FARM LAW

FARM LAW NOTES

Going it alone…

In? Out? Stay? Go? Remain? Leave? The result of the UK's referendum on EU membership was, as we and many others indicated before the event, always going to be tight and which way the wind would finally blow was in doubt until more or less the last moment. But the public has made its choice: we will go our own way.

As with many decisions, though, that raises more questions than it answers. The fact is that we are in uncharted territory. A Member State has never before chosen to leave the European Union, so the situation is quite without precedent.

The position in a more general sense is not helped by the political disarray the referendum result has precipitated. The Prime Minister has resigned; the Opposition leader has been preoccupied with fending off calls for him to step down; and two leading figures who supported the UK's exit have fallen by the wayside in the ensuing kerfuffle. *Confusione pedicabo*!

Let us look for a moment at the reaction on the "other side of the fence". EU Commission President Jean-Claude Juncker has suggested that Messrs Johnson and Farage are "leaving the boat" (although whether Boris Johnson jumped ship or was pushed from behind is a question we can leave for the tabloids). "Patriots don't resign when things get difficult, they stay", Juncker told the European Parliament in Strasbourg.

Less postural and more contemplative comments on the consequences for the people of Europe as opposed to the institution of the Union came from Hannes Lorenzen, President of ARC2020, the Agricultural and Rural Convention. He lamented the re-emergence of chauvinism across the continent and an increasing lack of willingness to talk to and understand one another. While the Iron Curtain may have come down, he said, new barriers are being erected.

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The Brexit result has indeed reverberated around the continent and has fuelled those with similar ambitions in France, Italy and the Netherlands, to name but three. There is a noticeable buoyancy in those who would retrench behind national borders.

Where does all this leave us in the UK? The decision has been made and we can expect Article 50 of the Treaty on European Union to be invoked. Or can we?

Tom Hickman, Reader at University College London barrister and one of the team hired by Mishcon de Reya in an action to ensure the UK government does not trigger the procedure for withdrawal from the EU without an Act of Parliament, has co-authored a post for the UK Constitutional Law Association in which he argues that art.50 permits a Member State to withdraw "in accordance with its own constitutional requirements".

Since it is s.2 of the European Communities Act 1972 – an Act of Parliament – which provides for the implementation of EU treaties and law in the UK, any executive decision by the government to operate art.50 without the authority of Parliament may not comply with art.50 itself. (A fuller explanation is provided in the article by Nick Barber, Tom Hickman and Jeff King, *Pulling the Article 50 Trigger: Parliament's Indispensable Role*, available from *ukconstitutionallaw.org*)

Interesting counter-arguments are made by Prof. Mark Elliott of Cambridge University in his post *On why, as a matter of law, triggering Article 50 does not require Parliament to legislate* (available from *publiclawforeveryone.com*). Although he does not disagree that statutory intervention is a viable means of triggering art.50, he does not regard it as necessary because, in his opinion, the 1972 Act does not limit the prerogative available under the sovereignty of Parliament.

That said, he questions the wisdom of proceeding without reference to Parliament, likening the consequences of invoking art.50 as equivalent, in legal terms, to deploying armed forces abroad – perhaps an unfortunate analogy – where there is "an increasing expectation" of parliamentary involvement.

Whether Parliament would, in any debate on the matter, ignore the wishes of the British people, albeit so narrowly expressed, is, of course, quite another question and one to add to the overall uncertainty filling present days.

It has been pointed out many times that art.50 is essentially a one way street. It can be invoked only by the Member State wishing to leave the Union, but once invoked there is no apparent mechanism for the notice to be rescinded other than by agreement, which may be unlikely given all the circumstances but is not technically impossible.

Membership will be terminated two years after the art.50 notice is given, unless the European Council agrees an extension, which it will do only if all other Member States agree. Timing is therefore absolutely crucial. Clearly, the UK authorities would prefer the terms of their departure to be clear before the termination takes effect.

But Prof. Alan Matthews of Trinity College, Dublin in his piece *Waking up to Brexit – two weeks on* offers an analysis which sees art.50 as providing a two-track process. An agreement is to be made "setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union" (art.50(2)). Thus, this is a set of transitional arrangements aimed first at extricating the UK from its Treaty rights and obligations, and secondly dealing with its future relationships (for further detail see *capreform.eu*).

It is quite possible – and clearly desirable from the UK perspective – for those two processes to be undertaken in parallel, but the reaction from the EU to the referendum result has been, as expressed by Trade Commissioner Cecilia Malmström, "First you exit, then you negotiate". President Juncker also made loud noises about

the need to trigger art.50 quickly in the interests of certainty.

The timing of any decision on invoking art.50 remains uncertain until the negotiating strategy is clear, but is not expected before the end of this year.

The way in which negotiations may progress can only be the subject of speculation at this point. Whether and to what extent trade deals, including agriculture, will be achievable will depend upon the respective attitudes of the parties. Some of the arrogance apparent from the Leave campaigners during the referendum campaign will probably have to be tempered with reality.

From the EU perspective, there is the school which supports President Juncker's thinking and which wants a quick solution to allow them to pursue further options towards greater integration. But that is countered by a more relaxed and tolerant group of northern and central nations.

As was raised at length in the referendum campaign, there are a number of possible formats of trade relationship which might be agreed, ranging from the Norwegian example, through independent agreements such as that with Canada, to total independence subject to WTO rules. Any of those will take time to finalise and, as Prof. Matthews notes, there is a serious possibility that, regardless of the final outcome, there will be a period between withdrawal and finalisation of such an agreement when tariffs in both directions will apply to trade.

For the time being, what will be the position in practice? In the short term, the answer is much as before. Certainly until formal termination of the UK's EU membership, whenever that may happen, we will be entitled to the benefits and subject to the responsibilities of the present Common Agricultural Policy.

What may replace that will be a function not only of the deal struck with the EU but also of the internal relationship within the UK between England and the devolved authorities of Wales, Scotland and Northern Ireland. Leaving aside the question of possible Scottish independence, which is never really far below the surface, each of those nations has implemented the CAP in its own way over the past 11 years and will doubtless wish to continue in that vein.

There will be an issue with CAP payments in the year in which UK withdrawal eventually takes place, in that applications may need to be submitted under the present regime without compliance with conditions being required under the Treaty for the full year.

Speaking at the Livestock Event, Farming Minister George Eustice indicated that, whilst nothing had been agreed and discussions at present concerned only options, the focus of support payments may change to reflect "a more holistic approach to protecting the environment", implying that direct payments may become less important.

He contradicted that implication to an extent on *BBC Farming Today*, maintaining the position he took during the referendum campaign that farming should be supported as it is now and that support could be funded from monies released from contributions which would no longer need to be made to the EU. He said: "Farming is important, food production is important, our environment matters and agricultural policy should be about protecting the environment, enhancing habitats, protecting water quality and protecting food security." But the precise focus of the policy remains very much unknown.

Whether he would have the support of the Treasury to underpin those broader objectives in the way he suggests also remains conjecture. Furthermore, whether and to what extent it will be possible to maintain agricultural support as envisaged by the Minister will, of course, depend not only on the results of the withdrawal negotiations, including the terms of any trade deals struck, but also on competing domestic

demands from, amongst others, the NHS, education and national security issues.

The terms on which any such support may be available are also open to debate. The feeling of the industry at large is that the present CAP imposes unrealistic burdens on it, but whether those burdens would be any less burdensome under a UK agricultural policy – or indeed national agricultural policies within the UK as noted above – is, like much else at this time, an open question.

DEFRA has notably focused of late on over-regulation as a function of its Red Tape Challenge, but it has been noticeable how much regulation, other than that which has become anachronistic, has been accepted as retaining a degree of relevance and/or purpose.

The fact is also, returning to the international perspective, that in order to continue to export to the EU – which is the UK's largest trading partner – the conditions under which produce is grown or made will have to meet its requirements. Issues such as, for example, genetic modification and neonicotinoids are viewed with much less scepticism in the UK than elsewhere in Europe but that does not permit a completely free hand if continued trading on acceptable terms is required. The alternative of simply replacing European markets with others subject to less regulation appears less appealing.

Another question heavily in evidence during the referendum campaign was immigration. At present, the citizens of all Member States of the EU have the right to work across the Union and agriculture in the UK benefits greatly, especially in the horticulture sector, from migrant labour. The former Seasonal Agricultural Workers Scheme was necessarily watered down as a result of the general right to work until it applied only to Romania and Bulgaria, and was abolished completely in 2014. Since then, the sector has struggled to attract employees, especially at harvest.

There is no indication of any firm proposals to deal with the question at present. The Chairman of the NFU Horticulture and Potatoes Board, Ali Capper, is reported as calling for the sector to be able to source labour from anywhere in the world. Some particular leniency for agricultural workers would appear to be on the table.

DEFRA's 25-year plans for farming and the environment remain in planning, but the emphasis has cleared changed following Secretary of State Liz Truss's announcement immediately following the referendum that the Department's officials are now working with a "dedicated team" to look at a package for the future. On the one hand, the efforts that agriculture has gone through in recent years to accommodate change through restructuring may produce merely incremental adaptations. On the other, wholesale reinvention of the basis and system of support cannot be ruled out.

So many question, so few answers! One is reminded of Rowan Atkinson's character, Sir Marcus Browning MP, who complained that life was uncertain and there was "certainly a certain degree of uncertainty about". Time will doubtless resolve that uncertainty, but exactly how and when remains … well, uncertain.

LEGAL BRIEFS

The cost of proprietary estoppel

The latest, and hopefully the final, instalment of the case of *Davies v Davies* was heard in the Court of Appeal recently ([2016] EWCA Civ 463). The first leg of the case was decided two years ago (see *Farm Law* No.209, June 2014) when Eirian Davies claim against her parents was found in her favour.

The thrust of the case was a sadly far from unusual, if somewhat extreme, example of an ill-managed family farm. Eirian had worked on her parents' farm in South Wales since a child for little reward. When she complained, she was told not to "kill the goose that lays the golden egg" and had been promised that the farm would be hers one day.

In short, and to skip over disputes about relationships and prospects of better work being forsaken out of loyalty, the relationship between daughter and parents broke down and she sought to cash in her chips. The Court of Appeal in the first case decided that she did indeed have the chips to cash.

This second case resolved the question of the value of those chips.

In summary, the value of the farming business was provisionally assessed at about £4.4m before tax, of which the land value represented the lion's share. The parents, although by now in their 70s, were still farming, but their principal source of income was solar panels erected on the land, which yielded some £42,000 per annum. They had made their home with their youngest daughter, Eleri, and were generally found by the judge to be "in a secure financial position".

Eirian was employed as a trainee foodstuffs specialist and did some relief milking. Her career gave her "some fulfilment, better hours and better pay" than she had received on her parents' farm, in spite of countervailing benefits such as free accommodation and board.

In the judge's view in the Administrative Court, this was not a case in which the expected benefit and the expected detriment were equivalent or not disproportionate for three main reasons. First, a number of different representations were made to Eirian at various times in the story. Secondly, when Eirian had walked away for the second time in 2001 she had, in her own words and at least to a degree, given up on the farm. Thirdly, her expectations were dependent on her continuing to work on the farm, but that did not happen.

The parties had taken polarised positions in relation to the value of the claim and the judge, with some difficulty, settled on a figure of around one third of the net value of the farm and the farming business, namely £1.3m.

Referring to previous cases, Lewison LJ in the Court of Appeal identified a "lively controversy" between those who advocated the exercise of judgemental discretion on the basis of giving effect to a claimant's expectations (unless it would be disproportionate to do so) and those who saw its function as to ensure that the claimant's reliance interest was protected, in order to compensate for the detriment suffered.

Whilst expressing relief at the lack of need to decide between those viewpoints, his Lordship indicated a preference for the second.

Analysing the judge's decision, he concluded that he had "applied far too broad a brush and failed to analyse the facts … with sufficient rigour". In this case, Eirian's expectations had moved. In 1985, she believed she was told that she would inherit the farm. Then in the late 1990s until 2001, she expected to be made a partner in the business with her parents.

She left on the failure of that expectation; she was prepared to give it up because "she was pregnant and had had enough". When her marriage broke down some time later and she returned to the farm, her expectation of inheritance revived.

This range of different expectations, some of which were mutually incompatible, moved the case away from the likes of *Gillett v Holt* ([2001] Ch 210) or *Thorner v Major* [2009] UKHL 18, where the same representation was made several times over a period of years.

As to detrimental reliance, his Lordship considered that when Eirian left for the first time, in 1989, she did so because she put her marriage and her

husband before her parents' disapproval of them. At that point, the value of her detrimental reliance was no more than the extent of her underpayment in terms of lack of wages for her work on the farm.

Although she returned in 1991, she left again in 2001 with a clear expectation that she would receive nothing by way of inheritance because her parents did not forgive her for leaving. Her final stay on the farm from 2006 to 2007 was a function solely of her failed marriage and ended because of what was in fact the terminal breakdown of her relationship with her father.

The judge had considered in light of that that the proper means of compensation for Eirian was not the transfer of the farm, in whole or in part, but a monetary award. The question was, how much?

In the court below, her parents had offered £350,000, comprising itemised payments in respect of accommodation, unfulfilled expectation of partnership, a share in the farming company and a balance in respect of underpayment over the years. The judge found that those figures undervalued each element.

Lewison LJ saw that the difference between the parents' offer and the judge's award was almost £1m but noted no analysis from the judge of how that difference was accounted for.

His Lordship found first that, although some allowance needed to be made for Eirian's unfulfilled expectations, it was relatively modest. Similarly, the giving up of her more comfortable working environment in favour of a return to the farm lasted only four or five years and the effect of the "rupture" was that she was able to return, if not to the precise lifestyle, then something like it.

Taking all the factors into account, the Court of Appeal increased the parents' figure, but only by £150,000 to £500,000.

One hopes but doubts that the Davies family will be able to recover from the traumas of this litigation and from the conduct which brought it about. The lessons from the case go beyond the purely legal.

Prescriptive rights of common

Our thanks to Christopher McNall, barrister of Manchester, for alerting us to the case of *Littlejohns v Devon CC* [2016] EWCA Civ 446, in which the Court of Appeal recently reviewed the case of Martin and Sarah Littlejohns, whose family had for decades grazed sheep and cattle on commons in Devon.

Following the introduction of the Commons Registration Act 1965, Mr. Littlejohns's father approached the NFU, who wrote to the County Council notifying their intention to register rights. For reasons since lost in the mists of time, the application was never made. As a result, the rights were not included on the commons register.

Notwithstanding non-registration, which went unnoticed for almost 20 years, grazing continued of over 200 animals, until the outbreak of foot and mouth disease in 2001 forced slaughter.

In 2010 the Littlejohns applied to the Council to amend the register to record their rights. The failure to register under the 1965 Act, which had to be done by 1970, would have extinguished any rights then enjoyed and the only way for the Littlejohns to proceed was to apply on the basis of long user/prescription.

In 2014, the authority refused to register those rights and the Littlejohns applied for judicial review of that decision.

The sole issue was whether the authority was correct in deciding that the Littlejohns' application to register rights of common ought to be refused because it fell outside the scope of sch.3 of the Commons Act 2006, which provided for the registration of certain unregistered rights of common created after the registers were originally drawn up.

The judicial review claim failed in the Administrative Court ([2015] EWHC 730 (Admin)) and the Littlejohns appealed to the Court of Appeal, which dismissed the appeal by a majority of 2-1, Sir Terence Etherton C dissenting.

Simply put, the overall intention of the 1965 Act was to establish a definitive register of common land and rights of common. All common land then existing and all rights over such land then existing were to be registered by 1970 failing which the land would no longer be regarded as common land, and any rights not so registered would no longer be exercisable as such.

Section 13 of the 1965 Act made provision for the register to be amended to include any common land coming into existence after 1965 and any rights over it (effected in due course by the Commons Registration (New Land) Regulations 1969) but no provision was made for amendment of the register to include new rights over existing registered common land. In the majority view in the Court of Appeal, Parliament prohibited registration of new rights of common over common land because it intended that they should no longer be capable of acquisition. The overall practical effect was to produce a scheme which was coherent, workable, and fair.

In his powerful dissenting judgement, the Chancellor begins from a different standpoint. Section 1(2) of the 1965 Act cannot be read, he said, as abolishing the right of an owner of common land to grant a right of common, and the correlative right of another to acquire (whether by express grant or prescription) such a right, since such a reading would amount to a serious interference with the rights of owners to do what they wanted with their land. That outcome was justified only where supported by clear statutory words.

Etherton C said: "There is … no coherent explanation anywhere in the statutory material, or admissible evidence as to its interpretation, which states that, let alone explains why, the ability to create rights of common over land registered or registrable before 3rd January 1970 … was abolished". Moreover, if it was not possible to create new rights of common after 1970, then the 1965 Act contained "an impossible circularity" because it allowed for the creation of new common land (s.13) but such common land could only be identified with reference to the rights over it (s.22). His conclusion, on that interpretative analysis, was that s.1(2) of the 1965 Act could not have had the effect for which the Council contended.

So far, three judges have rejected the claim, and only one judge has accepted it. The fact that this appeal raises such a difficult a point of law of such wide interest to the rural community that the appeal was backed by the NFU suggests that the Supreme Court may be approached for a final ruling.

Approval of glyphosate extended by EU

Farmers accustomed to using Roundup and similar herbicide products containing glyphosate will be relieved at the European Commission's last minute change of heart over its approval.

The previous authorisation had been due to expire on 30th June but, after two failures of the Standing Committee on Plants, Animals and Food to agree a renewal of the licence for want of a qualified majority, the Committee at its meeting on 29th June agreed an extension for a limited time, until the European Agency for Chemical Products (ECHA) issues its opinion, by the end of 2017 at the latest.

Commission Implementing Regulation 2016/1056 amending Implementing Regulation 540/2011 was published in the Official Journal and entered into force on 1st July 2016.

In anticipation of the ECHA opinion, a consultation has been issued on the harmonised classification and labelling proposals for glyphosate. The deadline for comments is 18th July. According to the

Commission, the ECHA opinion will be fully taken into account when deciding on subsequent steps.

The Commission has also proposed to the Member States a second text to restrict the conditions of use of glyphosate in the EU. These conditions include a ban of a co-formulant (POE-tallowamine) from glyphosate-based products, obligations to reinforce scrutiny of pre-harvest uses of glyphosate as well as to minimise the use in specific areas such as public parks and playgrounds. Discussions with the Member States are under way.

EU deadline extension for BPS

EU Agriculture Commissioner Phil Hogan has confirmed the intention to extend the date by which member states may make CAP direct payments without any reductions in the rate of reimbursement from the EU to the Member States concerned. Effectively, this measure extends the deadline by which direct payments must be made from 30th June to 15th October 2016.

The concession has been made in response to the difficulties experienced by a number of Member States and regions within them in completing their payments. Under normal rules, the reductions (applicable to the authorities) would be 10% on payments made in July, 25% on payments made in August and 45% for payments made in September, as happened in England on the introduction in 2005 of the Single Payment Scheme.

Mr Hogan stressed that this is "an exceptional measure, which reflects the difficulties that some paying agencies have experienced with the first year of payments under the new CAP. It represents an unprecedented level of flexibility on the part of the European Commission".

The Scottish Government is likely to be the greatest beneficiary of this leniency, having been behind the timetable in making payments since the end of 2015. NFU Scotland chief executive Scott Walker said: "The recent Audit Scotland report estimated that failure to deliver payments by the end of June could have cost the Scottish Government between £40 million and £125 million".

In England, NFU Vice President Guy Smith thought it unlikely to be a significant move, since following the agreement to make bridging payments on account most farmers had received most of the monies due for their claims. However, with a broader brush, and acknowledging that it applies only for 2016, he thought it to be "worrying principle". The disallowance fines for late payments puts pressure on the paying agencies and this relaxation "does not send the right signals to farmers".

CASES IN COURT

Turner v Secretary of State for Communities and Local Government

Town and Country Planning – Green Belt – Assessment of openness – Visual impact only one of several considerations

Court of Appeal
[2016] EWCA Civ 466

Background – Barrack Road in Ferndown, Dorset, consisted of a number of residential and commercial properties placed irregularly along the road. The site the subject of this appeal was on the eastern side of Barrack Road, which had no continuously built-up frontage. The Road was in a designated Green Belt.

On the site was a single static mobile home used for residential purposes. Adjacent was a commercial storage yard used for the storage of vehicles and for preparation, valeting, repair and sale of vehicles and for ancillary purposes. A certificate of lawful use had been obtained for the mobile home and the use of the yard had been established as lawful in a planning appeal decision.

John Turner applied for permission to erect a three-bedroom residential bungalow with associated curtilage. His application was refused and he appealed, arguing that the proposed redevelopment compared favourably with the existing certified lawful development in terms of its outward appearance. The new property, being smaller in terms of volume than the present mobile home taken with the 11 parked lorries related to it, "would not have a greater impact on the Green Belt" and should not therefore be regarded as inappropriate development.

The inspector rejected his appeal, as did Lang J in the High Court. Mr. Turner now appealed further, using essentially the same lines of argument as in the fora below. Specifically, he argued:

(i) the Inspector failed to treat the existing development on the site as a relevant material factor to be taken into account in considering whether the sixth bullet point of para. 89 was applicable, and

(ii) the Inspector wrongly conflated the concept of openness in relation to the Green Belt with the concept of visual impact.

Policy – The matter turned on the interpretation of Section 9 of the National Planning Policy Framework (NPPF).

The provisions relating to inappropriateness of development are at paras. 87-90. Under para.87, the first principle is that inappropriate development is by definition harmful and should not be approved except in "very special circumstances". Those circumstances will not exist unless the harm caused by the proposed development is clearly outweighed by other considerations (para.88).

Several specific exceptions to that principle are set out in para.89, of which the sixth, on which Mr. Turner relied, is: "limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development".

Judgement – As indicated, Mr. Turner contended that the proposed development would not be inappropriate in the Green Belt. The inspector had set out his reasoning against this argument, finding that the issue turned on the impact of the development on the openness of the Green Belt.

Openness, he had said, was essentially freedom from development and related primarily to the quantum and extent of development and its effect on the site. No valid comparison could be made, he considered, between the existing lawful use for a single mobile home and the presence of a much larger permanent structure, albeit only a single storey. The inclusion in calculations of the volume of 11 lorries the contents of which might be included in the new building did not take away from that conclusion.

Mr. Turner argued that the sole criterion of openness as far as the sixth bullet point of para.89 was concerned was the volume of structures comprising the existing lawful use of the site compared with that of the proposed replacement structure. The inspector had therefore erred, he said, by taking into account a wider range of considerations.

Sales LJ, giving the judgement of the court, took the view that the word 'openness' was "open-textured" and incorporated a number of possible factors each of which might be relevant in deciding any particular case. A major element

would be the extent of the present built-up nature of the Green Belt and of the site and its adjacent area before and after the development. Volumetric comparisons would be a material concern, but by no means the only one.

Visual impact was part of the concept of a Green Belt and a measure of extent by which "the unrestricted sprawl of large built-up areas" had been and could be checked.

That said, Sales LJ noted that in *R (Timmins) v Gedling BC* [2014] EWHC 654 (Admin), Green J had suggested that it would be "wrong in principle" to conclude the question of openness by reference to visual impact. His Lordship thought that to stretch the point too far and recommendation that that section of the judgement not be followed.

Nevertheless, the guidance on Green Belt policy contained in *Timmins* remained relevant. Particularly, the NPPF made specific reference to the former policy of PPG2 relating to Green Belts and made it clear that the policy that, as a general rule, no inappropriate development within the Green Belt would be permitted was supported and would continue.

In *R (Heath and Hampstead Society) v Camden LBC* [2007] EWHC 977 (Admin), Sullivan J, speaking in the context of PPG2, referred to the "death of a thousand cuts" whereby although visual intrusion from one single, modest proposal might not be significant, that from an accumulation of such proposals "could be very damaging to the essential quality of openness of the Green Belt". That, in Sales LJ's view, remains relevant guidance in relation to the concept of openness.

The inspector in this case had made no error of approach and his decision was upheld.

R (Waters) v Breckland District Council

Town and Country Planning – Certificate of lawfulness of operational development – Distinction between use and operational development – Assessment of lawfulness includes need to consider whether enforcement action may be taken – Discretion available to LPA in deciding whether to take enforcement action

High Court
[2016] EWHC 951 (Admin)

Background – CCL Holdings Ltd and Crown Chicken Ltd (together, CCL), Interested Parties in this action, and their predecessors had used the site near Kenninghall, Norfolk, for chicken rearing and an animal feed mill since the 1960s. Over the years, some buildings and structures had been added, others removed and some demolished. After modernisation and improvements, the present site comprised some 52 buildings and other structures.

Until about 1979, the use was, in planning terms, wholly agricultural, since the animal feed mill produced specialist feed for the chickens reared elsewhere on the site. The business was sold in about 1980 and expanded by the sale of some of the feed, as a result of which it became part agricultural, part industrial.

CCL purchased it in 1993, and at the time of these proceedings it produced in excess of 200,000 tonnes of animal feed products, about half of which were sold off site.

In May 2011, James Waters complained to Breckland DC (the Council) about an increase in operational hours at the site from 5½ to 7 days per week, including night time. Those complaints were investigated and it was discovered that, although environmental permits covered noise, dust and other emissions from the site's operations, there was no record of planning permission for the original establishment of the feed mill.

Various permissions had been granted for new building and ancillary works, which were mostly described as for agricultural activities. It was unclear, however, to what extent they might have required planning permission and whether they had acquired immunity from enforcement.

It was agreed between the Council and CCL that it would make an application for a lawful use certificate to regularise the position, pending which no further action would be taken.

The application was submitted in November 2011 and on 23rd July 2012 a certificate of lawful development was granted for (a) uses found to have subsisted since May 2002, listed in the First Schedule to the certificate, and (b) buildings erected on or before May 2008, shown on an attached plan.

In February 2014, the certificate was quashed by consent on the limited ground that it mis-stated the date of its application, and expressly without prejudice to Mr. Waters's grounds of claim. Further enquiries and procedures led in July 2015 to the grant of a second certificate of lawfulness in respect of 44 buildings or structures, categorised according to those which had express permission, those which were authorised by permitted development rights and those that were immune from enforcement action due to their age.

Mr. Waters made a further application for judicial review on grounds of two errors of law on the part of the Council:

1) it did not consider the lawfulness of the use of the site before granted the certificate; and

2) it did not take enforcement action against CCL in respect of unlawful use and operational development of the site.

Law – Applications for a certificate of lawfulness of existing use or development are governed by s.191 Town and Country Planning Act 1990. Any person may make such an application and if the local planning authority (LPA) is satisfied that the relevant use or operations are lawful, it must issue such a certificate (sub-s.(4)), following which that use or those operations are conclusively presumed to be lawful (sub-s.(6)).

Section 172, ibid, deals with the issue of enforcement notices and provides that the LPA may issue such a notice where it appears to it:

(a) that there has been a breach of planning control; and

(b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.

Section 173 sets out in detail the required contents of an enforcement notice.

The National Planning Policy Framework (NPPF) and associated Guidance (NPPG) make clear that enforcement is discretionary and, whilst it is important to protect the amenity of an area and maintain the integrity of the decision-making process, it remains an option to take no formal action in cases where it is expedient to do so. It underlines that the balance of public interest will vary from case to case.

Judgement – Lang J emphasised the distinction in s.191 between operational development and use. The section clearly enables an application to be made in respect of (a) any existing use or (b) any operations (sub-s.(1)). The distinction is reflected throughout various relevant provisions of the legislation.

In assessing under s.191(4) the lawfulness of operations, it must be borne in mind that s.191(2) includes within the definition of lawfulness the position in which "no enforcement action may be taken in respect of them" and that "the time for enforcement action has expired or for any other reason".

The question, however, was one of the exercise of planning judgement on the part of the LPA.

Even on Mr. Waters's own case, the buildings and structures under consideration here had been erected many years since and not merely for the purpose of industrial or intensified use.

In the judge's opinion, Mr. Waters had not established that the certificate of lawfulness granted in July 2015 was not itself lawful.

The history of the matter, although rather longer than it might have been, showed that at all times the Council had conducted a fair and thorough investigation of the issues involved. The decision not to take enforcement action while the investigations were continuing and before the decision had been taken whether or not to grant a certificate of lawfulness was reasonable in all the circumstances and could not be characterised as unlawful.

Mr. Waters's application was dismissed.

Lancashire County Council v Secretary of State for Environment Food and Rural Affairs

Town or village green – Commons Act 2006, s.15 – "Locality" and "neighbourhood" – Geographical spread of users across area – Compatibility of registration with statutory purposes – Use with permission of landowner

High Court
[2016] EWHC 1238 (Admin)

Background – Lancashire County Council (LCC) owned land in Lancaster adjacent to a primary school and claimed that it held it in its capacity as local education authority. It consisted, for the purposes of this case, of five adjacent parcels labelled A to E.

Areas A and B were fenced around, Area B being a mowed field. Areas C and D abutted Areas A and B and had previously been the subject of various mowing tenancies, the last of which ceased in 2001. Between Areas A and B and Areas C and D were hedges, some of which were overgrown with brambles. Area E, also adjacent to the school, was overgrown and difficult to access and at certain times contained a pond.

Janine Bebbington applied for the land to be registered as a town or village green, which application was granted in 2015 in respect of Areas A-D after a public enquiry. Area E was not registered.

Law – LCC was one of seven areas chosen to pilot the provisions of the Commons Act 2006 by the Commons Registration (England) Regulations 2008 (SI2008/1961). Section 15 of the 2006 Act provides that an application may be made for the registration of land as a town or village green where: "(2)…(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right lawful sports and pastimes on the land for a period of at least 20 years; (b) they continue to do so at the time of the application…".

The words "or of any neighbourhood within a locality" were first introduced into the Commons Registration Act 1965 by the Countryside and Rights of Way Act 2000.

Judgement – LCC challenged the inspector's decision on the following grounds:

(1) The expression "any locality" meant an administrative area, and as the administrative area in question had changed during the 20-year period, the relevant period of usage could not be shown; the Inspector had erred in holding that it had been shown;

(2) The applicant needed to show that there was a geographical spread of users throughout the locality;

(3) The Inspector ought to have found that the land was held for educational purposes and that registration as a town or village green would be incompatible with that statutory purpose, and thus was beyond the scope of the Commons Act 2006;

(4) She had also imposed too high an evidential standard on the LCC, in reality requiring it to prove beyond reasonable doubt that the land was held for educational purposes, and ignored the presumption of regularity; and

(5) The Inspector ought to have concluded on her findings that the LCC had exercised control over the land, and so had given permission for its use; her conclusion that there had been no permission was irrational.

Ouseley J considered each of those grounds in turn.

As regards the "locality", Ms Bebbington had referred to the electoral ward known as Scotforth East. It was not in dispute that an electoral ward could constitute a locality for these purposes, but LCC pointed out that Scotforth East had been abolished and recreated with different boundaries in 2001 and had thus not existed for the full 20 year period so as to support the application.

Considering the inspector's decision letter, the judge found that she had dealt with the question of the altered nature of the ward as one of fact and degree, which conformed with a common sense and practical approach. The change had, in its context, not been significant.

One aspect which might, as a general point, bear upon such considerations was whether a significant number of inhabitants of the locality, as changed, could still be said to have used the land as of right for 20 years. However, that point was not argued before her and thus she was not required to assess it.

The format of the change of boundaries – abolition of the ward and its replacement with another with an identical name, as opposed to alteration of existing boundaries – did not affect the conclusion, since the outcome was the same.

Even if the replacement ward was not a 'locality' for the purposes of the Act, the inspector would "obviously and necessarily" found that it constituted a 'neighbourhood' and her decision would have been no different.

On the matter of the spread of users, LCC argued that users should come from throughout the locality, not merely from part only of it, and the inspector had wrongly ruled that to be irrelevant.

In fact, on analysis of the decision letter, Ouseley J found that she had considered it at some length before reaching her conclusion. She had noted that no such requirement existed in the terms of the statute. The judge could not see what statutory purpose would be served by preventing registration in the absence of spread and agreed with the inspector that such a requirement would be a considerable additional hurdle. Review of the authorities found no support for it.

The third ground of appeal – conflict between registration and the statutory purpose for which the land was held – actually comprised two related issues and merged with the fourth.

The evidence of LCC's title revealed that the several areas had been acquired at different times under different authorities. The inspector had concluded that although there was no suggestion the land was held other than for educational purposes, "it is not possible to be sure" that that was the legal position. In LCC's submission, that reflected too high a burden of proof.

Ouseley J noted that the inspector had specifically referred to the required standard of proof elsewhere in the decision letter, but it was not possible in his view to infer merely from the use of the word "sure" that she had forgotten that in relation to this question.

The judge examined in detail the inspector's findings regarding the evidence of title and purpose of the acquisition of the land and reviewed the authorities in cases where that purpose was uncertain. He did not find any basis for a conclusion that the inspector's decision was irrational. Although it might permit a different conclusion, it did not do so strongly enough to warrant that finding.

It was, more importantly, the case that her reasoning and conclusion would have been affected by the way in which the matter developed in the inquiry. LCC would have been aware of that and could have taken issue with it there and then.

Given that conclusion, it was strictly unnecessary to determine the relationship between the statutory purposes for which the land was held and the recreational purpose, but Ouseley J considered the point nevertheless.

LCC argued, as it had before the inspector, that registration as a town or village green would render fulfilment of those purposes impossible, not to say illegal, and likened the case to that of *R (Newhaven Port & Properties Ltd) v East Sussex CC* [2015] UKSC 7 (see *Farm Law* No.217, March 2015). The judge held that, while the loss of certain of the areas might be inconvenient in varying degrees, it could not be said that LCC's general education functions required the use of them for educational purposes.

On the final ground, that of permissive use of the land, Ouseley J drew attention to the difference between a use which is neither by force, stealth or permission (*nec vi, nec clam, nec precario*) over 20 years, but which has been silently accepted by the landowner, and one which, from the landowner's conduct, could be said to be permitted.

The inspector had considered various acts on the part of LCC, such as requiring dogs to be kept on a lead; restricting users to the perimeter areas; and moving classes back into buildings for safety reasons. Each was alleged to have indicated a permission for the public use relied upon by the application, but none had been found sufficient to infer an implied permission for that use. The judge held this was a matter for the inspector's conclusion which could not be disturbed unless irrational, which it was not.

The appeal was dismissed on all grounds.

Allen v Commissioners for H.M. Revenue & Customs

Capital Gains Tax – Business Asset Taper Relief – Conacre – Definitions of 'farming', 'occupation' and 'husbandry' – Legal nature of conacre – Need to consider each case on its own facts

First-Tier Tribunal (Tax Chamber)
[2016] UKFTT 0342 (TC)

Background – John Carlisle Allen and his brother Andrew owned a parcel of land in Cookstown, Co. Tyrone. It had been in his family for upwards of 100 years, and the brothers had inherited it in 1998. For approximately 30 years, it had been down to grass and was let to a neighbouring farmer, Samuel Crooks, for grazing.

The agreement was by way of conacre and, although in most years it was made orally, the Tribunal found the terms to be the same from year to year. The land would be made available from 17th March to 1st November each year for a fee (described as a licence fee, as opposed to rent), payable in arrears, of £1,000.

During the period of his occupation Mr. Crooks was not allowed to slurry the land, but only to use farmyard manure. Occasionally, the Allen family would supply fertiliser "when the grass was getting weak". Control of the animals and liability for damage was with Mr. Crooks.

In between the seasonal agreements, Mr. Crooks would have no access to the land, which would be entirely at the disposal of the Allens. With no objection from them, animals belonging to non-owning family members or to associated businesses would graze during the winter. Water was supplied and paid for by them the year round, and they inspected and where necessary maintained the fences in stock-proof condition and annually cut the hedges. Weeds were cut by a contractor hired by the Allens.

The Allen family ran a livestock mart in connection with which the land was used occasionally for temporary housing of animals, usually only overnight and once every two or three weeks, throughout the year, during the periods of conacre by arrangement with Mr. Crooks and at other times also.

The issue for the Tribunal was the Closure Notice issued by HMRC disallowing Business Asset Taper Relief (BATR) from Capital Gains Tax on the sale of a parcel of the land. BATR had been disallowed on the grounds that Mr. Allen was not carrying out the business of farming. Whilst HMRC accepted that he had carried out come work on the land, it said that the acts of husbandry carried out were insufficient to be classed as 'farming'.

Law – The Income and Corporation Taxes Act 1988, s.832(1), describes farmland as land occupied "wholly or mainly for the purposes of husbandry" and "farming" is construed accordingly.

The definition of "farming" in the Income Tax Act 2007, s.996, uses words to the same effect.

Agriculture Act 1947, s.11, provides that good husbandry involves "maintaining a reasonable standard of efficient production, as respects both the kind of produce and the quantity and quality thereof, while keeping the unit in a condition to enable such a standard to be maintained in the future", taking into account "the character and situation of the unit, the standard of management thereof by the owner and other relevant circumstances".

Decision – The Tribunal outlined the principles of conacre, which it described as having become established across the island of Ireland in the 19th century and which reflected the socio-economic conditions of the time.

It involved the farmer being given access to the land for planting, cultivating and harvesting of a crop. The land and the crop belongs at all times during that process to the landowner and was paid for by the farmer at the end of the period, either in money, by a share of the crop, or in acknowledgement of labour during the process.

Alternatively, conacre operates as a form of agistment, akin to a profit à prendre and not amounting to a demise of the land or a parting with possession of it (Holmes LJ in *O'Flaherty v Kelly* [1909] 1 IR 223).

It was important to note that, although the terms 'landlord' and 'tenant' were used loosely in relation to conacre, neither form of conacre – for cropping or agistment – amounted to a lease. It is a legal institution *sui generis*, without any equivalent in England and Wales.

On the question of occupation, the Tribunal disagreed with HMRC's comments that "Mr. Crooks farmed the land and … alone was in occupation of the land". This provided no authority on the nature of Mr. Crooks's occupation nor an analysis of why, if he was in occupation, Mr. Allen could not be and did not engage with "the distinctive legal character" of conacre. It noted that the two authorities referred to in HMRC's *Businsess Income Manual*, which was relied on by HMRC, both related to land in England.

The Tribunal found that Mr. Allen and not Mr. Crooks had been in occupation for the whole period of his ownership. If that were not correct,

the occupation of Mr. Crooks applied for only 7½ months of the year and did not oust Mr. Allen's.

HMRC argued and the Tribunal agreed, that mere occupation is not enough to satisfy the test of farming; the occupation must be "wholly or mainly" for the purposes of husbandry.

Whilst the tax legislation does not define husbandry, the so-called rules of good husbandry set out in s.11 Agriculture Act 1947 provided some guidance. Tested against its criteria, the provision of fertiliser, clearing of weeds and other controls of the quality of pasture, and the maintenance of fencing, taken with the undisputed direct control of the Allens for 4½ months of each year, satisfied the test of occupation for purposes of husbandry.

On those grounds, it found that the land was "farm land" and that BATR applied.

As a cross-check, it considered the case of *McCall and Keenan v Revenue & Customs Commissioners* [2009] NICA 12, in which land provided on conacre had been found not to be occupied wholly or mainly for the purposes of husbandry, but rather as an investment.

It noted significant differences in the facts of that case compared with circumstances of the Allens' occupation. The land there had been occupied only by the grazier's animals and there was no obligation on the owner to fertilise it. Such works of maintenance as were carried out on the owner's behalf to fences, drains and the like and by way of weed control were not husbandry but in maintenance of the investment value.

Further, *McCall* had made clear that each case of conacre needed to be considered on its own facts. On the facts of this case, the appeal was allowed.

Jordan v Hughes

Agricultural Holdings Act 1986, Part IV – Succession on death – S.39(8): suitability – Farming ability, mental condition and financial resources of applicant

First-tier Tribunal (Agricultural Land & Drainage) (2016) ALT/M/S/2013/016

Background – William Jordan applied for a tenancy of a farm in Worcestershire on the death of his father, Christopher. The respondent, Mary Hughes, William's great aunt, owned the freehold jointly with Christopher's widow, Cathrine, who was a party to the action but took no part in the proceedings.

The farm consisted of some 67ha (165 acres) and was farmed by the partnership of W.B. Jordan and Sons as part of a larger enterprise consisting of mixed freehold and tenanted land totalling approximately 700 acres. W.B. Jordan was the grandfather of Christopher and on his death in 1967 he left the freehold of the holding to his children, Arthur and Mary (the respondent).

Arthur carried on the business of his father and was eventually joined by his sons, Christopher, Stephen and Brian. On Arthur's death in 1991, his share of the business passed to his widow, Margaret, who died recently before this hearing.

Arthur had a tenancy of the holding under the Agricultural Holdings Acts to which Christopher succeeded on his death, with effect from June 1993. The freehold became vested on Arthur's death in Christopher and Mary jointly.

The holding comprised, in addition to the land, a listed 4-5 bedroom farmhouse, two semi-detached cottages, and a range of traditional and modern farm buildings. Cathrine and her younger son Tom occupied the farmhouse; William lived in one of the cottages with his wife and two children under three years of age.

Christopher died in 2013, leaving an estate worth £1,597,000 which was inherited entirely by Cathrine. Christopher took his own life, which precipitated in William a series of events which caused him to require mental treatment. There were episodes of disturbed and agitated behaviour directed by him towards Mary, who was then in her late 80s.

Mary accepted that William was eligible to succeed under Part IV of the Agricultural Holdings Act 1986; the question was whether he was suitable having regard to the criteria in s.39(8) of the Act.

Mary opposed the application on three grounds: (a) that William lacked the ability to farm the holding; (b) he had mental health problems which, although she accepted they did not of themselves prevent him managing a farm, required the taking of medication in order to minimise the chance of relapse; and (c) he had insufficient financial standing.

Law – Agricultural Holdings Act 1986, s.39(8), requires the Tribunal in determining questions of suitability to succeed to a tenancy of a holding to have regard to:

(a) the extent to which the applicant has been trained in, or has had practical experience of, agriculture;

(b) the age, physical health and financial standing of the applicant; and

(c) the views (if any) stated by the landlord on the suitability of the applicant.

Decision – The Tribunal dealt first with the question of William's mental health. It heard from medical specialists instructed by either party, who agreed that, while William continued to take the drugs he had been prescribed, the running of the farm would be unlikely to have any substantial negative impact on his mental health.

The Tribunal acknowledged the legitimacy of Mary's concerns, but noted that the medical evidence was that there was an "effective early warning system" in place in the event that he suffered undue stress. It would be "unjust and wrong" to find him unsuitable on that basis. It also noted that he had been "calm, helpful and lucid" in giving his evidence.

On the question of his farming background, Mary brought into argument the fact that, in spite of being educated at agricultural college and 31 years old at the time of his father's death, William had not been made a partner in the family business. Brian gave evidence that the question had simply not arisen since the business had four partners and that was enough.

There was nothing significant, in Brian's view, in William's farming the holding on his own behalf. In fact, with the expansion of the rest of the family "now was a good a time as any" for that to happen. He confirmed that the partnership would assist by offering William contracting duties as they presently did from time to time.

The Tribunal found that the nomination in Christopher's will of Brian and not William as successor to the holding was neutral. It had no evidence of Christopher's thinking at the time he prepared his will and there were a number of possible explanations. It declined to draw any inferences that Christopher considered William unsuitable.

The Tribunal conducted a site visit to the holding and found the standard of farming to be satisfactory although there was "need of further investment in the short to medium term".

The question of William's financial standing was the subject of the most debate. Accounts were submitted of William's farming business based on the holding from October 2014 to April 2016. It was pointed out on Mary's behalf that, were the direction made as sought, costs such as rent, council tax, water, insurances, etc. would increase beyond the figures shown in those accounts.

Experts for either side produced "broadly equivalent" budgets. William's agent showed a small profit, Mary's a loss, but the difference was accounted for by the inclusion in the former figures of an allowance for agricultural contracting work, of which Mary's agent was not aware. He commented only that to do that work as well as look after the farm would allow William little time for family or recreation.

Taking into account a small financial benefit to be derived from the cottages, the Tribunal found that it would be possible for a profit to be achieved, albeit the margins would be tight and the profit modest.

William's cash reserves were assessed and it was noted that an overdraft facility had been confirmed to him should he obtain the tenancy. Most significantly, Cathrine had confirmed her support by way of gifts and loans from her own not inconsiderable resources. On that basis William's financial standing was found sufficient to support the tenancy.

FOCUS

Planning for Gypsies and Travellers in 2016

Matthew Knight, Knights Solicitors, Tunbridge Wells

There are an estimated 60,000 Gypsies and Travellers who live in caravans or tents and who wish to continue their nomadic way of life for at least part of each year. About 20% of these are technically homeless (without a lawful place to station their caravans or pitch their tents) due to the significant shortage in suitable pitches throughout England and Wales.

Over the last 50 years the situation has been affected by a series of political and legislative decisions in relation to accommodation for Gypsies and Travellers. The Caravan Sites and Control of Development Act 1960 (CSCDA) was created to control private caravan sites requiring a site licence for each, therefore planning permission had to be obtained. Section 23 of the CSCDA gave local planning authorities (LPAs) the power to close common land to Gypsies and Travellers; in contrast s.24 gave the LPAs the power to provide Gypsy & Traveller sites thus compensating for the closure. The LPAs made extensive use of s.23 but not s.24. Labour saw this as a problem and tried to rectify it with the Caravans Sites Act 1968 (CSA) by making the s.24 power an obligation.

In 1994 the Conservative government passed the Criminal Justice and Public Order Act 1994, repealing much of CSA, including the duty to provide authorised sites. Further powers were given to the Police and LPAs under ss.61 and 77 to remove Gypsies and Travellers whenever they parked their caravans on an unauthorised site. It also issued Circular 1/94 which contained new planning advice for LPAs on assessing areas to build Gypsy and Traveller sites, but this was largely ignored. Unfortunately the effect of these policies and legislation rendered it difficult for Gypsies and Travellers to continue to live their traditional way of life in a lawful manner.

In 2006 the Labour government revoked Circular 1/94 replacing it with Circular 1/2006 *Planning for Gypsy and Traveller Caravan Sites* encouraging LPAs to implement them. The Localism Act 2011 abolished these powers under the Conservative/ Liberal Democrat Coalition government.

In 2012 the Coalition government also revoked Circular 1/2006, including the *Guidance for Travelling Showpeople Sites* contained in Circular 04/2007, and replaced them with *Planning Policy for Traveller Sites* (PPTS). The present Conservative government has modified the

position further with amendments to PPTS which came into effect at the end of August 2015. (For the current policy, see *www.gov.uk/government/uploads/system/uploads/attachment_data/file/457420/Final_planning_and_travellers_policy.pdf*)

The planning policy for Gypsy and Travellers sites in Wales can be found in WAG Circular 30/2007.

The modified PPTS is the document that can guide Gypsies and Travellers and those involved in making planning decisions in England on what needs to be taken into account when making those decisions. The aim of the Conservative/Liberal Democrat Coalition government in 2012 was "to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life of travellers while respecting the interest of the settled community". LPAs are required to have a 5 year supply of sites to meet the identified needs of Gypsies and Travellers.

The 2015 modifications aim to provide proper support for the Gypsy and Traveller community – distinguished in the revised PPTS from "travelling showpeople" – who lead a "genuine traveller lifestyle" whilst preventing illegal development by those developers who pretend to be Gypsies and Travellers but are not.

"Gypsies and travellers" are defined at Annex I of PPTS as persons of a nomadic habit of life irrespective of race, origin, and including those that on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily or permanently, but excluding members of an organised group of travelling show people or circus people travelling together as such.

The onus is on those who do live a 'genuine traveller lifestyle' to prove it. However, no guidelines are provided in the PPTS to that end which might enable developers to assess their position. Until that blurred area is addressed and defined, it risks providing a loophole causing hindrance to LPAs in proper implementation of the policy.

Applications for planning permission for Gypsy and Traveller sites should be determined in accordance with the LPA's Development Plan unless material considerations indicate otherwise.

The government's aim in respect of the Gypsy & Traveller sites are detailed within para.4 of PPTS. Essentially it is to ensure LPAs make their own assessments and work collaboratively to identify sites whilst protecting not only Green Belt land but also sites protected under the Birds and Habitats Directives, Sites of Special Scientific Interest, Areas of Outstanding Natural Beauty, National Parks and local green spaces from inappropriate development.

This is to enable suitable sites to be developed, decreasing overall tension, and allowing better access for education, health care, and employment, with the ultimate object of not only benefiting the environment in the countryside but also smoothing relations between the two communities.

Paragraph 6 details how LPAs should compile the evidence needed. The overarching goal is to use early and effective community engagement allowing cooperation with Gypsies and Travellers giving the LPA a robust evidence base to establish gypsy and traveller accommodation needs. When producing the plans, according to para.9, the LPAs should have a supply for 5 years' worth of sites, identify a supply of specific developable sites for years 6-10 and where possible for years 11-15 after that. In considering this they should confer with other LPAs to ensure a balance between them whilst keeping sustainable development and the environment in mind.

Deliverable sites are those that are available now, therefore they should remain as such until the relevant planning permission expires. Developable sites are in a suitable location for housing development with reasonable prospects that it will be consented at the point envisaged.

When determining planning applications for Gypsies and Traveller sites LPAs should take into account several factors such as the availability or lack of traveller accommodation in combination with the specific circumstances of the applicant. LPAs must plan sites in such a way that they positively enhance the environment and increase its openness, promoting a healthy lifestyle for resident Gypsies and Travellers, such as providing areas for children to play whilst not enclosing the site with hard landscaping that may give the impression of the site being cut off. They should also consider making effective use of previously developed land including former industrial and commercial sites.

In all of this, LPAs should have consideration for art.8 of the European Convention on Human Rights when granting planning permission. As Gypsies and Travellers are in a vulnerable position due to being a minority there is a positive obligation on Contracting States to facilitate the Gypsy and Traveller way of life.

Enforcement action is available against those that set up unauthorised sites available to LPAs under the standard provisions of the Town and Country Planning Act 1990. Calls for stronger deterrents for developers of illegal encampments by creating new criminal offences have so far been resisted, but the Secretary of State for Communities and Local Government, Greg Clark, underlined the focus of the 2015 revisions on proactive policy as opposed to reactive, saying that it "strengthens the hand of councils to tackle unauthorised development". Whether that is so in practice remains to be seen.

LPAs are in a difficult position: on the one hand they have a statutory duty to meet the planning needs of Gypsies and Travellers in their areas; on the other they need to meet the planning needs of the settled community who desire lives free of the security and environmental problems often associated with Gypsy and Traveller sites. Freehold owners with homes near to potential Gypsy and Traveller sites are also fearful of the adverse effects of the proposed development on the values of their homes: a consideration which LPAs are not supposed to take into account. These fears are sharpened because for most owner occupiers their home is their principal capital asset and a new Gypsy or Traveller site may well act as a severe blight on that value.

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