Application Number	16/01431/AS
Location	Milee, Nickley Wood Road, Shadoxhurst, Ashford, Kent, TN26 1LZ
Grid Reference	98345/36685
Parish Council	Shadoxhurst
Ward	Weald South
Application Description	Change of use of land for the stationing of 4 gypsy pitches and associated development and the erection of a goat barn (part retrospective)
Applicant	Mr and Mrs May, c/o Agent
Agent	Mr Patrick Durr, Patrick Durr Associates, Cubys, Blind Lane, Goudhurst, Kent, TN17 1EL
Site Area	0.30 ha

1st Consultation

(a)	14/8R 3S	(b) Parish Council X	(c) NE X, FC -, KWT R, WT R, EA X, KH&T -, EHM X, WKPS R
(a)	18/3R 1S	(b) Parish Council -	(c) NE X, FC -, KWT R, WT -, EA X, KH&T -X, EHM X, WKPS -

Introduction

1. This application is reported to the Planning Committee as in the opinion of the Head of Development, Strategic Sites and Design this application is sensitive in nature.

Site and Surroundings

2. The application site is to the rear of an existing gypsy and traveller site which fronts onto Nickley Wood Road. The existing gypsy and traveller site comprises three authorised pitches.

3. The site is located in the open countryside, outside the built-up confines of any setllement. The site is positioned approximately one mile south of the village of Shadoxhurst, some 2.5 miles to the north of Hamstreet and some 7 miles to the south of Ashford.

4. Nickley Wood Road comprises mixed development served by a private road. Orlestone Saw Mill is located adjacent at the entrance into Nickley Wood Road. Beyond the Sawmill, development comprises thirteen dwellings and a number of authorised gypsy and traveller sites. The application site lies on the south side of the private road towards its end. There are a further two residential properties beyond the site to its east.

5. Access to the site is gained via Nickley Wood Road, and then through the authorised gypsy and traveller site. The application site is an irregular shape, which is due to the fact that the application site is confined to a pre existing area of surfaced trackway and lawful hard-surfaced and tarmacked areas.

6. The land is designated ancient woodland and is covered by a blanket Tree Preservation Order dated 2010. The site lies on the edge of an 86 ha Kent Local Wildlife Site - Shadoxhurst Woods and Pastures and is within the Shadoxhurst Woods Landscape Character Area (LCA) where landscape objectives seek to conserve and restore the landscape. The site is located approximately 215 metres to the north of the Orlestone Forest Site of Special Scientific Interest (SSSI).

7. A plan showing the application site in relation to its surroundings is found below and also attached as **Annex 1** to this report.

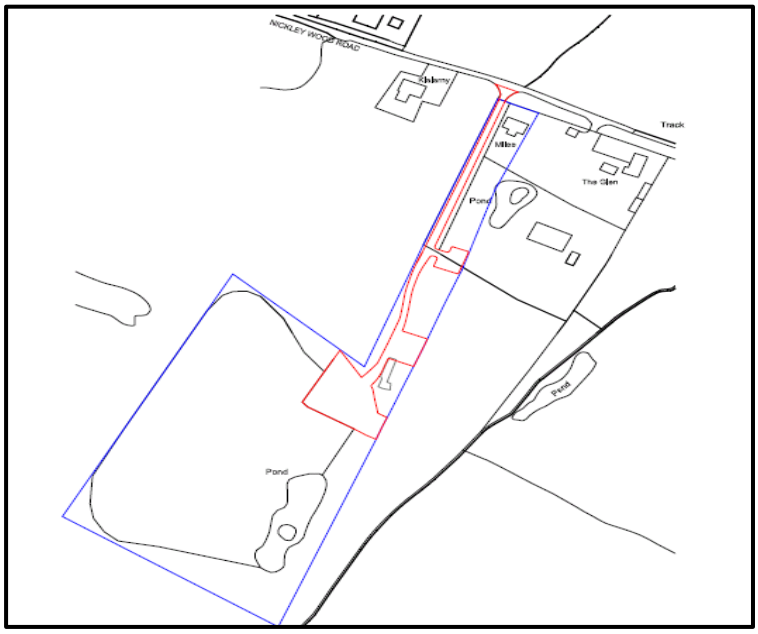


Figure 1 Site Location Plan

Proposal

8. The proposal is a full application. The application is for the change of use of land for the stationing of four gypsy pitches and associated development including the erection of a detached dayroom on each pitch, the erection of a

goat barn and a wooden post and rail fence to the perimeter. The development would be located on an area of pre-existing lawful hardstanding.

9. The application is part retrospective, in so far as one caravan is already stationed on pitch 1. Pitch 1 is located on an existing tarmacked area to the north of the authorised pitches. Prior to the siting of the unauthorised caravan, this area was used for car parking by the occupiers of the existing authorised pitches.

10. It is proposed to provide three further pitches on an existing area of hardstanding at the southern end of the site (pitches 2, 3 and 4). Each pitch would comprise a single mobile home, and a dayroom. The dayroom serving pitches 3 and 4 would be semi-detached.

11. The goat barn is proposed on existing hardstanding in a cleared area on the eastern side of the access track.

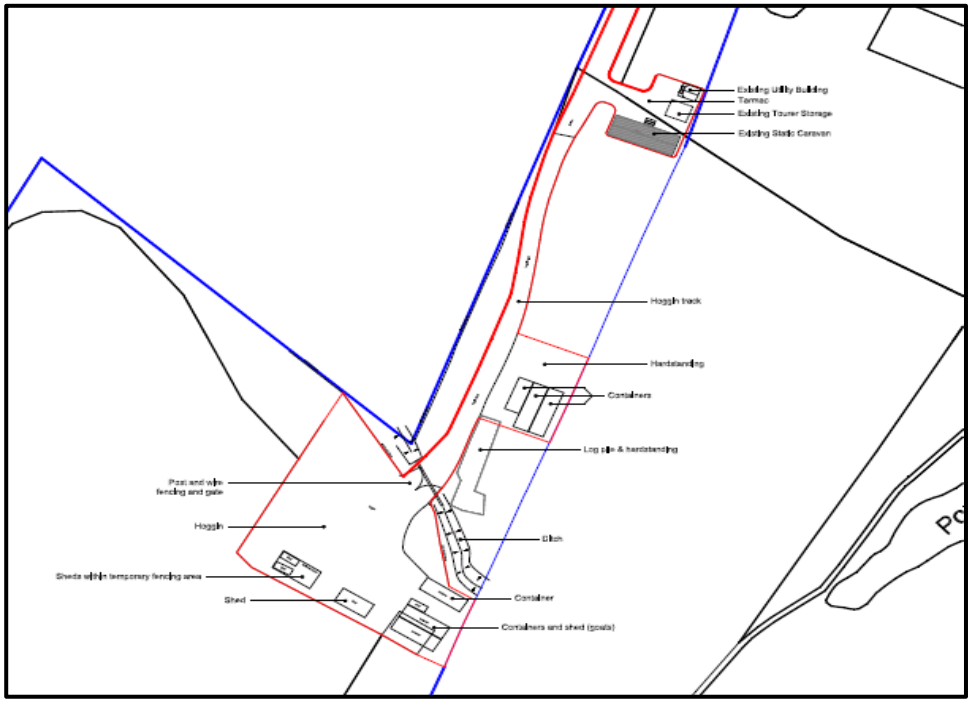


Figure 2 Existing layout with unauthorised mobile home identified

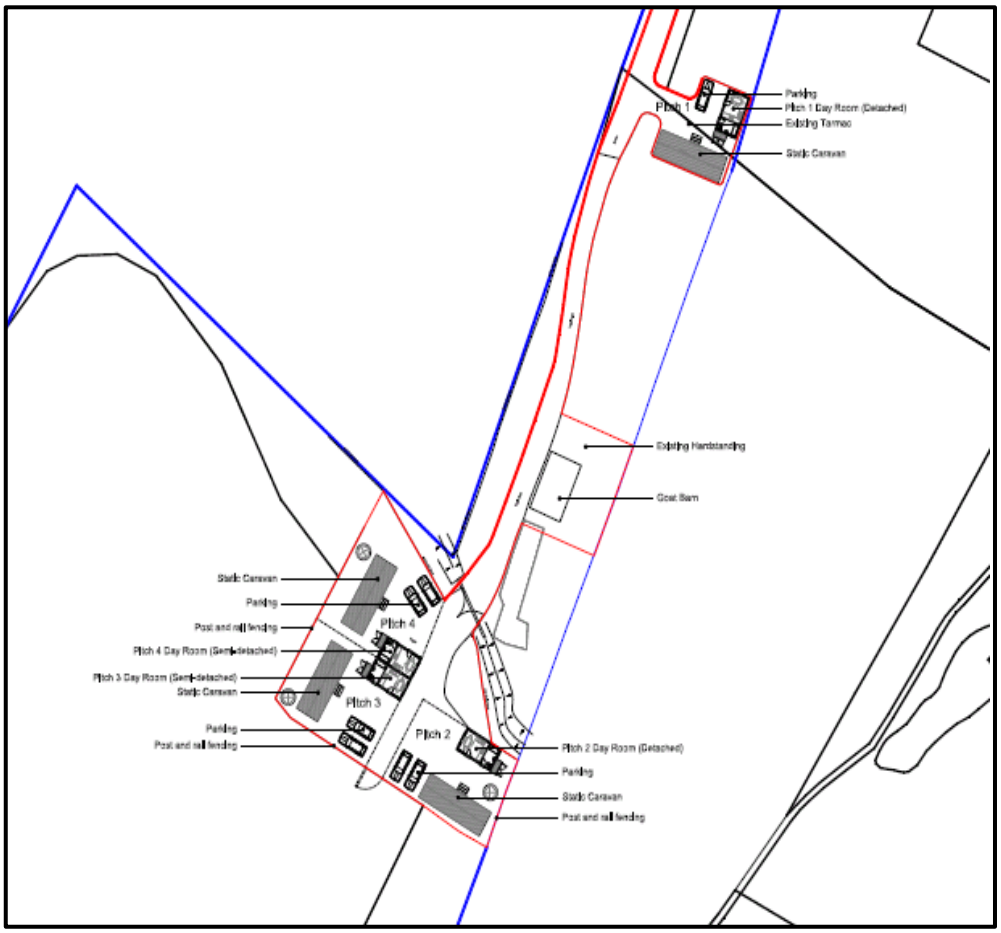


Figure 3 Proposed Layout

12. The detached dayrooms would measure 6m x 3.4m (excluding the attached store), and would have a ridged roof to a height of 3.85m. The semi-detached dayroom is double the width. The dayrooms would include a small kitchenette and bathroom. The walls of the dayrooms would be clad in dark stained timber boarding and the roof would be a dark grey fibre cement slate. Windows and doors would have dark brown uPVC frames.

13. The Goat barn would measure 11m x 6.9m. The building would have a lean to roof. The building would stand at a height of 3 metres at its tallest point. The barn would be finished in dark stained timber boarding and would have a roof made from dark grey profile steel sheeting.

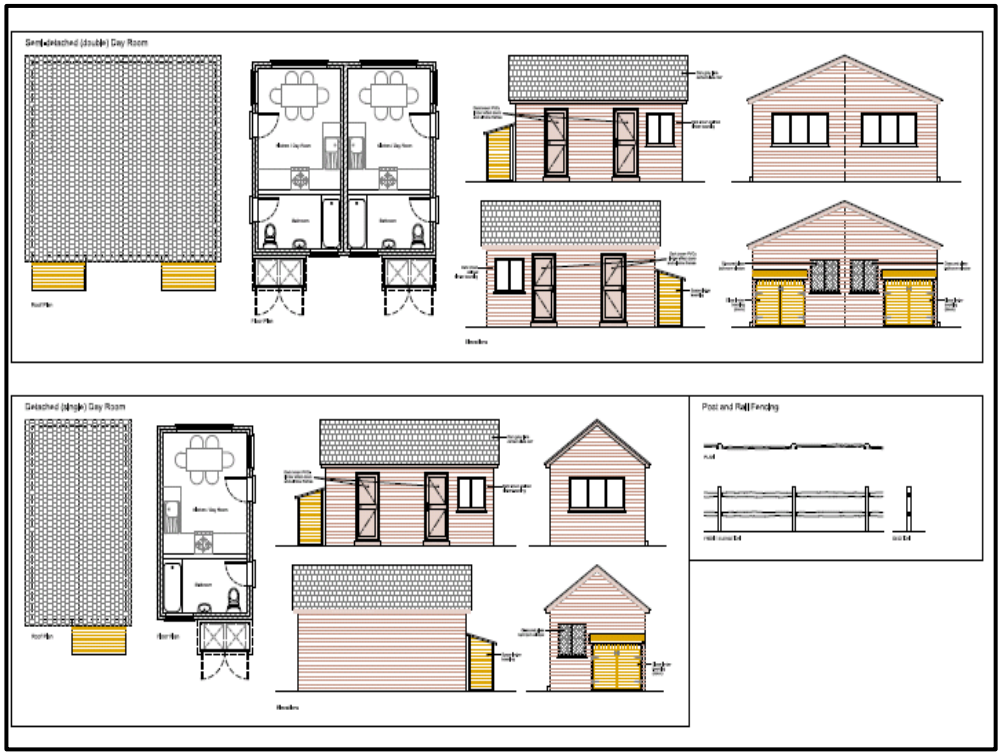


Figure 4 Dayrooms and perimeter fencing

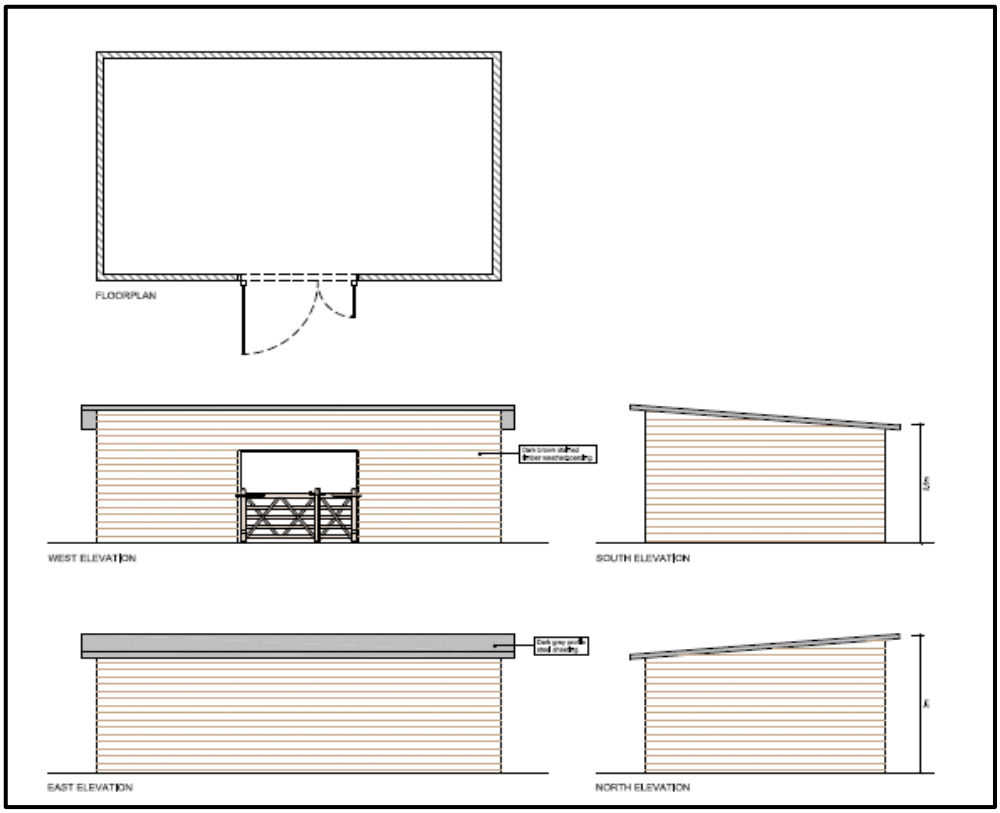


Figure 5 Proposed Goat Barn

14. In support of the application, the following documents have been submitted and are summarised below:

Design and Access Statement (DAS)

15. This describes the site, details the planning history, pre-application advice and refers to the status of the hard surfacing and containers on site. The DAS states that the accommodation will be occupied by members of the applicants' family. The DAS references planning policies and discusses the identified need for gypsy and traveller pitches. It also summaries the content of the Woodland Assessment.

16. The DAS concludes by stating that the proposal does not impact on the surrounding Ancient Woodland and mitigation is not appropriate due to the sites history and the proposals location. It states that the accommodation would provide much needed accommodation for the applicants' family; and that there is also an established need for additional traveller and gypsy pitches within the Ashford Borough.

Woodland Assessment

17. The Assessment concludes that:

"the site, although technically ancient woodland, was heavily damaged when it was covered in subsoil. As a result, it has lost its scientific interest to a very great extent. The possibility of limited development, provided that it is strictly contained, combined with an appropriate, detailed native – species planting plan, can go most of the way towards enabling part of the site to be properly restored and to continue as woodland, albeit initially as a plantation on an ancient woodland site".

Relevant Planning History

18. 06/00876/AS Siting of mobile home. Permission Granted 23/04/2007.

10/01341/AS Change of use of the land for the stationing of 2 no. additional static caravans and the erection of 2 no. additional day rooms. Permission Granted 10/03/2011.

13/00980/AS: Change of use of land to residential for stationing of 8 caravans to accommodate extended gypsy family. Refused 30/01/2014.

15/00761/AS: Change of use of land for the stationing of 4 gypsy pitches and associated development and the erection of a goat barn. Permission granted 08/11/15 (Decision quashed).

15/00761/CONA/AS: Discharge of conditions 4, 6 & 11. Details approved 01/04/2016.

A discussion relating to the planning history is to follow in the paragraphs below.

Consultations

Ward Members: The Ward Members are Cllr Bradford and Cllr Hicks. Cllr Bradford is a Member of the Planning Committee. Neither Ward Members have made any formal representations.

First Consultation

Parish Coucil: State that they would like this application to be deferred so that they have all the information relating to the judicial review and previous planning history. The parish council state that *"the application does not reflect the current situation. There are already static vans on the site not shown on the plan. If the officer is minded to support councillors would like the application elevated to the planning committee"*.

Natural England (NE): Statutory Nature Conservation Sites' – NE are satisfied that the proposed development being carried out in strict accordance with the details of the application, as submitted, will not damage or destroy the interest features for which Orlestone Forest SSSI has been notified. NE advises that this SSSI does not represent a constraint in determining this application.

Protected Species – NE advise the LPA to apply their Standing Advice as it is a material consideration in the determination of applications in the same way as any individual response received from NE following consultation.

Priority Habitat – NE indicate that this development includes an area of priority habitat. NE advises that if significant harm resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused.'

Ancient Woodland – NE advises that the proposals as presented have the potential to adversely affect woodland classified on the ancient Woodland Inventory. NE has referred the LPA to their Standing Advice.

Local Sites - NE advise the LPA to ensure it has sufficient information to fully understand the impact of the proposal on any local sites before it determines the application.

Sites of Special Scientific Interest Impact Risk Zones – NE advise of the process for consulting them on development in or likely to affect a Site of Special Scientific Interest.

Forestry Commission: Did not submit any comments.

Kent Wildlife Trust: Object to the application noting that the site falls within an area of woodland recorded in the Ancient Woodland Inventory of Kent as Ancient & Semi-Natural Woodland; and that the section of wood (Dering Wood) also forms part of the Shadoxhurst Woods & Pasture Local Wildlife Site. The Trust notes that notwithstanding the fact that much of the land has been cleared of trees in the last 10 years, it is the site of ancient woodland that is protected by designation and such sites are valued for their ground flora and/or archaeology not simply the tree cover. The Trust are not convinced that the residential use can be confined exclusively to the existing hard standing, and note that the intensification of recreational activity (of humans and their pets) can cause harm in the wider area, including disturbance to breeding birds and giving rise to vegetation damage/deadwood removal, litter, fire damage, noise and light pollution, damage to the woodland edge. The trust concludes that in the absence of any case of exceptional need, planning permission should be refused and the area allowed to heal.

Woodland Trust: The trust is concerned that the proposed gypsy pitches and goat barn will lead to the following impacts:

- Intensification of the recreational activity of humans and their pets causing disturbance to the habitats of breeding birds, vegetation damage/deadwood removal, litter, and fire damage;

- Fragmentation as a result of the separation of adjacent semi-natural habitats, such as small wooded areas, hedgerows, individual trees and wetland habitats;

- Noise and light pollution

- Where the wood edge overhangs public areas, branches and even whole trees can be indiscriminately lopped/felled, causing reduction of the woodland canopy.

- There will inevitably be a safety issues in respect of trees adjoining public areas and buildings, which will be threatening to the longer-term retention of such trees.

- Changes to the hydrology as a result of new hard-standing areas. This alters ground water and surface water quantities and can result in water run offs from urban development that change the characteristics and quality of the surface water as a result of pollution/contamination etc.

- Any effect of development can impact cumulatively on ancient woodland - this is much more damaging than individual effects.

The Trust objects to the application on the grounds that the current proposal will result in the direct loss of ancient woodland. The Trust state that their main concerns are:

- Unsuitable location of the development resulting in direct loss and damage to ancient woodland;

- Increasing isolation and fragmentation of Dering Wood and the surrounding habitats;

- Failure to provide for protective measures and management for ancient woodland.

Environment Agency: State that they have no comments to make.

Kent Highways and Transportation: No comments recived.

Environmental Health: No objection subject to a condition relating to the disposal of sewage.

Neighbours: 14 neighbours were consulted. 8 representations were received objecting to/commenting on the application. These are summarised below.

- The application should be refused in light of the Judicial Review of the decision in the relation to the previous application.

- Increase surface water pollution of adjoining woodland ditches through poorly maintained and constructed sewage disposal.

- Increased traffic movements.

- Nickley Wood Road is in poor condition and increased traffic would cause further damage to the road.

- Highway impacts – road safety, road blocking (from mobile home deliveries), no passing bays, no footways, no street lighting, damage to private verges (caused by wide vehicles and passing).

- Impact on Ancient Woodland and TPO trees.

- Impact on wildlife. Specific reference also made to bats, birds and owls.

- Noise and disturbance resulting from traffic generated by gypsy sites.

- Sewage disposal should be dealt with via a Package Treatment Plan and not a Septic Tank.
- Flooding from surface water.
- Insufficient infrastructure to accommodate increased density of development.
- Use of unathorised hardstanding.
- Impact upon the character and appearance of the countryside.
- Overdevelopment in Nickley Wood Road.
- The granting of permission will set a precedent.
- Concentration of gypsies is disproportionate to the number of settled residents.
- Information submitted with the application is inaccurate.
- The application is retrospective.
- There is no Design and Access Statement.
- There has been discrimination through the planning validation process as the application has been processed despite lack of / incorrect information.
- Contrary to policies GP12 and EN32 of the Local Plan 2000, CS1, CS11, CS14 and CS15 of the Core Strategy, TRS17 and the Tenterden and Rural Sites DPD and guidance within the Planning Policy for Traveller Sites.
- Applicants do not comply with the definition of a gypsy.
- Future occupancy conditions are not in practice enforced or, therefore, reasonably enforceable.
- Comments have been made relating to alleged unauthorised development on gypsy and traveller sites within Nickley Wood Road and also to the alleged breach of conditions imposed on grants of planning permission.

The Weald of Kent Protection Society: Objects to the application for the reasons summarised below.

- Potential damage to woodland highlighted by the judicial review of the decision in relation to the previous application.

Representations were received from 3 members of the public supporting the application for the reasons summarised below.

- The applicants' community living has very little impact on society.
- The application has been made and the development applied for through via the correct procedures.
- The applicants have no detrimental impacts on anything or anyone.

The following comments/statements have been made within the representations of support.

- Why are the applicants being persecuted for seeking to live as a traditional family within their own community, not affecting their neighbours?
- The family all work hard to fulfil a desired lifestyle that people have little or no knowledge or understanding of, so where is their human rights, they have applied through the correct channels.

Second Consultation

The second consultation was undertaken following receipt of amended plans to show the unauthorised mobile home, a tourer and utility building sited on pitch 1 and an amended proposed layout showing the dayrooms re-numbered so that they accord with the correct pitch number. The description was also amended to reflect the fact that part of the development to which the application relates is being applied for retrospectively (see paragraph 9 above).

Parish Council: Did not submit any further comments.

Natural England England: Confirm that their previous comments still stand.

Forestry Commision: Did not submit any comments.

Kent Wildlife Trust: State that the amendments do not address their 'in principle' objection. The Trust request that the application is determined having regard to the comments in their previous letter.

Woodland Trust: Did not submit any further comments.

Environment Agency: Confirm that their previous comments still stand.

Kent Highways and Transporation: No objection.

Environmental Health: Confirm that their previous comments still stand.

Neighbours: 18 neighbours were consulted. 3 representations were received objecting to/commenting for the additional reasons summarised below.

- It is contended that the Council are discriminating in favour of travellers and against the settled community in breach of its duty under Sections 29 and 149 of the Equality Act 2010. To demonstrate this reference is made and comparisons drawn from 3 applications relating to Little Criol Wood, Criol Lane Shadoxhurst. 15/000323/AS for a dwelling to replace existing structures and 15/00321/AS and 16/01465/AS both relating to change of use of land to station mobile home(s) for gypsies and convert an existing store to a day room. The application for the dwelling was refused whereas the other two applications were permitted.

- In none of the above applications did the development proposals accord with the development plan and the assessments in the case of the consents granted do not demonstrate any benefits to be taken into account when assessed against the policies in the NPPF.

A copy of a letter dated 1st March 2017 sent to all Ward Members of the Council has been received. The Letter relates to what is described as 6 critical issues. These issues are summarised/listed below.

i. The process of investigating gypsy and traveller status against the definition set out in the PPTS.

ii. The weight to be attached to gypsy and traveller status when determining an application.

iii. Discrimination in favour of travellers and against the settled community in breach of its duty under Sections 29 and 149 of the Equality Act 2010.

iv. Precedent.

v. Human Rights under The European Convention on Human Rights (incorporated into UK law by the Human Rights Act 1988).

vi. The finding of the Judicial Review of the decision in relation to the previous application reference 15/00761/AS.

One representation was received in support of the application. The representation includes the following comments/statements.

- The family have been open and transparent with their application doing nothing underhanded.

- Why are the applicants being discriminated against? They are not after all applying for holiday homes and living in them permanently.

- If the immediate neighbours don't have any issues here why do others?

Planning Policy

19. The Development Plan comprises the saved policies in the adopted Ashford Borough Local Plan 2000; the adopted Local Development Framework Core Strategy 2008; the adopted Ashford Town Centre Action Area Plan 2010; the Tenterden & Rural Sites Development Plan Document 2010; the Urban Sites and Infrastructure Development Plan Document 2012; the Chilmington Green Area Action Plan 2013; and the Wye Neighbourhood Plan 2015-30.

20. On 9 June 2016 the Council approved a consultation version of the Local Plan to 2030. Consultation commenced on 15 June 2016 and has now closed. At present the document does not form part of the development plan and policies in this emerging plan can be accorded little or no weight.

21. The relevant policies from the Development Plan relating to this application are as follows:-

Ashford Borough Local Plan 2000

GP12 Protecting the countryside and managing change

EN31 Important Habitats

EN32 Important trees and woodland

Local Development Framework Core Strategy 2008

CS1 Guiding principles to development

CS2 The Borough wide strategy

CS9 Design quality

CS11 Biodiversity and Geological Construction

CS14 Gypsies and Travellers

CS15 Transport

CS20 Sustainable Drainage

Tenterden & Rural Sites DPD 2010

TRS17 Landscape character & design

TRS18 Important Rural Features

Local Plan to 2030

SP1 Strategic Objectives

SP6 Promoting High Quality Design

HOU16 Traveller Accommodation

HOU17 Safeguarding Traveller Sites

ENV1 Biodiversity

ENV3 Landscape Character and Design

ENV5 Protecting important rural features

ENV9 Sustainable Drainage

22. The following are also material to the determination of this application:-

Supplementary Planning Guidance/Documents

Landscape Character Assessment SPD 2011

Sustainable Drainage SPD 2010

Government Advice

National Planning Policy Framework (NPPF) 2012

National Planning Practice Guidance (PPG)

23. Members should note that the determination must be made in accordance with the Development Plan unless material considerations indicate otherwise. A significant material consideration is the National Planning Policy Framework

(NPPF). The NPPF says that weight should be given to relevant existing Development Plan policies according to their degree of consistency with the NPPF. The following sections of the NPPF are relevant to this application:-

- Paragraph 14 sets out presumption in favour of sustainable development

- Paragraph 17 sets out the core planning principles including every effort should be made objectively to identify and then meet the housing needs of the area; and always seek to secure high quality design and a good standard of amenity for all existing and future occupants of land and buildings; encourage the effective use of land by reusing land that has been previously developed (brownfield), provided that it is not of high environmental value; contribute to conserving and enhancing the natural environment, conserve heritage assets.

- Section 4 requires developments that generate significant amounts of movement should be supported by a Transport Statement.

- Section 6 sets out the need to deliver a wide choice of high quality homes and the requirement to plan for the needs of different groups in the community including families with children and older people.

- Section 7 sets out the need to require good design.

- Section 11 requires the planning system to conserve and enhance the natural environment. Paragraph 118 contained within this section states that planning permission should be refused for development resulting in the loss or deterioration of irreplaceable habitats including ancient woodland, unless the need for, and benefits of, the development in that location clearly outweigh the loss.

National Planning Practice Guidance (PPG)

24. Other Government Guidance

Planning Policy for Traveller Sites (August 2015)(PPTS)

25. This document sets out the Government's planning policy for traveller sites. It should be read in conjunction with the NPPF.

Background

26. The relevant planning history is set out at paragraph 18 above. However, in light of the recent Judicial Review which resulted in the quashing of permission granted under reference 15/00761/AS, it is deemed appropriate in

this instance to provide some further detail relating to the background to this application.

27. There are currently 4 caravans stationed on the site at Milee. One of the caravans (stationed on pitch 1) is being applied for retrospectively under the current planning application. The remaining caravans were granted planning permission under references 06/00876/AS and 10/01341/AS.

28. In August 2013, application reference 13/00980/AS was received to change the use of the land to station an additional 8 caravans. This application was refused on the basis that the proposal resulted in intrusive development adversely affecting the character and appearance of the countryside which is designated as an Area of Ancient Woodland, covered by a Tree Preservation Order and lies within the Shadoxhurst Woods and Pastures Wildlife site 2012 and Shadoxhurst Woods Landscape Character Area. The decision notice states that the need for gypsy and traveller accommodation in the area did not outweigh the harm identified.

29. In June 2015 the Council received application reference 15/00761/AS for change of use of land for the stationing of 4 gypsy pitches, associated development and the erection of a goat barn. The June 2015 application differed from the previously refused scheme (13/00980/AS) in that it related to a smaller site area (13/00980/AS included land to the south and south west of the current application site), was for half the number of caravans, and involved the use of land that is already developed. Unlike 13/00980/AS, the caravans proposed under 15/00761/AS were confined to areas of the site where pre-existing lawful hard surfacing is located. No caravans were to be located on undeveloped land. It is important to note that at the time the LPA was determining 15/00761/AS the pre-existing hardstanding on the site had been in situ for over four years. Therefore, having regards to the provisions of sub-section 171B(1) of the Town and Country Planning Act 1990 (as amended)(“the 1990 Act”), the hard surfacing was lawful by virtue of the passage of time and immune from enforcement action. The application was deemed to have overcome the previous grounds for refusal and planning permission was granted on 11 November 2016.

30. However, this decision was successfully challenged by way of Judicial Review and the decision to grant planning permission (15/00761/AS) was quashed by Court Judgment dated 24 June 2016. A copy of this Judgment is attached to this report at **Appendix 2.**

31. The four grounds of challenge were as follows:

i. The Council failed to apply section 38(6) of the Planning and Compulsory Purchase Act 2004 which requires that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise.

ii. The Council failed to distinguish the development proposed from earlier proposal reference 13/00980/AS (for which planning permission was refused in January 2014) to station eight caravans at Milee to accommodate an extended gypsy family and failed to have regard to the importance of consistency in planning decision making.

iii. The Council failed to have regard to the fact that the granting of planning permission 15/00761/AS could set a precedent for development of further gypsy and traveller sites causing cumulative harm to the semi-natural ancient woodland in the area.

iv. The Council failed to have regard to the fact that condition (2) contained in the impugned planning permission was not reasonably enforceable/would fail to achieve its stated purpose.

32. The challenge was successful on ground (1) only. In summary, the Court found that:

i. the Council should have concluded that Local Plan Policy EN32 required permission to be refused given the harm to the ancient woodland (which the assessment recognised) that the proposed development would cause; and

ii. the Council should not have concluded that the proposed development was in accordance with the development plan as a whole on balance, given the recognised conflict with Local Plan Policy GP12 (and which Policy EN32 above expressed in stronger terms), having regard to Policy CS14 in the Core Strategy; CS14 did not permit the Council to take into account the need for further gypsy and traveller sites as part of the assessment of compliance or otherwise with the Development Plan.

33. Mr John Howell QC (Sitting as a Deputy High Court Judge), summarised his Judgment (at paragraph 102) as follows:

> “Essentially what I have found is (i) that the Development Control Manager should have concluded that local plan policy EN32 required permission to be refused given the harm to the ancient woodland (which the assessment recognised) that the proposed development would cause and (ii) that she should not have concluded that the proposed development was in accordance with the development plan as a whole on

> balance, given the conflict she appears to have recognised with Local Plan policy GP12 (and which she should have recognised with Local Plan policy EN32 which is in stronger terms than policy GP12), having regard to policy CS14 in the Local Development Framework Core Strategy. That policy did not permit her to take into account the need for further gypsy and traveller sites. That is not to say that the Development Control Manager failed to take into account the limited harm to the ancient woodland that the proposed development was assessed to cause or that she was not entitled in reaching her decision to take the need for further gypsy and traveller sites into consideration as another material consideration. **The assessment on the basis of which she took her decision was not flawed on the basis of a failure to take into account relevant matters on their merits independently of the development plan. It was flawed on the basis of how those matters fell to be classified in terms of the development plan**".[**my emphasis**]

34. Accordingly, the Court found that (i) the Council should have concluded that Local Plan Policy EN32 required permission to be refused given the harm to the ancient woodland (which the assessment recognised) that the proposed development would cause; and (ii) the Council should not have concluded that the proposed development was in accordance with the Development Plan as a whole on balance, given the recognised conflict with Local Plan Policy GP12 (and which Policy EN32 expressed in stronger terms), having regard to Policy CS14 in the Core Strategy.

35. Regarding point (i), the proposed scheme may not have resulted in the damage or loss of any individual important trees. However, the Court held that the woodland itself (for example, the flora and fauna present within the woodland) could still be damaged or lost. Therefore, the fact that no trees would be lost did not mean that the proposal was in accordance with Policy EN32.

36. Concerning point (ii), no development plan document allocated the site as a gypsy and traveller site. Policy CS14 did not support the proposed development and the courts have held that only policies (and not explanatory text) are relevant when applying section 38(6) of the Planning and Compulsory Purchase Act 2004.

37. Therefore, whilst Policy CS14's explanatory text is clearly relevant to the interpretation of the Policy, it is not itself a policy or part of a policy. The explanatory text states that "if there is an identified need then there is a requirement for the Council to identify suitable sites" and "in the meantime, any proposals for additional facilities for gypsies and travellers can continue to be assessed against national guidance".

38. The PPTS is such national guidance and paragraphs 2 and 27 of the PPTS state as follows:

> Paragraph 2 — "Planning law requires that applications for planning permission must be determined in accordance with the development plan, unless **material considerations** indicate otherwise. This policy must be taken into account in the preparation of development plans, and **is a material consideration in planning decisions**…"
>
> Paragraph 27 — "If a local planning authority cannot demonstrate an up–to-date 5 year supply of deliverable sites, this should be a **significant material consideration** in any subsequent planning decision when considering applications for the grant of temporary planning permission…" [**my emphasis**]

39. The Court recognised that the Council was entitled in reaching its decision to take the need for further gypsy and traveller sites into consideration. However, this should have been taken into account as a material consideration and only after the Council had concluded that the proposal was not in accordance with the Development Plan as a whole.

40. In my view, having regard to the emphasised passage at paragraph 102 of the judgment (see paragraph 33 above), the Council could still conclude that this proposal should be granted planning permission. In doing so, however, the Council would need to establish whether the proposal is in accordance with the Development Plan as a whole. Assuming that it would not be in accordance with the Development Plan as a whole then the Council would need to identify the policies harmed. Only then would the Council go on to consider whether there are any other material considerations which would outweigh the identified harm.

41. The current application seeks planning permission for the same development proposed under application 15/00761/AS, albeit that permission for the caravan stationed on pitch 1 is being applied for retrospectively. Whilst this caravan was originally stationed with the benefit of planning permission it is now unlawful following the quashing of permission reference 15/00761/AS. In terms of the physical aspects of the development proposed there are no material differences between the current application and 15/00761/AS. As such, the application remains materially different from 13/00980/AS for the reasons set out at paragraph 28 above. Procedurally, the current application differs to 13/00980/AS and 15/00761/AS insofar as Certificate C has been completed as opposed to Certificate A.

Assessment

42. The following are the principal issues to be considered in determining this application:

- Principle of the proposed development;
- Location;
- Impact on visual amenity;
- Impact on the natural environment including ancient woodland, TPO trees and wider biodiversity;
- Impact of the development on residential amenity;
- Highway safety;
- Flooding and Drainage; and
- Other relevant material considerations

Principle of the Proposed Development

43. Paragraphs 2 and 22 of the PPTS and paragraphs 2 and 210 of the NPPF, state that planning law requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise (Section 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990).

44. Paragraph 23 of the PPTS states that applications should be assessed and determined in accordance with the presumption in favour of sustainable development and the application of specific policies in the NPPF and the PPTS.

45. Paragraph 14 of the NPPF states that at the heart of the NPPF is a presumption in favour of sustainable development and this should be seen as a “golden thread running through decision-taking”. There are three dimensions to sustainable development: economic, social and environmental (paragraph 7 of the NPPF).

46. The mechanism for applying the presumption in favour of sustainable development is set out in paragraph 14 of the NPPF and states that for

decision-taking this means (unless material considerations indicate otherwise):

- approving development proposals that accord with the development plan without delay; and

- where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:

  - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or

  - specific policies in this Framework indicate development should be restricted.

47. Development Plan policy relating to Gypsy and Traveller provision is set out in Policy CS14 of the Core Strategy. The policy states:

If required, sites for gypsies and travellers (as defined in Circular 01/06) will be identified in a site allocation Development Plan Document on the basis of the following criteria:-

a) It should be based on a clearly identified need that cannot be met on an existing or planned site;

b) It should be in accordance with the guiding principles set out in Policy CS1, have regard to impact on the countryside and transport impact in accordance with Policy CS15.

48. Sites for gypsies and travellers are required (see paras. 96 onwards below). However, at present, there is no such Development Plan Document as referred to within policy CS14. Accordingly, the application site has not been considered for allocation or allocated. Consequently, although the Council has a policy that seeks to secure adequate provision for gypsies and travellers, the requirement of this policy has not yet been fulfilled. In my view, policy CS14 serves to provide a mechanism for allocating sites within a development plan document as opposed to providing criteria against which to assess an application for planning permission for gypsy and traveller sites. The policy is not one that requires permission to be refused for unallocated sites if there is a requirement for gypsy and traveller sites in advance of the adoption of a development plan document.

49. For the reasons above, I do not consider that Policy CS14 supports the current application; however, neither do I consider that it prohibits

development relating to gypsies and travellers on unallocated sites as a matter of principle. Therefore, the matter of whether or not the proposed development is acceptable is to be determined on its merits in accordance with other relevant policies in the development plan and having regard to guidance contained in the PPTS, NPPF and to other relevant material considerations. This approach is supported by Policy CS14's explanatory text (see paragraph 34 above).

Location

50. Paragraph 13 of the PPTS states that Local Planning Authorities should ensure that traveller sites are sustainable economically, socially and environmentally. Paragraph 13 includes a number of guiding principles (listed a-h) which aim to seek to ensure that Local Planning Authorities achieve this through their planning policies.

51. Nowhere in the PPTS does it state that gypsy sites in rural areas are unacceptable as a matter of principle. However, the PPTS indicates that LPAs should very strictly limit new traveller site development in open countryside that is away from existing settlements or outside areas allocated in the development plan. Amongst other things, the guiding principles at paragraph 13 indicate that LPAs should ensure access to appropriate health services, ensure children can attend school on a regular basis and provide a settled base that reduces the need for long-distance travelling.

52. Whilst the PPTS seeks to strictly limit new traveller site development in open countryside, in this case, the proposed pitches would extend an existing gypsy and traveller site and would be located on previously developed land comprising lawful hard standing. In addition, the site is considered to be reasonably located for use for gypsies and travellers for the reasons set out below.

53. The private road on which the application site is located feeds onto Church Lane which is an unclassified road. The junction of Nickley Wood Road with Church Lane is approximately 1.5 miles from the junction onto the Hamstreet Road (a classified carriageway and principle 'A' Road) connecting Ashford (7 miles to the north east) with surrounding villages. Shadoxhurst village is located a mile to the north, and includes a public house, village hall and a post office and convenience store at Stubbs Cross. The public transport network is also accessible from Shadoxhurst village. Hamstreet village is approximately 2.5 miles to the south and has a primary academy, medical service, a train station, post office and local shops. The distances are satisfactory in my view, and would ensure that occupiers of the application site will not need to travel long distances to local services and facilities. This view is supported by the fact that there is already a consented gypsy and traveller use of the wider

Milee site.

54. For the reasons set out above, I am satisfied that in terms of its location, the site fulfils the relevant objectives set out in the PPTS. This is a material consideration which I afford moderate weight.

Impact on Visual Amenity

55. Policy GP12 of the Local Plan seeks "to protect the countryside for its own sake, for its landscape and scenic value and for the important wildlife habitats it contains, and to respond to the need for carefully managed change to accommodate demands for agricultural diversification, tourism and public access to the countryside". Policy GP12 is relevant to visual amenity in so far as visual amenity is encompassed within the policy's general aspirations

56. Core Strategy Policies CS1 and CS9 and Policy TRS17 of the Tenterden and Rural Sites DPD are also concerned with visual impact and seek (amongst other things) to ensure appropriate design that respects the character and appearance of the area.

57. The above policies are consistent with the NPPF which states that "the government attaches great importance to the design of the built environment" (paragraph 56 of the NPPF).

58. The proposed pitches would be located on previously developed land comprising a pre-existing hardstanding immune from enforcement action.

59. The proposed pitches would be located in excess of 80 metres south of the access off Nickley Wood Road. Pitches 1 and 2 and the goat barn would be located to the east of the track behind the authorised pitches. Pitches 3 and 4 would be located to the west of the track on a parcel of land south of dense woodland. As such, public views of the proposed development would be extremely limited, if obtainable at all.

60. The caravans, day rooms and goat barn are relatively modest in height. The caravans will be viewed in context with other caravans in the locality which are authorised. The palette of materials proposed to be used in the construction of the day rooms and goat barn are common to the local vernacular. The chosen stains/colours are muted. For these reasons, in my view, the caravans and associated structures would not appear out of context in this setting. As such, on balance, any views of the development which may be obtainable would not result in a level of visual harm which I consider would justify refusing planning permission.

61. The boundary treatments and gates identified on the proposed layout plan are

appropriate to the rural setting.

62. In conclusion, the proposed pitches would be located on previously developed land and so, in relation to visual impact, for the reasons above, I consider that the proposed development would comply with Policy GP12 of the Local Plan, Policies CS1 and CS9 of the Core Strategy and Policy TRS17 of the Tenterden and Rural Sites DPD. This is a material consideration which I afford moderate weight.

Natural Environment

63. Policy GP12 of the Local Plan (reproduced in full at paragraph 455), seeks to protect the countryside for its own sake and so is relevant to the assessment of the impacts on the ancient woodland and protected trees. Policy EN32 of the Local Plan states that permission will not be granted for development which would damage or result in the loss of important trees or woodlands. Policy EN31 of the Local Plan states that development which significantly affects semi natural habitats will not be permitted unless measures have been taken to limit impact and long term habitat protection is provided where appropriate.

64. Amongst other things, policy CS1 of the Core Strategy seeks protection for the countryside and landscape from adverse impacts of growth.

65. Policy TRS17 of the Tenterden and Rural Sites DPD states that *"development in the rural areas shall be designed in a way which protects and enhances the particular landscape character area within which it is located, and, where relevant, any adjacent landscape character area*". The policy states that proposals should have regard to a number of factors including, the type and composition of wildlife habitats and the pattern and composition of trees and woodlands. Policy TRS18 states amongst other things that development in the rural areas shall protect and where possible, enhance ancient woodland.

66. Policy CS11 of the core strategy states that development should avoid harm to biodiversity and geological conservation interests and seek to maintain and, where practicable, enhance and expand biodiversity by restoring or creating suitable semi-natural habitats and ecological networks to sustain wildlife in accordance with the aims of the National and Kent Biodiversity Action Plans. If, exceptionally, there are circumstances in which other considerations justify permitting development that causes harm to such interests, appropriate mitigation or compensation measures will be required.

67. These policies are consistent with the NPPF which clearly indicates that the planning system should contribute to and enhance the natural and local

environment. Paragraph 118 of the Framework lists a number of principles via which this is achieved through the decision making process.

68. The site is located outside of the Orlestone Forest SSSI and Natural England are satisfied that the proposed development being carried out in strict accordance with the details of the application, as submitted, will not damage or destroy the interest features for which SSSI has been notified.

69. A Woodland Assessment prepared by Martin Newcombe (Professional Naturalist, Wildlife and countryside Management Consultant and Lecturer) dated 5th November 2014 has been submitted with the application. The same report accompanied application 15/00761/AS. The report describes the condition of the site, indicating that at the time of the survey, its condition was comparable to when the site was acquired by the owner in 2008. The report indicates that the site comprises widely spaced standard trees with no coppice stools, no other understorey and a much reduced density of trees when assessed next to the remaining peripheral woodland. The report states the site lacks any of the earthworks, ground flora, shrubs or any other features that still exist in other woodland in the area. It indicates that the pond was in situ, and the present boundaries were already fixed and fenced. Ground flora had developed into grassland which has been subjected to grazing by horses, goats and geese. This site description remains reflective of the condition of the site at the time of my last visit which was on 10 February 2017.

70. Natural England and the Forestry Commission have issued standing advice and a guide to assist in assessing the potential impacts of development on Ancient Woodland. The standing advice lists a number of impacts of development including destruction of an area of ancient woodland; loss of whole veteran trees and/ or loss of limbs; and ground damage including loss of understorey, and/ or soil and/ or root disturbance, and changes to hydrology from drainage within ancient woodland;

71. The Woodland Assessment identifies that historically, the survey area has already been partially destroyed as the ground flora and shrubs and the coppiced trees are missing, and there has been extensive deposition of non – native spoil onto the site of the ancient woodland which has buried the former woodland floor. Many standard trees have also already been lost, and many of those that remain are damaged or stressed.

72. Unlike the proposal under application 13/00980/AS, the proposals under application 15/00761/AS and the current application do not result in the laying of additional hard surfacing at the site. As the area of hardstanding will not increase, the proposals are not considered to result in any significant changes to hydrology. The proposals are confined to the areas occupied by pre-existing hardstanding without any more hardstanding proposed to be laid. It is

not proposed, (neither is it necessary), to remove any trees to accommodate the proposals, and as the development will be located on pre-existing hardstanding, there would be no harm to root systems of trees.

73. Despite this, the use of the land will almost certainly intensify as a result of any grant of planning permission including from, increased activity, noise, lighting etc. Furthermore, as there is no reasonable means (in my view) to prevent or control footfall beyond the areas of hardstanding, this in turn will prevent the re-establishment of species of flora and fauna in these areas. For these reasons, the proposals are considered to be detrimental to the Ancient Woodland and wider biodiversity.

74. The development is therefore, in my judgment, contrary to Policy EN32 which indicates that in these circumstances planning permission will not be granted. Similarly, the proposals would be contrary to the provisions of Policy GP12 of the Local Plan and Policy CS11 of the Core Strategy. Finally, the proposals would be contrary in part to policies TRS17 and TRS18 of the Tenterden and Rural Sites DPD, breaching 2 of 9 criteria set out at policy TRS17 (criteria b and c), and 1 of 4 criteria set out at policy TRS17 (criteria a).

75. With regards to Policy EN31 of the Local Plan, this policy is not permissive of development that significantly affects semi-natural habitats or any other important habitats including natural woodlands unless measures have been taken to limit impact and long term habitat protection is provided where appropriate. In my view, the siting of the caravans and associated structures on pre-existing hardstanding is a measure which seeks to limit the harmful impacts of the development. The Woodland Assessment submitted concludes that, confining the siting of the caravans and structures on the pre-existing hardstanding together with an appropriate, detailed planting and management plan, will contribute towards enabling part of the site to be properly restored and managed to the benefit of the ancient woodland and wider biodiversity. This can be secured by planning condition if planning permission is granted. For these reasons and subject to the recommended condition I find no conflict with policy EN31.

76. Whilst the condition recommended above was not imposed on the previous grant of permission (15/00761/AS), for the reasons I have identified, I consider it to be reasonable and necessary to limit the impacts of the development. I also note that securing a planting and management plan complies with the criteria set out in policy CS11 which requires measures for mitigation or compensation where harm is identified to biodiversity and also with the landscape objectives set out in the Landscape Character Assessment SPD which amongst other things seeks landscape restoration.

77. The fact that the grant of planning permission would secure a mechanism for providing some restoration and management is a material consideration to which I afford moderate weight.

Impact on Residential Amenity

78. Paragraph 17 of the NPPF is consistent with local planning guidance in so far as it identifies a set of core land use planning principles that should underpin decision making including that planning should always seek to secure a good standard of amenity for all existing and future occupants of land and buildings.

79. The distance maintained between the proposed caravans and associated structures, and nearest neighbouring caravan is in excess of approximately 20 metres. The nearest neighbouring lawful dwelling is in excess of 80 metres from the nearest proposed caravan and associated structures . This would ensure that the development would not cause demonstrable harm to neighbours amenity through loss of privacy, loss of light, loss of immediate outlook or by having an overbearing presence. The distances maintained will also ensure that the proposals do not result in any undue noise and disturbance.

80. The caravans and day rooms proposed maintain in excess of 10-15 metres from one another and so I have no concerns relating to adverse impacts on the amenities of one another.

81. Concern has been raised regarding noise and disturbance resulting from traffic associated with gypsy and traveller sites. The increase in the number of pitches at this site, will in turn result in some intensification in traffic movements in general, however, these are not considered to be significant (see Highway Impacts assessment).

82. Paragraph 005 of the *PPG: Noise* contains guidance on how to recognise when noise is an issue. It states that *"noise has no adverse effect so long as the exposure is such that it does not cause any change in behaviour or attitude. The noise can slightly affect the acoustic character of an area but not to the extent there is a perceived change in quality of life".* Having regard to the guidance contained in the PPG, I have not been presented with any evidence which suggests that the increase in traffic associated with this proposal would increase noise traffic impacts in such a way that would cause changes to behavior and attitude. I am therefore satisfied that there would be no observed adverse effects resulting from the increased traffic movements associated with the proposed development.

83. In conclusion, in relation to its impact on residential amenity, I consider that the proposed development would comply with the relevant guidance in the NPPF. This is a material consideration which I afford moderate weight.

Highway Impacts

84. Policy CS15 of the Core strategy relates to transport impacts and indicates amongst other things that developments that would generate significant traffic movements must be well related to the primary and secondary road network, and this should have adequate capacity to accommodate the development. New accesses and intensified use of existing accesses onto the primary or secondary road network will not be permitted if a materially increased risk of road traffic accidents or significant traffic delays would be likely to result. Generally, Policy CS15 relates to proposals which would prejudice key transport infrastructure routes or facilities. Policy C15 does state:

"In rural areas, proposals which would generate levels of traffic, including heavy goods vehicle traffic, beyond that which the rural roads could reasonably accommodate in terms of capacity and road safety will not be permitted".

85. Neither application 13/00980/AS for 8 caravans or 15/00761/AS for 4 caravans were deemed to result in any unacceptable highway impacts.

86. The proposal for 4 additional pitches would result in a net increase in movements to and from the site, but these traffic movements would not be significant in my view.

87. Nickley Wood Road is a private road and the proposed site is served from a private access track which starts some 700m from Church Lane. Kent Highways have confirmed that visibility from the junction where Nickley Wood Road joins the public highway at Church Lane is adequate and as such, they do not have any highway safety concerns with regard to the proposal. They have also stated that the proposed number of pitches does not give cause for concern in terms of traffic generation. For these reasons I am satisfied that the proposals would not place undue pressure on local infrastructure or materially increase risk of road traffic accidents or significant traffic delays.

88. Concern has been raised regarding the suitability of Nickley Wood Road with regards to is capability to accommodate the proposed development. Nickley Wood Road is a single track road which is surfaced but is perhaps in need of repair in some parts. There are some passing spaces but I am advised that these are mostly informal and that use of these results in damage to private property. As Nickley Wood Road is privately owned, its condition including the provision of formal passing spaces is a matter for the relevant owner(s).

Furthermore, Policy CS15 makes no reference to road maintenance-type issues and so, therefore, it provides no basis for the LPA to take the "suitability and condition" of Nickley Wood Road into account.

89. There is adequate space within the application to accommodate parking for two vehicles per pitch.

90. In conclusion, based upon the number of pitches proposed, parking provision and the conclusions of Kent Highways (who raise no objection), I do not consider that the proposal would result in any demonstrable adverse highway impacts. Therefore, in terms of highway safety, the proposed development would comply with the relevant policies in the development plan. This is a material consideration which I afford moderate weight.

Flooding and Drainage

91. The application site is located within Flood Zone 1 where there is little to no risk of fluvial or tidal flooding.

92. In terms of surface water runoff, the hardstanding is pre-existing and proposed caravans and structures would be confined to this area. Consequently, I do not consider that the development would increase surface water run-off from the site which would comply with the requirements of the Councils SuDs SPD.

93. The application has been subject to consultation with Environmental Health who raise no objection to the proposals which the application states includes the use of a package treatment plant (PTP).

94. In the likelihood that the discharge from the PTP will be into the ground a condition is recommended to ensure that relevant permits are in place and to protect groundwater vulnerability. Appropriate permissions should also be sought via the Environment Agency in the form of an Environmental Permit. Evidence from the Environment Agency that they are satisfied with the proposal, should be provided where required. If a permit is not required then evidence should be submitted from the Environment Agency stipulating this. The rules regarding PTP's vary depending on the volume of discharge and surrounding ground conditions/point of discharge.

95. It is recommended that the applicant uses the guidance on the government's website in relation to 'permits you need for a septic tank'. The applicant should also consider the guidelines/requirements at https://www.gov.uk/guidance/discharges-to-surface-water-and-groundwaterenvironmental-permits

Need

96. The need to plan for the housing requirements of the gypsy and traveller population is set out by the Government in their guidance contained in the PPTS, August 2015.

97. The PPTS states that LPAs should identify and update annually, a supply of specific deliverable sites sufficient to provide 5 years' worth of sites against their locally identified need. If a local planning authority cannot demonstrate an up–to-date 5 year supply of deliverable sites, this should be a significant material consideration in any subsequent planning decision when considering applications for the grant of temporary planning permission. The exception is where the proposal is on land designated as Green Belt; sites protected under the Birds and Habitats Directives and/or sites designated as Sites of Special Scientific Interest; Local Green Space, an Area of Outstanding Natural Beauty, or within a National Park (or the Broads) none of which apply to the site the subject of this application.

98. The Council's Gypsy and Travellers Accommodation Assessment (GTAA) May 2013 sets out the pitch requirements in the Borough of Ashford up to 2028. This sets out a requirement to provide 57 pitches in the Borough by this date. Progress towards meeting this need is currently being met through windfall sites such as this as no sites have been formally adopted (see above).

99. Whilst there is an unmet need, the Council is currently taking a proactive approach and has allowed 22 permanent pitches and 7 temporary pitches in the Borough within the last five years. Five pitches have also been allowed on appeal.

100. The Council are continuing to seek to address their 5-year supply through the allocation of sites in the emerging Local Plan to 2030. However, as it currently stands, the Council has no adopted sites and at the present time proposed sites in the emerging Local Plan will only deliver 7 pitches. Furthermore, it is likely to be in the region of 2-3 years before any allocated and deliverable sites will be available.

101. Consequently, the PPTS requirement to have a supply of specific deliverable sites sufficient to provide 5 years' worth of sites against a locally set target has not been met, and until such time that sites are allocated in the emerging Local Plan, the need can only be met through the grant of planning permission on appropriate windfall sites as and when they come forward. In accordance with the requirements of the PPTS, I afford this material consideration significant weight.

Concentration

102. The PPTS states that when assessing the suitability of sites in rural or semi-rural settings, local planning authorities should ensure that sites in rural areas respect the scale of, and do not dominate, the nearest settled community, and avoid placing an undue pressure on the local infrastructure.

103. Concerns have been raised in this regard with specific reference to the dominance of gypsy and traveller sites in Nickley Wood Road. Nickley Wood forms part of the wider community of Shadoxhurst.

104. As I have already stated, the proposals are unlikely to be visible from the public domain and so do not have an overbearing physical presence.

105. I have not been presented with any evidence that the existing gypsy/traveller community has any significant impact on village facilities or infrastructure.

106. It is acknowledged that there are a number of gypsy/traveller sites in Nickley Wood Road (which vary in size). I have received a number of representations which reference the transport impacts arising from these sites and noise and disturbance associated with this. The transport impacts and impact on amenities have been addressed in the preceding paragraphs and have been found to be acceptable. I have not been presented with any evidence which suggests that the cumulative impacts of other activities associated with existing gypsy and traveller sites in Nickley Wood Road result in any direct adverse impacts on neighbours amenities.

107. In relation to the present proposals, in my view, four additional pitches would not materially alter the ratio of gypsies/traveller to the settled community which in my view comprises Shadoxhurst as a whole in such a way that the gyspy and traveller sites would dominate. I am therefore satisfied that the proposals would not result in any adverse off site impact on local infrastructure and living conditions. As such, I afford limited weight to this material consideration.

Gypsy and Traveller Status

108. Representations have been received regarding a lack of evidence relating to the gypsy and traveller status of the applicants. The application confirms that the proposed 4 pitches are for relatives of the current occupiers of the site. I have no evidence to suggest that the future occupiers of the site (or equally the applicant) are not gypsy and travellers.

109. Occupancy can be strictly controlled via a planning condition restricting the occupation of the pitches to those who comply with the definition of a gypsy

and traveller which is set out in the PPTS. Planning permission will run with the land and such a condition will ensure that future occupiers of the site will be gypsies and travellers. If, in the future, persons do reside on the site who are not defined as gypsies and travellers then the LPA would be able to take enforcement action. If necessary, the Council could serve a planning contravention notice under Section 171C of the Town and Country Planning Act 1990 to obtain such information in writing as they may need from any person having an interest in the land or using it for any purpose in order to determine whether any breach has occurred.

110. Representations have been received concerning the enforceability of such a condition. This matter was considered by the Judge during the Judicial Review and is addressed at paragraphs 95-100 of the Judgement appended. It is material that the Judge took no issue in law with regards to the imposition of the occupancy condition.

111. I am therefore satisfied that the recommended condition is reasonable and enforceable.

Precedent

112. A number of representations received raise concerns regarding precedent and allege that the granting of planning permission will pave the way for similar development within the ancient woodland. The third ground of challenge to planning permission 15/00761/AS was that the Council failed to have regard to the fact that the granting of planning permission could set a precedent for development of further gypsy and traveller sites causing cumulative harm to the semi-natural ancient woodland in the area. Consequently, the issue of precedent is discussed at length in the appended Judgement at paragraphs 55 to 94.

113. Having considered the representations received and having regard to the Judgement, I consider that it is appropriate to address the issue of precedent as a material consideration.

114. In my judgment to grant permission for this application would not set a precedent for granting permission for further gypsy and traveller sites which would result only in limited harm to the ancient woodland. There are specific circumstances relating to this application, notably the use of the pre-existing hard-standing without the need to lay any more and there being no need to remove any trees nor cause harm to the root systems of any trees (see para 62 above), which are material factors in this case which are unlikely, in my judgment, to be repeated elsewhere.

115. In conclusion, I am satisfied that the proposal does not set any harmful precedent and I therefore afford limited weight to this material consideration.

Other Matters

116. Representations have been received regarding the level of information submitted with the application. I have assessed the information and visited the application site, and I am satisfied that the information received is sufficient for the purposes of validation and determination.

Planning Balance and Conclusion

117. The 'Planning Balance' is the process of 'weighing up' the relevant factors in the exercise of a planning judgement and considering the issues to decide whether planning permission should be granted. This means examining the development plan and taking other material considerations which apply to the proposal into account. Into the balance are the material planning considerations starting with development plan policy, national planning policy and development management considerations.

118. Having regard to Section 38(6) of the Planning and Compulsory Purchase Act 2004, I consider that there is a conflict with the development plan and that the proposed development would not comply with the development plan as a whole. It is necessary therefore to consider whether other material considerations, including relevant policies in the NPPF and PPTS, nevertheless indicate that planning permission should be granted.

119. Policy CS14 of the Core Strategy does not support the current application but neither does it prohibit development relating to gypsies and travellers on unallocated sites as a matter of principle. The development is considered to be harmful to the ancient woodland and wider biodiversity contrary to Policy EN32 of the Local Plan; Policy GP12 of the Local Plan; and Policy CS11 of the Core Strategy. The proposals are contrary in part to Policies TRS17 and TRS18 of the Tenterden and Rural Sites DPD. This is a matter of considerable weight to be afforded against the proposal. However, the grant of planning permission would secure a mechanism for providing some restoration and management of the land by allowing officers the opportunity to impose a condition requiring a planting and woodland management plan. As a form of "appropriate mitigation" (as required by, for example, Policy CS11) this is a benefit which could not be secured otherwise, and so is afforded substantial weight in favour of the proposal.

120. The proposed pitches would extend an existing gypsy and traveller site and would be located on previously developed land comprising lawful hard standing. The site is reasonably located in terms of its proximity to the nearest

villages, ensuring that occupiers will not need to travel long distances to local services and facilities, thus fulfilling the relevant objectives set out in the PPTS. In my view the proposals would not result in any adverse visual impacts. The proposed development and the increased traffic movements arising from it, are not considered to give rise to any adverse impact on neighbouring amenities. The traffic impacts arising are not deemed to be significant and can be accommodated without resulting in any adverse highway impacts such as placing undue pressure on local infrastructure or materially increasing risk of road traffic accidents or significant traffic delays. The proposals are not considered to increase flooding from surface water drainage due to the fact that the development is located on pre-existing hardstanding. Subject to the imposition of an appropriately worded condition, a suitable solution can be achieved to deal with drainage issues. These too are material considerations and benefits which I consider weigh in favour of granting planning permission for the proposals.

121. As required by the PPTS, I have considered the matter of whether the proposal would result in an increase in gypsy and travellers sites which dominate the nearest settled community and place an undue pressure on local infrastructure. For the reasons detailed above, I am satisfied that they would not, and I afford concerns raised in this respect limited weight.

122. The imposition of an appropriately worded condition will ensure the accommodation is only occupied by those who comply with the definition of gypsies and travellers set out in the PPTS. As such I afford limited weight to the comments received regarding the status of future occupiers of the site.

123. In this instance it has been deemed appropriate to consider the matter of precedent as material. Having done so I am content that the grant of planning permission would not set any harmful precedents. It is not irrational or unreasonable for the LPA to determine each application on its merits and in my view the granting of planning permission for this proposal would not prevent the LPA from refusing permission in the future for sites within the Ancient Woodland as it did do at Milee in 2013.

The PPTS states that if a local planning authority cannot demonstrate an up–to-date 5 year supply of deliverable sites, this should be a significant material consideration in any subsequent planning decision when considering applications for the grant of temporary planning permission. The LPA cannot demonstrate an up–to-date 5 year supply, as such I afford this significant weight in favour of granting planning permission for the proposal.

124. Planning decisions are a matter of judgement and the weighing up of all the material planning considerations. The proposal does not accord with the Development Plan as a whole. However, in my judgement the benefit of

securing a planting and woodland management plan together with the material considerations which weigh in favour of the proposal and the significant weight afforded to the need to provide accommodation for gypsies and travellers demonstrably outweigh the harm arising from the proposal and therefore justifies a departure from Development Plan policy in this instance.

125. The granting of a temporary planning permission as set out in the PPTS would allow the Development Plan process to consider whether a site was acceptable on a permeant basis. The application as submitted, is for a permanent planning permission. However, for the reasons set out above, I consider that on balance the development is acceptable in its own right, and there is no reasoned justification for seeking that permission is granted on a temporary basis only. I therefore recommend that a permanent planning permission is granted.

Human Rights Issues

126. Legislation set out in the Equality Act 2010 sets out the public sector equality duty (PSED). Section149 of the Equality Act states that a public authority must, in the exercise of its functions, have due regard to the need to:

- *Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;*

- *Advance equality of opportunity between people who share a protected characteristic[1] and those who do not. This may include removing or minimising disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; taking steps to meet the special needs of those with a protected characteristic; encouraging participation in public life (or other areas where they are underrepresented) of people with a protected characteristic(s);*

- *Foster good relations between people who share a protected characteristic and those who do not including tackling prejudice and promoting understanding;*

127. *The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.*

[1] The applicants are understood to have a protected characteristic as Romany Gypsies irrespective of whether they would also be categorised as gypsies and travellers for the purposes of planning law (as defined in the PPTS)

128. The PSED must be considered as a relevant factor when considering its decision but does not impose a duty to achieve the outcomes in s.149. The level of consideration required (i.e. due regard) will vary with the decision including such factors as:

- The importance of the decision and the severity of the impact on the Council's ability to meet its PSED;

- The likelihood of discriminatory effect or that it could eliminate existing discrimination.

129. The Council should give greater consideration to decisions that have a disproportionately adverse impact on a protected characteristic. In appropriate cases, this may involve an understanding of the practical impact on individuals so affected by the decision. Regard should be had to the effect of mitigation taken to reduce any adverse impact. The Council is also entitled to take into account other relevant factors in respect of the decision, including policy considerations. In appropriate cases, such countervailing factors may justify decisions which have an adverse impact on protected groups.

130. Having regard to the balance of considerations outlined above, the recommendation below is considered to represent an appropriate balance between the interests and rights of the applicant (to enjoy their land subject only to reasonable and proportionate controls by a public authority) and the interests and rights of those potentially affected by the proposal (to respect for private life and the home and peaceful enjoyment of their properties).

Working with the applicant

131. In accordance with paragraphs 186 and 187 of the NPPF, Ashford Borough Council (ABC) takes a positive and proactive approach to development proposals focused on solutions. ABC works with applicants/agents in a positive and proactive manner as explained in the note to the applicant included in the recommendation below.

Recommendation

Permit

Subject to the following conditions and notes:

1. The remaining development hereby permitted shall be begun before the expiration of 3 years from the date of this decision.

Reason: To comply with the requirements of Section 91 of the Town and

Country Planning Act 1990 as amended by Section 51 of the Planning and Compulsory Purchase Act 2004.

2. The development shall be carried out in accordance with the details of external materials specified in the application which shall not be varied without the prior written permission of the Local Planning Authority.

Reason: In the interests of visual amenity.

3. Within 1 month from the date of this decision in the case of pitch 1, prior to the occupation of the accommodation permitted on pitches 2, 3 and 4 and prior to each new occupation, written details providing confirmation of the occupant's gypsy/traveller status shall be submitted to and approved in writing by the Local Planning Authority.

Reason: The site lies in an area where an unrestricted caravan site would not normally be permitted.

4. The site shall not be occupied by any persons other than gypsies and travellers as defined in Annex 1: Glossary of the Planning Policy for Traveller Sites (August 2015).

Reason: The site lies in an area where an unrestricted caravan site would not normally be permitted.

5. No more than four single unit mobile homes as defined in the Caravan Sites and Control of Development Act 1960 and the Caravan Sites Act 1968, shall be stationed on the site at any time. The mobile homes shall only be positioned as on approved Drawing MAY1/05B and any material change to the position of the mobile homes, or their replacement by another mobile home(s) in a different location, shall only take place following the written approval from the Local Planning Authority.

Reason: In accordance with the terms of the application and in the interests of visual amenity.

6. Within one month of the date of this grant of planning permission, a detailed scheme for re-planting to include planting plans; written specifications (including cultivation and other operations associated with plant and tree establishment); schedules of plants, noting species, plant sizes and proposed numbers/densities where appropriate and a woodland management plan, prepared in consultation with an appropriately qualified ecologist and arboriculturalist shall be submitted to and approved in writing by the Local Planning Authority in consultation with Kent Wildlife Trust, the Forestry Commission and Natural England. The woodland management plan shall

include a description and evaluation of features to be managed; aims and measurable objectives of management; appropriate management prescriptions for achieving aims and objectives and preparation of a work schedule (including an annual work plan capable of being rolled forward each year). The planting scheme shall be fully implemented within the next available planting season following the approval of the detailed scheme for the re-planting and managed in accordance with the approved woodland management plan unless previously agreed otherwise in writing by the Local Planning Authority. Upon request, the Woodland shall be made available for inspection by the Local Planning Authority.

Reason: To compensate against the harm identified to the Ancient Woodland in the interest of biodiversity and to provide appropriate woodland management.

7. Any trees or other plants which within a period of five years from the implementation of the planting scheme die, are removed or become seriously damaged or diseased shall be replaced in the next planting season with others of a similar size and species unless the Local Planning Authority give prior written consent to any variation.

Reason: In order to protect and enhance the amenity of the area.

8. The approved development shall be carried out in such a manner as to avoid harm to the existing trees, including their root systems, and other planting within the Ancient Woodland by observing the following:

- No fires shall be lit within the spread of branches or downwind of the trees and other vegetation;
- No materials or equipment shall be stored on land outside of the application site.
- Ground levels shall not be raised or lowered in relation to the existing ground level, except as may be otherwise agreed in writing by the Local Planning Authority.
- No trenches for underground services shall be commenced without the prior written consent of the Local Planning Authority. Such trenching as might be approved shall be carried out to National Joint Utilities Group recommendations.

Reason: Pursuant to Section 197 of the Town and Country Planning Act 1990 and to protect the Ancient Woodland and trees protected by Tree

Preservation Order in the interest of the appearance and character of the site and locality.

9. In the case of pitches 2, 3 and 4, none of the caravans shall be occupied until and the day rooms shall not be used until works for the disposal of sewage have been provided on the site to serve the development hereby permitted, in accordance with details to be submitted to and approved in writing by the Local Planning Authority. In the case of pitch 1, these details shall be submitted within one month from the date of this decision and provided on site within one month from the date of the approval of those details in accordance with the details approved.

Reason: To avoid pollution of the surrounding area.

10. A permit from the Environment Agency should be submitted to Ashford Borough Council (where required) before the PTP is active and discharging. Should the Environment Agency determine that an environmental permit not be required then written evidence from the Environment Agency clarifying this should be submitted as a alternative.

Reason: To protect vulnerable groundwater resources and ensure compliance with the National Planning Policy Framework.

11. No commercial activities shall take place on the land, including the storage of materials, and no vehicles over 3.5 tonnes shall be stationed, parked or stored on the site.

Reason: To enable the Local Planning Authority to regulate and control the development of land and to protect the visual amenities of the locality.

12. Within 1 month of the date of this decision a plan confirming the position of the approved post and rail fencing and providing details of the design of the wire fencing to be attached to it, shall be submitted to and approved in writing by the Local Planning Authority. The fence should be positioned to prevent encroachment into the woodland. The boundary treatment shall be completed prior to siting any caravan on pitch 2, 3 and 4 or in accordance with a timetable previously agreed in writing with the Local Planning Authority. The boundary treatment shall be provided in accordance with the approved details and shall be permanently maintained.

Reason: The surrounding land is ancient woodland and is subject to a Tree Preservation Order. The fence is required in order to preserve the amenity of the area and this valuable asset.

13. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any Order revoking or re-enacting that Order with or without modification), no gates, walls, fences or other means of enclosure shall be erected on the site without a prior express grant of planning permission written permission of from the Local Planning Authority.

Reason: To enable the Local Planning Authority to regulate and control the development of land and to protect the visual amenities of the locality.

14. No external lighting shall be installed on the site without the prior written consent of the Local Planning Authority.

Reason: In the interests of amenity of the surrounding are and adjoining residents.

15. Within 1 month of the date of this decision details of the means of disposal of faecal, bedding or other waste arising from the animals housed within the development shall be submitted to and approved in writing by the Local Planning Authority. Such waste material arising from the animals so housed shall be disposed of solely in accordance with the approved details and shall not be burned within the application site or any land identified within the blue line as shown on drawing number MAY1/01.

Reason: In the interests of residential amenity and to prevent pollution of any watercourse

16. The goat barn hereby permitted shall only be used for agricultural purposes.

Reason: In the interests of the character of the countryside

17. The development shall be carried out in accordance with the plans listed in the section of this decision notice headed Plans/Documents Approved by this decision, unless otherwise agreed by the Local Planning Authority.

Reason: To ensure the development is carried out in accordance with the approval and to ensure the quality of development indicated on the approved plans is achieved in practice

Notes to Applicant

1. Working with the Applicant

   In accordance with paragraphs 186 and 187 of the NPPF Ashford Borough Council (ABC) takes a positive and proactive approach to development proposals focused on solutions. ABC works with applicants/agents in a positive and proactive manner by;

   - offering a pre-application advice service,
   - as appropriate updating applicants/agents of any issues that may arise in the processing of their application
   - where possible suggesting solutions to secure a successful outcome,
   - informing applicants/agents of any likely recommendation of refusal prior to a decision and,
   - by adhering to the requirements of the Development Management Customer Charter.

   In this instance

   - the applicant/agent was updated of any issues after the initial site visit,
   - The applicant was provided the opportunity to submit amendments to the scheme/address issues.
   - The application was considered by the Planning Committee where the applicant/agent had the opportunity to speak to the committee and promote the application.

2. The site is covered by a Tree Preservation Order. It is a criminal offence to undertake any works to trees covered by a Tree Preservation Order. Therefore, the applicant is advised that no works shall be carried out to the trees on site without the prior consent of the Local Planning Authority.

Background Papers

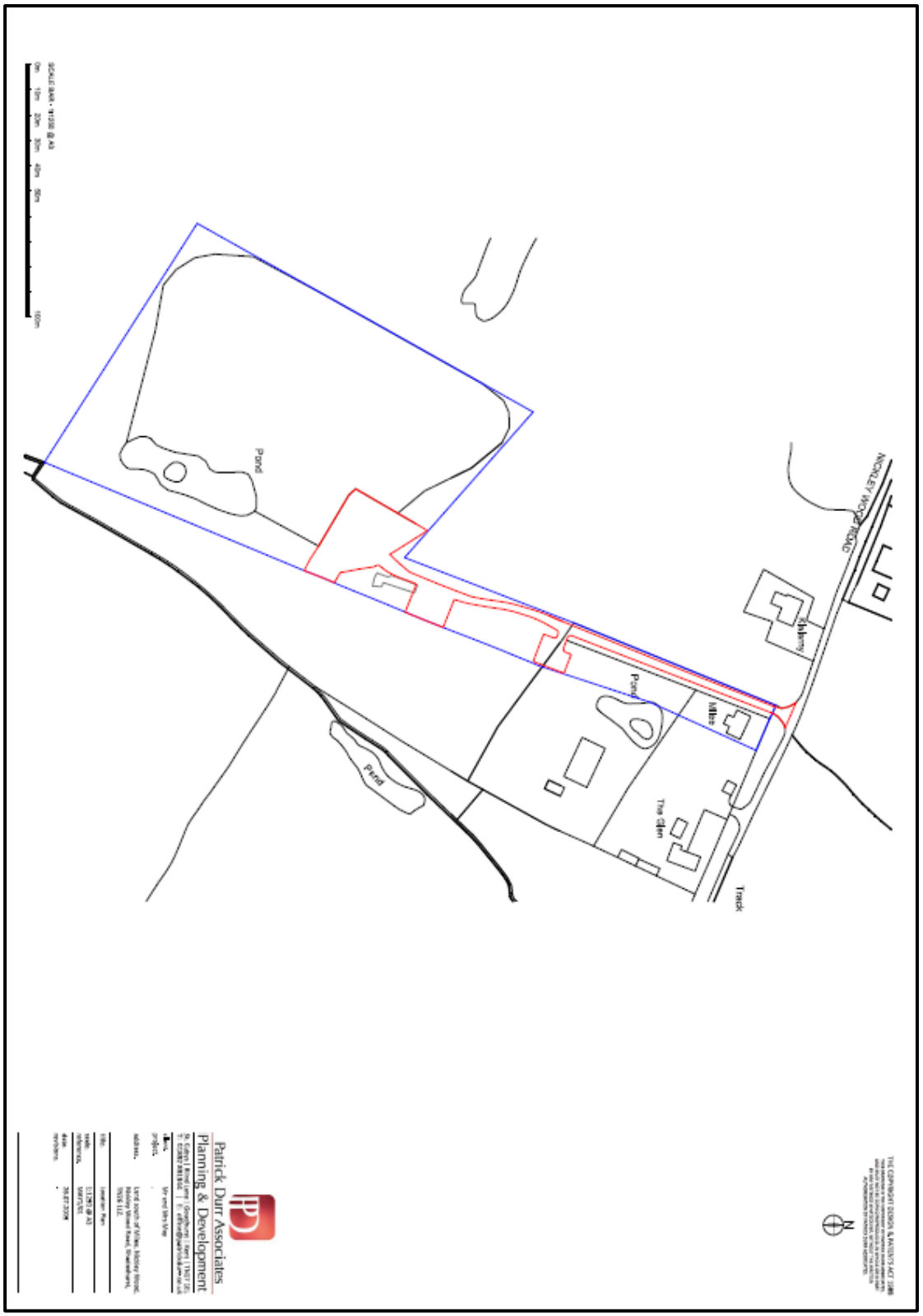
All papers referred to in this report are currently published on the Ashford Borough Council web site (www.ashford.gov.uk). Those papers relating specifically to this

application may be found on the View applications on line pages under planning application reference 16/01431/AS.

Contact Officer: Claire Marchant **Telephone:** (01233) 330739

Email: claire.marchant@ashford.gov.uk

Annex 1


Pond
Pond
Pond
Ashmy
Mike
The Glen
Track
NICOLE WOOD ROAD
N
Patrick Durr Associates
Planning & Development

Annex 2

Case No: CO/6597/2015

Neutral Citation Number: [2016] EWHC 1525 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 June 2016

Before :

MR JOHN HOWELL QC
(Sitting as a Deputy High Court Judge)

- -

Between :

THE QUEEN **On the application of** **RAYMOND COOPER**	**Claimant**
- and -	
ASHFORD BOROUGH COUNCIL	**Defendant**
- and -	
MICHAEL MAY	**Interested Party**

- -
- -

Mr Andrew Parkinson (instructed by **Richard Buxton Env & Public Law**) for the **Claimant**
Mr Giles Atkinson
(instructed by **Council's Head of Legal & Democratic Services**) for the **Defendant**
The Interested Party did not appear and was not represented

Hearing date: 24 May 2016

- -

Judgment

Mr John Howell QC :

1. This is an application for judicial review of the grant of planning permission by Ashford Borough Council for four gypsy pitches and associated development at Milee, Nickley Wood Road, near the village of Shadoxhurst in Kent. The Claimant, Mr Raymond Cooper, who lives nearby, was given permission to bring this claim by Lang J.

2. On behalf of the Claimant, Mr Andrew Parkinson, contends that the Council's decision to grant planning permission was flawed on four main grounds. (i) First he contends that the Council failed to apply section 38(6) of the Planning and Compulsory Purchase Act 2004. That enactment requires the determination of applications for planning permission to be made "in accordance with the [development] plan unless material considerations indicate otherwise". The Council failed to do so, so Mr Parkinson submits, since no judgement was reached on whether the proposed development accorded with a number of key development plan policies or with the development plan taken as a whole. Alternatively he submits that there were no adequately reasoned findings on these points or that any findings that there were, were flawed. (ii) Secondly Mr Parkinson contends that the Council failed to distinguish the development proposed from an earlier proposal (for which they had refused planning permission in January 2014) to station eight caravans at Milee to accommodate an extended gypsy family and failed to have regard to the importance of consistency in planning decisions. (iii) Thirdly he contends that there was a failure to have regard to what he submits was the fact that the grant of permission would set a precedent for the development of further gypsy and traveller sites causing cumulative harm to the semi-natural ancient woodland in the area. (iv) Finally he contends that the Council failed to have regard to the question whether the second condition which they imposed on the grant of planning permission, limiting occupation of the site to gypsies and travellers, would achieve its stated objective and whether a personal permission should have been imposed instead.

BACKGROUND

3. Nickley Wood Road is a private road in the countryside about one mile south of Shadoxhurst. There is a sawmill at the entrance to the road which also serves other businesses, thirteen dwellings and a number of authorised gypsy and traveller sites.

4. The land at Milee, for the development of which the Council gave planning permission ("*the site*"), is to the south of Nickley Wood Road. It is regarded in planning terms as being in the open countryside. It falls within an area that is covered by a blanket Tree Preservation Order and designated as ancient woodland. It also lies on the edge of Shadoxhurst Woods and Pastures, an 86 hectare Local Wildlife Site, and in the Shadoxhurst Woods Landscape Character Area, where the policy is to conserve and restore the landscape.

5. The site itself consists of a thin strip of land most of which is to the rear of an exiting authorised gypsy and traveller site on Nickley Wood Road that has three permitted pitches. The parts of the site proposed for development consist of an existing hard-surfaced trackway and lawful hard-surfaced and tarmacked areas. Access to Nickley Wood Road was proposed through the existing authorised gypsy and traveller site to

the north. Both sites are owned by the Interested Party, Mr Michael May, who was the applicant for the planning permission impugned in this claim.

6. On the south side of Nickley Wood Road, to the west of the site, there are other authorised gypsy and traveller sites. These are (i) Kialarney, for which the Council gave planning permission for a twin unit mobile home for a Romany and associated hardstanding in March 2012; (ii) Woodland Vale, for which planning permission for the siting of three traveller units was granted by the Council in August 2013; and (iii) Oakdrive, which has planning permission for two static units.

7. The Claimant contends that there are other, unauthorised caravans stationed on sites north and south of Nickley Wood Road. Mr Parkinson stated, for example, that part of a site known as Woodside on the north side of the road has been in occupation unlawfully by travellers for between four and five years and that an application for planning permission for a holiday static caravan park on that land was withdrawn on October 27th 2015. He also pointed out that the owners of another site on the north side of the road, Bambridge Wood, have advertised the land for sale in three lots of 30, 5 and 5 acres, stating that they are semi-cleared and suitable for traveller use.

THE DECISION IMPUGNED

8. On November 11th 2015 the Council granted conditional planning permission for the making of a material change in the use of the site so that it may be used for the stationing of four gypsy pitches with associated development and for the erection of a goat barn.

9. The development proposed comprised three pitches to be provided on an existing area of hardstanding at the southern end of the site with single mobile homes, a detached dayroom and a pair of semi-detached dayrooms. The fourth pitch and an accompanying dayroom were proposed on an existing tarmacked area used for car parking by the occupiers of existing authorised pitches to the north. The goat barn was proposed on existing hardstanding in a cleared area on the eastern side of the access track.

10. The decision to grant permission was taken on behalf of the Council by their Development Control Manager under delegated powers. She had been provided with an assessment ("*the assessment*") and a recommendation to grant conditional planning permission by the Council's Case Planning Officer.

11. Having identified relevant planning policies (including policies GP12 and EN32 of the Ashford Borough Local Plan and policies CS1 and CS 14 of the Local Development Framework Core Strategy) and having described the proposal, the relevant planning history and representations received, the assessment stated that:

> "The main issues for consideration are:
>
> - the principle of the proposed development
> - gypsy status of the applicants
> - need for and provision of gypsy sites

- sustainability

- the impact of the development on visual amenity/impact on ancient woodland and TPO trees

- the impact on the development on residential amenity

- highway safety

- other material considerations"

12. In dealing with the principle of the proposed development, the assessment stated that:

> "This application is subsequent to the refusal of an earlier planning permission under application 13/00980/AS which sought planning permission for use of a larger area of land for a gypsy site with the siting of 8 caravans. That proposal extended to a larger area of land to the south and south west of the current application site, onto previously undeveloped land. The current application is limited to the areas of existing hard surfacing which have been deemed lawful.
>
> Central Government advice contained within the NPPF provides concise government guidance with the presumption in favour of sustainable development to be seen as "a golden thread running through decision-taking". The Framework identifies that there are 3 dimensions to sustainable development - an economic role, a social role and an environmental role which should not be undertaken in isolation. The NPPF also states that Local Planning Authorities should recognise the intrinsic character and beauty of the countryside and that the planning system should contribute to and enhance the natural and local environment by protecting and enhancing valued landscapes. This is endorsed by Development Plan Policy."

13. When dealing with "the impact of the development upon visual amenity/impact on ancient woodland and TPO trees", the assessment stated that:

> "The development will not be visible from Nickley Wood Road, there is existing well established and protected screening to all sides and there are no short term views into the site. As stated above, the site is TPO'ed ancient woodland and is on the edge of an 86 ha Local Wildlife Site. Unlike the proposal under the 2013 application, the current proposal does not result in the laying of additional hard surfacing at the site, will not result in the loss of trees and will not result in harm to the roots of those trees. Further, the development will not extend beyond the previously developed parts of the site. However, the use of the land, within this protected site, will be intensified and will result in harm to the wildlife and will prevent the re-

establishment of species of flora and fauna in these areas. As such, a balancing exercise is required in terms of harm of the development and the benefits of the development."

14. Having addressed these and the other main issues identified in turn, the assessment's conclusion was in these terms:

"The main issues in this case are:-

(a) The proposed development would contribute towards meeting the general need for gypsy sites in the Borough and as planning provision is still to be resolved, significant weight must be given in the decision making process to this.

(b) Although within the open countryside, the site is located a mile from Shadoxhurst which is identified under policy TRS1 of the Tenterden & Rural Sites [Development Plan Document] as suitable for minor residential development / infilling. Although services are limited in Shadoxhurst (pub, village hall, nursery, post office at Stubbs Cross) it does lie on a bus route. The site is also only 2.5 miles from Hamstreet which has a primary school, train station, village store, and a doctor's surgery. Ashford town is 7 miles away which has a full range of services. This is a sustainable location given that gypsy and traveller sites can be accepted in rural areas as a matter of principle.

(c) The parts of the site which are the subject of this application has lawful hard surfacing and some weight needs to be given to this. The proposed development would be confined to those hard surfaced areas and would not introduce any further hard surfacing on the protected land. The proposed development will result in some harm to the visual amenity of the area, but this will be limited, being to the rear of an existing site and being well screened. I do not consider the development will cause significant harm to the visual amenity of the locality.

(d) The development would not have an adverse impact upon the residential amenity of the closest neighbours;

(e) There is sufficient space within the ownerships land for parking and turning facilities and there would be no significant impact on highway safety.

The principle of the development in rural areas can be acceptable in general terms and the development would go some way to meeting the identified need for further gypsy sites.

The council currently has a lack of suitable alternative sites in the short to medium term. Whilst the site is in the countryside, given its proximity to Shadoxhurst, Hamstreet and Ashford, I do not consider the location of the site to be unacceptably unsustainable for a gypsy and traveller site and it would satisfy the criteria of paragraph 13 of the [Secretary of State's Planning Policy for traveller sites]. Weight should also be given to the fact that the proposal would be entirely contained on previously developed land.

The proposed development would not cause significant harm to the character and appearance of the rural landscape and the wider countryside; would not be harmful to the residential amenity of the occupiers of dwellings in the locality; would not be harmful to highway safety and would not result in the loss of trees. The resultant intensity in the use of this part of the site will have a negative impact on the ancient woodland and wildlife site, however this impact is required to be balanced against the previous developed nature of this part of the site and the benefit of the development. Given the condition of the application site, I consider this impact to be limited.

Concerns have been raised over the dominance of gypsy and traveller sites in Nickley Wood Road however, this is an extension to an existing site and will result in 4 additional pitches to the rear of that site. As stated above, Nickley Wood Road is a mixed community of the settled population and gypsy sites. Consideration is required to be given to the impact of the proposed development on the nearest settled community in terms of scale and also in maintaining a peaceful and integrated co-existence between the site and the local community, respecting the interests of the settled community. I do not consider the addition of the proposed four pitches to the rear of the existing site to result in a situation where the gypsy sites dominate the nearest settled community.

On balancing the identified harm resulting from, and the benefits of this proposal in this location, I conclude that it falls in favour of the development.

Whilst I note the concerns raised by the objectors, given the lack of harm identified combined with the ongoing identified need for gypsy & traveller sites in the Borough and at present the lack of a 5 year supply of deliverable / available sites I recommend that planning permission is granted."

The concerns noted included objections on the ground that the proposed development was contrary to development plan policy and that, if permitted, it would set a precedent.

15. The assessment concluded with a recommendation to grant conditional planning permission. That recommendation was accepted by the Development Control Manager.

16. The second condition imposed was that:

> "The site shall not be occupied by any persons other than gypsies and travellers as defined in paragraph 1 of Annex 1: Glossary of the Planning Policy Guidance for Gypsy and Traveller Sites.
>
> Reason: The site lies in an area where an unrestricted caravan site would not normally be permitted."

The sixth condition imposed was that:

> "Prior to the installation of the caravans, details shall be submitted of a scheme to fence off the woodland area from the area of the caravans identified on the proposed site plan. This scheme shall include details of the type and height of fence and it's location. This scheme shall be approved in writing by the Local Planning Authority and it shall be installed prior to the installation of the caravans, and thereafter retailed.
>
> Reason: The surrounding land is ancient woodland and is subject to a Tree Preservation Order. The fence is required in order to preserve the amenity of the area and this valuable asset."

GROUND 1: COMPLIANCE WITH SECTION 38(6) OF THE PLANNING AND COMPULSORY PURCHASE ACT 2004

i. The development plan

17. As I have indicated the first ground on which Mr Parkinson contends that the decision to grant planning permission is flawed is that the Council failed to apply section 38(6) of the Planning and Compensation Act 2004. Where that enactment applies, as it does when a local planning authority determines whether or not to grant planning permission, it requires that "the determination must be made in accordance with the [development] plan unless material considerations indicate otherwise". In this case the development plan comprised, so far as relevant, certain saved policies of the Ashford Borough Local Plan, the Local Development Framework Core Strategy and the Tenterden and Rural Sites Development Plan.

18. In his submissions Mr Parkinson drew attention to two policies in the Local Plan, GP12 and EN32. These provide that:

> "GP12. To protect the countryside for its own sake, for its landscape and scenic value and for the important wildlife habitats it contains, and to respond to the need for carefully

managed change to accommodate demands for agricultural diversification, tourism and public access to the countryside".

"EN32. Planning permission will not be granted for any development proposals which would damage or result in the loss of important trees or woodlands."

19. He also drew attention to parts of policy CS1 in the Local Development Framework Core Strategy that provide that:

"CS1. Sustainable development and high quality design are at the centre of the Council's approach to plan making and deciding planning applications. Accordingly, the Council will apply the following key planning objectives:

.....

C. Protection for the countryside, landscape and villages from adverse impacts of growth and the promotion of strong rural communities;

D. New places - buildings and the spaces around them - that are of high quality design, contain a mixture of uses and adaptable building types, respect the site context and create a positive and distinctive character and a strong sense of place and security;"

20. It also convenient to set out at this point the part of the Local Development Framework that deals with sites for gypsies and travellers. It states that:

"10.22 The Council is working with three other Kent districts – Maidstone, Tonbridge and Malling, Tunbridge Wells – and the County Council - on a sub-regional Gypsy and Traveller Accommodation Assessment survey to assess the needs of gypsies and travellers. The findings of this assessment will feed into the South East Plan that will eventually allocate specific plot requirements back to each District. The guidance from the government in ODPM Circular 01/06 makes it clear that if there is an identified need then there is a requirement for the Council to identify suitable sites.

10.23 Dependent upon the outcome of the Assessment, the Council may need to identify a site or sites for gypsy and traveller accommodation. If so, the site(s) will be identified on the basis of Policy CS14 below. In the meantime, any proposals for additional facilities for gypsies and travellers can continue to be assessed against national guidance.

POLICY CS14: Gypsies and Travellers

10.24 If required, sites for gypsies and travellers (as defined in Circular 01/06) will be identified in a site allocation

> Development Plan Document on the basis of the following criteria:-
>
> 10.25 a) It should be based on a clearly identified need that cannot be met on an existing or planned site;
>
> 10.26 b) It should be in accordance with the guiding principles set out in Policy CS1, have regard to impact on the countryside and transport impact in accordance with Policy CS15."

Although the Council recognises the need for sites for gypsies and travellers, there is no development plan document allocating the required sites.

ii. Submissions

21. Mr Parkinson submits that the Planning Officers failed to "grapple" with "the section 38(6) test". He submits that they failed to consider whether the development proposed was in accordance with "key development plan policies", namely parts C and D of Policy CS1 of the Local Development Framework Core Strategy as well as GP12 and EN32 of the Ashford Borough Local Plan, and that they failed to find (as they were required to do) whether or not the development proposed was in accordance with the development plan taken as a whole: see ***City of Edinburgh Council v Secretary of State for Scotland*** [1997] 1 WLR 1447 per Lord Clyde at p1459d-e; ***R (Hampton Bishop Parish Council) v Herefordshire County Council*** [2014] EWCA Civ 878, [2015] 1 WLR 2367, per Richards LJ at [28]; ***Tiviot Way Investments Limited v Secretary of State for Communities and Local Government*** [2015] EWHC 2489 (Admin), [2016] JPL 171, per Patterson J at [27]). Alternatively he submits that there were no adequately reasoned findings on these points or any findings that there were were flawed.

22. On behalf of the Council, Mr Giles Atkinson, contends that the relevant Officers had regard to these policies that were among those listed as being relevant as the beginning of the assessment. In terms of the specific policies, he submitted that Part C of Policy CS1 is concerned with the protection of the countryside as such, as is part of Local Plan GP12. That was a matter which the Officers considered when finding that the principle of development on this site was acceptable. He further submitted that Part D of the Policy CS1, that seeks high quality new places, and Local Plan policies GP12 and EN32 were concerned with the impact on visual amenity as well as the impact of any development on ancient woodland and TPO trees. Those are matters the assessment considered under those headings.

23. The Council's position on the conclusions reached about those policies, however, has not been consistent. In response to the Claimant's pre-action protocol letter that had asserted that the development was contrary to these and other policies, it was stated that the proposed development "would not be contrary to the policies referred to by the Claimant". Mr Atkinson submitted, however, echoing the summary grounds on which the Council opposed permission, that it is plain that the officers considered that the proposed development did <u>not</u> comply with Local Plan policy GP12, because the assessment recognised there would be harm to wildlife and that it would prevent the re-establishment of flora and fauna on the areas which had already been developed.

He further submitted that they considered that the development was not in breach of Local Plan EN32 as it did not involve in any loss of trees or harm to their roots.

24. The Council's position on whether or not their officers considered the proposed development to be in accordance with the development plan as a whole has likewise been inconsistent. In response to the pre-action protocol letter, the Council referred to the balancing exercise undertaken in the assessment, contending that it demonstrated that the allegation made, that the assessment had not set out clearly the material justifications for departing from the development plan, was simply mistaken. That involved an apparent acceptance that it did. By contrast, in their summary grounds explaining why permission to make this claim should be refused, it was said that, although the proposed development did not accord with Local Plan policy GP12, "other considerations [including the contribution to the need for more gypsy sites] contribute to the assessment that, in the light of the whole plan, the proposal is in accordance with it". In his skeleton argument, however, reverting to the approach in the response to the pre-action protocol letter, Mr Atkinson submitted that it was clear that the Officers treated the development as one that was not in accordance with the development plan as the assessment recognised that a balance had to be struck, weighing material considerations in the form of the need for gypsy and traveller sites against the negative but limited impact on the ancient woodland and wildlife site. Had the proposal been in accordance with the development plan, then no such balancing exercise in accordance with section 38(6) would have been required. Orally Mr Atkinson appeared to revert to the approach in the summary grounds, contending that the question of the need for, and provision of, gypsy and traveller sites was raised by Policy CS14 and was weighed in the balance when determining whether the development was in accordance with the development plan as a whole.

25. Mr Parkinson submitted in response that the Council was seeking to rewrite the decision; that the development was unarguably inconsistent with Local Plan Policy EN32, which required permission to be refused as it would damage important woodlands (as the assessment recognised), and that the need for gypsy and traveller sites was irrelevant when determining whether the application was in accordance with the development plan. Since there was no Development Plan Document allocating the site as a gypsy and traveller site, Policy CS14 did not support the proposed development and only policies, not explanatory text, were relevant when applying section 38(6) of the 2004 Act: see ***R (Cherkley Campaign Ltd) v Mole Valley District Council*** [2014] EWCA Civ 567, [2014] 2 EGLR 98, per Richards LJ at [14]-[17].

iii. Consideration

26. In dealing with any application for planning permission a local planning authority is required to have regard to the provisions of the development plan so far as material: see section 70(2)(a) of the Town and Country Planning Act 1990. In this case the assessment identified all the development plan policies to which I have referred and others as relevant development plan policies when considering the proposed development. But reference to relevant policies is not of itself sufficient to discharge that duty. An authority must also interpret the policies correctly and, given the duty imposed by section 38(6) of the Planning and Compulsory Purchase Act 2004, as a general rule, it must also determine (a) whether the individual material policies support or count against the proposed development or are consistent or inconsistent with them and (b) whether or not the proposed development is in accordance with the

development plan as a whole: see ***Tesco Stores Ltd v Dundee City Council*** [2012] UKSC 13, [2012] PTSR 983, per Lord Reed at [17]-[19], [22]; ***R (Hampton Bishop Parish Council) v Herefordshire County Council*** [2014] EWCA Civ 878, [2015] 1 WLR 2367, per Richards LJ at [28], [32]-[33]. Mr Atkinson did not suggest that this was a case in which a departure from such general rules would be lawful.

27. The assessment contains no statement whether or not the individual policies to which I have referred supported or counted against the proposed development and whether it was consistent or inconsistent with them. Nor did it state whether or not the development proposed was considered to be in accordance with the development plan as a whole.

28. A local planning authority is not now, however, under any statutory obligation to give any reasons, or to give any summary of their reasons (as they once were), for the grant of planning permission, whereas they are required to give full reasons for any refusal of permission or conditions imposed[1]. In such circumstances the Court of Appeal has found that there was no general obligation at common law requiring reasons to be provided for the grant of planning permission: see ***R v Aylesbury District Council ex p Chaplin*** (1998) 76 P&CR 207. There may be something in the circumstances such that reasons need to be provided: see eg ***R v Mendip District Council ex p Fabre*** (2000) 80 P&CR 500 per Sullivan J (as he then was) at pp509-513, ***Oakley v South Cambridgeshire District Council*** [2016] EWHC 570 (Admin) per Jay J at [35]-[41]. Article 6 of the ECHR may also require reasons to be provided to a person whose civil rights are determined by the grant of permission. But Mr Parkinson has not sought to contend that this was such an exceptional case in which there was any requirement on the Council to give reasons for the grant of permission.

29. The question is, therefore, whether the Claimant has discharged the onus on him to show on the balance of probability that, when taking the decision, the Development Control Manager has failed to make the determinations required or, if she did, they were legally flawed in some respect.

30. The Claimant can, of course, do no more than produce such documents as are available to him that record what has occurred. Those do not record what conclusions the Development Control Manager made (if she made any) about (a) whether the individual material policies supported or counted against the proposed development or were consistent or inconsistent with them and (b) whether or not the proposed development was in accordance with the development plan as a whole and what her reasons (if any) were for any such conclusions. These are questions of fact. The Council has not filed any written evidence from her.

31. As Sales J (as he then was) stated in ***R (Das) v Secretary of State for the Home Department*** [2013] EWHC 682 (Admin) at [21][2]:

> "Where a [Defendant] fails to put before the court witness statements to explain the decision-making process and the

[1] see article 35(1) of the Town and Country Planning (Development Management Procedure)(England) Order 2015 (as amended by article 7 of the Town and Country Planning (Development Management Procedure)(England) (Amendment) Order 2013.
[2] although the decision in this case was reversed in the Court of Appeal, that was on grounds that do not affect these principles: see [2014] EWCA Civ 45, [2014] WLR 3538.

reasoning underlying a decision they take a substantial risk. In general litigation, where a party elects not to call available witnesses to give evidence on a relevant matter, the court may draw inferences of fact against that party: *Wisniewski v Central Manchester Health Authority* [1998] Lloyds Rep Med 223 , 240; *Herrington v British Railways Board* [1972] AC 877 , 930G-H (Lord Diplock); *The Law Debenture Trust Corporation plc v Elektrim SA* [2009] EWHC 1801 (Ch), [176]-[179]. The basis for drawing adverse inferences of fact against the [Defendant] in judicial review proceedings will be particularly strong, because in such proceedings the [Defendant] is subject to the stringent and well-known obligation owed to the court by a public authority facing a challenge to its decision, "to co-operate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings" (*Belize Alliance of Conservation Non-Governmental Organisations v The Department of the Environment* [2004] UKPC 6; [2004] Env LR 761 , at para. [86] per Lord Walker of Gestingthorpe; and see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409; [2002] All ER (D) 450 (Oct) at [50] per Laws LJ, and *I v Secretary of State for the Home Department* [2010] EWCA Civ 727 , [50]-[55])."

32. As I have mentioned, however, the Council did file an Acknowledgement of Service incorporating summary grounds for contesting the claim in which their Head of Legal and Democratic Services signed a statement that the Defendant believed that the facts stated in the form were true. CPR 32.6(2) provides that "at hearings other than the trial, a party may rely on the matters set out in...his statement of case". Notwithstanding the distinction recognised between a statement of case and an acknowledgement of service in CPR 22.1(a) and (d) and in CPR Parts 15 and 16, Collins J held that both the summary grounds contained in an Acknowledgement of Service and detailed grounds in judicial review proceedings constitute a statement of case within the definition of that term for the purpose of the CPR in CPR 2.3(1) in ***R (Corner House Research) v BAE Systems Plc*** [2008] EWHC 246 (Admin), [2008] CP Rep 20. On that basis, therefore, the Council would be entitled to rely on the matters stated in its summary grounds at the hearing of this claim. If the summary grounds contain what can be said to constitute "written evidence", then it will have been served under CPR 54.8 and be admissible by virtue of CPR 54.16(2)(a). But in any event in my judgment the Council could not resile from any facts stated in its summary grounds without providing written evidence that they are incorrect (which should also explain why they were incorrectly set out).

33. Where there are issues of fact about what conclusions an authority may have reached and for what reasons, in my judgment it may well be unsatisfactory for an authority to rely on any summary grounds they have filed. CPR 54.14 provides for those who have served an Acknowledgement of Service to serve any written evidence within 35 days after service of the order giving permission. It is plainly preferable for any relevant

facts in issue to be verified in a witness statement by a person who can do so of their own knowledge. Moreover summary grounds for opposing a claim are documents primarily setting out arguments. They do not always clearly distinguish (as no doubt they should) between facts and arguments. For example it can sometimes be difficult (as in this case) to decide whether the reasons stated are those that were in fact entertained by a decision maker for any conclusion reached or those that may be advanced to justify it. The guidance in the cases is that, where the Defendant has to explain the decision-making process and the reasoning underlying a decision (where it is not apparent from the documents), its duty of candour should be discharged in witness statements. In my judgment that guidance should normally be followed so that the facts can be clearly established in order to resolve claims fairly and justly.

34. In the Council's summary grounds it was asserted that the proposal was "clearly judged to be in accord with policy EN32". This appears to be an inference drawn from the assessment rather than a statement of what the Development Control Manager may in fact have thought. The reason given for the judgment was that the assessment stated that the proposed development would not result in the loss of trees. Local Plan Policy EN32 is not concerned, however, merely with damage to, or loss of, important trees. It is also concerned with, and requires permission to be refused for, any development proposals which would damage important woodlands. In this case the assessment concluded that "the resultant intensity in the use of this part of the site will have a negative impact on the ancient woodland", albeit that the impact was considered to be "limited". Although a condition was proposed to address such impact on the ancient woodland, the assessment did not suggest that it would eliminate any "negative impact" such that no damage would be caused. On this basis, if this part of Policy EN32 is considered, it follows inevitably that the grant of permission for the proposed development was not consistent with the policy EN32. Given the contentions in the summary grounds and the absence of any witness statement, the only conclusion to be drawn is either that the Development Control Manager failed to consider this part of the policy or that she reached an irrational conclusion that the proposed development was consistent with it.

35. The Council's summary grounds asserted that "the officer has clearly considered all the relevant issues and determined that the proposal was in accordance with the [development] plan as a whole". Although the first part of this statement consists of argument, the latter part appears to be an assertion of fact. Given that the summary grounds also asserted that the proposed development was in conflict with Policy GP12, that conclusion was said to have been reached by a balancing exercise "in which the conflict with GP12 is balanced against the fact that the proposal is on previously developed land and the benefit of the development, the contribution to the need for more gypsy sites...policy CS14 is clearly being applied...very clearly the proposal is found to be in accordance with policy CS14." It was asserted that policy CS14 expresses a "policy imperative...supportive of more gypsy sites in Ashford".

36. In my judgment the proposal was not in accordance with Policy CS14. That policy is one that provides that, if required, sites for gypsy and travellers will be identified in a site allocation Development Plan Document on the basis of certain criteria. There is no such Development Plan Document and accordingly the site is not one allocated in it (whether or not it would meet those criteria). The policy is not one that requires permission to be refused for unallocated sites if there is a requirement for gypsy and

traveller sites in advance of the adoption of such a development plan document. As the text in paragraph 10.23 of the Local Development Framework leading to policy CS14 states, "in the meantime, any proposals for additional facilities for gypsies and travellers can continue to be assessed against national guidance." But the proposed development neither complies with Policy CS14 nor does that policy as such support it. Accordingly in my judgment, if the Council's summary grounds describe the Development Control Manager's reasoning, they disclose a further error of law when explaining why it was thought that the proposed development was in accordance with the development plan as a whole.

37. National guidance, in the form of Planning Policy for traveller sites, provides that local planning authorities should determine planning applications for traveller sites having considered *inter alia* the existing level of local provision and need for sites: see paragraphs 23 and 24(a) of the Planning Policy for traveller sites. Given that paragraph 10.23 of the Local Development Framework contemplates assessment in accordance with such national guidance, however, the question arises whether that reference enables the existing level of provision and need for sites to be taken into account when determining whether a proposed development for a traveller site is in accordance with "the development plan". If it does, it might be said that any error in the interpretation of Policy CS14 was immaterial.

38. The "development plan" for this purpose includes the adopted or approved development plan documents[3], that is to say certain local development documents[4]. These must set out the authority's policies relating to the development and use of land in their area[5] and a reasoned justification for them[6]. Until April 6th 2012 the part containing policies and the part which comprised the required reasoned justification had to be clearly identified[7]. But both parts form part of the "development plan".

39. In ***R (Cherkley Campaign Ltd) v Mole Valley District Council*** [2014] EWCA Civ 567, [2014] 2 EGLR 98, Richards LJ (with whose judgment Underhill and Floyd LJJ agreed, stated (at [16]), however, that

> "when determining the conformity of a proposed development with a local plan the correct focus is on the plan's detailed policies for the development and use of land in the area. The supporting text...is plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy."

Although the actual decision in that case is distinguishable[8], I propose to follow that guidance.

[3] see section 38(2)(b) of the Planning and Compulsory Purchase Act 2004.
[4] see section 37(3) of the Planning and Compulsory Purchase Act 2004.
[5] see section 17(3)of the Planning and Compulsory Purchase Act 2004.
[6] see regulation 13(1) of the Town and Country Planning (Local Development)(England) Regulations 2004; regulation 8(2) of the Town and Country Planning (Local Planning)(England) Regulations 2012.
[7] see regulation 13(2) of the Town and Country Planning (Local Development)(England) Regulations 2004.
[8] In that case only the policy and not the text had been preserved when the local plan ceased to have effect and in this case the text is not seeking to add a requirement to Policy CS14.

40. The difficulty in this case is that the text in paragraph 10.23 of the Local Development Framework Core Strategy is not a reasoned justification for Policy CS14. It may be said to be a policy (albeit one not identified as such) for the determination of planning applications until any required sites are identified in a development plan document in accordance with Policy CS14[9]. Given that it is not identified as a policy (as other policies in the Local Development Framework Core Strategy are), however, in my judgement it would not be appropriate to treat it as one of the policies contained in that document, given the different levels of scrutiny which proposed policies that are identified as such inevitably attract in the process leading to the adoption of a development plan document. Accordingly, in my judgment paragraph 10.23 cannot be invoked as a justification for treating the need for further traveller sites as a material consideration when considering whether or not the proposed development was in accordance with the development plan.

41. Assuming that the Development Control Manager did form conclusions on the consistency of the proposed development with policies in the development plan and whether the development was in accordance with it, therefore, it follows that the summary grounds disclose two errors of law: the first in relation to Local Plan policy EN32; the second in relation to policy CS14. Both errors also flaw the determination which the summary grounds states was made that the proposed development complied with the development plan as a whole given the conflict with Local Plan policy GP12 which it is said was recognised.

42. The Claimant has accordingly established the first ground on which this claim is brought on that basis.

GROUND 2: THE PREVIOUS REFUSAL OF PLANNING PERMISSION AND THE IMPORTANCE OF CONSISTENCY IN PLANNING DECISIONS.

43. Mr Parkinson contended that the Council had failed to distinguish the development proposed from an earlier proposal for 8 caravans for which the Council refused planning permission in January 2014 and that the Council failed to have regard to the importance of consistency in planning decisions.

44. The grounds on which the earlier application was refused, as stated in the notice of refusal, were that:

> "The proposed development would be contrary to Policy GP12 of the Ashford Borough Local Plan (2000), policies CS1, CS11, CS14 and CS15 of the Local Development Framework Core Strategy, Policies TRS17 and TRS18 of the Tenterden and Rural Sites Development Plan Document, Designing Gypsy and Traveller Sites Good Practice Guide (2008) and to Central Government Guidance contained in the NPPF and the Planning Policy for Traveller Sites and would therefore be harmful to matters of acknowledged planning importance for the following reasons:

[9] This might be said to be a reason why no further policy was required to govern the position until the development plan document was adopted.

1. The change of use of the land and the stationing of up to 8 static caravans together with the associated domestic paraphernalia and associated hardstanding would be intrusive development adversely affecting the character and appearance of the countryside which is designated as an Area of Ancient Woodland is covered by a Tree Preservation Order and lies within the Shadoxhurst Woods and Pastures Wildlife site 2012 and Shadoxhurst Woods Landscape Character Area.

2. The need for gypsy and traveller accommodation in the area does not outweigh the harm identified above."

45. Mr Parkinson's submissions effectively assume that the Council were under an obligation to provide reasons for distinguishing the proposed development from that refused in 2014. I am not persuaded that there was any such obligation: the developments differ in a number of material respects, such as the nature of the land on which the development proposed in each case was to occur and the number of pitches each involved. But, even if there was any such obligation, in my judgment the reasons for distinguishing them are evident from the assessment.

46. The assessment explicitly distinguished the proposed development from that for which planning permission had been refused by reference to the matters identified in reasons 1 and 2 in the notice of refusal. The assessment stated (as previously set out) that:

> "This application is subsequent to the refusal of an earlier planning permission under application 13/00980/AS which sought planning permission for use of a larger area of land for a gypsy site with the siting of 8 caravans. That proposal extended to a larger area of land to the south and south west of the current application site, onto previously undeveloped land. The current application is limited to the areas of existing hard surfacing which have been deemed lawful."

In consequence:

> "Unlike the proposal under the 2013 application, the current proposal does not result in the laying of additional hard surfacing at the site, will not result in the loss of trees and will not result in harm to the roots of those trees. Further, the development will not extend beyond the previously developed parts of the site."

The assessment concluded that such limited harm as the development proposed would cause was outweighed in this case by the need for gypsy and traveller pitches.

47. Mr Parkinson contended, however, that this was insufficient to distinguish the two applications. Regard had to be had to the full basis on which the earlier application had been refused: ***R. (on the application of Havard) v South Kesteven DC*** [2006] EWHC 1373 (Admin); [2006] JPL 1734 at [14]. In this case the assessment failed to

take into account all of the grounds on which the earlier application had been refused, in particular policy CS15 in the Local Development Framework Core Strategy. That policy provides *inter alia* that:

> "Developments that would generate significant traffic movements must be well related to the primary and secondary road network, and this should have adequate capacity to accommodate the development. New accesses and intensified use of existing accesses onto the primary or secondary road network will not be permitted if a materially increased risk of road traffic accidents or significant traffic delays would be likely to result.
>
> In rural areas, proposals which would generate levels of traffic, including heavy goods vehicle traffic, beyond that which the rural roads could reasonably accommodate in terms of capacity and road safety will not be permitted."

48. Mr Parkinson pointed out that the earlier and the proposed developments would both use the same rural roads and would both use the same existing access onto the primary or secondary road network.

49. In considering the smaller development proposed in the later application, that contains only half the pitches, the assessment noted that:

> "Kent Highways - raise no objection to the application, noting that Nickley Wood Road is a private road, and that the private road junction with the adoptable highway at Church Lane is located on the outside of a bend and has good visibility splays in both directions."

It stated that:

> "The site would provide 4 additional pitches and whilst [it] would result in a net increase in movements to and from the site, these traffic movements would not be significant and would not place undue pressure on local infrastructure....there is good visibility splays in both directions where the private road meets the adoptable highway. Concerns have been raised over the ability of the private road to accommodate the traffic generated from the development and the lack of passing places, however, as stated above, the increase in traffic movement will be limited and in my view, will not result in a detriment to the safety of the users of the private road."

Its conclusion was that "there will be no significant impact on highway safety" and the development "would not be harmful to highway safety".

50. Policy CS15 is only infringed by the grant of permission for a development if an intensified use of an existing access onto the primary or secondary road network would be likely to result in a "materially increased risk of road traffic accidents" or, in

a rural area such as this, if the proposal would generate levels of traffic which the rural roads cannot reasonably accommodate in terms of capacity and road safety. The assessment was plainly that, in the case of the proposed development, there would be no such materially increased risk or problems in terms of capacity and safety.

51. Mr Parkinson's case in effect is that, assuming that the earlier proposal would have infringed Policy CS15, some explanation must be provided why the later proposal by contrast would not also do so. Although Policy CS15 was referred to in the reasons for refusal of the earlier application, however, the reasons for the conflict with the policies identified contained no mention of any highway issue. That is no doubt because the officer's assessment of that application in respect of highway safety stated simply that there was "no issue". The assumption that the earlier proposal was in fact considered to infringe Policy CS15 is thus mistaken. But, even on the assumption that there was in fact a highway reason for refusing the earlier application, the reason why a different view was taken with respect to the proposed development under consideration is plain: the volume of movements generated by a development half the size of the earlier development was not assessed to be likely to have an effect that meant that granting permission would infringe Policy CS15. Moreover no more by way of reasons could reasonably be expected or required. Given that there was no highway reason identified in the two reasons given for refusal to explain how policy CS15 was infringed and the actual assessment identified no highway issue, there was no way in which reasons for any stated conflict (if there were indeed any) could be addressed and the proposed development distinguished so as to explain why a different conclusion had been reached: all that could be done was to assess the likely impact of the later, different proposal.

52. Nonetheless Mr Parkinson submitted that consideration should nonetheless have been given (but was not) to the importance of consistency in planning decisions. As Mann LJ stated in ***North Wiltshire District Council v Secretary of State for the Environment*** (1993) 65 P&CR 137 CA at p145,

> "One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision."

Mr Parkinson further submitted that consistency ought to be determined, not by reference to any analysis that in fact underpinned any earlier decision of a local planning authority, but only by reference to the notice of refusal itself, just as what a planning permission authorises, so he submitted, falls to be determined solely by the notice of the grant of planning permission and any document expressly incorporated by reference in it.

53. In my judgment the effect of Mr Parkinson's submissions verges on the absurd in this case. It would require the Council to give weight to the importance of being consistent with an apparent conclusion unsupported by any apparent reason, disregarding the fact that it was evidently a mistake, notwithstanding the fact that, in their view, on the merits a different conclusion on the same matter should be reached in the case of the proposed development. But, even assuming (in the Claimant's favour) that the principles of construing planning permissions apply when considering refusals of permission, the notice in this case is not free from ambiguity given that the reasons for any conflict bear no relation to the policy in issue. In such circumstances reference to "extrinsic" documents would in any event be permissible. But, even ignoring that, to sustain his case Mr Parkinson would need to show that no reasonable authority would have failed to attach weight to the importance of being consistent with the earlier apparent conclusion that a different development was in conflict with Policy CS15 for some unknown reason when it thought the proposed development was unobjectionable in terms of that policy. In my judgment Mr Parkinson has not advanced a case that establishes that.

54. This ground for impugning the decision to grant planning permission accordingly fails.

GROUND 3: PRECEDENT

i. Introduction

55. The third ground on which the decision in this case is impugned is that there was a failure to have regard to a material consideration, namely the whether granting permission would set a precedent for future development of gypsy and traveller sites in the local area.

56. This was a concern which the Claimant expressed to the Council in his objections to the proposed development. His fear was that such further development would cause further access problems and completely change the character of the area to something more akin to a full scale gypsy encampment to the detriment of the environment and the settled residents. He contended that this was not merely a mere fear or generalised concern with no evidence to justify it. He referred to Woodside and Bambridge Wood, and more generally to "the remaining number of cleared open spaces available for development", as plots where such further development could be encouraged.

57. Given that there were already previous grants of permission for gypsy and traveller sites along Nickley Wood Road, in his oral submissions Mr Parkinson submitted that the precedent which the decision impugned should be seen as setting was one of granting planning permission for gypsy and traveller sites when that would result only in limited harm to the semi-natural ancient woodland in the area. No such harm, he claimed, had been thought to result from the other permissions for such sites when they were granted. That, so he submitted, should have been seen as one of the main issues given the cumulative effect that such permissions could have on such a valuable natural resource; and, had that issue been considered, it could have made a real difference to the decision. Just as it would be "folly" for a decision maker not to consider the cumulative effect on the openness of the Green Belt of setting a precedent by granting permission for an inappropriate development such as a traveller site that was unobjectionable in itself (as the court had said in ***R (Wood) v First***

Secretary of State [2004] EWHC 456 (Admin) at [12]), so here the Council should have considered that the ancient woodland could be materially harmed by numerous permissions each of which would itself cause limited harm. Mr Parkinson contended that it was irrelevant whether or not the Claimant had identified that particular concern: he could not know the basis on which the decision would be taken and the facts, so he submitted, speak for themselves.

58. The assessment noted that neighbours had argued (among other concerns expressed about the proposed development) that "if permitted the development would set a precedent". The assessment noted such concerns but concluded that planning permission should nonetheless be granted given the lack of identified harm and the identified need for gypsy and traveller sites. On the face of it that would suggest that the concern about precedent was considered. But the Council's case is that it was not considered. Their summary grounds asserted that "the Council was correct in this case not to consider the prospect of its decision setting a precedent for future development. What the Claimant asserts as evidence of likely future applications in fact amounts precisely to the 'fear or generalised concern that' the Judge in *Poundstretcher* referred to." This argument includes a statement of fact, that the prospect of setting a precedent was not considered. What follows appears to be an argument seeking to justify that failure, rather than a statement of the reasons (if any) that the Development Control Manager had for not considering that matter. Mr Atkinson likewise submitted that what the Claimant had articulated was 'mere fear or generalised' concern". Woodside has been the subject of an invalid application for a different use. Beyond that, so he submitted, the Claimant's "evidence" amounted to no more than fearful speculation based on the size of plots on nearby sites which is not enough for precedent to be a factor in this case.

ii. Precedent as a material consideration

59. The assumption that, for precedent to be capable of constituting a material consideration, there must be "evidence in one form or another" that granting permission would encourage other similar proposals which would then be difficult to resist and that "mere fear of precedent or a generalised concern is not enough", is based on the judgment in ***Poundstretcher Limited v Secretary of State for the Environment*** (1989) JPL 90. In my judgment such a formulation conflates a number of separate questions.

60. The adverse consequences on other sites that the grant of planning permission may have is capable in law of being a material consideration in determining whether or not it should be granted: see ***Collis Radio Limited v Secretary of State for the Environment*** (1975) 29 P&CR 390 per Widgery LCJ at p396. Whether it is a material consideration on the facts of a particular case and, if it is, what weight should be given to it in that determination are questions of planning judgment. As Mr Duncan Ouseley QC (as then was) stated in ***Rumsey v Secretary of State for the Environment*** [2001] JPL 1056 at p1061, "*Poundstretcher* cannot be seen as providing some precise legal test as to the nature of the material that [a decision-maker] must have when reaching a judgment on the precedent issue. The recognition of the inadequacy of mere fear or generalised concern is no more than saying that [the decision-maker] must have some material on which to base his view, and the nature of what is required will vary from case to case."

61. If the decision maker takes the effect of setting a precedent into account, his judgment that it is a material consideration in a particular case and any further judgment that it is of itself sufficient to warrant the refusal of permission in that case are judgments that may be flawed if no reasonable planning authority could have reached them in the circumstances.

62. These cases were concerned, however, with whether the decision-maker erred in taking the effect of setting a precedent into account. By contrast this case involves the contention that the decision-maker erred in failing to take that such an effect into account.

iii. When failure to take precedent into account constitutes a legal error

63. As the House of Lords decided in ***Tesco Stores v Secretary of State for the Environment*** [1995] 1 WLR 759, a consideration is "material" for the purpose of section 70(2)(c) of the Town and Country Planning Act 1990 if it is "relevant": see per Lord Keith at p764g-h; ***R (Watson) v Richmond on Thames LBC*** [2013] EWCA Civ 513 at [25]. "The word "material considerations" is treated as it is elsewhere in administrative law: that is to say, as meaning considerations material (or relevant) to the exercise of the particular power in its statutory context and for the purposes for which it was granted": per Lord Carnwath JSC ***R (Health and Safety Executive v Wolverhampton City Council*** [2012] UKSC 34, [2012] 1 WLR 2264, at [49].

64. Based on what Lords Keith and Hoffmann said in ***Tesco Stores***, however, it is sometimes said that "whereas the issue of whether a consideration is relevant is a matter of law, the weight to be given to a material consideration is a matter of planning judgment": see eg per Holgate J ***R (Nicholson) v Allerdale Borough Council*** [2015] EWHC 2510 (Admin) at [11(iii)]. This might suggest that, if the Court considers that the consideration is relevant, the authority has unlawfully failed to have regard to it in breach of section 70(2)(c) of the 1990 Act.

65. In my judgment, however, the question whether a consideration is material can conflate two questions that need to be distinguished. The first is whether the consideration is one capable in law of being a material consideration for planning purposes. The second is whether it is material for the purposes of the determination of the particular application in question. The first is plainly a question of law for the court to determine. The second, however, involves a question of planning judgment for the decision maker. As Scott Baker LJ stated in ***South Cambridgeshire District Council v Secretary of State for Communities and Local Government*** [2008] EWCA Civ 1010, [2009] PTSR 37 at [36], "it is a matter for the planning authority.... to decide what are the material considerations and, having done so, to give each of them such weight as she considered appropriate. That, so it seems to me, is a matter of planning judgment." That is consistent with the decision in ***Tesco Stores***. The only question in issue in that case was in what circumstances was an offer to fund a link road (that is to say to provide a public benefit) capable of being a material consideration. There was no issue, once the question of law had been determined, whether the specific offer was material in the circumstances of that case: see ***R (WE Black Limited) v St Albans City and District Council*** [2015] EWHC 2059 (Admin) at [37]. Had it been, that would have involved a planning judgment and, as Lord Hoffman stated in that case, "if there is one principle more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the

local planning authority or the Secretary of State": see [1975] 1 WLR 759 at p780f. In my judgment the statements in the speeches of Lords Keith and Hoffmann in that case on relevance being a question of law need to be read in the context of the issue they were addressing on that appeal.

66. It follows, therefore, that it is not for the court to determine whether any potential adverse consequences on the ancient woodland which the grant of planning permission might have by setting a precedent for the further development of sites for travellers within it was a material consideration on the facts of this case.

67. Given that any such potential adverse consequences would be capable of being a material consideration in law, therefore, the contention that the Council erred in failing to have regard to them involves consideration of two distinct questions: (i) whether the Council could lawfully have treated the adverse consequences on other sites that the grant of planning permission might have as being a material consideration on the facts of this case and (ii), if they could have done, what is the consequence of their not having done so.

68. The Council's case amounts to the contention that no reasonable authority could have regarded the grant of permission in this case as setting a harmful precedent as there was no real evidence of likely future applications for development of traveller sites in this area. The Claimant had drawn attention, as Mr Parkinson has done, however, to a number of plots within the area of ancient woodland that may be the subject of applications for permission for traveller sites. This is an area in which there appears to be a demand for pitches for travellers. Not only have planning permissions previously been granted for a number of pitches, there are plots advertised for sale for that purpose. There also appear to be a number of unauthorised mobile homes. Indeed the Council recognises the need for pitches for travellers in the borough. In my judgment, therefore, any judgment that the prospect of future applications for the development of land within the area designated as ancient woodland was a "mere fear or generalised concern" was not one a reasonable planning authority could reached. There was plainly a rational basis for concluding that there was such a prospect. Whether any and, if so, how many, such sites could be developed each with only limited harm to the ancient woodland, and what cumulative effect that might have on it, is not something that was apparently addressed by the Development Control Manager. In that respect, however, it is not irrelevant that ancient woodland is recognised to be an irreplaceable habitat. The National Planning Policy Framework, for example, recommends that "planning permission should be refused for development resulting in the loss of deterioration of irreplaceable habitats, including ancient woodland,...unless the need for, and benefits of, the development in that location clearly outweigh the loss": see paragraph [118]. A cumulative impact on an irreplaceable habitat may not unreasonably be a concern when considering an application, just as it may be when considering the cumulative impact of development on the openness of the Green Belt. In my judgment it would not necessarily have been unlawful for any potential adverse consequences on the ancient woodland that the grant of planning permission might have by setting a precedent to have been treated as a material consideration in this case.

69. The Council state that Development Control Manager did not consider the prospect of the decision setting a precedent for future harmful development. What is then the legal effect of that failure?

70. That prospect is not a consideration that the relevant legislation expressly requires to be taken into account (as it does in the case, for example, of the desirability of preserving a listed building and its setting). Nor is it a necessary implication of the legislation that it is a consideration that must be considered whenever planning applications are determined. It is a consideration that the legislation permits, but does not require, to be taken into account in any particular case. Three different tests have been endorsed by the Court of Appeal for determining when a decision is invalid when regard has not been had to such a consideration in the determination of a planning application. These are (i) that the decision is invalid if no reasonable authority would have failed to take the consideration into account; (ii) that the decision is invalid if the court considers that there is a real possibility that the authority would have reached a different decision if regard had been had to it; and (iii) that the decision is invalid if the consideration is one that would have tipped the balance to some extent, or would have had some weight, one way or another, if it had been taken into account without necessarily being determinative.

71. The approach in public law generally is that the decision is invalid if no reasonable authority would have failed to take a consideration into account to which the legislation permits regard to be had. "A decision to take into account (or not to take into account) a permissible consideration will only be challengeable on *Wednesbury* grounds": see Wade and Forsyth *Administrative Law* 11th ed at p324; cf ***R (Khatib) v Secretary of State for Justice*** [2015] EWHC 606 (Admin) per Elias LJ at para [49] et seq; ***R (London Criminal Courts Solicitors Association v Lord Chancellor*** [2015] EWHC 295 (Admin) per Laws LJ at [32]-[34].

72. In my judgment that approach was established by the House of Lords in ***In re Findlay*** [1985] AC 318. In that case the complaint was that the Secretary of State had failed to consult the parole board before adopting a new policy governing the release of certain prisoners on licence. As Lord Scarman stated (in a speech with which the other members of the Appellate Committee agreed) at pp333-4,

> "there is no express statutory requirement for such consultation: and...I find it impossible to imply any such requirement into the statute....
>
> But this is not the end of the contention. Mr. Sedley also invoked the "Wednesbury principle" (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223), submitting that no reasonable Home Secretary could have reasonably omitted to consult the board. He prayed in aid some observations of Cooke J. in the New Zealand case of *CREEDNZ Inc. v. Governor General* [1981] 1 N.Z.L.R. 172 . The facts of that case bear no resemblance to this case. But the judge did consider the question of the proper exercise of an administrative discretion in a situation where a statute permits but does not require consideration of certain matters. The judge said, at p. 183:
>
> > 'What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal

> obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision.'
>
> These words certainly do not support Mr Sedley's submission. But, and it is this upon which Mr. Sedley has to found his argument, the judge in a later passage at p. 183, line 33, did recognise that in certain circumstances, notwithstanding the silence of the statute, "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers ... would not be in accordance with the intention of the Act."
>
> These two passages are, in my view, a correct statement of principle."

Lord Scarman then rejected in that case "the submission of unreasonableness and with it the contention that failure to consult the board was unlawful."

73. It follows, therefore, that, when legislation does not require (whether expressly or by implication), but permits, a specific consideration to be taken into account, that the decision is invalid if no reasonable person would have failed to have regard to it.

74. In ***Derbyshire Dales District Council v Secretary of State for Communities and Local Government*** [2009] EWHC 1729 (Admin), [2010] 1 P&CR 19, however, Carnwath LJ (as he then was), sitting in the Administrative Court, treated the second passage quoted by Lord Scarman as one raising "a question....of statutory construction..it is necessary to show that the matter was one which the statute expressly or impliedly (because "obviously material") requires to be taken into account "as a matter of legal obligation"": see at [28]. That reading of Lord Scarman's speech, which Mr Parkinson adopts, in my judgment fails to reflect the fact that the second passage quoted is directed at a case in which the consideration in question is not one that the legislation requires to be taken into account expressly or by implication. Nor does this interpretation reflect the fact that the passage was taken by Lord Scarman as support for the use of the *Wednesbury* test for determining whether the decision is invalid for failing to take into account such a consideration, which was the test that he then applied immediately after his quotation of the second passage from Cooke J's judgment. That test is of course conditioned in its application by the legislation within which any decision falls to be made but it is not itself a question of statutory construction. Moreover, if the question is one of statutory construction, it is not clear (at least to me) what the question of statutory construction is or how the question is to be answered (if not by reference to the *Wednesbury* test as Lord Scarman did). Mr Parkinson submits that the question is whether something is "so obviously material" or so "fundamental to the decision" in a particular case that there is an obligation to consider it. But that is a question of judgment that depends on the circumstances of the particular case (not one of statutory construction). Moreover, if the court is to form its own view on the merits on that matter, as Mr Parkinson contends, the court will not be reviewing the legality of the decision by reference to the only currently established objective test (consistent with that function of review),

namely the *Wednesbury* test, and there is plainly the risk, no doubt having heard argument that the decision maker did not, that a decision maker might not unreasonably have thought differently about the significance of the matter. If it is to avoid that risk, I am unclear how the outcome of this alternative approach may differ from that produced by the application of the *Wednesbury* test. In the event Carnwath LJ's decision was consistent with the interpretation of ***In re Findlay*** as imposing a *Wednesbury* test: see [36]-[37].

75. Mr Parkinson also sought to rely on the analysis by Holgate J in paragraphs [151(ii)] and [151(iv)] of his judgment in ***R (Luton Borough Council) v Central Bedfordshire Council*** [2014] EWHC 4325 (Admin) in which he suggested that a decision would be invalid not only if the consideration was one no reasonable person would have failed to take into account but also if it was so obviously material to a decision particular decision that failing to consider it "would not accord with the intention of the legislation". I have difficulty reconciling what in my judgment is the correct analysis of ***In Re Findlay*** to be found in paragraph [150] of Holgate J's judgment with what is said in paragraph [151]. But it is unsurprising in my judgment that Holgate J did not seek to distinguish them in application in paragraph [152] of his judgment. The relevant principles were not the subject of argument in the Court of Appeal in that case: see [2015] EWCA Civ 537, [2015] 2 P&CR 19, at [71] and [76]).]

76. More significantly, however, Carnwath LJ's interpretation of Lord Scarman's speech, which Holgate J was seeking to reflect, has not been that adopted by the Court of Appeal in other cases, which were not cited to Carnwath LJ. In those Lord Scarman has been treated as endorsing a *Wednesbury* test when considering whether there was any obligation to take into account considerations that legislation permits regard to be had to: see eg ***R (Jones) v North Warwickshire BC*** [2001] EWCA Civ 315, [2001] PLCR 31 at [20]-[21]; ***R (Khatun) v Newham LBC*** [2004] EWCA Civ 55, [2005] QB 37, at [35]; ***R (Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs*** [2006] EWCA Civ 1279, [2008] QB 289, at [131]-[132].

77. This first, *Wednesbury* test has also been applied in planning cases by the Court of Appeal: see ***R (Jones) v North Warwickshire BC*** *supra;* ***R (Langley Park School for Girls Governing Body) v Bromley LBC*** [2009] EWCA Civ 734, [2010] 1 P&CR 10, at [37] and [41]. Mr Atkinson submits that it is the test that falls to be applied in this case.

78. The second test, that a decision is invalid if a judge considers that there is a real possibility that the authority would have reached a different decision if the consideration had been taken into account, stems from the decision of the Court of Appeal in a compulsory purchase case, ***Bolton MBC v Secretary of State*** (1991) 61 P&CR 343. Mr Parkinson submitted that this test has been endorsed in a planning context by the Court of Appeal, for example, in ***R (Watson) v Richmond on Thames*** [2013] EWCA Civ 513 at [26], and that it is the test that he submits should be applied in this case. The second test is not the same as the first. A consideration may be one that no reasonable person would have failed to take into account but it may be uncertain (in a judge's view) whether or not there is a real possibility that the decision would have been different if it had been taken into account. Conversely a judge may consider that there is a real possibility that the decision might have been different if regard had been had to a matter even when a reasonable person might have decided

not to have regard to it. The views of potential consultees to which no regard is had when there is a decision not to consult may provide an example of such a case.

79. The third test, that the decision is invalid if the consideration is one that the court considers would have tipped the balance to some extent, or would have had "some weight", one way or another, without necessarily being determinative, if it had been taken into account, was propounded by the Court of Appeal in ***R (Kides) v South Cambridgeshire DC*** [2002] EWCA Civ 1370, [2003] 1 P&CR 19, at [121]. This test was said to be no different in practice than the second test by the Court of Appeal in ***R (Watson) v Richmond on Thames*** *supra* at [28] for the purpose of their decision in that case. But it need not produce the same results: it is possible that, if taken into account, a consideration could have had "some weight" without there being a real possibility that the authority would have reached a different decision if they had taken it into account. Similarly the court might consider that the consideration would have had "some weight" without it being one no reasonable person would have failed to take into account.

80. In my judgment the second test is inconsistent with the decision of the House of Lords in ***In re Findlay*** *supra.* It confuses the test for the legality of the exercise of a discretion with that for determining the materiality of any erroneous exercise of it and it is inconsistent with it. In practice it would also impose an onus on a claimant and a task on the court which both are ill-equipped to discharge.

81. Although the Court of Appeal in ***Bolton MBC v Secretary of State for the Environment*** (1990) 61 P&CR 343 was referred to the judgment of Cooke J in ***CREEDNZ Inc v Governor General*** *supra* and, when giving his judgement (with which the other members of the court agreed) Glidewell LJ referred to some parts of it, the decision of the House of Lords in ***In re Findlay*** was not cited to the court.

82. In that judgment Glidewell LJ stated that:

> "The relative importance of the matter which has not been taken into account, is an aspect, and a very major aspect, of the question "was that consideration relevant?" or "should the decision maker have taken it into account?" I venture to suggest that from the authorities generally, and particularly those to which I have referred, one can deduce the following principles:
>
> 1. The expressions used in the authorities that the decision maker has failed to take into account a matter which is relevant...or that he has failed to take into consideration matters which he ought to take into account, which is the way in which Lord Greene put in *Wednesbury*....have the same meaning.[10]
>
> 2. The decision maker ought to take into account a matter which might cause him to reach a different conclusion to that which he would reach if he did not take it into account. Such a

[10] As ***In re Findlay*** shows and as Cooke J (as he then was) explained in ***CREEDNZ*** by reference to Lord Greene's judgment, however, a permissible consideration is one that is relevant, otherwise it could not lawfully be taken into account. But that does not necessarily mean that there is any obligation to take it into account.

> matter is relevant to his decision making process. By the verb "might", I mean where there is a real possibility that he would reach a different conclusion if he did take that consideration into account.
>
> 3. If a matter is trivial or of small importance in relation to the particular decision, then it follows that if it were taken into account there would be a very real possibility that it would make no difference to the decision and thus it is not a matter to which the decision maker ought to take into account.
>
> 4.... there is clearly a distinction between matters which a decision maker is obliged by statute to take into account and those where the obligation to take into account is to be implied from the nature of the decision and of the matter in question. I refer back to the Creed N.Z. case.
>
> 5. If the validity of the decision is challenged on the ground that the decision maker failed to take into account a matter in the second category, it is for the judge to decide whether it was a matter which the decision maker should have taken into account.
>
> 6. If the judge concludes that the matter was "fundamental to the decision," or that it is clear that there is a real possibility that the consideration of the matter would have made a difference to the decision, he is thus enabled to hold that the decision was not validly made. But if the judge is uncertain whether the matter would have had this effect or was of such importance in the decision-making process, then he does not have before him the material necessary for him to conclude that the decision was invalid."

83. Mr Parkinson submits that, when Glidewell LJ referred in Point 3 to making "no difference to the decision" and in Point 6 to making "a difference to the decision", he was not referring to a different outcome. It would be sufficient if the consideration merely added some weight to the argument for or against. In my judgment, however, the different decision or the different "conclusion" (to which Glidewell LJ referred in Point 2) was a different outcome. That is also the sense in which he applied Point 5 in that case: see p354.

84. In my judgment Points 5 and 6 are plainly inconsistent with the decision in ***In re Findlay*** which I have described above and as it has been interpreted by the Court of Appeal[11]. For the reasons given above, the test for whether a consideration must be

[11] Carnwath LJ also declined to apply it on the basis of such inconsistency in ***Derbyshire Dales DC v Secretary of State for Communities and Local Government*** *supra* see at [23] et seq. Mr Parkinson nonetheless contended that there was no difference between a matter being "obviously material" or "fundamental" to a decision and one that there is a real possibility that it would have made a difference to the decision if it had been taken into account. The two tests are not the same: a matter might (in a judge's view) be "obviously material" without giving rise to that possibility. There may equally be such a possibility even if a judge is uncertain whether the matter is "fundamental" to the decision.

taken into account which the legislation does not (expressly or by implication) require to be taken into account is the *Wednesbury* test. As I have explained, it may not produce the same results as the test propounded in Points 5 and 6.

85. In my judgment the second test also effectively confuses the test for the legality of the exercise of a discretion with that for determining the materiality of any erroneous exercise of it and it is inconsistent with that test. What matters should be regarded as relevant and taken into account when exercising a discretion is a matter for the judgment of the decision maker when the relevant legislation does not itself constrain that choice. Like the exercise of any other judgment not engaging Convention rights and certain European law issues, its legality falls to be reviewed by reference to the *Wednesbury* test[12]: if no reasonable person could have had regard to a consideration, or if no reasonable person could have failed to take it into account, the exercise of that judgment is unlawful. If regard is had to such an irrelevant consideration or if there is a failure to consider something a decision maker was obliged to take into account, however, then the decision is invalid (and, prior to the enactment of section 31(2A) of the Senior Courts Act 1981, would normally have been quashed on a claim for judicial review) unless it is shown (the onus being on those asserting it to be the case) that the decision would necessarily have been the same regardless[13]. In such circumstances the legal flaw is shown to be immaterial. The second test confuses the test for legality with the test for immateriality and it is inconsistent with it: under the test for immateriality the legal error will still be material if the court is uncertain whether the decision might have been different; on the second test, however, there is no legal error at all in such a case.

86. By reversing the burden on the issue of the materiality of any omission, the second test also imposes an onus on the claimant to show that there is a real possibility that the decision would have been different had the consideration been taken into account (rather than imposing the onus on those who deny the existence of that possibility). In practice that involves putting an onus on the claimant that he or she may be ill-equipped to discharge and it imposes a task on the court that it is ill-equipped to undertake. It requires a claimant to show, and the Court to determine, what *relative* weight a decision-maker might have attached to a consideration that has not been considered. In the case of some decisions, of which decisions on planning applications are an example, the considerations which may, and are, taken into account are often incommensurable in nature and the weight that may have been given to each by the decision maker may not be separately identifiable. Indeed any assumption that a particular weight has been attached to each consideration in isolation may well be misconceived. Nor may the precise relative weight given be discernible. Moreover, even if the weight that was in fact attached to different considerations is identifiable, their relative weight could well have been different had account been taken of a further consideration. Requiring a claimant to show, and a court to judge, what weight might be given to a matter that has not been considered by the decision maker, whether that might have altered the relative weight given to other considerations had regard had been had to it and whether, if it had been considered there is a real

[12] unless and until it is superceded (if it ever is) by a proportionality test.
[13] see eg ***Simplex GE Holdings v Secretary of State for the Environment*** (1989) 57 P&CR 306 per Purchas LJ at p327 and Staughton LJ at p329; ***R (Smith) v North East Derbyshire Primary Care Trust*** [2006] EWCA Civ 1291, [2006] 1 WLR 3315 per May LJ at [10]; ***Secretary of State for Communities and Local Government v South Gloucestershire Council*** [2016] EWCA Civ 74 per Lindblom LJ at [25].

possibility that decision would have been different, particularly where the decision maker is not an individual but a committee each of whose members may have had different views, is to impose a task both are ill-equipped to discharge. It is far different in practice from requiring those who assert that the decision would necessarily have been the same to satisfy the court of that contention. Moreover it will almost inevitably involve the court forming a judgment on what it considers the underlying merits of the case may be in substitution for that of the person in whom legislation has vested the decision.

87. Mr Parkinson submitted that the second test had been endorsed by the Court of Appeal in the context of planning in ***R (Watson) v Richmond on Thames LBC*** [2013] EWCA Civ 513. In that case Glidewell LJ's principles were described by Maurice Kay LJ (at [26]) as providing "a helpful means of determining what is material or relevant". Maurice Kay LJ recognised (at [28]) that the question of what "other material considerations" were required to be taken into account by section 70(2) of the 1990 Act was not a matter of determining what specific matters the legislation obliges the decision maker to have regard to as that section "leaves at large what other considerations may be material". In relation to such matters he treated the second test as being applicable in that case. There appears, however, to have been no argument as to whether the first test should have been applied or to ***In re Findlay*** or ***R (Jones) v North Warwickshire BC*** *supra* by which the Court of Appeal was bound. It is also right to note that the second test was applied by the Court of Appeal in ***Secretary of State for the Environment v Edwards (PG)*** (1995) 69 P&CR 607. But no reference was made in the judgment of Roch LJ to ***In re Findlay***. Carnwath LJ considered in ***Derbyshire Dales DC v Secretary of State for Communities and Local Government*** that, although justifiable on the basis of a Wednesbury test, the approach in ***Edwards*** was inconsistent with that decision of the House of Lords and other authorities: see at [22]-[23].

88. The third test is that the decision is invalid if a judge considers that the consideration is one that would tip the balance to some extent, or would have "some weight", one way or another, without it necessarily being determinative, had it been taken into account. This test was propounded, without any apparent citation or consideration of any authority, in ***R (Kides) v South Cambridgeshire DC*** [2002] EWCA Civ 1370, [2003] 1 P&CR 19, at [121]. The Court of Appeal in ***R (Watson) v Richmond on Thames LBC*** *supra* (see at [28]) regarded the distinction between this test and the second test as being "too fine to matter for present purposes" when considering the appeal in that case. As I have explained, however, it might lead in other cases to different results. Quite apart from other objections there may be to it (including the requirement that the court must form a judgment about what weight (if any) might be attached to the matter that was not considered and whether that might have tipped the scales "to some extent" one way or another and might have had "some weight", however, in my judgment the weight of authority is in any event inconsistent with this test.

89. Accordingly the question is whether the prospect of the decision impugned setting a precedent for future harmful development was a consideration which no reasonable planning authority would have failed to take into account in the circumstances of this case when determining whether or not to grant planning permission.

iv. Application of the test in this case

90. Mr Parkinson submits that the precedent created by the decision is one that permission will be given in the light of the need for gypsy and traveller sites for further such development provided that it results only in limited damage to the ancient woodland in the area.

91. To be of concern such developments cumulatively must be likely to result in unacceptable damage to that habitat. For this to be a matter that no reasonable authority would fail to treat as a material consideration in the decision impugned, it is not enough for there to be a prospect merely of future applications for permission for such sites within the area designated as ancient woodland. It may be inevitable that they would cause harm that is neither similarly limited nor outweighed by the need for such sites. Such applications the Borough Council could refuse consistently not merely with the decision impugned but also with the earlier application they refused in 2014 that also related to Milee. A major consideration in the refusal of the earlier application (as the assessment that led to the refusal shows) was the possibility of the regrowth of the habitat if the site was left undeveloped. By contrast the proposed development was assessed not merely not to involve any damage to any trees or their roots but also not to involve the laying of additional hard surfacing. The impediment to regrowth was already lawfully in place. The Claimant has not alleged, nor provided any evidence, that there any other sites which could be developed each with only such limited harm to the ancient woodland, much less what cumulative effect their development might have on it. There are other constraints on development in this area but, even ignoring those, in my judgment, the Claimant has not discharged the onus on him, therefore, to show that no reasonable authority would have failed to take the prospect of the decision setting a precedent for future, cumulatively harmful development into account in the circumstances of this case when determining whether or not to grant planning permission.

92. As originally formulated, the Claimant's claim on the precedent issue suffered from the problem that the decision impugned is not the first granting permission for a gypsy or traveller site along Nickley Wood Road. If a precedent for such development in the area existed, it had been set before but, as the refusal of the proposed development at Milee in 2013 showed, such grants did not prevent the Council refusing permission for a development having an unacceptable impact *inter alia* on the area of ancient woodland. It is, of course, not necessarily an irrational approach for a planning authority to treat each application on its own individual merits. Mr Parkinson understandably perhaps, therefore, put the Claimant's case on the basis that the decision set a precedent for granting permission for gypsy and traveller sites when in each case only limited harm to the area of ancient woodland may result.

93. In reaching my conclusion on the precedent issue I have assumed (as Mr Parkinson asserted) that the decision impugned was the first in which permission for a gypsy and traveller site was granted when there was any recognition that any harm to the ancient woodland would result. This was not an allegation raised in the claim form or even Mr Parkinson's skeleton argument but was first developed by Mr Parkinson orally. The Council had no opportunity to address that factual contention in evidence and Mr Atkinson had no opportunity to take proper instructions on whether or not it was in fact correct. Given my conclusion on the way Mr Parkinson put the Claimant's case on the assumption that his assertion was correct, however, I need not consider

whether the point was one in any event open to Mr Parkinson to take. I note that Mr Atkinson raised no objection to me considering it.

94. For the reasons given, the claim on Ground 3 fails.

GROUND 4: CONDITION 2

95. Mr Parkinson contended that, as the proposed development was only acceptable in policy terms given the need for gypsy and traveller sites, a key issue should have been whether condition 2 was enforceable and achieved its stated objective. He submits that the Council failed to do so as it was required to do: see ***R (Helford Village Development Company Limited) v Kerrier District Council*** [2009] EWHC 400 (Admin) at [39]-[40]. It also failed to consider whether a personal permission should have been granted instead.

96. Condition 2 is plainly such as to be capable of enforcement: it cannot be said to be so uncertain in its terms that it is invalid. The assessment stated that "the occupation can be strictly controlled via a planning condition restricting the occupation to those who comply with the definition of a gypsy and traveller." But, so Mr Parkinson submitted, that failed to recognise the practical difficulties in determining whether any individual falls within the definition and the fact that the authority does not regularly monitor compliance, acting only if breaches of planning conditions come to their attention (as revealed by an answer given after the decision impugned to a Freedom of Information request).

97. I have considered the definition of gypsies and travellers in the Glossary of Planning Policy for traveller sites which the second condition incorporates. The assessment states that occupation can be strictly controlled through use of the condition using that definition. There is no basis for any contention that that was a conclusion that no reasonable authority could have reached. Whether someone has a "nomadic way of life" or has "ceased to travel temporarily" for certain specified reasons no doubt involves considering the facts but involves no greater difficulties in principle than some other standard planning conditions. As the Council point out, they have power to serve a planning contravention notice under section 171C of the Town and Country Planning Act 1990 to obtain such information in writing as they may need from any person having an interest in the land or using it for any purpose in order to determine whether any breach has occurred. If enforcement action is taken, the onus would be on those contending on appeal that no breach of the condition had occurred to make good that claim. The fact (if it be so) that an authority only acts if they have notice of a potential breach of a planning condition (rather than actively seeking to find such breaches) does not mean that the condition could not reasonably be imposed or that no reasonable planning authority would have imposed the condition without first considering what the likelihood of breaches coming to their attention would be.

98. This case is plainly distinguishable from the position in ***R (Helford Village Development Company Limited) v Kerrier District Council*** *supra*. In that case enforcement of the condition imposed would not have achieved its objective (preventing the use of part of the foreshore). In this case enforcement of the condition would achieve its objective.

99. Although Mr Parkinson submits that the Council should have considered granting only a personal permission, the need which the permission granted was intended to meet was that of sites for gypsies and travellers, not that of any specific individuals. As the assessment stated, "it is the status of the future occupiers of the site which is required to be considered here."

100. The claim on Ground 4 accordingly fails.

RELIEF

101. For the reasons given above, the Claimant has established the first ground on which the claim is made.

102. Essentially what I have found is (i) that the Development Control Manager should have concluded that local plan policy EN32 required permission to be refused given the harm to the ancient woodland (which the assessment recognised) that the proposed development would cause and (ii) that she should not have concluded that the proposed development was in accordance with the development plan as a whole on balance, given the conflict she appears to have recognised with Local Plan policy GP12 (and which she should have recognised with Local Plan policy EN32 which is in stronger terms than policy GP12), having regard to policy CS14 in the Local Development Framework Core Strategy. That policy did not permit her to take into account the need for further gypsy and traveller sites. That is not to say that the Development Control Manager failed to take into account the limited harm to the ancient woodland that the proposed development was assessed to cause or that she was not entitled in reaching her decision to take the need for further gypsy and traveller sites into consideration as another material consideration. The assessment on the basis of which she took her decision was not flawed on the basis of a failure to take into account relevant matters on their merits independently of the development plan. It was flawed on the basis of how those matters fell to be classified in terms of the development plan.

103. Previously the question in terms of relief was whether the decision would necessarily have been the same had the flaws in the decision not occurred[14]. On that basis I would not have been satisfied that it would necessarily have been the same.

104. Section 31of the Senior Courts Act 1981, however, now provides that

> **"(2A) The High Court-**
>
> **(a) must refuse to grant relief on an application for judicial review,**
>
> **(b) ……,**
>
> **if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.**

[14] see footnote 13 above.

(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest."

105. This provision raises a number of as yet unresolved questions. But, for present purposes, when final relief is being considered, in my judgment "the conduct complained of" must refer to the conduct complained of insofar as the conduct is found to be unlawful. It is true that section 31(8) defines the relevant conduct as "the conduct (or alleged conduct) of the defendant which the applicant [for judicial review] claims justifies the High Court granting relief." But no applicant can claim that conduct that the Court has not found unlawful justifies the grant of any relief.

106. In this case, had the conduct found to be unlawful not occurred, the Development Control Manager would have treated the proposed development as one that fell to be refused in accordance with policy EN32 as well as regarding it as being contrary to policy GP12. She would also have treated the proposed development as one that was not in accordance with the development plan as a whole. She would have had to decide, therefore, whether those policy matters and such limited harm as she found that the proposed development would in fact cause was outweighed by the need for further gypsy and traveller sites. That need, the assessment stated, had to be given "significant weight" in this case. What the Development Control Manager might have done in such circumstances depends ultimately on what additional weight (if any) she would have accorded to the limited harm that the proposed development would cause in the light of these policy considerations.

107. In my judgment, although the court must consider section 31(2A) of its own initiative when considering final relief (as opposed to the grant of permission when it may have a discretion whether or not to do under section 31(3C)), the court must still be satisfied on the balance of probabilities that it is highly likely that (in this case) permission would have been granted had the unlawful conduct found had not occurred. In determining whether it appears that it is highly likely that would have occurred, the question is not whether it is highly likely that the judge hearing the case would have taken the same decision. Section 31(2A) of the 1981 Act does not require the court to treat itself as the decision maker. Moreover the court must act on the evidence it has or on reasonable inferences from it.

108. In this case there is no need to address any evidence that the Council has filed on the point, or to decide what to make of any such evidence provided after the event, since the Council has filed no such evidence. Further such evidence and documents before the Court provide no basis on which to infer what additional weight (if any) the Development Control Manager might have attached to the objections to the development in the light of the policy considerations to which I have referred. That is not to say that, in some cases at least, the answer may not be clear from the material before the court. But in this case it is not. In those circumstances I am not satisfied on the balance of probabilities that it is highly likely that the Development Control Manager would still have treated the significant weight that was given to the need for further gypsy and traveller sites as outweighing the objections to the proposed development once the policy considerations to which I have referred were taken into account. I cannot be satisfied, therefore, that it is highly likely that, if the conduct I

have found to be unlawful had not occurred, permission would nonetheless have been granted for the proposed development.

109. This claim accordingly succeeds on the first ground and the decision to grant planning permission is quashed.