# TOWN AND COUNTRY PLANNING ACT 1990

**APPEAL BY MR PATRICK GAVIN AGAINST THE NON-DETERMINATION OF BY KETTERING BOROUGH COUNCIL OF AN APPLICATION FOR THE REMOVAL OF CONDITION 1 OF PLANNING PERMISSION REFERENCE KET.2015/0500 GRANTED AT APPEAL ON 13TH FEBRUARY 2017 REFERENCE APP/L2820/W/15/3139293**

**PLOT 24B, GREENFIELDS, BRAYBROOKE ROAD, MARKET HARBOROUGH, LE16 8LX**

**GPS REFERENCE: 15_733A**

**LPA APPEAL REFERENCE: KET/2020/0373**

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**INITIAL GROUNDS OF APPEAL**

**ON BEHALF OT THE APPELLANT**

**GREEN PLANNING STUDIO LTD**

**Preliminary matters**

1. These initial grounds of appeal are submitted against the non-determination by Kettering Borough Council of an application ("the application") for the removal of condition 1 of planning permission reference KET.2015/0500 granted on appeal on 13th February 2017, reference APP/L2820/W/15/3139293 for the *"change of use of land to use as a residential caravan site for one gypsy family with two caravans, including the laying of hardstanding and the erection of an amenity building".*

2. Condition 1 states:

   *"The development hereby permitted shall be for a limited period being the period of 3 years from the date of this decision. At the end of this period the use hereby permitted shall cease, all caravans, buildings, structures, materials and equipment brought on to, or erected on the land, or works undertaken to it in connection with the use shall be removed, and the land restored to its condition before the development took place in accordance with a restoration scheme submitted to the local planning authority within 28 days of the date of this decision and subsequently approved in writing."*

3. The Appellant seeks to remove condition 1 to allow permanent use of the Appeal Site *"as a residential caravan site for one gypsy family with two caravans, including the laying of hardstanding and the erection of an amenity building".*

4. The Appellant is also appealing against an enforcement notice issued by Kettering Borough Council at the same site dated 2nd October 2020 alleging a breach of condition of planning permission reference KET.2015/0500 (the aforementioned permission).

5. Given that the appeals concern the same site and development, GPS have prepared these initial grounds of appeal as opposed to a full statement of case outlined in PINS

guidance in order to link the two appeals so that they may be heard together, with evidence submitted to the same timetable.

*Validity of the Application*

6. The Application was submitted on 9th June 2020. The Council confirmed by way of correspondence dated 29th June 2020 that they would not be validating the application.

> *"Having considered the content of your email and after seeking legal advice, we must advise you that a S73 option is not available to the applicant of Plot 24B. Therefore, the submitted application, seeking to vary the condition on an expired temporary consent, cannot be validated."*

7. The Appellant maintains and will demonstrate that the Application was valid and ought to have been determined.

8. The Appellant will demonstrate that there is no provision in statute or case law which provides for the conclusions that a time limited permission within Section 72 of the TCPA expires at the end of the time limiting period.

9. The Appellant will rely on the Court of Appeal judgment of ***Avon Estates Ltd*** *v Welsh Ministers [2011] EWCA Civ 533* in support of his position.

10. The Court of Appeal and the Administrative Court in ***Avon Estates Ltd*** were considering whether a seasonal occupancy condition could endure beyond the period for which the related use was permitted, by condition. It was necessary for both courts to consider and make findings upon the effect of a time limiting condition on the status of a planning permission. The Administrative Court, endorsed by the Court of Appeal, held that such a permission does not and could not "*expire*", there being no such provision within the 1990 Act. The permission endures for the benefit of the land. This

is a finding of general application and binding upon the Council and an Inspector, and of direct and significant relevance to this matter.

11. The Appellant will also rely on the House of Lords in ***Pioneer Aggregates UK v SSE*** [1985] 1 AC 132 where it was held, there are only a limited number of ways in which a planning permission can be "*extinguished*", and none of those mechanisms include by operation of a time limiting condition.

12. The analysis of Beatson J in the Administrative Court in ***Avon Estates Ltd***, in respect of the status of a temporary planning permission remains good law. Where the Judge erred, according to the Court of Appeal, is in how he considered the subsequent effect of the conditions applying to such a permission. At [17] Beatson J sets out the issues at hand, setting out at [17a] the issue relevant in this matter:

> *"…17. The application gives rise to four issues, although in the event only one was contentious. The four issues are:*
>
> *…….*
>
> *(a) Did the permissions lapse in their entirety with the consequence that no occupancy conditions remained attached to them? Or did they survive the time-limiting conditions, which have been breached but can no longer be enforced, so that they are still subject to the seasonal occupancy conditions, which have not been breached?..."*

13. The competing principal submissions are set out at [18] – [20]:

> *"…18. As to sub-issue (a), on behalf of the applicant, Mr Young submitted that after the specified dates the planning permissions expired……he submitted that because after the specified date there were no planning permissions to which the conditions could attach, they ceased to exist…*
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> *19. On behalf of the Welsh Ministers, Mr Moffat submitted that the planning permission did not cease to exist at the specified dates…*

*20. Mr Stinchcombe, on behalf of the Council, adopted Mr Moffat's submission that the planning permission did not expire after the specified period, adding that what expired was the time within which the use was to cease and restoration should have occurred…"*

14. Beatson J then goes on to address the principal issue of the status of a temporary planning permission at [28] – [40], the relevant paragraphs providing as follows

*"…28. I turn to the issues. First, the status of the permissions after the specified dates. Did they lapse in their entirety and with them the seasonal occupation conditions?...*

*34. I turn to the statute itself, the 1990 Act. The starting point is to consider the effect of planning permission. That is dealt with in section 75. Section 75(1) provides:*

> *"Without prejudice to the provisions of this Part as to the duration, revocation or modification of planning permission, any grant of planning permission to develop land shall (except in so far as the permission otherwise provides) enure for the benefit of the land and of all persons for the time being interested in it."*

*35. The circumstances in which a planning permission could be extinguished were considered in Pioneer Aggregates UK v Secretary of State for the Environment [1985] 1 AC 132. In his speech, Lord Scarman held that the "clear implication" of the statutory provision equivalent to section 75(1) then in force was that "only the statute or the terms of the planning permission itself can stop the permission enuring for the benefit of the land and of all persons for the time being interested therein (see 141 H)."*

*38. What is the impact of the reference in section 72(2) to "planning permission granted for a limited period"? The provision provides a statutory description of*

*a category of permission which is defined in section 72(1)(b). Section 72(1)(b) does not only relate to planning permission, the terms of which state they "expire". Indeed, as Mr Moffat observed, the word "expire" is not used in the 1990 Act*

*39. Section 72(1)(b) concerns a planning permission requiring, inter alia, the discontinuation of any use "at the end of a specified period". To give section 72(2) the effect for which Mr Young contends would be to contemplate all planning permissions within section 72(1)(b) having no effect whatsoever, no juridical existence for any purpose at the expiry of the period. Section 72 does not in itself provide that any particular consequences flow from a planning permission falling within section 72(1)(b) and thus described in the Act as "for a limited period".*

*40. Mr Young has not been able to point me to anything in the 1990 Act which positively supports (whether, to which I have referred, by the use of the word "expire" or in another way) the position for which he contends. The reference to planning permission for a limited period in sections 73A(2)(b) and 73A(3)(b), 91(4)(c) and 102(2) do not support the submission that at the end of the period the planning permission is to be treated as of absolutely no effect whatsoever. There is no exception in section 75 in respect of a planning permission for a limited period, and the common law exceptions to the principle stated in Pioneer Aggregates, that is mutually inconsistent planning permissions where one but not the other has been implemented and the effect on a planning permission after a material change of use has been implemented, do not suggest that there is a broader common law exception…"*

15. Finally, at [42] Beatson J arrives at his unimpeached conclusions in respect of the general status of a time limited permission:

*"…42. I accept the submission contained in the proposition set out in paragraph 43 of Mr Moffat's written submissions, which are substantially similar to those of Mr Stinchcombe in paragraph 19 of his skeleton argument…..As Mr Stinchcombe submitted,* ***the planning permission does not cease to exist.*** *What has expired is the time within which the use should have ceased and the restoration should have occurred…."* **[emphasis added]**

16. The challenge brought in the Court of Appeal was not brought on the basis of an incorrect finding as to the status of a temporary planning permission but rather the effect of conditions attached to such permissions. Both the Administrative Court and the Court of Appeal proceeded on the basis that a temporary permission does not cease to exist, it endures for the benefit of the land, **it cannot expire**. Where the Court of Appeal differed with the Administrative Court is in the interpretation of the effect of conditions attached to the permission in the accepted context that the permission itself had not ceased to exist.

17. Sir David Keene, giving the lead judgment, cites the judgment of Beatson J at [9] and proceeds on the basis that the approach of Beatson J in respect of the status of a temporary permission was correct. This is a binding ruling of general application and one of direct relevance in this matter.

18. Taking the judgment of Beatson J in the Administrative Court in respect of the status of a temporary permission and the citing with approval of that conclusion in the Court of Appeal it is unequivocal that a temporary permission does not cease to exist at the end of the temporary period.. The relevant permission continues to exist, such should be beyond any reasonable or rational discussion.

19. The planning permission remains intact, for the reasons espoused in ***Avon Estates Ltd***, as set out above. There is simply no provision in the 1990 Act for a planning permission to "expire", as Beatson J held, cited with approval in the Court of Appeal,

*"…[a] planning permission does not cease to exist. What has expired is the time within which the use should have ceased and the restoration should have occurred…".*

20. The Appellant will also demonstrate that the issue of the Enforcement Notice, the appeal of which the Appellant will seek to link to this appeal, further supports the Appellant's position that the permission did not cease to exist.

21. The Council have issued an Enforcement Notice in respect of an alleged breach of Condition 1 of planning permission KET.2015/0500. However, if, the planning permission had ceased to exist as the Council, in refusing to validate the Application assert, there could be no breach of condition upon which to base the Enforcement Notice.

22. The Appellant will be submitting a costs application against the Council in relation to this appeal as it is clear from the issue of the Enforcement Notice that the Council consider the planning permission to be extant.

**Whether the condition meets the tests of the NPPF and the PPG**

23. The Appellant will demonstrate with reference to the material considerations listed below, that the condition no longer passes the test of necessity as set out at PPG (ID 21a-014-20140306).

24. In particular, the Appellant will demonstrate that the Council's progression toward the provision of alternative sites, (the justification for the grant of the temporary planning permission in the previous appeal) has not been as anticipated by the Council in the previous appeal. The Council had anticipated that the adoption of LP Part 2, which should have lead to allocation of gypsy and traveller sites, would take place in March 2018. It will be shown that this did not occur.

25. The most up to date Local Development Scheme dated September 2019, confirms that the Council are now seeking to provide a separate DPD for gypsy and traveller pitch allocations which will be based on their 2019 Gypsy and Traveller Accommodation Assessment ("GTAA").

26. The Appellant will demonstrate that there have already been substantial delays in the provision of gypsy and traveller sites and there remains no mechanism to do so. The timescales for the projected adoption of the DPD will be demonstrated to be ambitious at best. Further the Appellant will demonstrate that the GTAA upon which the Council seek to base that DPD underestimates the need in the District in any event.

27. For the above reasons, it will also be submitted that the condition is no longer to be considered reasonable.

**Harm**

28. The LPA have refused to determine the application. The Appellant cannot therefore know with certainty at this stage what harms the Council intend to raise in relation to the substantive application. Once the Council have confirmed their position, the Appellant will set out full grounds of appeal on the alleged harms.

29. Within the Enforcement Notice dated 2nd October 2020 the following harms are alleged:

    a. Character and appearance and valued landscape

30. It is assumed that this harm will also be alleged by the Council in the context of the section 73 appeal. It will be demonstrated with reference to the NPPF, the relevant provisions of the North Northamptonshire Joint Core Strategy, the Northamptonshire Environmental Character Assessment (NECA) and the appeal decision of ***Creaney*** v *Kettering Borough Council* APP/L2820/W/16/3144399 (and others) dated 22nd March

2017 along with consideration of the area itself, that the Appeal Site does not lie in a valued landscape.

31. It will further be demonstrated that the existence of mobile homes is an established characteristic of the area which despite being rural, encapsulates a number of land uses (residential, commercial, and agricultural). The Appellant will set down that the additional pitch sought under this application is in-keeping with the immediate character of the wider area.

32. The Appellant will state that given the small scale of this development that any impact on appearance is likely to be limited, particularly given, that other mobile homes are located in close proximity to the appeal site.

33. If the Inspector considered appropriate a landscaping scheme could be conditioned so as to reduce any harm.

34. The Appellant reserves the right to raise additional evidence once the LPA has clarified their position.

**Material considerations in favour of the appeal**

35. The material considerations outlined below will be advanced in favour of the appeal. Those material considerations are need (national, regional and local), lack of available, suitable, acceptable, affordable alternative sites, lack of a five year land supply, failure of policy, if necessary the personal circumstances of the site occupants (personal need, health, education, and the best interests of the child).

Need

36. Taking into consideration the latest available estimations of need for gypsy and travellers sites in the District, GPS Ltd are of the view that the relevant GTAA

underestimates the level of need in the District. This is a material consideration of significant weight.

Lack of suitable, acceptable, affordable sites

37. Alternative sites must be available, acceptable and affordable *(Angela Smith v Doncaster MBC).* It appears from all of the available information that there are no alternative available sites for the Appellant to move to and there seems little likelihood that there will be in the foreseeable future. The lack of alternative sites is a material consideration of significant weight in favour of the appeal.

Five-year land supply

38. The LPA are unable to demonstrate a five-year land supply of deliverable land for gypsy and traveller sites. A lack of a five-year land supply is a matter that should attract considerable weight in favour of a grant of planning permission. The lack of a five-year land supply is a material consideration of significant weight in favour of the appeal.

Failure of policy

39. The LPA do not currently have a policy capable of delivering the required amount of pitches. The LPA are working towards too low a figure and will inevitably fail to meet the actual level of need in the District. Failure of policy is a material consideration of significant weight in favour of the appeal.

Personal circumstances

40. Personal circumstances only need to be considered if the Inspector determines a departure from policy and/or other harm and then finds that the other material considerations are insufficient to outweigh the identified harm. If necessary, personal circumstances can then be included to outweigh any harm. These will be set down with

appropriate weight indicated. In any event, the proposed site residents easily fulfil the definition of gypsy and travellers as per Annex 1 of the PPTS.

Best Interests of the Children

41. The best interests of the children on the site are of paramount consideration and no consideration should be given greater weight than the best interests of the child when considering whether the material considerations outweigh any harm. In the assessment of proportionality there is an explicit requirement to treat the needs of the children on the site as a primary consideration (UNCRC Article 3, fully set out at para 80-82 of AZ).

**Planning balance**

42. The planning balance will need to be undertaken once the LPA's position in relation to the alleged harms and relevant policies are confirmed.

43. If it is concluded that the paragraph 11 'weighted balance' does not apply and some conflict with the development plan is identified, the Appellant will demonstrate that, even applying the traditional planning balance, the material considerations relied upon outweigh any harm identified such that a permanent non-personal permission should be granted.

**Permanent or temporary consent**

44. It is common sense as well as case law Court of Appeal Judgment Moore v SSCLG and London Borough of Bromley [2013] EWCA Civ 1194 that a temporary consent means the harm is reduced. The appropriate time frame for a temporary consent will be considered in the Hearing Statement.

**Human Rights Article 8 considerations**

45. The Appellant will demonstrate that there is a clear obligation upon the Inspector to ensure that any decision made by a state body accord with the obligations under Article 8 ECHR. Incorporated into that obligation are the obligations set out under the United Nations Convention of the Rights of the Child, and in this case specifically Article 3. This obligation was no crystallised upon in the publication of ***AZ*** *v SSCLG and South Gloucestershire District Council [2012] EWHC 3660 (Admin),* but has existed for a number of years.

**Best Interests of the Child**

46. The best interests of the children are to enable them a safe environment where they have access to education and healthcare. Where the best interests of the child clearly favour a certain course, in this case a grant of planning permission, that course should be followed unless countervailing reasons of considerable force displace those interests.

47. There are no countervailing reasons of considerable force that have been relied upon to outweigh the need for the children to have a settled permanent base, which will enable amongst other things, access to education and to healthcare when needed.

48. It is submitted that the welfare and wellbeing of the child can only be safeguarded by the grant of a permanent planning permission, or in the alternative a temporary permission for a period that should give certainty of alternative suitable and lawful accommodation being secured by the LPA through the plan process.

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