

THRINGS

SOLICITORS

Mr S Weaver
Principal Planning Officer
Havant Borough Council

Via email: planning.development@havant.gov.uk

14 April 2021

Your Reference: APP/19/01262
Our Reference: RWJ/MCK/A4274-3

Direct Line: 02380 930 320
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Dear Mr Weaver

The Town and Country Planning Act 1990 (as amended)

Town and Country Planning (Development Management Procedure) (England) Order 2015

Site Address: Tournerbury Woods, Tournerbury Lane, Hayling Island

Proposal: Application for Certificate of Lawfulness for an existing use or development relating to (1) change of use of Woods Cottage and its environs into leisure/tourism use for the purposes of holiday lettings and camping, and as a commercial event venue for the purposes of both holidays and the holding of weddings and events and the utilisation of any ancillary buildings and structures that may be required as necessary for such uses; (2) erection of log cabin and adjoining deck; (3) erection of Victorian style gazebo structure; and (4) erection of marquee structure.

I refer to your letter of 1 April 2021. Thrings acts for A G Phillips and Son Limited (AGP).

Thank you for your invitation to comment upon further information provided to Havant Borough Council (LPA) by the applicant under cover of a letter and attachments from Irwin Mitchell Solicitors (IMS) dated 24 March 2021 (the further information (hereafter the AFI), which in turn was in response to the LPA's letter to that firm of 10 March 2021.

I preface the attached representations on the AFI by raising the point that the online planning register does not contain a copy of the LPA's correspondence with the applicant's solicitors dated 10 March 2021 (the LPA correspondence). This correspondence is directly addressed by IMS in their response of 24 March 2021, and IMS make detailed legal submissions and challenge matters of fact which are based on interim LPA conclusions of fact. They describe the LPA correspondence as "draft workings and preliminary legal advice". That advice cannot be privileged.

AGP has quite fair and important concerns that the LPA has not thus far disclosed correspondence from the LPA that might possibly amount to a 'minded to' letter or partial determination or analysis of the application. That is a concern that AGP suspect is doubtless shared by other interested persons in the locality. The discrete point is that it is not possible to comment fairly on the response of IMS

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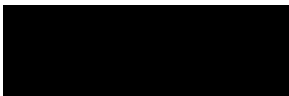
without seeing the LPA correspondence to which IMS refer. This wrinkle is quite easily remedied by correcting the omission of the LPA correspondence on the online planning register.

Accordingly, in the interests of natural justice and to ensure fairness to all persons that have made representations, I respectfully request a copy of the LPA correspondence is provided on the online planning register in advance of the determination of this application. I also request a further 14 days for the making of representations by interested persons including AGP after the LPA's notification that the LPA correspondence is online.

In the interim, please kindly take account of the necessarily limited attached representations in response to the AFI materials.

Many thanks to officers for providing the care and thoroughness to ensure this application is properly given the consideration that is warranted. It must have taken a great deal of time. The legal and factual thresholds are exacting and stringent. The LPA ought not to have the evidential burden thrust upon it. AGP are confident officers will not make connections or unwarranted assumptions unsupported by firm evidence. It is not my intention to repeat the representations you have from this firm dated 13 February 2020 in respect of the legal tests.

Yours sincerely



Matt Gilks

Senior Associate Solicitor

Thrings LLP

Further Representations on an application for a Certificate of Lawfulness under section 191 of the Town and Country Planning Act 1990 ('the principal Act')

APP/19/00889 I Application for Lawful Development Certificate relating to the erection of log cabin and adjoining deck; erection of victorian [sic] style gazebo structure; and erection of marquee structure ('the application').

Tournerbury Woods, Tournerbury Lane, Hayling Island ('the application land')

1. Background

- 1.1. These further representations on the application are made on behalf of A.G. Phillips and Son Limited ("AGP") of Tournerbury Farm, Tournerbury Lane, Hayling Island Hampshire P011 9DL. AGP have owned Tournerbury Farm neighbouring Tournerbury Woods, Tournerbury Lane, Hayling Island ("the Application Land") during the entirety of the period specified in the application.
- 1.2. We make the following observations on the further information provided to Havant Borough Council (LPA) by the applicant under cover of a letter and attachments from Irwin Mitchell Solicitors (IMS) dated 24 March 2021 (the further information (hereafter the AFI)) . The prefix P is a reference to paragraph numbers in the letter from IMS with representations supporting the AFI: for example, a reference to P5 AFI is a reference to paragraph 5 of that letter.

2. Response to P4 to P7 AFI

- 2.1. AGP's view is that it is perfectly legitimate for the LPA to try to pin down or identify the single continuous mixed use for which the applicant is seeking a certificate. P4 AFI demonstrates that the description of what is being applied for is not clear. From AGP's perspective the confusion is evident in P5. In passing the AFI refers to a host of sui generis uses. The LPA would be forgiven for some difficulty in sorting out a comprehensive description for the ever-changing jumble of diverse alleged activities. For example, the introduction of a timeshare concept needs better evidence - how did it impact on the use of the land within the red line? None of these activities appear greater than an exercise of permitted development for the majority of the relevant period - that is consistent with such a potpourri.
- 2.2. AGP say that if any of these uses drop in or drop out during the relevant period then the certificate for the whole area (the red line) cannot be granted as a matter of law. The situation on the ground on 19 December 2009 is the base use - and the LPA will have to determine that. As an aside, AGP would ask the shooting be considered a private event at a distinct location. We await evidence from the applicant that the LPA ought to be treating this as a commercial shoot.
- 2.3. AGP is confused by a link from use classes to this broad all-encompassing medley of changing mixed uses. With respect the applicant's point goes nowhere. That some of these activities, were they to have been carried out in a certain manner (quite differently from how they are alleged to have been carried out) perhaps have fallen into a specific use class under the 1987 order in respect of buildings is nothing to the point. AGP say the alleged activities were not carried out over a relevant period to render them immune from enforcement, and even if they were carried out at all, it is not a precise fit with any single or even combined use class.
- 2.4. The root of this matter is the requirement for precision. The LPA is not being asked to certify if there was one umbrella activity that might be casually described as leisure or events, but

whether there was a material change of use of land over the applicant's defined area (the "Venue Location Plan" with land edged red submitted by the applicant and dated 9 December 2019) by the carrying out of proven activities in the precise mix of uses described over the ten years back from the date of the application. Once again, overall the factual and legal matrix demonstrates that no planning enforcement action could have been taken by the LPA over the relevant period and the new operational development is simply tied to the late material change of use. This operational development associated with an unauthorised change of use remains vulnerable to planning enforcement action - that is why the LPA were able to issue a planning enforcement notice. This ties in with AGP's earlier points about materiality and the ancillary enabling development.

- 2.5. The legal concept of an ancillary building with its own distinct use is unknown to the law. Unlike the concept of curtilage, environs is not a concept known to the law of planning; see *Blackbushe Airport Ltd v R* (on the application of Hampshire County Council) and another [2021] EWCA Civ 398 at paragraphs 26, 55 and 61 per Andrews LJ.

3. Response to P9 AFI

- 3.1. This commentary on the law ought to be interpreted cautiously in the context of this specific application. Each determination ought to be sensitive to its individual circumstances. For that reason and in the interests of brevity it is not proposed to repeat submissions already made. Suffice it to say AGP submit the legal considerations are not as binary as the applicant asserts.
- 3.2. AGP are of the view that the basis of the submission in P9 AFI introduces a new matter for enquiry; what is the precise position being adopted by the applicant?
- 3.3. The applicant proceeds on the basis that it is possible to analyse the decision before the LPA upon the basis the buildings and structures were not erected for the uses described in the certificate: "there is no requirement to ... link operations to use."
- 3.4. Accordingly, it would be sensible for the LPA to request that the applicant clarify once again the uses for which the structures were erected. If these were not uses associated with the uses stated in the application for the certificate the LPA might well ask the applicant to explain the uses that ought properly to be associated with these structures. That missing aspect of the application materials ought to be nailed down before a decision on this application is taken. In P11 in the AFI the structures are indicated to be associated with "events". Clarification from the applicant in a new statutory declaration or witness statement would be helpful, in addition to an update as to what has occurred since 2019.

4. Response to P10 to P16 AFI

- 4.1. AGP is at a disadvantage because it does not have sight of the LPA correspondence. AGP suggest any new analytical evidence such as that referred to in P11 AFI ought to be preferable to a new overarching witness statement from the applicant.
- 4.2. There has been no witness statement from the applicant dealing with these matters to properly introduce them as evidence. According to the electronic planning register there has been no statutory declaration from the applicant since December 2019, but the LPA is being asked to accept further explanatory material and commentary. How could this evidence be brought forward at an appeal against a refusal of the certificate without hearing from the

applicant? It follows that a new statement *from the applicant* is a necessary step in respect of this application.

- 4.3. In respect of the table with purple events referred to in P14.1, AGP is under the impression that the reproduction of the applicant's AFI on the LPA website does not show this. If that is wrong, please it is content to receive clarification.
- 4.4. In respect of P14.2 and P14.3 the difficulty for AGP is that it appears that in the example chosen, the days after a wedding (honeymoon days in Wood Cottage) are being adopted as wedding days, not as holiday let days. This conflates the occupants associated with an event (a wedding) with the subsequent use as a holiday let. If newlyweds choose to begin their honeymoon at another venue or abroad it would not be suggested that was a continuation of a wedding use at that new venue.
- 4.5. The flexible approach of the applicant to meeting the needs of visiting customers since 2016 cannot provide a justification for the grant of a certificate in this case. Nothing in the email of 12 August 2012 indicates this was anything other than the exercise of permitted development rights, and it is arguable that the Thursday and Friday were not even a material change of use, since it is not immediately apparent that the wedding party arrived until Saturday.

5. Response to P17 and P18 AFI

- 5.1. The series of bank statements are entirely redacted. That means that it is impossible for AGP to comment upon the explanatory material provided by the applicant's solicitor in P17.2 and P17.3.
- 5.2. What may be said with absolute confidence is that a statutory declaration or witness statement from the applicant is required, and until then this new material ought to be treated with appropriate caution as to evidential value or weight.
- 5.3. AGP say the statements made in the AFI are too general in their support for the application. AGP suggest that if there were a statutory declaration from the applicant then one would expect a far more detailed background for each transaction relied upon. This would be linked to the use of the land in order to meet the proper evidential threshold. That statutory declaration would have to be disclosed and would have to speak to each statement. There is no statutory declaration.
- 5.4. AGP are of the view this application ought to be refused, so the applicant is at liberty to put forward this evidence in renewed application in a coherent manner.

6. Response to P19 and P20

- 6.1. It is axiomatic that corroboration is required when other members of the public provide corroborative evidence rejecting the assertions made in the application materials.
- 6.2. It is not helpful for the applicant to suggest that weight ought to be given to his witness statement of 2019. Where is the necessary statement *from the applicant* support the supply by advisors of so much other information. AGP cannot identify a further supporting statutory declaration or witness statement *from the applicant*.
- 6.3. The most recent witness statement on the LPA's file is from a director of AGP. The applicant has not taken the opportunity to reject or traverse the AGP statement. AGP's evidence ought

to be preferred, as it is precise and persuasive evidence that the certificate ought not be granted. All that has happened as alleged in the application has involved the use of AGP's land for access. AGP's view is that the activities alleged by the applicant are a hotchpotch. The better interpretation of the applicant's own evidence is that for the majority of the relevant period the applicant simply relied upon and used permitted development rights. There are documents available to the LPA in which the applicant has explained reliance upon those rights. Aside from the use of permitted development rights, nothing presented was close to material before 2016. That which might be considered material varied from that time onwards over a period of far less than ten years.

- 6.4. In P20 the SFI makes a point about "non-partisan" sources. We commend the LPA on its approach thus far and ask it not to be diverted by a divergence of view on private rights which is not relevant to the matters of fact that must be proven for this application.
- 6.5. The applicant suggests a face to face meeting with the LPA's officers on MS Teams. AGP suggests that this would not be appropriate. The applicant ought to give evidence in a statutory declaration in which all the additional clarification which he is ready to offer is in the public domain. If the LPA goes ahead with a meeting in which further evidence is provided or explained, then that evidence ought to be subsequently reduced to writing in a statutory declaration. This is especially so if the meeting would include a technical clarification from the applicant of how alleged activities have been counted.

7. The activities require a planning application

- 7.1. There is an extant planning application for the activities alleged in the certificate. That is the proper resort for this applicant. In all the circumstances the certificate application ought to be refused.
- 7.2. AGP has built an alternative route for the applicant to use, and the requirement to use that new route ought to be a condition of any grant of planning permission. The fact that route is necessary is because AGP's directors have had a "front row seat" about what has been going to and from the Application Land for well over ten years. That is the reason why their evidence and the evidence of others on the period of time over which these activities have been material and brought about a change in the character of the land ought to be preferred by the LPA to that of the applicant in connection with the determination of this application.

Thrings LLP Solicitors

14 April 2021