

THRINGS

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17 March 2022

Our Reference: MCK/A4274-4

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Dear Mr. Weaver,

RE: Tournerbury Woods, Tournerbury Lane, Hayling Island, Hampshire, PO11 9DL

Application APP/21/01310 ("the Application")

1. Our client has requested that we clarify a number of matters raised by HMPC Ltd in its correspondence to you of 24 February 2022 ("HMPC Letter"). There is absolutely no value to the local planning authority's officers if our correspondence deals at length with all the points already dealt with by AGP among that voluminous and verbose correspondence. When taken individually and holistically the arguments presented in the HMPC Letter are weak and misconceived, and the legal points are so much weaker so that they may be safely disregarded.
2. However, we have set out a limited response to some of the new points with each heading taking an extract from the wording of the HMPC Letter. Accordingly, we make these rather self-evident and concise thematic points in riposte to extracts from that letter.

"Private amenity concerns"

3. The reason for refusal of the previous application (appeal proposal) ought not to be misunderstood or narrowed. The current proposal is unfavourable in terms of the living conditions and for the business enterprise for all the reasons articulated by the local planning authority:

"on-going risk of noise and disturbance to occupiers of the Farm dwellings; and the risk of conflict between visitor movements and the safe and satisfactory functioning of the farmyard activities as a whole."

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“There is no third -party land within the application site” and “the track through Tournerbury Farm lies outside of this planning application”.

4. This is a demonstrable case of a statement that appears wholly misconceived and quite remarkably uninformed.
5. As we understand it HMPC Ltd should be expected to be familiar with the location plan submitted with the Application.
6. We refer the local planning authority to the lines edged red of the location plan submitted with the Application 29 November 2021 (Enclosure 1)¹ and the HM Land Registry Official Copy Register and Plan showing part of the land is owned by A G Phillips And Son Limited (Enclosures 2 and 3).
7. The upshot is that AGP do own part of the Application land and it means that the appropriate certificate has not been completed by the applicant. It is accepted by AGP that there is no requirement that the Applicant should own or hold any legal interest in the application site, but that is not the same as suggesting that the procedural requirements ought to be dispensed with entirely when the land within the red line is not owned solely by the Applicant.
8. Article 13 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (DMPO) requires notice of the application to be served upon all persons who at the beginning of the period of 21 days ending with the date of the application were owners² of any of the land to which the application relates. It is irrelevant whether the ownership of the land changes hands during the 21-day period or subsequently.
9. A copy of any article 13 notice need not be submitted with the application but a certificate that the requisite requirements have been observed must be given under DMPO article 14.
10. As a matter of law, section 65(5) provides that a local planning authority may not entertain any planning application unless the requisite notices have been served: see Appendix 1 (underline emphasis added). A failure by the local planning authority to comply with this requirement exposes the local planning authority to the risk of a legal challenge to the grant of any planning permission in circumstances where this failure remains uncorrected at the date of the issue of a notice of planning permission
11. No evidence of the service of the notice having been served has been provided to the local planning authority.
12. The Certificate A provided with the application is the wrong certificate. Our clients require written confirmation from the local planning authority that this planning application will not be determined until this defect is remedied by the applicant. Certificate B should be submitted by the Applicant and proper notice given to AGP. The Applicant should not rely on the incorrect address used for serving notice in the previous application.

“the potential loss of private amenity”

13. The application presents an amenity issue, a business risk issue and safety issues. There is no point in repeating submissions already made.

“Although third parties comment about the track itself and its suitability, the extent of the rights of use, easements and potential conflicts along its length because of competing uses, there has been no substantive challenge from any party”

14. No fair minded and informed local planning authority could accept this proposition. The extent of rights, conflicts and so on have been disputed throughout the application process.

¹ The application must include a plan enabling the land to be identified and that the normal practice is to identify the land by marking a red line around the site Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595), article 7(1)(c)(i).

² An 'owner' is defined as any person who is the estate owner in respect of the fee simple in the land or is entitled to a tenancy of the land granted or extended for a term of years certain of which not less than seven years are remaining, or in the case of applications prescribed by development order, is entitled to an interest in any mineral so prescribed: see Town and Country Planning Act 1990 (TCPA 1990), s 65(8) as inserted by the Planning and Compensation Act 1991 (PCA 1991), s 16.

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15. There are a number of legal opinions set out in the HMPC Letter. HMPC Limited are, with the greatest respect, in our view unable to provide any reliable professional legal opinion or view on the legal aspects of the Application whatsoever.

“No alternative access before the planning authority for consideration and therefore no requirement for the planning authority to consider such a possibility.”

16. In the circumstances of this particular case, that submission is wholly incorrect and demonstrates a misunderstanding of planning law. The obverse is true. There is an obvious alternative crucial to determination of the matter. And it is more than simply before the planning authority, but it is an obvious alternative with the benefit of an implemented planning permission granted by the local planning authority. It was granted specifically taking into account that it was an alternative that avoided the reason for refusal of the Application’s earlier planning application that preceded this Application. The officer report stated:

“The principle of the development, its impact upon the character and appearance of the area, its arboricultural and ecological considerations, access and highway considerations, and impact upon the amenity of adjoining occupiers are all found to be acceptable and in accordance with relevant development plan policies”

17. Appendix 2 of this letter sets out the relevant legal principles.
18. The local planning authority would be falling into legal error were it to ignore a crucial extant and implemented planning permission reference APP/21/00536 for an obvious alternative before the decision-maker that would overcome the harm identified and take into account the implications of the agent of change principle.
19. Furthermore, the Applicant should confirm to the local planning authority that AGP have in principle accepted heads of terms offered on 7 March 2022 by the Applicant for the use of the track permitted by APP/21/00536 subject to contract in terms of drafting and negotiating precise terms.

“The applicant, in providing justification for the development proposed and to rebut much of the amenity claims by AGP, has provided significant evidence to the enforcement team...”

“The proposal includes use of an existing right of way as it exists”

20. The “significant evidence to the enforcement team” about activity at AGP is specifically relied upon as a justification with supporting material for the applicant’s planning application, then as a matter of law it forms part of the planning application materials and must be published for public scrutiny.
21. The details of all the information provided in support of the application ought to be more clearly explained and examined in the officer report to allow full consideration by the Committee. The specific information provided should form part of the online application materials on the Council’s planning portal so that members of the public are able to make representations. There is no public interest in withholding it because the applicant has specifically waived anonymity by identifying that they are the source of the planning enforcement complaint.
22. If the Council’s officers were to give advice to the Planning Committee without putting this “significant evidence” and information on the register or having AGP’s representations in response to that material drawn to their attention (when they can be made in response to the publication), then in the event planning permission were granted there would be a legal error: failure to take into account a relevant material consideration.
23. This is particularly problematic because the applicant has already effectively made it plain in the HMPC Letter that the information is a relevant material consideration on which the applicant places reliance, so as well as the question of the importance of ensuring AGP can address these “secret” representations, there is an additional point that the failure of the local planning authority to publish that information is a legal error in any event.

“Many of the attachments accompanying the [Thrings letter] of 2nd February, and commentary within raise matters of private law, which are not material to the consideration of the application.”

24. This is a remarkable change of position from the applicant, whose many pronouncements on the legal status of the track has been a feature of this matter for many years, and we provide two non-exhaustive instances.

25. On 8 November 2019 in respect of planning application APP/18/00943 the applicant’s solicitors wrote:

“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.” (emphasis added)

26. In respect of the appeal statement of case for APP/19/01262 the applicant’s solicitors wrote:

“For completeness ... there are a number of ancillary rights ... would enable my clients lawfully to ... *significantly to improve* the surface of the Right of Way or, indeed, to do other works to accommodate *vehicular use safely and conveniently*.” (emphasis added)

“the starting point for the applicants’ should permission be refused, would be to examine alternatives, including the utilisation of the land fully for its lawful use of agricultural and forestry”

27. This is an admission by the Applicant that agricultural and forestry use is the lawful use of the land, which rather undermines their own certificate and enforcement notice appeals, particularly since in the background to the enforcement appeal, they accept:

“2.2 The Appeal Site was originally part of a working farm but was of limited value to the wider agricultural operation because of its mudflats, woodland, and scheduled monument. *Only a relatively small area of open land existed around the dwelling and this too was unsuitable for most agricultural purposes.* The area of woodland, now comprising a significant element of the Appeal Site, was used for ad hoc shooting as part of daily farming activities, with pheasants reared in the woodland for sport” (emphasis added)

The Council will recall elsewhere in that statement that there is an admission that there was no material change in use until the unauthorised use began in 2016:

“The access operated without significant issue until 2016/17 when, *in response to increased usage*, agreement was reached with the adjacent landowner (Mr Phillips) to seek permission for a new access to divert event traffic away from his property.” (emphasis added)

Site of Special Scientific Interest

28. The National Planning Policy Framework states:—

“180. When determining planning applications, local planning authorities should apply the following principles: b) development on land within or outside a Site of Special Scientific Interest, and which is likely to have an adverse effect on it (either individually or in combination with other developments), should not normally be permitted. The only exception is where the benefits of the development in the location proposed clearly outweigh both its likely impact on the features of the site that make it of special scientific interest, and any broader impacts on the national network of Sites of Special Scientific Interest.”

29. The officer report for the earlier application indicated that the SSSI was outside or adjacent to the Application site. That is incorrect. The majority of the Application site is within the SSSI.

30. Natural England have suggested a VMS will deal with its concerns. The local planning authority should ensure that Natural England are fully informed of the fact that any VMS will require a

planning obligation to be legally effective, and that will require AGP to become a party to that planning obligation.

“the applicants are willing to discuss the potential for advance notice of events to the local planning authority”

31. It is quite striking that even at this stage in the Application, the applicant will not accept that it is the Applicant that would have to co-operate and co-ordinate with AGP to deliver a safe development, and it would be the Applicant’s responsibility to ensure that the event was acceptable in all other respects.
32. Instead, the proposal is to utilise the local planning authority as the *de facto* event manager vis a vis AGP and to leave supervision of the relationship between the Applicant and AGP as a matter to be conducted by the local planning authority.
33. This rather self-serving approach is reflected in the commentary on conflict between livestock and vehicles, which focuses only on the impact on the applicant’s visitors:

“Cars and visitors to Tournerbury Woods would not be inconvenienced by this movement [of livestock]”.

Inquiries

34. The local planning authority ought not to make an error in allowing the inquiries to fall away and at the same time withdraw the planning enforcement notice. This is because in those circumstances they may inadvertently permit the hitherto unauthorised breach of planning control to become immune from planning enforcement action without the requirements necessitated by the special European status of the Application land. So, if the Council officers are contemplating that the grant of this planning permission will enable a safe withdrawal of the planning enforcement notice they are wholly mistaken. The enforcement notice, and the refusal of the certificate would have to remain extant - and the Applicant would have to withdraw their appeals. At the present time there are no circumstances in which this planning permission ought to be granted. Instead a new planning application based on the alternative access is the simple and obvious solution.
35. In conclusion, we suggest that is appropriate to give no weight to the HMPC Letter. The application should be refused. The new track alternative should be used for access and that would in event would require a change to the rights over that land, which AGP are content to accept on the basis of the offer made by the Applicant just a few days ago. In place of an amendment to remove that part of the red line from AGP’s land and a legal agreement or prohibition on use of the farm track by attachment of condition, in all the circumstances it would be far preferable that this application is refused and a renewed holistic application with the alternative route for planning permission be brought forward for fresh consideration by the local planning authority.

Yours sincerely,

Thrings LLP

Appendix 1: Section 65 of the Town and Country Planning Act 1990

[65 Notice etc of applications for planning permission] [or permission in principle]

[(1) A development order may make provision requiring—

- (a) notice to be given of any application for planning permission [or permission in principle], and
- (b) any applicant for such permission to issue a certificate as to the interests in the land to which the application relates or the purpose for which it is used,

and provide for publicising such applications and for the form, content and service of such notices and certificates.

[...]

(5) A local planning authority shall not entertain an application for planning permission [or permission in principle] unless any requirements imposed by virtue of this section have been satisfied.

(6) If any person—

- (a) issues a certificate which purports to comply with any requirement imposed by virtue of this section and contains a statement which he knows to be false or misleading in a material particular; or
- (b) recklessly issues a certificate which purports to comply with any such requirement and contains a statement which is false or misleading in a material particular, he shall be guilty of an offence.

(7) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(8) In this section—

[...]

“owner” in relation to any land means any person who—

- (a) is the estate owner in respect of the fee simple;

[...].

(9) Notwithstanding section 127 of the Magistrates' Courts Act 1980, a magistrates' court may try an information in respect of an offence under this section whenever laid.]

Appendix 2: Alternatives

36. The relevant legal principles were identified by Sales LJ in *R (Luton BC) v. Central Bedfordshire Council* [2015] EWCA Civ 537, who summarised the position at [71]:

“(i) There is an important distinction between (1) cases where a possible alternative site is potentially relevant so that a decision-maker does not err in law if he has regard to it and (2) cases where an alternative is necessarily relevant so that he errs in law by failing to have regard to it (paragraph 17).

(ii) Following *CREEDNZ v. Governor-General* [1981] 1 NZLR 172, *Re Findlay* [1985] AC 319 and *R (National Association of Health Stores) v. Secretary of State for Health* [2005] EWCA Civ 154, in the second category of cases the issue depends upon statutory construction or whether it can be shown that the decision-maker acted irrationally by failing to take alternative sites into account. As to the first point, it is necessary to show that planning legislation either expressly requires alternative sites to be taken into account, or impliedly does so because that is “so obviously material” to a decision on a particular project that a failure to consider alternative sites directly would not accord with the intention of the legislation (paragraphs 25-28).

(iii) Planning legislation does not expressly require alternative sites to be taken into account (paragraph 36), but a legal obligation to consider alternatives may arise from the requirements of national or local policy (paragraph 37);

(iv) Otherwise the matter is one for the planning judgment of the decision-maker (paragraph 36). In assessing whether it was irrational for the decision-maker not to have had regard to alternative sites, a relevant factor is whether alternative sites have been identified before the decision-maker (paragraphs 21, 22 and 35 and see *Secretary of State v Edwards* [1995] 68 P. & C.R. 607 where that factor was treated as having “crucial” importance in the circumstances of that case).”

In the case of the Applicant’s application, it is self-evident that not only has the alternative been identified and permitted by the decision-maker, it is preferred by the decision maker.