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Community Care • Housing • Immigration/Asylum • Planning • Welfare Benefits

RESPONSE TO DCLG 'PLANNING AND TRAVELLERS' CONSULTATION

Introduction

South West Law is a social welfare law firm with over 13 years' experience of representing Gypsies and Travellers in planning matters including applications, appeals, statutory challenges, judicial reviews and defence against enforcement action.

Background

We fully endorse the joint consultation response by Ruston Planning and the Community Law Partnership which provides the following summary of the social and historical context to these proposals:

> "Recent reports show the discrimination and disadvantage experienced by the Gypsy and Traveller community in England and in the UK in general (see, for example, *Experts by Experience* from Anglia Ruskin University and the Joseph Rowntree Foundation and *Civil Society Monitoring on the Implementation of the National Roma Integration Strategies* from the Decade of Roma Inclusion Secretariat Foundation – both published in October 2014).
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> It is important to have regard to the historical context. The Caravan Sites Act (CSA) 1968 introduced a duty on certain local authorities to provide sites for Gypsies and Travellers (brought into force in 1970). This duty was eventually repealed by a previous Conservative Government in the Criminal Justice and Public Order Act 1994. On the one hand it is true to say that the some 350 local authority Gypsy and Traveller sites that currently exist in England, would probably not have been in place (in the vast majority of cases) without the existence of that duty. On the other hand it is also true to say that the failure of successive central governments to ensure that local authorities complied with this duty meant that insufficient sites were built during this period of time leading to the current situation where there is completely inadequate provision of sites.
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> In many ways this was a period of time when there was a certain amount of "localism" in that certain local authorities were meant to be providing the sites and, on the other

hand, a potential for "central control" in that the Government could (albeit that they virtually never did) have stepped in to ensure that recalcitrant local authorities complied with the duty.

The Department of the Environment Circular 01/94 (Welsh Office Circular 02/94) *Gypsy Sites and Planning* (in combination with the repeal of the duty to provide sites) put the emphasis on the provision of private sites. However it did not provide a system by which private individuals could realistically bring such sites into existence. In a sense this period of time is the perfect example of "localism" and also the perfect example of how, if local authorities are left to their own devices, then there will be complete stagnation in the provision of sites.

Research has shown that, in this period of time, some 90% of planning applications to local authority planning committees by Gypsies and Travellers were unsuccessful (*Confined, Constrained and Condemned*, Friends, Families and Travellers (FFT), 1996). In a later study by FFT (*Planning Appeals Gypsies and Travellers*, January 1998) it was shown that only 34% of appeals to Planning Inspectors by Gypsies and Travellers against unsuccessful applications were successful.

In the Niner report *Local Authority Gypsy/Traveller Sites in England* (2003), it was estimated that between 1,000-2,000 permanent and 2,000-2,500 transit pitches were required by 2007 just to keep up with the current Gypsy and Traveller population.

The introduction of some central control of the process in the form of Housing Act 2004 and Office of the Deputy Prime Minister (ODPM) Circular 01/06 led to a slow but sure increase in the provision of sites. Certain Conservative MPs have claimed that this Circular produced a bias in favour of Gypsies and Travellers but, if this had been the case, then presumably the problem of site provision would have been resolved by now.

The slow improvement that took place in the wake of Circular 01/06 is shown by research by Doctor Jo Richardson and Ros Lishman of the De Montfort University for Lord Avebury (*Impact of Circular 01/06 : Supply of New Gypsy/Traveller Sites*, 29 March 2007). In this study a total of 129 appeal decisions were reviewed, 75 being before 1 February 2006 (the implementation date for the Circular) and 54 being after that date. Between the two periods the number of allowed appeals increased by 20% and the number of dismissed appeals decreased by 20%. Before 1 February 2006, the majority of temporary allowed appeals were for two years. In contrast, after 1 February 2006, all but two temporary appeal decisions were for 3 years.

The Department for Communities and Local Government (DCLG) presented their own evidence at the time indicating that, in the year ending December 2009, local authorities determined 217 applications for Gypsy and Traveller pitches, 50% of which were granted. This is a figure that is unprecedented in terms of the period prior to the introduction of ODPM Circular 01/06 (and the period subsequent to the removal of 01/06).

The history of the attempt to ensure adequate provision of Gypsy and Traveller sites (which can be dated from the introduction of the Caravan Sites and Control of

Development Act 1960) has shown that, without some form of central control and central oversight, site provision will not be achieved. Though central government failed to step in sufficiently in the period between 1970 and 1994 when there was a duty on certain local authorities to provide sites, it appears that the fact that there was a **duty** was sufficient to ensure the provision of the 350 or so sites that are now in place. Nevertheless, history also shows that the "problem" of site provision would have been resolved if there had been some central oversight. The current proposals will lead to an even more disastrous deterioration in the supply of Gypsy and Traveller pitches.

The Government accepts that the problem of unauthorised encampments and unauthorised developments is created by the lack of adequate pitches and adequate stopping places. The actions of the Coalition Government have done very little to improve the situation. Since coming to power in 2010, the following law and policy have had a significant impact on the Gypsy and Traveller community:

- The Localism Act 2011 amongst other measures curtailed the ability to apply for retrospective planning and revoked the regional strategies that had previously contained pitch targets

- The Legal Aid, Sentencing and Punishment of Offenders Act (LASPOA) 2012 and subsequent legal aid changes and cuts have had serious implications on the provision of legal aid for Gypsies and Travellers

- *Planning policy for traveller sites* (PPTS) in March 2012 changed the national planning policy and withdrew Circular 01/06

- The 2005 Temporary Stop Notice (TSN) regulations have been withdrawn meaning that a TSN can be issued for caravans that are a Gypsy's or Traveller's home. Failure to comply can mean a fine of up to £20,000

- Since June 2013 most Gypsy and Traveller planning appeals in the Green Belt have been recovered for decision by the Secretary of State for Communities and Local Government (SSCLG). In most cases the SSCLG has gone against the recommendation of his Planning Inspector.

These provisions of law and policy have already had a significant detrimental impact on the Gypsy and Traveller community. However, the latest proposals will have even more serious detrimental implications. The Government have presented Gypsies and Travellers who continue to live in caravans with a Catch 22 scenario. If you travel, you will be hounded from pillar to post. If you decide that you cannot possibly keep up with this travelling due to the impossibility of the situation and you settle down, you will be told that you should travel. Our conclusion is that what the Government are really seeking is not integration but assimilation. They are seeking to drive Gypsies and Travellers into housing and, indeed, the restrictive policies applied by this Government and the failure of this Government to ensure that there is adequate site provision has already led to large numbers of Gypsies and Travellers (much against their will in many cases) moving into bricks and mortar accommodation.

This amounts to a destruction of a way of life by the back door.

It will be important to have a look at the statistics that the Government are quoting. The historical count of Gypsy/Traveller caravans shows that, since 2000, in general, the numbers on unauthorised sites (covering both unauthorised developments and unauthorised encampments) has been dropping. Numbers certainly have not been rising despite the propaganda put out by this Government.

The Government like to paint a picture of a situation where the planning system is, in their strange view of things, slanted in favour of Gypsies and Travellers. In fact, the history mentioned above indicates that it has become more and more difficult for Gypsies and Travellers to obtain authorised sites and the system has not enabled them to do so (obviously we partially except the situation with regard to the provision of local authority sites between 1970 – when the Caravan Sites Act 1968 duty came into force - and 1994). In fact, when housing development is required, it is often the case that this is either allowed in the Green Belt or the Green Belt boundary is re-drawn to allow this to occur (see, for example, the recent approval of 100 new houses at Bucknalls Lane, Watford in the Green Belt, APP/B1930/A/13/2207696). It would appear that the discrimination in the planning system is against rather than in favour of Gypsies and Travellers in terms of attempting to get sites in the countryside.

In the Introduction at para 1.2 DCLG state:-

Our policy is clear that local authorities are responsible for objectively assessing their own site needs and identifying a suitable 5-year supply of sites to meet their needs, as is consistent with national planning policy as a whole.

However it is abundantly clear that this will not happen without some active, central oversight and central involvement."

Questions

Question1 – 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?

South West Law does not agree with this proposal.

The stated aim of Planning Policy for Traveller Sites – "to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life..." – reflects the judgment in *Chapman v UK* (2001) 33 EHRR 18 in which it was confirmed that:

"...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 arriving at the 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).

The consultation document states: *"This is not about ethnicity or racial identity. It is simply that for planning purposes the Government believes a traveller should be someone who travels."* However, *Chapman* makes it clear in that:

"73 the applicant's occupation of her caravan is an integral part of her ethnic identity as a gypsy, reflecting the long traditon 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

74 The Court finds therefore that the applicant's right to respect for her private life, family life and home are in issue in the present case" (emphasis added).

The Court recognised that rather than travelling, it is the occupation of caravans that is an integral of the ethnic identities of Romani Gypsies and Irish Travellers. Therefore the positive obligation to facilitate the gypsy way of life relates to facilitating their occupation of caravans. If PPTS is intended to meet this obligation then it would be entirely missing the point if it were only for the benefit for 'Travellers who travel'. The proposed definition would further restrict the ability of many ethnic Romani Gypsies and Travellers to live in caravans and would thus offend Article 8.

As Sullivan J (as he was then) said in *Wrexham County Borough Council v The National Assembly for Wales and Berry* [2002] EWHC 2414 Admin:

"I can see nothing in the judgments to suggest that had the Court of Appeal been confronted with what might be described as a 'retired' gypsy, it would have said that he had ceased to be a gypsy because he had become too all and/or too old to travel in order to search for work. In my judgment such an approach would be contrary to common sense and common humanity. As a matter of common sense, the time comes for all of us, gypsy and non gypsy, when we become too old and/or too infirm to work. Old habits, whether nomadic or not, die hard. It could not be right for a gypsy who had been living al his life on a gypsy caravan site or sites whilst he was still young enough and fit enough to travel to seek work to be told when he reached retirement age that he had thereby ceased to be a gypsy for the purposes of the application of planning policy. It would be inhuman pedantry to approach the policy guidance... upon that basis" (para 20, emphasis added).

The Equality Impact Assessment (EIA) recognises that the proposal would have the greatest impact on "the elderly who no longer travel due to reasons related to ill health or disability. Similarly, it would also impact on children and young people including those with disabilities or special educational needs who use a settled base in order to access education; as well as women who have ceased to travel in order to care for dependents." Gypsies and Travellers often live in extended family groups with 3 or more generations together on a site. Rarely will they all still practice the 'nomadic habit of life': single mothers may require in order to raise the children; grandparents may have retired from work; other adults may be too ill to travel. Were the proposal to be implemented, the unavoidable reality will be that families will be split up with only those who are still travelling for work still eligible to live on a site. This will be disastrous for families who have always lived together and who rely on each other for practical and emotional support. The EIA acknowledges that, among the Gypsy and Traveller population, it is the most vulnerable who will be most affected by the proposed changed but fails to provide a reasoned justification for this.

Similarly, despite noting the impact that the proposal would have on children, the consultation document gives no consideration to the how it would accord with the need to treat the best interests of the child as a primary consideration (see the United Nations Convention on the Rights of the Child and *ZH (Tanzania v Secretary of State for the Home Department* [2011] UKSC 4)). The proposal would further limit the opportunity for children live in accordance with their culture and traditions while enjoying the same access to education as children living in bricks and mortar.

Consideration needs to be given to the practical implications of implementing the proposed definition. The Royal Town Planning Institute has commented that the burden of deciding whether an individual has permanently ceased travelling will fall upon local planning authorities (LPAs) and that an operational defintion of 'permanently' will be difficult to arrive at.

Q2 – 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?

The government is seeking views on further measures to support Travellers who would fall under the new definition to facilitate their nomadic habit of life and suggests the use of conditions ensuring that transit sites are available at certain times of the year. It is not clear how this would work and the government acknowledges that this would be a matter for LPAs. Transit sites are very rare, as are emergency stopping places and arrangements for tolerating certain sites on a temporary basis. As outlined above, LPAs are not meeting their obligation to provide sites and unless a statutory duty with objectively-set targets is reintroduced there is little prospect of an increase in public bodies' commitment to

facilitating the nomadic habit of life.

Q3 – 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?

The 2006 Regulations ensure that the needs of Gypsies and Travellers living in bricks and mortar are taken into account when preparing an accommodation needs assessment. Gypsies and Travellers are often forced into bricks and mortar accommodation as a result of the severe shortage of sites: many can no longer abide the cycle of unauthorised encampment followed by eviction, and the sense of hostility and disenfranchisement that comes with it. However, moving into conventional housing can bring its own difficulties including psychological problems arising from a sense of isolation and claustrophobia. It is therefore vital that the needs of Gypsies and Travellers are properly taken into account in accommodation needs assessments.

The House of Commons ODPM: Housing, Planning, Local Government and the Regions Committee *Gypsy and Traveller Sites* 13th Report of Session 2003–04 states:

"There is a difference between having a definition that leads specifically to a site's outcome so far as the planning legislation is concerned and the sort of definition that you might want for a housing needs survey to accommodate the wider needs of Gypsies and Travellers. The planning definition would necessarily be related to the land use, whereas a housing needs assessment might be related to the wider needs of Gypsies and Travellers, considering those who are already living in bricks and mortar, for example" (para 59).

And the consultation document concerning the definition of Gypsies and Travellers for the purpose of the Housing Act 2004 notes that:

"12. *The purpose of the planning system is to regulate the use and development of land in the public interest. It is, therefore, appropriate that the planning definition should be limited to those who can demonstrate that they have specific land use requirements arising from their nomadic way of life. The planning definition is relevant to the application of planning policies and the determination of applications for planning permission. In this context, having 'gypsy status', where it has implications for land use, can be a material consideration in the determination of planning applications.*

13. *The proposed housing definition is for a very different purpose. It is intended to be a pragmatic and much wider definition which will enable local authorities to*

understand the possible future accommodation needs of this group and plan strategically to meet those needs. It recognises that there will be movement between sites and bricks and mortar housing, and that an understanding of the full gypsy and traveller community, not just those who are currently travelling, is necessary in order for local authorities to meet their responsibilities and put proper strategic plans in place.

14. *Falling within the housing definition does not confer a direct advantage on any individual. It does not in itself imply that that person 'should' live on a site, or has 'gypsy status' for planning purposes. It means that the individual belongs to a group whose accommodation needs must be assessed by the local authority. Once a need has been identified the local authority will then develop a strategy to meet it. However, there are a variety of ways in which gypsy and traveller accommodation needs may be met and the definition does not tie the local authority to specific solutions."*

These matters are thoroughly considered in the report, 'A place to call home: Ethnicity, culture and planning for Traveller sites' (October 2014) by the Traveller Movement which we fully endorse.

Q4 – Do you agree that Planning Policy for Traveller Sites be amended to reflect the provision in the National Planning Policy Framework that provide protection to these sensitive sites (AONB, SSSI etc)? If not, why not?

We do not agree to this because it is unnecessary. The two policy documents are intended to be read together so the protections afforded to these sites by the NPPF already apply to proposals for Gypsy and Traveller sites.

Q5 – 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?

We do not agree with this proposal. The RTPI itself has stated that 'open countryside' is a very nebulous concept and as such could be "overly restrictive insofar as it could restrict Traveller sites from areas of low landscape quality, which are relatively well concealed, yet well related to settlements and services... Applications for Traveller sites should be treated in the same manner as any other development activity." There is no objective justification for treating Traveller sites in the open countryside any differently from housing development and to do so would be discriminatory.

Gypsy and Traveller sites are often located in rural areas given the cost of land within settlement boundaries, the fact that such land is often designated for other purposes, and the level of local opposition to Traveller sites in residential areas. This proposal would directly conflict with the government's stated aim of promoting private site provision because it would severely limit the areas in which sites could realistically be located. It would drastically exacerbate the shortage of available sites and lead to an increase in unauthorised encampment by Gypsies and Travellers with nowhere else to go.

Q6 – 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? If not, why not?

We do not agree with this proposal. Under the current system there is no enforceable obligation on local authorities to provide sites to meet its need. This provision in PPTS is the main 'stick' with which local authorities are encouraged to take adequate steps to address the needs of Gypsies and Travellers resorting to their areas. Removing it will mean that local authorities have no reason provide a 5 year supply of sites and in areas that are already wilfully ignoring their accute unmet need, supply is likely to drop off altogether.

Q7 – 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?

We do not agree with this proposal. The 'very special circumstances' test has been developed through the courts over a number of years and functions perfectly well as a means of determining proposals for all types of development in the Green Belt. Altering the test for Traveller sites alone would be discriminatory and there is no justification for doing so.

Q8 – 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?

We do not agree with this proposal. By a considerable margin, the primary cause of unauthorised occupation is the historical and accute underprovision of sites. The problem has become more severe since any enforceable obligation on local authorities

was removed. Implementing a proposal such as this would only worsen underprovision as planning permission is denied to people whose only options were to stop on the roadside, on someone else's land, or on their own land without authorisation. Furthermore, it would be discriminatory to impose this as a material consideration in relation to Traveller sites without introducing a similar provision for other unauthorised residential developments.

Q9 – Do you agree that unauthorised occupation causes harm to the planning system and community relations? If not, why not?

We do not agree with this proposition. The failure of local authorities to meet their obligations to provide sites is what causes the harm to the planning system and to community relations. The lack of provision causes significant harm to Gypsies and Travellers who wish to live in accordance with their way of life.

Q10 – Do you have evidence of the impact of harm caused by intentional unauthorised occupation? (And if so, could you submit them with your response.)

Please see response to Q9.

Q11 – Would amending Planning Policy for Traveller Sites in line with the proposal set out in paragraph 4.16 above help that small number of local authorities in these exceptional circumstances? If not, why not? What other measures can Government take to help local authorities in this situation?

No. The only unauthorised development that we are aware of that fits the description in the consultation document is Dale Farm. PPTS states that the policy will be reviewed when "fair and representative practical results of its implementation is clear". Dale Farm is a unique case and in the absence of evidence of any other similar encampments we consider that it is premature and inappropriate to introduce this kind of proposal. It is not clear how this proposal would work in practice: how 'large-scale'would the site have to be, and how 'significant' the increase in need could be. This proposal would hand local authorities the option of not providing sites, which would undoubtedly be an appealing option for many of them. However it could have catastrophic effects on the level of provision and greatly increase the number of unauthorised encampments.

Q12 – 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?

The consultation document reaffirms the government's commitment to increasing the level of authorised provision in appropriate locations to address historic under supply; addressing the inequalities the Gypsy and Traveller communities experience; and delivering a planning system that applies equally and fairly to all. The document sets out proposals for reform which it considers will achieve these aims but makes no reference to the alternatives. For the reasons set out in this response, South West Law does not believe that these proposals will further the government's stated aims and in fact will be a regressive step leading to more Gypsies and Travellers being forced into unsuitable accommodation, more unauthorised encampments, and greater inequality between Gypsies and Travellers and the settled population.

Finally, would draw your attention to *R (Moseley) v London Borough of Haringey* [2014] UKSC 56 in which the Supreme Court confirmed that, when a public body carries out a consultation, procedural fairness and the need for meaningful particupation demand that consultees should be informed of alternative methods of achieving the desired outcome. The consultation document does not indentify any alternative options and does not explain why they are not being taken forward. This means that this consultation is not in accordance with *Moseley* and the principles of fair consultation. We therefore call upon the government to redraft the consultation document accordingly and re-start the consultation process.

23 November 2014
South*West*Law