirely unreasonable and disproportionate, and would only result in significant unlawful encampments elsewhere in the district.

76. The Appellants have demonstrated that 6 months is a wholly inadequate period of time in which to reasonably and proportionately return the Appeal Site to a nominal TSP site. The compliance period should be extended to a more realistic 2 years.

77. The suggestion by the LPA that an extension of the compliance period to 5 years in preference to a temporary permission is irrational, such a compliance period being unheard of. If it is accepted that 5 years is the necessary period to allow those residents on the Appeal Site to secure alternative accommodation then a temporary planning permission for 5 years should be granted, not an excessively extended compliance period.

Conclusions

78. The use of the Appeal Site for G&T provides the LPA with a very much needed contribution to their simply overwhelming need for further G&T site provision. Quite often hyperbole are applied to the levels of need identified for further G&T accommodation but, in this district, the levels of immediate and future need identified in the 2022 GTAA justify that hyperbole. This is not an Authority who have properly engaged with the need for G&T accommodation, apply a discriminatory approach to the interpretation of relevant national policy and seek to defeat these appeals by a misplaced reliance upon the need to retain extant TSP plots that appear not to have been needed for many years, evicting a large number of G&T families onto the roadside without any real prospects of securing alternative accommodation in the next 5 years.

79. The Appellants present their appeals on three overall limbs; firstly that permanent planning permission should be granted, or in the alternative a permanent personal permission or as a fall-back a 5 year temporary permission.

80. However, the obvious solution to the Shakespearean tragedy that is the very long running enforcement proceedings relating to this site are, with respect, self-evident. In the event that it is found the Notices have been properly served then the EN1 ground (b) appeal should succeed to the extent that the ambiguous references to "*waste*" in the requirements are removed, the EN1 ground (a) appeal should succeed, granting a suitably conditioned planning permission for a residential caravan site only for G&T use, the EN1 ground (f) and (g) appeals fall away and no further action need be taken on the appeals relating to EN2 and EN4. The significant number of residents of the

Appeal Site secure a permanent home, many of them for the first time in their adult lives, the LPA secure an extensive contribution to their prodigious G&T need, and two plots from a largely unwanted TSP site are retained for TSP use.

81. In all the circumstances the Inspector is respectfully asked to allow the appeals, granting permanent planning permission for the use of the Appeal Site for G&T.

Michael Rudd
Kings Chambers
Manchester – Birmingham – Leeds
28th November 2023