MURDOCH PLANNING

Playing by the rules?

Response to the Consultation: Planning and Travellers

"It is worse than useless to harass Gypsies from place to place unless some shelter or retreat is allowed" – Hoyland, 1815

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My qualifications include a BA with Honours (Goldsmith's College, London University, 1989), an MSC (Bristol University, 1996), a Ph D (Bristol, 2000) and an MA in Town and Country Planning (University of the West of England, 2006). I am a Member of the Royal Town Planning Institute. I have been professionally involved with the planning system as it relates to Gypsies and Travellers for some 20 years and have taken Gypsy and Traveller planning cases at Local Planning Authority level, on Appeal to the Secretary of State, to the High Court, to the Court of Appeal and as far as the House of Lords. I am widely published in the field, including in the Journal of Planning and Environment Law (2002 and 2008), and am co-author of the Planning Chapter in the lead text-book on the subject, *Gypsy and Traveller Law* (Commission for Racial Equality/Legal Action Group, 2008).

Introduction

In the Summary to the Consultation it states:

"The Government remains committed to increasing the level of authorised traveller site provision in appropriate locations to address historic undersupply as well as to meet current and future needs... [and] *also believes that further measures are needed to ensure that planning rules* ***apply fairly*** *and equally to both the traveller and settled community."*

At section 1.2 the Consultation restates that:

"1.2 The Government remains committed to increasing the level of authorised provision in appropriate locations to address historic under supply and meet present and future site needs [stressing at 1.8 how important the CLG consider it is] ***to play by the rules.***"

At 1.9 the Consultation is critical of "*those who choose to ignore planning rules*" and indeed the title of Section 2 *"Ensuring Fairness in the Planning System"* appears to underline this concern.

The fundamental problem with the reasoning behind the Consultation is that the issue of "*historic under supply*" has been caused by Local Authorities who have "*choose*[n] *to ignore planning rules*" and have not "*play*[ed] *by the rules*" where Gypsy and Traveller site provision is concerned for the last 50 years. To fully appreciate how this situation arose and has been perpetuated there is a need for some context.

The Courts have placed the matter within a wider historical context that has seen Gypsies and Travellers as more sinned against than sinning in this regard. Progressively restrictive legislation and policy have deprived Gypsy and Traveller communities of their traditional stopping places and park-ups, with insufficient alternative provision to replace them. To then criticise these communities for the unauthorised sites that result today is to poke out their eyes and blame them for being blind:

"For centuries the commons of England provided lawful stopping places for people whose way of life was or had become nomadic. Enough common land had survived the centuries of enclosure to make this way of life still sustainable, but by s.23 of the Caravan Sites and Control of Development Act 1960 Local Authorities were given powers to close the commons to Travellers. This they proceeded to do with great energy, but made no use of the concomitant power given to them by s.24 of the same Act to open caravan sites to compensate for the closure of the commons. By the Caravan Sites Act 1968, therefore, Parliament legislated to make the s.24 power a duty...For the next quarter of a century there followed a history of non-compliance with the duties imposed by the Act of 1968, marked by a series of decisions of this

court holding Local Authorities to be in breach of their statutory duty, to apparently little practical effect....."[1]

From the foregoing we can see that it was Local Authorities who failed to *play by the rules*, firstly by failing to use the s24 power to provide a sufficient number of authorised sites for Gypsies - defined as '*persons of a nomadic habit of life, whatever their race or origin'* - after those same Local Authorities had closed the Commons to them, and then secondly when failing to comply with the statutory duty that was placed on them to provide such sites in the 1968 Caravan Sites Act.

The Cripps Report was commissioned in order to inform the government why so many Local Authorities were standing in breach of the law in failing to provide Gypsy sites. Cripps found that the main reason that sufficient sites were not being provided, despite the statutory duty to do so, was because of prejudice towards Gypsies:

"It is impossible to overstate the strength of feeling, bordering on the frenetic, to the creation of a Gypsy site in almost any reasonable location."

Therefore, it was not the 1968 Act itself that failed – what failed was **enforcement against recalcitrant Local Authorities who breached the statutory duty to provide Gypsy sites by Direction from the Secretary of State, supported by the courts where appropriate**. By the time the statutory duty was repealed via the Criminal Justice and Public Order Act 1994, fewer than 40% of local authorities had met their legal obligation to provide an adequate number of lawful sites. That is, after some 25 years of mandatory municipal site provision more than 60% of local authorities had failed to *play by the rules* and provide enough sites for Gypsies.

The privatisation of Gypsy site provision: Circular 1/94 *Gypsy sites and planning*

Circular 1/94 was introduced to meet the gap in provision following the repeal of the statutory duty to provide sites in the former 1968 Act. Under 1/94 Local Authorities were required to undertake a Quantitative Assessment of the need for further Gypsy

[1] Sedley, J (now LJ) alluded to this problem in *R v Lincolnshire County Council, Ex p Atkinson* (1995) 8 Admin LR 529 at 533.

sites and allocate land to meet the need identified in their Development Plans. The definition of 'Gypsy' from the 1968 was retained in 1/94.

There is now almost universal agreement - from groups as diverse as the Association of Chief Police Officers, the Local Government Association, the Royal Town Planning Institute, Gypsies and Travellers' organisations and people affected by the inevitable unauthorised sites that flow from *historical under-provision* - that Circular 1/94 was an utter failure because most local authorities failed to *play by the rules* and either assess need, let alone allocate sufficient sites. In consequence the Government commenced a root and branch policy review in 2001:

> *"...because... 1/94 has failed to deliver adequate sites for Gypsies and Travellers...over the last 10 years. Since the issue of Circular 1/94, and the repeal of local authorities' duty to provide Gypsy and Traveller sites there have been more applications for private Gypsy and Traveller sites. However, LPAs have refused the majority of these. A new direction is necessary to ensure that the accommodation needs of Gypsies and Travellers are addressed with the same consideration as is given to the accommodation needs of other sections of the community. This will also help to promote good community relations at the local level, and avoid the conflict and controversy associated with unauthorised developments and encampments."* (ODPM, 2004 paragraphs 2-3)

The human and social consequences of this shortfall in lawful site provision are becoming increasingly evident, as the Joint Committee on Human Rights found in 2005 when they expressed

> *"...concern at the discrimination* [Gypsies and Travellers] *face, reflected in their higher child mortality rate, exclusion from schools, shorter life expectancy, poor housing conditions, lack of available camping sites, high unemployment rate and limited access to health services...Evidence...attests to the multiple discrimination faced by Gypsies and Travellers, and their exceptional level of social exclusion ...**It is unequal access to adequate and culturally appropriate accommodation, however, which lies at the root of***

many of the inequalities that face Gypsies and Travellers. *In their evidence to us, the Gypsy and Traveller Law Reform Coalition emphasised the consequences of insecurity of tenure for the health and education of Travellers, and the ... detrimental impact which eviction and the lack of secure sites had on the welfare of Traveller children ...*

Research conducted by Pat Niner concluded that

> *"Perhaps the most striking impression from this spectrum of research and reports from almost forty years is the similarity of the issues and concerns being discussed, and the resistance of the problems being identified to 'solution'... There are particular continuities in terms of basic demographic factors, poor health, prejudice and discrimination on the part of the settled community and very poor living conditions... experienced by Gypsies and other Travellers not living on authorised sites. Resistance to site provision and objections from the settled community to proposals for development are recurring themes..."* (ODPM 2003 p40)

One of the consequences of the prejudice that both Cripps and Niner refer to is that, just as most Local Authorities effectively ignored the duties imposed on them under the 1968 Caravan Sites Act, so most similarly failed to meet the requirements imposed on them by the replacement policy, 1/94. This represents a further illustration of Local Authorities not *playing by the rules* where Gypsy site provision is concerned.

Back in 1994 then Shadow Lord Chancellor, Lord Irvine of Lairg could see that:

> *"There is humbug at the heart of the government's policy. The humbug is not simply that what they are suggesting is unrealistic as a solution to the problem of unauthorised sites; it is also that at the same time as they suggest that private site provision is the solution on which we should rely, they are making such provision more difficult by altering national planning policies.* ***The real effect of the legislation, which they dare not openly avow, is to make those who have no lawful place to reside in their vehicles disappear through the imposition of criminal sanctions.***"

In February 2006 Circular 1/2006 *Planning for Gypsy and Traveller Caravan Sites* was issued as a replacement document to 1/94. 1/2006 required Local Authorities to meet the need identified in their area by February 2011 at the very latest.

Quantitative Assessments

- In relation to quantitatively assessing the extent of need, s225 of the Housing Act 2004 made the type of assessments envisaged in 1/94 a statutory duty on local authorities.

Locations

- The Planning and Compulsory Purchase Act 2004, together with the guidance in 1/2006, also obliged Local Authorities to identify specific sites to meet the need identified.

In reality, this was not the introduction of a new policy ***but the enforcement of a decade-old one which Local Authorities had ignored with impunity.***

Whilst reform of the planning system as detailed above was plainly necessary – as 1/94 had failed - the evidence suggests that on its own (and certainly without a robust enforcement culture to ensure all Local Authorities actually meet their duties under it) the planning system alone will not meet need.

What is required is a system that meets the peculiar accommodation needs of Gypsies and Travellers, people for whom

> *"...the problem is compounded by the features peculiar to them: their characteristic* [nomadic] *lifestyle debarred them from access to conventional sources of housing provision. Their attempts to obtain planning permission almost always met with failure: statistics quoted by the European Court*[2]*...*[found that] *90% of applications made by Gypsies had been refused*

[2] Chapman v the UK (2001) 33 EHRR 399 page 420, para 66.

whereas 80% of all applications had been granted. But for many years the capacity of sites authorized for Gypsies had fallen far short of that needed... "[3]
[4]

I agree with Niner (ODPM 2003: 207) that what is necessary is to both

> *" Restore – **and enforce** – a duty to provide sites. There is a strong and pervasive feeling that Local Authorities are unlikely to respond without a duty being imposed as long as site provision is seen as unpopular, especially in comparison with other local priorities...doubtful whether carrots alone can prove effective in encouraging further site provision without some sticks...Government needs to give Local Authorities a much clearer steer on national policy towards Gypsy/Traveller site provision. Something stronger...is needed to ram home the message about quantifying needs for Gypsy sites, identifying specific site locations wherever possible and ensuring that criteria-based policies are not totally exclusionary, thus ensuring that a plan-led system can produce sites through development control."*

Q1: Do you agree that the planning definition of travellers should be amended to remove the words or permanently to limit it to those who have a nomadic habit of life? If not, why not?

No: please see the following sections.

THE ISSUE OF GYPSY AND TRAVELLER STATUS: WHO IS A 'GYPSY'?

The question of who is and who is not a *"Gypsy"* or *"Gipsy"* has been the subject of much judicial authority and departmental guidance, which will be briefly considered below.

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[3] *South Bucks v Porter, Wrexham CBC v Berry and Chichester Dc v Keet and Searle*, 19th May 2003,
[4] See also Todd and Clark, House of Commons Research Paper (1992) Department of the Environment, HMSO.

It is well established that the nomadic people we have come to call *"Gypsies"* - the Romanies – left North West India about 1500 years ago (evidenced clearly in their Sanskritic languages still used to this day) and had reached our shores by the 16th Century at the latest. Arguably the term *"Gypsy"* itself is a misnomer as it derives from the word *"Aegyptian"* whence Tudor society erroneously imagined these groups originated.

Nonetheless, the term *"Gypsy"* has persisted and in modern times we can see the repeated legislative incorporation of the word: under s127 of the Highways Act 1959 a *'Gipsy'* could be prosecuted for pitching a booth or stall on the highway, a term which the courts at the time considered should refer not to Gypsies as members of a particular ethnic minority group but as a lifestyle issue. In Mills –v- Cooper [1967] 1 QB 459 reinforced the view that Gypsy status for the purposes of the Highways Act was not determined by ethnicity or birth but by how one lived one's life: did one travel and follow a nomadic way of life, that was the defining issue.

One year after Mills v Cooper was decided, the definition of Gypsy as nomad entered the statute books by way of s16 of the Caravan Sites Act 1968: *"persons of a nomadic habit of life, whatever their race or origin."* As detailed above, back in 1960 the Caravan Sites and Control of Development Act had given Local Authorities the power to create Gypsy caravan sites in compensation for the closure of the commons to Travellers by s23 of the same Act.[5] Following the failure of the 1960 Act to create a sufficient number of such sites[6] s16 of the Caravan Sites Act 1968 placed those same Local Authorities under a statutory duty to provide adequate caravan sites for *'Gypsies residing in or resorting to'* their area.

In London Borough of Greenwich v Powell [1989] 2 WLR 7 (1988) the House of Lords held that a person might fall within the s16 definition if s/he led a nomadic life only seasonally and notwithstanding that s/he regularly returned for part of the year to the same place, at which s/he might be said to have a fixed abode or permanent residence.

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[5] See R v Wealdon DC ex parte Atkinson.
[6] Only 9 sites were built between 1960 and 1968.

In 1994 the Court of Appeal [*R v South Hams DC, ex parte Gibb and Ors*] reviewed the law with respect to the statutory definition holding that the term *'nomadic'* imported the requirement that there be some recognisable connection between one's travelling and the means by which one made or sought one's living: that is, there was an economic dimension to nomadism. It was matter of fact and degree for the decision maker to decide on the evidence whether the way an individual travelled amounted to a *'nomadic habit of life'* or not, whatever the racial/ethnic origins of those whose status was at issue.

When the 1968 Act duty to provide sites was repealed by the Criminal Justice and Public Order Act in November 1994, the s16 definition of Gypsy was retained (via s80 of that Act). This was the definition to be applied when Gypsies and Travellers thereafter applied for planning permission to legitimise their own caravan sites under Circular 1/94 *"Gypsy Sites and Planning"* which had been issued in the January of 1994.

Since then over the years, case-law has repeatedly confirmed that to satisfy the definition of *'nomadic'* it is not necessary to be perpetually travelling but that one could settle for periods and remain a Gypsy in law. In *R v Shropshire County Council ex parte Bungay [1990] 23 HLR @196* Otton J dismissed a challenge brought by an aggrieved local resident to the granting of planning permission for a family to reside on a private site. That challenge to 'Gypsy' status concerned the fact that the family had settled down when their father had become too ill to continue traveling and had not then travelled for some 15 years (up until the date of the application to the Court). The challenge was - how could they be *'nomadic'* and thereby Gypsies if they no longer travelled? The answer the Court gave is that if Gypsies are *'persons of a nomadic habit of life whatever their race or origin'*, then one had to look wider than just at their current situation but at the individual's *"habit of life"*. Otton J held that in a situation where people have stopped travelling in order to care for their relatives, then it could be said that their nomadic habit of life was **in abeyance** and had not been abandoned.[7]

[7] R –v- Shropshire County Council ex parte Bungay [1991] HLR 195.

In *O'Connor –v- The First Secretary of State and Bath and North East Somerset Council [2003] JPL 1128* a successful challenge was made to an Inspector's decision to dismiss a Planning Appeal[8] for a Gypsy site for a single family in the Bristol Green Belt because (in the Inspector's view) the Applicant had failed to demonstrate Gypsy status as a consequence of her current inability to travel through her children's educational needs, child care responsibilities and her own health problems. I was instructed in both the Planning Appeal and subsequent legal challenge, where the High Court held that:

> *"it was not enough as this Inspector had done to merely look at the travelling being done at the time of the Inquiry* ***but that one had to look at the whole life, to look at the reasons why one had ceased travelling*** *at the moment and likelihood of travelling resuming in the future."*

In the case of *Wrexham County Borough Council –v- The National Assembly for Wales and Berry [2002] EWHC 2414* Sullivan J heard an application to quash planning permission granted to a Gypsy site in a situation where the head bread-winner had ceased travelling due to serious, life-threatening ill health. Sullivan J dismissed the council's application stating that

> *"to find that someone who had been a Gypsy all their life had lost that status once they had become too old or too ill to continue to work* [was] *inhuman pedantry that defied common sense and common humanity and fell foul of the duty to facilitate the Gypsy way of life as provided for by Article 8."*[9]

Case law therefore confirms that people should not lose their status as Gypsies and Travellers simply by virtue of force of circumstance such as old age, ill health, caring responsibilities or the educational needs of their children, preventing them from travelling.

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[8] S78 TCPA.

[9] I was instructed in both *O'Connor* and both *Berry* cases, as well as involved in subsequent policy changes introduced by the government in this area of law.

Such an approach was supported by the (then) Office of the Deputy Prime Minister ['ODPM'] Select Committee in 2004 after it took expert evidence in relation to Gypsy and Traveller policies, where the definition issue was one of the critical matters examined. I was called to give evidence to the Select Committee in relation to this very issue. Chapter 3 of the Select Committee's subsequent Report is devoted to this matter.

Following that Report, the government supported a definition which embraced those *"Gypsies and Travellers* [who] *stop travelling permanently or temporarily because of health reasons, or caring responsibilities but still want to maintain their traditional caravan dwelling lifestyle..." (ODPM January 2005, pp2-3).*

Quite aside from such issues of identity, when considering the ability of people to pursue a fully nomadic way of life, account also needs to be taken of the obstacles - legislative and administrative – that have increasingly been placed in the way of a life travelling on the roads in recent years. In the case of Gypsies and Travellers living on authorised local authority sites, the difficulties encountered since the introduction of the Criminal Justice and Public Order Act 1994 – which repealed the duty to provide sites at the same time introducing what the High Court described as *'draconic'* eviction powers for both the police and local authorities – have made travelling on the roads significantly more difficult than hitherto, with more and more Gypsies and Travellers seeking fewer and fewer lawful pitches. This has inhibited and frustrated nomadism considerably. In *Connors –v- The UK [EctHR 27 May 2004]*, the UK Government's own evidence to the European Court demonstrated that very nearly 90% of residents on Local Authority Gypsy caravan sites had not travelled anywhere during the preceding 3 years.

In *Basildon DC v the First Secretary of State and Cooper*, the court held that the lack of sites justified a Gypsy family being unable to travel in the manner that they had previously: "...*what is the reason for this* [ceasing travelling]*? The lack of temporary sites is the answer. 'They had only moved onto the site when it became too difficult for them to live on the roadside.' ... do they intend to resume travelling? I quote again from the report 'They would like to do so but are frustrated by the lack of temporary sites.'* "

In February 2006 Circular 1/94 was repealed and replaced by Circular 1/2006 *"Planning for Gypsy and Traveller caravan sites."* In that Circular and elsewhere[10] the (then) DCLG grasped the issue of remaining within the definition if force of circumstance prevents a person actively travelling for work. Paragraph 15 of 1/06 defined *'Gypsies and Travellers'* as

> *"Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily or permanently..."*

The paragraph 15 1/2006 definition was imported into PPTS at Annex 1.

THE IMPLICATIONS OF BEING AN ETHNIC GYPSY OR TRAVELLER

Whilst there is no need to be an ethnic Romany Gypsy or an Irish Traveller to come within the paragraph 15 definition, the fact that one is from either of those groups does has implications for both race relations legislation as well as under the European Convention on Human Rights ['ECHR']. This is because Romany Gypsies and Irish Travellers have been held to be racial groups (in the *Commission for Racial Equality v Dutton; and Allied Domecq*, respectively so far as the Race Relations Acts are concerned).

In terms of the ECHR, I was agent in an Appeal against a refusal of planning permission and the issuing of enforcement notices in a Gypsy site in Chichester District where an Inspector allowed the Appeals, *inter alia*, because of the unjustified interference with the Gypsies' human rights inherent in the LPA's austere interpretation of Development Plan policies:

> *"69. Account has been taken of the Council's argument that the judgment in Chapman [v the UK] found that the United Kingdom*

[10] For example, in the definition of *'gypsies and travellers'* for the purposes of s225 of the Housing Act 2004.

government was not under an obligation to provide an adequate number of gypsy sites. But paragraph 9 of Circular 1/94 says that repeal of the statutory duty of local authorities under the 1968 Act to provide gypsy sites makes it all the more important that local planning authorities make adequate gypsy site provision in their development plans. In this case the Council has not demonstrated that it has a sound statistical basis for its conclusion that there is no need for any new gypsy site, despite saying that it accepts there is a small unmet need. ...

70. Against this background the limited harm caused to the environment, and hence to the public interest, by the appeal development has to be weighed against the serious harm to the Applicants arising from the failure to recognise and provide for the needs of gypsies in the District by granting permission for sites. It is concluded that in this case that limited harm does not constitute a pressing social need for the interference with Article 8(1) rights of all the Applicants which would result from the upholding of these notices. Moreover, by leading to a situation where there is a high probability that at least one of the Applicants would lose their present home for a significant period, such interference would be disproportionate. For these reasons, and because the Council has not convincingly established why the interference is necessary, it is concluded that it is unacceptable. Thus the human rights arguments weigh heavily in favour of the Applicants."

Article 8 of the ECHR concerns the "*Right to respect for private and family life*

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the*

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In *Chapman v United Kingdom* (2001) 33 EHRR 399 the European Court of Human Rights said:

> *"73. The Court considers that* ***the applicant's occupation of her caravan is an integral part of her ethnic identity as a gypsy, reflecting the long tradition of that minority of following a travelling lifestyle.*** *This is the case even though, under the pressure of development and diverse policies or from their own volition, many gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children.* ***Measures which affect the applicant's stationing of her caravans have therefore a wider impact than on the right to respect for home. They also affect her ability to maintain her identity as a gypsy and to lead her private and family life in accordance with that tradition.*** "(emphasis added).

I was also instructed in the Court of Appeal case of *Wychavon DC v the Secretary of State and the Butlers* where Lord Justice Pill held:

> *"I say at once that in my view the judge was wrong, with respect, to treat the words "very special" in the paragraph 3.2 of the guidance* [PPG2] *as simply the converse of "commonplace". Rarity may of course contribute to the "special" quality of a particular factor, but it is not essential, as a matter of ordinary language or policy. The word "special" in the guidance connotes not a quantitative test, but a qualitative judgment as to the weight to be given to the particular factor for planning purposes. Thus, for example, respect for the home is in one sense a "commonplace", in that it is an aspiration shared by most of humanity. But it is at the same time sufficiently "special" for it to be given protection as a fundamental right under the European Convention. Furthermore, Strasbourg case-law places particular emphasis on the special position of gypsies as a minority group, notwithstanding the wide margin of discretion left to member states in relation to planning policy (see Chapman v*

UK 33 EHRR 399; and the comments of Lord Brown in Kay v Lambeth LBC [2006] 2 AC 465 para 200). Thus, in Chapman the Strasbourg court recognised that the gypsy status did not confer "immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment", but added:

> *"...the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases... To this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life..." (para 96, emphasis added)*

The special position of gypsies in this respect is reflected in the 2006 guidance. Against this background, it would be impossible in my view to hold that the loss of a gypsy family's home, with no immediate prospect of replacement, is incapable in law of being regarded as a "very special" factor for the purpose of the guidance."

The proposal to remove the words *"or permanently"* from the current planning definition in situations where people have become too ill or too old to travel anymore is not only excessively legalistic, inhuman pedantry but it is also discriminatory: other classes of land-users such as agricultural workers or forestry workers do not lose the status as such upon retirement, old age or ill health. Why then should Gypsies be treated less favourably than others in this regard?

I have an example which suitably disposes of this issue: one of my Traveller client's children, a 2 year old girl, tragically suffered from meningitis as a baby as a result of which she had to have both arms and one of her legs amputated in order to save her life. This child will never be able to travel for work and yet she is an ethnic Traveller, born in a caravan whose entire culture and tradition involves caravan living. If the proposal to amend the definition is implemented, this child will forever fall outside of the definition and not be permitted to reside in caravans on a private site. That would

be a wholly outrageous and in my view unlawful outcome and throws into serious doubt the intelligibility of the proposal. I note that both the Royal Town Planning Institute and the Planning Officers' Association oppose this change and would urge Ministers to step back and consider the depth of opposition this proposal has brought forth.

Question 2: Are there any additional measures which would support those travellers who maintain a nomadic habit of life to have their needs met? If so, what are they?

Yes, there are many but in brief the main ones would be to:

- reintroduce the statutory duty to provide sites (as the Welsh Assembly is doing)
- enforce against recalcitrant Local Authorities who fail to *play by the rules*
- ensure that a network of transit sites were available to facilitate nomadism
- reconvene the Ministerial Group on reducing inequalities experienced by Gypsies and Travellers and ensure it has regular meetings.

Question 3: Do you consider that: a) we should amend the 2006 regulations to bring the definition of "gypsies and travellers" into line with the proposed definition of "travellers" for planning purposes? And b) we should also amend primary legislation to ensure that those who have given up travelling permanently have their needs assessed? If not, why not?

No – on the contrary, I think that the extant s225 definition should be applied to planning. I would also refer to and adopt the concerns of the Royal Town Planning Institute, the Planning Officers' Association and Equality and Human Rights Commission with respect to this part of the Consultation.

Furthermore, as the current intention is for the planning and housing definition to become one, in my view it would be appropriate to:

a) ensure that the Select Committee hears evidence in relation to this matter **before** the planning definition is amended; and

b) defer the introduction of all the proposals in the Consultation until the definition issue has been considered by Parliament.

Question 4: Do you agree that Planning Policy for Traveller Sites be amended to reflect the provisions in the National Planning Policy Framework that provide protection to these sensitive sites (set out in para. 3.1 of the consultation document)? If not, why not?

No – such a change is unnecessary given that the PPTS is to be read in conjunction with the Framework. I adopt the submissions made in this regard by Heine Planning and Michael Hargreaves Planning.

Question 5: Do you agree that paragraph 23 of Planning Policy for Traveller Sites should be amended to "local authorities should very strictly limit new traveller sites in the open countryside"? If not, why not?

No – such a change would place Traveller sites in a worse position than for bricks and mortar development. This would be discriminatory and fall foul of the public sector equality duty. I adopt the reasoning of the Royal Town Planning Institute and Equality and Human Rights Commission with respect to this issue.

Question 6: Do you agree that the absence of an up-to-date five year supply of deliverable sites should be removed from Planning Policy for Traveller Sites as a significant material consideration in the grant of temporary permission for traveller sites in the areas mentioned above (set out in para. 3.7 of the consultation document)? If not, why not?

No – to do would reduce further the likelihood that Local Authorities would *play by the rules* and provide sufficient sites to meet need. There is already a clear inequality between the how the Framework treats the lack of a 5 year supply of housing generally and Traveller sites in particular. Such inequality would be increased by this proposal.

Question 7: Do you agree with the policy proposal that, subject to the best interests of the child, unmet need and personal circumstances are unlikely to outweigh harm to the Green Belt and any other harm so as to establish very special circumstances? If not, why not?

No – to do so would introduce an element of pre-judgment into the process that would be unlawful as I will explain below.

Firstly it is important to recall that the test for very special circumstances does not arise from PPTS or the Framework but was introduced by the last Conservative Government in 1995in PPG 2. Since then the Courts have consistently held that where only one consideration is being advanced as constituting the very special circumstances necessary to justify inappropriate development in the Green Belt, then it is self-evident that that consideration must itself be very special (see *Doncaster MBC v SSETR* [2002] JPL 1509). In *Chelmsford BC v FSS* [2004] 2 P&CR 34 the Court found that as the *"only circumstances relied upon...as being very special circumstances for the purposes of [Green Belt] policy were the... perfectly ordinary educational needs of the 2 children"* then this could not amount to very special circumstances (plural).

Both *Doncaster* and *Chelmsford* were considered when the High Court (upheld by the Court of Appeal) heard the case of *R (ota) Basildon DC v FSS and Mrs Temple* where it was held:

> *"13. In such a case it is plain that the one factor relied upon must itself be capable of being a very special circumstance. In Chelmsford, I concluded that the apparently ordinary educational needs of two girls aged 7 and 6 could not reasonably be described as special, let alone as "very special". Although Doncaster was a reasons challenge, a similar problem had arisen. The sole alleged very special circumstance was the apparently unexceptional educational needs of the children on the site."*

By contrast, in *Temple* a basket of circumstances were advanced as amounting to very special circumstances:

"17. The short answer to the claimant's argument is that in planning, as in ordinary life, a number of ordinary factors may when combined together result in something very special. Whether any particular combination amounts to very special circumstances for the purposes of [Green Belt policy] *will be a matter for the planning judgment of the decision-taker. Having applied the correct test, it was open to the Inspector in the present case to conclude that the combination of factors which she identified... amounted to very special circumstances."*

Were the proposed amendment to come into force, it would fly in the face of established authority and introduce an element of prejudgment into the planning process that would be unlawful.

Question 8: Do you agree that intentional unauthorised occupation should be regarded by decision takers as a material consideration that weighs against the grant of permission? If not, why not?

No. The reason that there is *historical under-provision* of sites for Gypsies and Travellers is because Local Authorities have field *to play by the rules* for the last half century and comply with planning rules in allocating sufficient sites to meet need. It is self-evident that where there is an insufficient supply of authorised sites, there will inevitably be unauthorised sites. That does not equate with intentionality however and the introduction of this proposal would fall foul of the duty to facilitate the Gypsy way of life, blaming the Traveller victims for the failures of Local Authorities to provide authorised sites.

Question 9: Do you agree that unauthorised occupation causes harm to the planning system and community relations? If not, why not?

No. The harm to the planning system arises because Local Authorities have failed to comply with successive policies designed to meet the unmet need for Gypsy and Traveller sites. Enforcing against such authorities would ensure a supply of sites for Travellers thereby restoring community cohesion.

Question 10: Do you have evidence of the impact of harm caused by intentional unauthorised occupation? (And if so, could you submit them with your response.)

No. This question is misconceived: the harm that is caused as a result of the failure to ensure an adequate supply of sites for Gypsies and Travellers **is to the life chances of Gypsies and Travellers**, in terms of life expectancy (10 years less for Traveller men than non-Traveller men); child mortality rates; educational attainment rates; as detailed by the Equalities and Human Rights Commission, whose submission in relation to this issue I adopt.

Question 11: Would amending Planning Policy for Traveller Sites in line with the proposal set out in paragraph 4.16 of the consultation document help that small number of local authorities in these exceptional circumstances (set out in paragraphs 4.11-4.14 of the consultation document)? If not, why not? What other measures can Government take to help local authorities in this situation?

No. Unauthorised developments are an expression of the immediate unmet need for authorised site provision. If that need is discounted, then the Travellers will not disappear but the 'problem' will move from site to site until the nettle of sufficient authorised provision is grasped and resolved.

The best thing that the Government could do would be to enforce against recalcitrant Local Authorities who have failed to meet need for the last 50 years and make sure that they finally do so now. That would resolve the issue in one fell swoop.

Question 12: Are there any other points that you wish to make in response to this consultation, in particular to inform the Government's consideration of the potential impacts that the proposals in this paper may have on either the traveller community or the settled community?

In this respect I adopt the submissions of the Equality and Human Rights Commission.

Question 13: Do you have any comments on the draft planning guidance for travellers (see Annex A of the consultation document)?

The need to have a consistent approach to assessing needs is fundamental to providing sufficient sites for Travellers. I note that there is specific guidance on how to do so for the settled community so that the needs assessed in one area are consistent with others. If left to their own devices without a consistent set of guidelines for undertaking the assessments, then it is clear that there will be differences of approach that will undermine the robustness and reliability of the process. Allowing the foxes to count the chickens in any way they wished would be unlikely to result in meaningful data emerging. Gypsies and Travellers survived 2 centuries when it was a capital offence to be a 'gypsy' in England; failing to count them for the reasons of local political convenience will not result in them leaving the area, merely driving the problem from one site to another in a perpetual misery-go-round.

Murdoch Planning Limited, November 2014