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Mr Steve Weaver
Planning Officer
Havant Borough Council

BY EMAIL ONLY

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08 November 2019

Dear Mr Weaver

MR AND MRS CHRISTOPHER SNELL – PLANNING APPLICATION APP/18/00943

A. Introduction and preliminary observations

1. This letter and its enclosures are intended to address the impact of traffic to and from the Tournerbury Woods Estate for those activities which are the subject of Planning Application APP/18/00943 (“the Application”), and to assist the Council with a proper understanding of the access through Tournerbury Farm.
2. This letter and, in particular, the enclosed Transport Statement and Report prepared by Intermodal Transportation Ltd militate towards granting the Application.
3. By way of a preliminary observation and having been watching the progress of the Application carefully throughout, I am concerned that the Council’s approach to consultation is “gold plated”, when compared with that of other local planning authorities, and, more importantly, as to the impact and implications of that approach. It appears to have emboldened those who wish to object and, perhaps, to have given them a sense that anything can be said with impunity from liability in the torts of defamation and slander of title. While qualified privilege might attach to representations about a planning application up to a point, qualified privilege has its limits: for example, where statements are demonstrably untrue or motivated by malice.
4. I draw this to your attention in the context of Section C below. As you know, the NFU made representations on 16 January 2019 on behalf of and on the factual instructions of Mr Graham and Mrs Sue Phillips of AG Phillips & Son Ltd which went to the issue of amenity and the connected issue of the extent of my clients’ right of way through Tournerbury Farm. I invited the NFU to withdraw that letter on the basis that it libelled my clients Christopher and Alice Snell and slandered their title. Albeit without admission of liability, the NFU did so and apologised in writing to my clients. I might have advised the same course of action in relation to certain representations made by others

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5. I invite the Council to consider the submissions at Section C below in light of that background – and to consider carefully the appropriate weight to give to any further response on behalf of Mr and Mrs Phillips and/or AG Phillips & Son Ltd. More generally, if the Council is going to take a very proactive approach to consultation, as opposed to taking the more usual approach of just posting an applicant's submissions on its website, it should be conscious that it will, itself, likely stimulate greater response. It should accordingly take great care in assessing the weight it attributes to such responses.

B. Intermodal Transportation Ltd Transport Statement and Report on Right of Way

6. As above, I enclose copies of the following documents prepared by Chris Glegg BSc CEng MICE MIHT of Intermodal Transportation Ltd:
- Transport Statement.
 - Highway Review of Right of Way through Tournurbury Farm.
7. The former speaks for itself. As to the latter, I draw to your attention the following observations and conclusions:
- Traffic movements using the private right of way have been assessed based on actual event guest numbers and from traffic counts in 2019.
 - The assessment of the capacity of the private right of way has been based upon the highest event attendance of those surveyed in 2019 and the worst case peak hour flow has been adopted to review the highest traffic demand in any one hour.
 - The capacity of the private way has been assessed assuming worst case assumptions regarding 'shuttle' working along the restricted sections of the private way that only allow for one-way movements at any given time.
 - The assessment has shown that even the restricted sections of the private way have ample spare capacity, taking into account extremely robust assumptions.
 - The extent of potential delay to those accessing the house and buildings at Tournurbury Farm would be modest and in the context of a typical journey to and from the point of origin (Tournurbury Farm) on the wider road network (public highway) would be minimal.

C. Amenity in the planning context

8. The Local Plan does not provide significant guidance as to how the Council should approach the issue of amenity. Policy CS16, which is aimed more squarely at operational development, provides that:

"Planning permission will be granted for development that is designed to a high standard, which helps to create places where people want to live, work and relax. All development should demonstrate that its design:

1. *Responds to, draws inspiration from and respects local context and:*
 - a) *Identifies and responds positively to existing features of natural, historic or local character within or close to the proposed development site;*
 - b) *Integrates with existing local landscape features, promotes wildlife and biodiversity and/or applies characteristics of the local area into the design of a scheme wherever possible to create variety and interest;*
 - c) *Uses the characteristics of the locality to help inform the design of the new development including heights, massing, existing buildings lines, plot widths and depths, materials and proportions of windows and doors;*

- d) *Is well connected to and integrates with the immediate local area and the wider area by linking to existing pedestrian and cycle routes and encouraging people to use public transport where possible; and*
- e) *The development does not cause unacceptable harm to the amenity of neighbours through smell, the loss of privacy, outlook, noise and overlooking.* (My emphasis)

9. To the extent that Policy CS16 is on point in these circumstances:

- 9.1 The test and threshold is *unacceptable* harm to the amenity of the neighbours, not any harm. That is to be judged objectively – and please see below as to the basis on which AG Phillips & Son Ltd agreed to purchase Tournerbury Farm in 1987 and has since developed it.
- 9.2 The material harm in question is only through smell, loss of privacy, outlook, noise and overlooking.
- 9.3 Nothing in the Application can have any impact in terms of smell and in terms of outlook or overlooking.
- 9.4 As to privacy and noise, AG Phillips & Son Ltd purchased Tournerbury Farm with the reservation of a right of way at all times and for all purposes with or without vehicles through the middle of it (see para.11f below). The farmhouse and other residential dwellings are in exactly the same locations in 2019 as they were in 1987. It developed Tournerbury Golf Centre on its own doorstep. It also substantially increased the built footprint of the Farmyard around and close to the Right of Way, rather than away from it (compare the enclosed copies of aerial photographs of Tournerbury Farm taken in 1986 (monochrome) and on 22 April 2015).
10. Having proper regard to Policy CS16, to the extent that it is relevant, the Council should grant the Application.

D. Private right of way

11. To assist the Council to understand the relevant private law context when it comes to considering and determining the Application, I have explained it below, including with the benefit of advice from Samuel Laughton of Ten Old Square. I **enclose** copies of the following documents:
- Land Registry Official Copies and Title Plan for title SH14945 (my clients' title, including woodland, harbour frontage and Woods Cottage: together "Tournerbury Woods").
 - Land Registry Official Copies and Title Plan for title HP342493 (AG Phillips & Son Ltd's title: "Tournerbury Farm").
 - Conveyance of 17 November 1987 of Tournerbury Farm ("the 1987 Conveyance").
12. By the 1987 conveyance, my clients' father/father-in-law reserved:
- "unto the Vendor [i.e. himself] a right of way in favour of the Vendor and his successors in title being the owners or occupiers for the time being of Tourn Bury [sic] Wood Tourn Bury [sic] Plantation and Wood Cottage and their tenants agents licensees and others authorised by them at all times and for all purposes with or without vehicles over and along the tracks shown hatched black on the said plan making good any damage thereby caused[.]"*
13. My clients are the late Mr Snell's successors-in-title, via his widow Mrs Francesca Snell. The Right of Way benefits the land which is now registered as title SH14945.

14. By agreement with AG Phillips & Son Ltd in the 1987 Conveyance, the Right of Way is reserved without limitation:
- 14.1 It is without limitation as to the type of user: the owner of Tournerbury Woods, its agents and licensees could lawfully exercise the Right of Way on foot or in an articulated lorry, if it so chose.
- 14.2 It is without limitation as to the time of user: the owner of Tournerbury Woods, its agents and licensees could lawfully exercise the Right of Way at 3am or 3pm or any time between those times, "24/7/365", if they so chose.
- 14.3 It is without limitation as to the purpose of user: it will accommodate any type of user of title SH14945.
- 14.4 It is without limitations allowing A G Phillips & Son Ltd to control user: although the parties could have agreed that user was subject to a speed limit or gates, they did not do so.

Will the Right of Way accommodate a change of use of Tournerbury Woods?

15. The answer is in the affirmative. The relevant law is summarised in Gale on the Law of Easements (20th edn) at 9-61 as follows:

"[I]t appears now to be settled that, subject to any restriction to be gathered from the words of the grant or the surrounding circumstances, a right of way may be used, in the manner authorised by the grant, for any purpose and to any extent for the time being required for the enjoyment of the dominant tenement or any part of it, irrespective of the purpose for which the dominant tenement was used at the date of the grant."

16. See also *White v Grand Hotel, Eastbourne* [1913] 1 Ch 113, where the dominant tenement (ie, the title benefitting from the right) was turned from a private dwelling-house into a hotel. The Court of Appeal held that a right of way granted for general purposes is not to be restricted to access to the land merely for such purposes as were reasonably required at the date of the grant. Cozens-Hardy MR said at 116:

*"The plaintiffs' main point was this: they said that the right of way ... was limited in its nature; that it was only a right of way for what I may call domestic purposes as distinct from trade purposes; and that it was only for such use as could reasonably be expected to be in the contemplation of the parties at the time when the defendants' house ... was a private residence, and ought not to be altered now that [it] is turned into a garage. ... we have come to the conclusion that there is no ground for limiting the right of way in the manner suggested. ... It is a right of way claimed under a grant, and, that being so, the only thing that the Court has to do is to construe the grant; and unless there is some limitation to be found in the grant, in the nature of the width of the road or something of that kind, full effect must be given to the grant, and we cannot consider the subsequent user as in any way sufficient to cut down the generality of the grant.
... I think that the law is settled clearly and conclusively by the decision of the Court of Appeal in United Land Co. v. Great Eastern Ry. Co. I, therefore, do not differ in any way from the view taken by Joyce J, that the right of way is not to be restricted to access to the land merely for such uses as were reasonably required at the date of the grant."*

17. Gale goes on to suggest that, "It is still a question, however, whether a description, in the grant, of the *terminus ad quem* limits the dominant owner to user for the purposes of that terminus as it was at the time." It is, however, over 150 years since Parke B said in *Henning v Burnet* (1852) 8 Ex 187 at 192 that:

"No doubt, if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tan-yard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered." (emphasis added)

18. In *United Land Co v Great Eastern Railway Co* (1875) 10 Ch App 586 at 590, Mellish LJ commented that:

"No doubt there are authorities that, from the description of the lands to which the right of way is annexed, and of the purposes for which it is granted, the Court may infer that the way was intended to be limited to those purposes. But if there is no limit in the grant, the way may be used for all purposes." (emphases added).

19. Here, the right of way, as reserved, does not contain the sort of description of the dominant tenement or purposes for which it is granted, that would, on the basis of the above cases, prevent the Right from being used for all purposes. The phrase '*Tourner Bury Wood Tourner Bury Plantation and Wood Cottage*' is clearly intended merely to identify the dominant tenement, rather than to restrict the use of the Right of Way. The reservation falls well within the principle set out in *White v Grand Hotel* above: any change of use of Tournerbury Woods should not of itself have any effect on the use of the Right of Way.

Excessive user?

20. The answer is in the negative. In summary and as Intermodal Transportation Ltd's report acknowledges, there is a limited number of days annually where there is traffic of any intensity and, within that limited number of days, limited periods of user with any intensity.

Proper construction of the 1987 Conveyance

21. The proper construction of the 1987 Conveyance starts with the document itself: the analysis above proceeds on the basis that extrinsic evidence, for example, as to what the parties actually intended is not necessary to resolve any ambiguity. The 1987 Conveyance is sufficiently clear on its own terms.
22. Beyond the question of interpretation and from contemporaneous evidence, the current owner of Tournerbury Farm purchased it in 1987 and agreed to the reservation of the Right of Way with its eyes wide open as to the possibility of any sort of development of Tournerbury Woods, including types of development which would lead to much greater use of the Right of Way through Tournerbury Farm than the Application would allow in the planning context. (AG Phillips & Son Ltd's business in 1987 was building and development, not farming, and it was explained in terms to their solicitor that Tournerbury Wood was retained with the possibility of commercial development, residential development or even a commercial forestry operation.) In that light, the Council should consider carefully the weight it attaches to the representations made by or on behalf of AG Phillips & Son Ltd, its directors and shareholders as to the impact of user of the Right of Way, especially where those representations are underscored with an apparent moral indignation as to any increase in user since 1987.
23. I emphasise that I have addressed private law property issues at paras.11-24 of this letter not because I am professionally naïve as to the distinction between public law planning considerations and private law property issues; nor because I am encouraging the Council to start taking into account irrelevant considerations. I have done so, rather, because the Council should understand the property context fully: just as it is a given that anyone driving along the public highway that is Tournerbury Lane to/from Tournerbury Woods is entitled to do so, it is a given that anyone agent or invitee of my clients driving through Tournerbury Farm to Tournerbury Woods is entitled to do so.

E. Conclusion

24. Having regard to the report of Intermodal Transportation and to the limited policy of relevance in the Local Plan and with a proper contextual understanding, the Council should take the approach that the Application is acceptable in terms of its impact amenity and transport terms.

Yours sincerely

JAMES PAVEY
PARTNER
For and on behalf of IRWIN MITCHELL LLP

Sent electronically
Read and approved by James Pavey but not signed

Enc: