

Tournerbury Woods Estate, Hayling Island, Hampshire
Appeal under section 78 of the Town and Country Planning Act 1990

Havant Borough Council Reference:
19/01262

STATEMENT OF CASE
ON BEHALF OF THE APPELLANTS

July 2021

Haydn Morris BA(Hons) Dip TP MRTPI

Tournerbury Woods Estate, Hayling Island, Hampshire

Appeal under section 191 of the Town and Country Planning Act 1990
against the decision of Havant Borough Council to refuse a certificate of lawful use and
development comprising

Use of land, buildings, and structures (including log-cabin and adjoining deck, gazebo and
marquee) for weddings and as a commercial events venue, use of Woods Cottage for
holiday lettings and uses ancillary to weddings and events, use of existing lawful access,
woodland and agriculture

Havant Borough Council Reference: 19/01262

**STATEMENT OF CASE
ON BEHALF OF THE APPELLANTS**

July 2021

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- 1 This Statement is provided on behalf of Mr Christopher Snell, Mrs Alice Snell and Tournembury Holdings Ltd ("the Appellants") in support of their appeal against the refusal by Havant Borough Council ("the Council") dated 2nd June 2021 to refuse a certificate of lawful use and development comprising:

Use of Land, buildings, and structures (including log-cabin and adjoining deck, gazebo and marquee) for weddings and as a commercial events venue, use of Woods Cottage for holiday lettings and uses ancillary to weddings and events, use of existing lawful access,

on land at Tournembury Woods, Hayling Island, Hampshire ("the Appeal Site").
- 2 The application was dated 19th December 2019 and submitted to the local planning authority on 24th December 2019 following the issuing by the Council of an enforcement notice at the site (Havant BC reference 18/CMP/UNCU) and an application for retrospective planning permission, reference 18/00943. The enforcement notice is appealed (PINS reference APP/X1735/C/20/3248610) and is subject to Inquiry. The retrospective application was refused on 25th June 2021, and has also been appealed (Appeal reference APP/X1735/W/21/3278661).
- 3 All three matters (applications and appeals) are interrelated. They apply to the same site, the same uses and development, and the same supporting evidence. It has been requested to the Planning Inspectorate, with the co-operation of the Council, that appeals into each of the three matters should be co-joined. The inquiry into the enforcement notice was postponed until the outcome of the Council's determination of the CLEUD and retrospective applications was known. It was understood that should the applications be approved the enforcement appeal could be withdrawn. If the applications were refused, as is the case, these would be appealed and the potential to co-join the appeals would be considered once the appeals were duly made.
- 4 This Statement (together with the accompanying Appeal Form) specifies the grounds of appeal and sets out briefly the facts on which the Appellants propose to rely in support of those grounds. The appellant challenges the decision of the Council on grounds that the Certificate of lawful use and development should be granted.
- 5 Following extensive discussions with the Council and the provision of copious amount of evidence, the appellants believe they have demonstrated that the use of land for weddings and commercial events has taken place continuously at the site in excess of ten years. The appellants also believe they have demonstrated that ancillary buildings and structures and associated operational development has existed continuously for sufficient

time to ensure they are immune for enforcement action. There is no issue that the buildings and structures are used ancillary to the use of the land, but not exclusively and therefore the claim these are "*part and parcel of the material change of use which has occurred on the land*" is inaccurate and not proven. The buildings and structures have existed at the site for the requisite period to be immune from enforcement.

- 6 The appellants believe the use and development is immune from enforcement action and a certificate of lawful use and development should be issued.

The appellants' case

- 7 The appellants challenge the reason for refusal dated 2nd June 2021 on grounds that:
- the decision has been reached by an inappropriate weighting of evidence
 - the extensive body of evidence submitted has not been fully and appropriately evaluated and therefore any assessment is incomplete
 - the procedure followed by the planning authority is more akin to that of a planning application than a consideration of fact
 - the decision appears to be weighted by planning judgement through a process of planning balance rather than the pure application and consideration of fact
 - the decision was weighted by subjectivity, particularly that provided by objectors to the proposal
 - undue weight has been applied to representations purporting to provide witness evidence, which contain significant errors, assumptions, speculation and personal preferences
 - the appellants believe that the decision was swayed by a less than satisfactory scrutiny of representations, such that matters going beyond fact were considered as appropriate in the consideration of the submission
 - the Council has inappropriately subdivided uses and structures from one another in an attempt to demonstrate the use has not been continuous across the whole site, or that all structures have been at site the requisite period of time to be immune from enforcement action.
 - the appellants have provided ample evidence across the whole site to demonstrate an interrelationship of uses and use of ancillary buildings and structures
 - the uses and activities at site do not require all of the site to be used at any one time. Different

elements will be used depending on the specific event, the whole site is nevertheless available at all times.

- a number of representations were submitted to cause frustration and to promote self-interests. That evidence cannot be relied upon as matter of fact

8 The appellant's concerns for the absence of due process is set out in a letter from their legal team to Havant Borough Council dated 6th January 2021, and appended hereto as part of the Statement of Case. Also appended are subsequent letters from the legal team dated 24th March and 27th April 2021.

9 The appellants will reference the planning history of the appeal site in supporting the case for issue of an appropriate certificate of lawfulness. This will include cross referencing to a planning application for retrospective planning permission also at appeal (Appeal reference APP/X1735/W/21/3278661) the supporting material to which was also considered in parallel by the planning authority when reaching this determination.

Witnesses

10 The appellants intend to produce Proofs of Evidence and call witnesses on the following topics:

- (i) History of the site and the business
- (ii) Scope of activities and uses across the site and site management
- (iii) Complaints, objections and responses and liaison with the local authority
- (iv) Planning;
- (v) Economic, social and environmental benefits;
- (vi) Environmental issues;
- (vii) Noise and disturbance;
- (viii) Access, traffic management and safety;
- (ix) Legal Status of the site and access

Conclusion

11 The appellants will demonstrate that a certificate of lawful use and development is acceptable

12 The appellants will be inviting the Inspector to allow the appeal.

HMPC Ltd
for the Tournembury Woods Estate
9th July 2021

Your Ref:
Our Ref: 014073/014073/A8099604-6/24182921-1

Mr Steve Weaver
Planning Officer
Havant Borough Council

BY EMAIL ONLY

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6 January 2021

Dear Mr Weaver

**MR CHRISTOPHER AND MRS ALICE SNELL
APPLICATION FOR A CERTIFICATE OF LAWFUL EXISTING USE OR DEVELOPMENT ("CLEUD")
APP/19/01262 & PLANNING APPLICATION APP/18/00943**

A. Introduction

1. I am writing as I am conscious that the Council may shortly determine my clients' Application for a CLEUD APP/19/01262 ("the CLEUD Application") and Planning Application APP/18/00943 ("the Planning Application") – logically and rationally in that sequence.
2. My clients and all their professional advisors are sufficiently concerned as to certain factual and legal positions which the Council are being urged to adopt by objectors that I am writing to address a small number of the most pertinent issues. This letter has been seen in draft by Haydn Morris of HMPC Ltd and Nicola French of Holbury Consultancy Service Ltd.
3. In my letter of 8 November 2019, I invited the Council to consider carefully the appropriate weight to give to certain consultation responses, especially as a very proactive approach to consultation would, itself, likely stimulate a greater level of response. My observation 14 months later is that such an approach to consultation has also stimulated objections which are more opinionated and shrill in tone, and, at the same time, less grounded in fact, logic and law. That is no criticism of the Council's process, provided that, in scrutinising those responses, the Council attaches the appropriate weight to them.

B. Habitats Regulations Assessment

4. As you are aware, a 'shadow' Appropriate Assessment has been prepared on my clients' behalf and submitted by Haydn Morris of HMPC Ltd to the Council. That approach was borne of professionalism and pragmatism, and on the conclusion that the Planning Application is likely to have a significant effect on the Chichester and Langstone Harbours SPA and Solent Maritime SAC and other proximate European Sites (ie, the "screening" test contained within regulation 63(1)(a) of the Conservation of Species and Habitats Regulations 2017 ("the 2017 Regulations"). My clients

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have taken the view that this triggers the need for an Appropriate Assessment, and have demonstrated through careful analysis, and to the satisfaction of Natural England and the Council's own ecological adviser, that the Council can be certain that the Planning Application will not adversely affect the integrity of all those European Sites (regulation 63(5)). It remains, of course, for the Council to make its own Appropriate Assessment, consult Natural England as to the conclusion, and address the mitigation measures identified and detailed (regulation 63(6)) to ensure that no adverse effect will occur.

5. I preface my comments at para.6 below with para.4 above: the Council has before it materials which should assist it in correctly addressing its mind to its duties under the 2017 Regulations and the underlying EU Law, now adopted as part of our domestic law. My comments below are cautionary: the Council should be wary about following the interpretative approach to the 2017 Regulations which objectors have urged on it.
6. Chichester Harbour Conservancy (CHC) has submitted to the Council what is described on its face as a "Legal Opinion", but which seems to have been prepared as an outward-facing lobbying document on legal and planning policy issues. If it had been prepared on a privileged basis to advise CHC, one could reasonably have expected a more nuanced document, canvassing different views. As it is, it urges the Council not to grant the Planning Application and not to determine the CLEUD Application. In doing so, it readily discloses errors in the underlying legal analysis – for example:
 - 6.1 In describing the implications of regulation 63(1) on pages 4-6 of the "Legal Opinion", no distinction is drawn between the initial "screening" test (whether the plan or project is likely to have a significant effect) and, if the authority takes the view that it is likely to have such an effect, the substantive appropriate assessment as to whether the plan or project will adversely affect the integrity of the European site.
 - 6.2 The writer of the "Legal Opinion" seems similarly to elide the two stages at page 7: "If it is not possible to determine that the proposal will not have any significant effect on the site then the precautionary principle has to be applied and the application refused." That is an inaccurate statement of the law. She does so again at paragraph 2 of page 12 in support of an argument that the Council's policy DM9 contains a more stringent test for development in the coastal zone than that in regulation 63 of the 2017 Regulations. Based on an incorrect reading of regulation 63, that argument and the underlying comparison do not stand up to scrutiny.
 - 6.3 The "Legal Opinion" draws no attention to the duty on the Council under regulation 63(6) to consider conditions or restrictions when considering whether a plan or project will adversely affect the integrity of the European site – for example, in mitigating any harm. Rather, the "Legal Opinion" proceeds (incorrectly) on the basis that, if the applicants have not proved that there is "no harm to the interests of nature conservation", that is the end of the matter.
 - 6.4 At page 6, the writer of the "Legal Opinion" suggests that, "This Assessment [ie, the Appropriate Assessment] must be carried out in view of the site's conservation objectives. The decision maker must therefore look at the designation's [sic] citation for the SSSI." That is a manifest error of law: the decision-maker must have regard to the citations for the European Site, not the citation for the SSSI, which, in practice, is likely to be much broader in its scope than for the European Site. So, in the penultimate and final paragraphs of page 6, the species which are listed are immaterial to the Appropriate Assessment: they are not included in the citations for the relevant European Sites.
7. At paras.39-43 of their Representations (enclosure 3 to their letter of 13 February 2020), Things LLP address the relationship between the Habitats Directive and Conservation of Habitats and Species Regulations (albeit that they cite the 2010 Regulations, rather than the 2017 Regulations which replaced them), the Planning Application and the CLEUD Application. They say that it is critical that the Council "engages in the requirements of the regulations". That is uncontroversial: the Council cannot derogate from its duties under them. They go on to say that "the factual and

legal circumstances mean that a certificate of lawfulness must be withheld". That assertion has no basis in law. The matters to which the CLEUD Application relates turn on the issue of immunity from enforcement control through the effluxion of time, not the exercise of discretion whether to grant planning permission: the 2017 Regulations are not relevant in the determination of the CLEUD Application.

8. As to the Council's obligations in relation to the SSSI, the "Legal Opinion" submitted by CHC, at pages 9 and 10, quotes from the 2005 Government Circular: Biodiversity and Geological Conservation – statutory obligations and their impact within the planning system. In particular, the writer of the Legal Opinion points to para.57 of the Circular, which summarises the duty at s.28G(2) Wildlife and Countryside Act ("WCA") 1981: "Th[e] general and overarching duty requires an authority to take reasonable steps, consistent with the proper exercise of the authority's functions to further the conservation and enhancement of the features for which the sites are of special interest." As to which:
 - 8.1 Much of the focus of the Circular is on the carrying out by a "s.28G authority" (ie, within the meaning of s.28G WCA 1981) of "operations likely to damage any of the flora, fauna or geological or physiographical features by reason of which a [SSSI] is of special interest". The duty in s.28G(2), properly understood, is not confined to a s.28G authority as a local planning authority under the Town and Country Planning Act ("TCPA") 1990.
 - 8.2 On a proper analysis, the threshold contained in that duty is a lower one than embodied in the regulation 63(1) of the 2017 Regulations.
 - 8.3 When a s.28G authority is carrying out its obligations as a local planning authority under the Town and Country Planning Act 1990, the firm emphasis of the Circular, rooted in s.28I WCA 1981, is that it consults Natural England (in 2005 English Nature). Here, Natural England has been consulted, and is satisfied that "there is unlikely to be increased disturbance to the Heronry during the nesting months of January to June" and has not identified exceptional circumstances which would militate towards it assessing the Planning Application and associated documents in relation to protected species.

C. Real property and other material factual considerations

9. At paras.11-22 of my letter of 8 November 2019 to you, I set out the real property background for you. I have enclosed a copy of that letter and do not repeat those paragraphs, which I invite you to read before continuing with this letter. I adopt the abbreviations in those paragraphs.
10. For completeness of analysis as I did not address it previously, it is settled law that there are a number of ancillary rights to the Right of Way, which would enable my clients lawfully to make up (as they have done previously) and significantly to improve the surface the Right of Way or, indeed, to do other works to accommodate vehicular user safely and conveniently. As *Gale on the Law of Easements* (20th edition) summarises at paras.9-112 to 9-113:

"9-112 The dominant owner is entitled to enter the servient land to effect repairs or to alter the surface of the servient land to accommodate the right granted. So a dominant owner may be entitled to enter the servient land to install lighting if that is reasonably necessary to enable the way to be used safely and conveniently.

9-113 The following summary of the law has been described as "settled for centuries" and uncontroversial. Subject to contrary agreement,

- (1)the grantee may enter the grantor's land for the purpose of making the grant of the right of way effective viz. to construct a way which is suitable for the right granted to him;*
- (2)once the way exists, the servient owner is under no obligation to maintain or repair it;*
- (3)similarly, the dominant owner has no obligation to maintain or repair the way;*
- (4)the servient owner (who owns the land over which the way passes) can maintain and repair the*

way, if he chooses;

(5)the dominant owner (in whose interest it is that the way be kept in good repair) is entitled to maintain and repair the way and, if he wants the way to be kept in repair, must himself bear the cost;
(6)he has a right to enter the servient owner's land for the purpose but only to do necessary work in a reasonable manner."

11. For these purposes, the dominant owners and successor-in-titles to the party who reserved (rather than had the benefit of the grant of) the Right of Way are my clients.
12. As I emphasised at para.23 of my letter of 8 November 2019 and as I re-emphasise here, I do not canvass these issues from a lack of understanding as to the distinction between planning law and the law of real property; rather, because they form part of the material factual background here. It is not, as Thrings LLP suggest in their 6 December 2019 letter to you, "plain as a pikestaff that such submissions are not relevant". They are pertinent for the following reasons:
 - 12.1 My clients, through the extent of the Right of Way as reserved and by the ancillary rights recognised through settled caselaw, are able to deliver an access way that is sufficient for the purposes of the Planning Application. Its use over more than 10 years is also well-documented in the context of the CLEUD Application - and should be considered by the Council in that context.
 - 12.2 These issues go to the credibility and, therefore, weight which should be attached to the objectors' representations about the impact on amenity – albeit that the impact on amenity need to be considered through the relatively narrow matrix of Policy CS16, para.1(e) (see paras.8-10 of my letter of 8 November 2019). In particular, the objectors' company was the original contracting party, on notice as to the possibility of increased usage over time; and the Right of Way for which the company contracted will lawfully accommodate such usage and, through ancillary rights, works to facilitate such usage.
13. The arguments as to the impact on amenity which Thrings LLP have made on behalf of objectors are somewhat diminished by the objectors' company's promotion of housing on land which it owns adjacent to the farmyard and dwelling, and comprising part of the farm holding. It is a live representation to the pre-submission Local Plan (submissions R110 & R111 for land allocation H30) to build 60 dwellings immediately adjacent to the farmyard as part of a 150-unit greenfield development that includes the Hayling College's playing fields and repositioning of the existing golf centre car park much closer to the farmyard and dwelling.
14. Not only would the size of holding be reduced if the land was to be released, but it also brings into question the longevity of the farm and need for a yard. The objectors' company has been positively advocating bringing potential adverse amenity impacts close to the farm, while at the same time objecting to a loss of amenity if the Planning Application was granted. The potential housing site has been rightly deleted from the latest version of the local plan for reason access cannot be secured. Provision of an access to the proposed housing site is, perhaps ironically, linked to my clients' lawful access.

D. Proper scrutiny of representations

15. As I commented at para.3, I have been and am concerned as to the contents, tone and, indeed, reliability of certain representations which have been made by way of objection to both the Planning Application and the CLEUD Application. I appreciate that these are public consultation processes which do not mandate the same evidential standards and forensic scrutiny as would be applied in a civil court. Equally, however, the Council should not lose sight of the need to consider carefully the weight to be placed on what amounts to or purports to be witness evidence, especially in relation to the CLEUD Application, to be determined as a matter of fact and law, rather than as a matter of planning judgement. Relevant questions in assessing what weight should be placed on evidence or what purports to be evidence include:

- 15.1 Is it primary evidence (ie, within the direct knowledge of the person giving it, having perceived and/or heard it themselves as a direct party to what happened) or is it hearsay evidence (ie, evidence of a fact or thing which is, in fact, recounting what a third party told them that they (the third party) had seen and/or heard)?
- 15.2 Aside from the considerations in para.15.1, how reliable is the evidence?
- 15.3 Is the evidence given independently or as part of a concerted "campaign"?
- 15.4 What has or might have actuated the person making the representations to give the evidence he or she has given? Is it self-interest? Is it malice (in the legal sense of the word)? Is the evidence disinterested and given for the public good?
- 15.5 Is what purports to be evidence actually advocacy?
16. To apply those questions to the representations of one of the objectors chosen at random (anonymised, but apparently Virginia Knowles, a resident of Mengeham Lane), who has commented at least twice on both the CLEUD Application and the Planning Application:
 - 16.1 *"There is a photograph at EB 0025 of a Christmas party taking place in one of the Wood Field marquees in December 2011 in which the guests are wearing muddy wellington boots rather than indoor wedding-appropriate footwear."* (Comments of 13 February 2020 on the CLEUD Application) As my clients have indicated and consistent with the thrust of their evidence in the CLEUD Application, the tent in question was within the curtilage of Woods Cottage, not in the field in the middle of Tournerbury Woods, further away. Ms Knowles does not, as I understand it, claim to have been present: this is surmise, rather than direct first person evidence.
 - 16.2 *"It is another pertinent factor in this submission that the previous holiday lettings business, and the subsequent wedding venue business, cannot possibly be considered to be one and the same thing, or to have "slowly and organically" segued from one to the other. There is a distinct watershed difference, before and after 2012[.]"* (Comments of 13 February 2020 on the CLEUD Application) Mengeham Lane is not within direct view of Woods Cottage nor within direct view of Tournerbury Farm, such that the use of Woods Cottage and its amenity area and those going to and from it were capable of being seen from Mengeham Lane. This is really no more than advocacy.
 - 16.3 *"The applicant has claimed that 10,253 people visited TW between September 2017 and 2018. This compares with 0 to 4 persons a month, on average, apart from shooters, visiting TW before 2000. After holiday lettings picked up following the second Woods Cottage refurbishment in 2008, traffic increased slightly, but always within manageable and acceptable limits, with usually no more than one or two cars for each Woods Cottage letting."* (Comments of 13 February 2020 on the CLEUD Application) In similar vein, how can the person commenting do so reliably from direct knowledge unless they were standing by the gate of Tournerbury Farm or on the outside of Woods Cottage with regularity and frequency over periods of months? This amounts to a combination of opinion and advocacy.
17. These may be minor examples, but they are a sample of many similar examples. My clients and I are concerned as to the cumulative effect of these and other such representations, if taken as direct evidence of fact at face value.

E. Conclusion

18. Please would you acknowledge receipt and please would you let Haydn Morris or me know whether you require any further information from us to enable the Council to determine the CLEUD Application and the Planning Application.

Yours sincerely

JAMES PAVEY
PARTNER
For and on behalf of IRWIN MITCHELL LLP

Sent electronically
Read and approved by James Pavey but not signed

cc. Haydn Morris BA(Hons) Dip TP MRTPI, HMPC Ltd
Nicola French, Holbury Consultancy Service Ltd

Your Ref:
Our Ref: 014073/014073/A8099604-6/25178896-1

Mr Steve Weaver
Planning Officer
Havant Borough Council

BY EMAIL ONLY

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24 March 2021

Dear Mr Weaver

**MR CHRISTOPHER AND MRS ALICE SNELL
APPLICATION FOR A CERTIFICATE OF LAWFUL EXISTING USE OR DEVELOPMENT ("CLEUD")
APP/19/01262 ("the CLEUD Application")**

A. INTRODUCTION

1. I am writing in substantive response to your e-mailed letter of 10 March 2021.
2. In doing so, I should like to thank you for the opportunity to comment on the draft workings and preliminary legal advice in what is undoubtedly a complicated matter, but also to register two linked concerns: the length of time which it has taken your team to consider the substance of the CLEUD Application, which was lodged on 24 December 2019, and the request on 10 March 2021 for further information.
3. Since 24 December 2019, there has been a significant number of communications, mainly by e-mail, but also by telephone, between you, for the Council, and Haydn Morris of HMPC Ltd and me, for my clients. Mr Morris and I have been asking since at least July 2020 whether any further information or clarification is required for the Council to determine the CLEUD Application. In short, if the issues raised in your e-mailed letter of 10 March 2021 were matters of concern, the Council should have raised them nine months ago, if not, indeed, in the first quarter of 2020. By my clients' calculation, the Council has determined over 1,000 planning applications of one type or other since 24 December 2019.

B. PLANNING USE AND OPERATIONS

The correct approach to change of use

4. In your e-mailed letter of 10 March 2021, you have quoted advice from "the Legal team", which, in form and in substance, appears to separate out uses: Woods Cottage, shooting and camping, weddings, and corporate events are all treated separately. That advice, which mixes commentary on law and evidence, seems to ignore, without explanation, the way in which the CLEUD Application was framed. "Element 1" (as it was described in Mr Snell's witness statement and our Note

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accompanying the CLEUD, referring to the first numbered bullet point in box 8 of the CLEUD Application form) was expressed to seek recognition of "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 events venue for the purposes of both holidays and the holding of weddings and events and utilisation of any ancillary buildings and structures that may be required for such uses". More importantly, the advice ignores how the change of use should be properly characterised.

5. As a matter of analysis and by reference to the Town and Country Planning (Use Classes) Order ("UCO") 1987 (as amended):
 - 5.1 There are no specific planning use classes which cover use as a wedding venue, as a commercial event venue or for shooting events.
 - 5.2 The above uses might constitute leisure and assembly and recreational uses which now fall into three categories under the UCO 1987:
 - Class E – for indoor sport, recreation or fitness, not involving motorised vehicles or firearms, principally to visiting members of the public.
 - Class F2 – an area or place for outdoor sport or recreation, not involving motorised vehicles or firearms.
 - Sui generis – other assembly and leisure and recreational uses.
 - 5.3 The uses for which the CLEUD Application seeks recognition of lawfulness, however, are both indoor and outdoor uses and the sporting element includes the use of firearms. So, they do not fall into Class E and F respectively; rather, each constitutes a *sui generis* use.
6. Element 1 of the CLEUD Application is framed so as to encompass a mixed use comprising *sui generis* use for leisure, tourism and as a commercial events venue: ie, there is more than one primary use of the land. Section 191(5)(b) Town and Country Planning Act ("TCPA") 1990 requires the CLEUD to "describe the use" - or uses – but it clearly envisages the same approach to uses and the UCO 1987 as would obtain when the local planning authority is considering an application for planning permission under s.70 TCPA 1990.
7. In simple terms, the Council should not be breaking down the CLEUD Application into what amounts to a series of "mini" CLEUD applications for specific individual uses and the Council risks a justiciable legal error if it proceeds to determine the CLEUD Application in this way.

Operations

8. The legal advice quoted in your letter of 10 March 2021 reads as follows in respect of the gazebo, log cabin and decking (numbered bullet points 2-4 in box 8 of the CLEUD Application form):

"Gazebo, log cabin and decking.
The structures are part and parcel of the change of use and are not lawful unless the use itself has been demonstrated to be lawful."
9. This too appears to disclose an error of law. Where, as here, the CLEUD Application is referential to expiry of the time limits in s.171B TCPA 1990, the material issue is whether the structures have been physically present on the ground for four years. If so, the Council must grant the CLEUD in respect of them as has been physically present. There is no requirement to demonstrate both use and physical presence nor to link operations to use: see s.191(1)(a) and (b) TCPA 1990, which are disjunctive.

C. EVIDENCE

Calculating the number of events

10. In your e-mailed letter of 10 March 2021, you have explained the analytical approach you have taken to the evidence, by compiling two spreadsheets. You provide two summary tables in the body of the letter: ie, summarising the analysis in the spreadsheets. At section B above, we have set out how, as a matter of law, we believe the Council should properly approach its consideration of the CLEUD Application vis-à-vis uses. In light of that analysis, the division in the summary tables between (at least) "Wedding Event", "Corporate booking" and "Event" falls away: they are essentially false distinctions. Moreover, they are false distinctions which are carried into the Council's legal analysis quoted below and the second summary table in the 10 March 2021 letter.
11. Furthermore, you have appreciated that, in my clients' booking calendar, "multiple entries arise for individual days to some extent," without, perhaps, appreciating that there is no double-counting or intention to double-count. I enclose a spreadsheet, in which my clients and I have sought to summarise accurately the approach to how the numbers of events and lettings of Woods Cottage have been calculated in preparing the CLEUD Application. See Table 1 and, in particular, please note:
 - 11.1 Table 1, when read with my client Christopher Snell's witness statement and the booking calendar extracts which have been exhibited, should assist you to see that the CLEUD Application has been prepared scrupulously and with intellectual honesty; also, that it is not simple and that choices had to be made as to how most accurately and logically to do so, in particular by reference to legal analysis as to uses. It was necessary to find a way of consistently and coherently describing and counting events: my clients and I went to a great deal of trouble in working out the most accurate and helpful way of doing so, having regard to the way in which the land and structures are used by reference to the events. My clients hope that table 1 will assist the Council.
 - 11.2 The total figures in numbered rows 1 and 5. Those are the figures set out in paragraphs 19-29 of my client Christopher Snell's witness statement for the 11 years from 2009 to 2019 (inclusive), supported by a statement of truth.
 - 11.3 In reviewing and checking the figures, my clients note that there is one correction to be made to the calculations, which was simply human error: the total number of days in 2016 is 133 days, as set out in the enclosed spreadsheet, rather than 183 days.
12. Table 2 in the enclosed spreadsheet provides what I hope is a clearer explanation as to the colour-coding applied to my clients' booking calendar to help in the taxonomy and counting of the number of events when preparing the CLEUD Application in 2019.
13. Against that background, it is worth highlighting that the Council has, by counting the coloured squares in the booking calendar and ignoring the totals in the tables to the right, miscalculated the number of events, to populate its spreadsheets/summary tables. To take an example, you say that the example of a "7 day wedding" is "insightful". This appears to be the wedding booking of [REDACTED] in August 2012, but, if not, it provides a helpful example. To reproduce the relevant colour key ("WC" is "Woods Cottage") and booking calendar extract for August 2012:

MONTH									
EVENT		CORPORATE BOOKING		WEDDING		WC ONLY		OTHER	
ig-12	Mon	Tues	Wed	Thurs	Fri	Sat	Sun	Booked August	
			1st	2nd	3rd	4th WEDDING	5th		
6th	7th	8th	9th	10th	11th	12th			
	CLUBBY EVENT								
13th	14th	15th	16th	17th	18th	19th			
				CLUBBY EVENT	CLUBBY EVENT	CLUBBY EVENT			
20th	21st	22nd	23rd	24th	25th WEDDING	26th			
27th	28th	29th	30th	31st			DAYS		
							EVENTS		

14. If you adopt the approach of counting the different coloured squares, you would read the extract from the booking calendar as representing 13 'Wedding days' + 6 'Corporate days' + 11 Event days and 8 WC Only (Woods Cottage only/ holiday let) days. My clients have been rather more precise in their approach:
- 14.1 Please see the table immediately to the right of the calendar: there were 11 events, which saw use of the land within the red line on the CLEUD Application plan on 28 of 31 days in August 2012. For the purposes of counting, the 11 events are coloured purple.
- 14.2 Like many others, the [REDACTED] wedding was not a single, one-day event. Woods Cottage was occupied in connection with it from Thursday to Wednesday, including the first three days of the bride and groom's honeymoon. As you will see from the enclosed e-mail of 12 August 2012 from the bride to my client Mr Snell, the wedding itself took place on the Saturday, with set-up on the Thursday and the Friday and tidy-up on the Sunday. There were associated, but separate, parties with guests on both the Friday and Sunday: together with the wedding on the Saturday, that gives you the key as to why three events have been counted for the purposes of the CLEUD Application in relation to that booking. As such, it is a good example of the type of extended weddings, some with a series of events over days, which my clients specialise in.
- 14.3 It would be wrong of the Council to approach wedding (and indeed other event) activities at the Tournbury Woods Estate as if it were, say, a hotel venue which only rents a dining room for a single day hire. Tournbury has, since at least 2009, offered clients flexibility as to use of the site: such use is not limited or constrained as the afternoon or evening hire of an hotel or social club for the purposes of 'an event'. That is a significant part of its attraction as a venue for event hire, in particular for wedding events, with associated parties/events taking place over a number of days, with a single booking fee and invoice.
15. If you take the figures from the monthly tables to the right of the calendar, you will see how the figures in the tables showing annual totals are calculated: it is those figures which are set out in paras.19-29 of Mr Snell's witness statement, subject to the correction for 2016 at para.11.3 above.
16. Lastly, I note in the first summary table that you have a final column, "No event". That appears to miss the point: there does not need to have been use of that part of the Tournbury Woods Estate included within the red line of the CLEUD Application for each of 365 days a year for 10+ years to have changed the use. The relevant uses inevitably fluctuate in their intensity year on year and, indeed, with the seasons within those years, but those set out as "Element 1" of the CLEUD Application have been the primary uses (ie, comprising the mixed use).

Further evidence

17. The following further documents have been uploaded into a dataroom in a file named "2021 Further Information":
 - 17.1 Bank statements from January 2010 to December 2014.
 - 17.2 Tournerbury Holdings Ltd's Barclays "Paying in Book" from June 2008 to May 2012. Please note, in particular, payments for BTL Ltd and Insurance Initiatives Ltd and CMF Ltd payments, including that 'Club Monkey Puzzle Points' (rendered as "CMP" or "CMP points").
 - 17.3 'Club Monkey Puzzle', as shown in the public marketing of the Club at a South Coast Exhibition in May 2008 (see the Evidence Base), was Tournerbury's "points based" system so that corporate clients could utilise full flexibility in booking Tournerbury for various different purposes throughout a year: for example, client entertaining or staff off-site meetings. There are not individual invoices for each 'event day' and the paying in slips and corroborating bank statements attest to these purchase of points *en bloc*.
 - 17.3 Various photographs from 2009 to 2020 showing the shoot at Tournerbury, provided by [REDACTED] who have run the Tournerbury shoot consecutively since 2004. (Please see the pdf entitled "Assorted Tournerbury Shoot Photographs 2009 to 2020".) Apart from one photograph (at the top of page 20 of the pdf), all the photographs were taken in different parts of the CLEUD Application red-line area. As well as showing those present on shoot days, they also show use of Woods Cottage, the Gazebo, the deck and the marquee, as well as pheasant poults and ducklings being delivered in the summer months in a number of years.
18. Please note:
 - 18.1 My clients have provided corroborative bank statements from January 2010 to December 2014 (5 years inclusive) and the copies of paying-in books from 2008 to 2012 for several reasons. First and foremost, summary table 2 in your 10 March 2021 letter discloses that your preliminary view is that there were no or very few events in the years 2008 to 2012: those documents corroborate the booking calendars and the numbers of events to which my client's witness statement speaks. Secondly, as it goes to credit: it is a representative sample which goes to a true picture of what events were taking place. Thirdly: the paper and electronic search, scanning, redaction and uploading of the additional documents now available in the dataroom took more than seven very full working days to achieve, and my clients had to draw a line somewhere, in the interests of proportionality.
 - 18.2 Unredacted and redacted versions of the documents listed in paras.17.1 and 17.2 are provided, as before on the basis that the Council does not disclose the unredacted copies on its planning website. A separate file in the dataroom named "2021 Further Information – Fully redacted for HBC to publish on portal" has also been supplied for the Council's ease and contains the same documents but redacted appropriately.

Corroboration

19. In your letter of 10 March 2021, you place significant emphasis on corroboration by documentary evidence and appear to give no credit to my client Christopher Snell's evidence as set out in his witness statement, though I note that you have stopped short of saying that:
 - 19.1 As you will be well aware, the Evidence Base supporting the CLEUD Application runs to c.1,000 pages – and, in its preparation just as in additions to it, a line had to be drawn somewhere in the interests of proportionality and cost. As set out at para.17, my clients are, nevertheless, happy to provide further corroborating documentary evidence: see below.

- 19.2 As I have indicated at para.11.1, it was necessary, in preparing the CLEUD Application, to find a method of taxonomising and counting events which reflected (a) a proper legal analysis as to uses and (b) the events and uses of land as they have taken place on the ground. I hope that table 1 in the enclosed spreadsheet will assist you quickly to see that the way in which the events and uses of land have been characterised and counted has been coherent and intellectually honest throughout.
20. As a matter of the proper consideration and weighing of evidence, the Council should, in any event, be slow to disregard my client's witness evidence as such without direct evidence to the contrary, similarly verified by a statement of truth. There is a small number of representations in response to the CLEUD Application: before attributing any weight to those representations, the Council should consider very carefully the motivation of their authors, as a matter of inference, and, moreover, what direct and detailed evidence they can give over the prolonged period. The standard of proof for my clients is the balance of probabilities; there is no witness evidence, in particular from a non-partisan source, which is properly formulated and verified with a statement of truth to gainsay what my client Christopher Snell has attested to; and the Council should be very careful not to elevate the evidential bar higher, so that my clients are, in practice, having to prove their case beyond reasonable doubt.

D. NEXT STEPS

21. Please acknowledge receipt by return.
22. In my e-mail of 10 March 2021, I spelt out the objective urgency in consideration and determination of the CLEUD Application. To that end, please will you scrutinise the contents of this letter and its enclosures carefully, including with the Council's lawyers to whom this is copied. If you are in any doubt as to any evidence or as to how events have been counted, please e-mail me as a matter of priority: it may be simplest that my client Christopher Snell explains to you and your colleagues, in a Teams call, how the events have been counted. He is willing and, indeed, would be pleased to do so, in order to avoid any further confusion or delay.
23. In light of the parallel planning enforcement appeal, please would you confirm to Haydn Morris and me when you propose to determine the CLEUD Application.

Yours sincerely

JAMES PAVEY
PARTNER
For and on behalf of IRWIN MITCHELL LLP

Sent electronically
Read and approved by James Pavey but not signed

Your Ref:
Our Ref: 014073/014073/A8099604-8/25598410-1

Mr Steve Weaver
Planning Officer
Havant Borough Council

BY EMAIL ONLY

James Pavey
Direct Dial: 01293 742746
james.pavey@irwinmitchell.com

27 April 2021

Dear Mr Weaver

**MR CHRISTOPHER AND MRS ALICE SNELL
APPLICATION FOR A CERTIFICATE OF LAWFUL EXISTING USE OR DEVELOPMENT ("CLEUD")
APP/19/01262 ("the CLEUD Application")**

A. INTRODUCTION

1. I am writing in response to the Further Representations made by Thrings LLP on behalf of AG Phillips & Son Ltd and, to a lesser extent, to the comments made by my client Christopher Snell's cousin Virginia Knowles on the submissions made in my letter of 24 March 2021.
2. By way of emphasis:
 - 2.1 This is by way of *reply* in the usual forensic way: ie, the proponent of a proposition is given the opportunity to put it forward; the opponent to respond; and the proponent to reply. It does not, on any analysis, merit or require a further round of consultation.
 - 2.2 If I have correctly understood the Council's approach to consultation, you will have sent a copy of my 24 March 2021 letter to over 100 people. From what has been published, only four people responded within the consultation period: two apparently in concert; one short hand written note and one short objection directly on the planning portal. My clients and I draw the obvious inference from that.

B. POINTS IN REPLY

- The correct approach to change of use***

3. At para.6f of my letter of 24 March 2021, I set out the correct characterisation of use for the purpose of considering the CLEUD, reflecting how the CLEUD Application was framed, as made, in December 2019:

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"Element 1 of the CLEUD Application is framed so as to encompass a mixed use comprising sui generis use for leisure, tourism and as a commercial events venue: ie, there is more than one primary use of the land. Section 191(5)(b) Town and Country Planning Act ("TCPA") 1990 requires the CLEUD to "describe the use" - or uses – but it clearly envisages the same approach to uses and the UCO 1987 as would obtain when the local planning authority is considering an application for planning permission under s.70 TCPA 1990."

4. Thrings LLP, at paras.2.1 to 2.4 of their Further Representations describe the evidence as an "ever-changing jumble of diverse alleged activities" and an "all-encompassing medley of changing mixed uses", but that is to miss the point. There has been a continuous thread running through the considerable volume of use: ie, as an events venue. The CLEUD Application, as originally made and as it continues to be explained some 16 months later, reflects the factual reality: there has been a consistent and continuous mixed use for leisure, tourism and as a commercial events venue for more than a decade.
5. In my letter of 24 March 2021, I also cautioned against the "salami slicing" approach which Thrings LLP urge on the Council – or, as I put it, what would amount to breaking the substance down into a series of "mini" CLEUD applications for specific individual uses:
 - 5.1 As above, that approach is inconsistent with the way in which the CLEUD Application was made – and, indeed, with the continuity of the evidential picture over more than a decade.
 - 5.2 It is a contrived approach, which, if taken to a logical extreme, would raise the bar for CLEUD applications inappropriately high: it focuses on trying to find as much dissimilarity as possible between individual events, so as to differentiate between them and draw a conclusion that there is no continuity of use. That is not how s.191 Town and Country Planning Act 1990 (particularly s.191(5)(b)) is framed, nor how the Courts have approached its interpretation and application in practice.

Operations

6. At paras.8 and 9 of my letter of 24 March 2021, I wrote as follows:

"8. The legal advice quoted in your letter of 10 March 2021 reads as follows in respect of the gazebo, log cabin and decking (numbered bullet points 2-4 in box 8 of the CLEUD Application form):

"Gazebo, log cabin and decking.

The structures are part and parcel of the change of use and are not lawful unless the use itself has been demonstrated to be lawful."

9. This too appears to disclose an error of law. Where, as here, the CLEUD Application is referential to expiry of the time limits in s.171B TCPA 1990, the material issue is whether the structures have been physically present on the ground for four years. If so, the Council must grant the CLEUD in respect of them as has been physically present. There is no requirement to demonstrate both use and physical presence nor to link operations to use: see s.191(1)(a) and (b) TCPA 1990, which are disjunctive."

7. Clearly, para.9 was a response, as a matter of legal analysis, to the approach which your legal advisors had proposed and which you had set out in writing. It did not, as Thrings LLP seem to suggest, at para.3.2 of their Further Representations, "introduce a new matter for enquiry" on behalf of my clients.

Evidence

8. At para.3.4 of their submissions and elsewhere, Thrings LLP call for yet further evidence. The Council has well over 1,000 pages of contemporaneous documentary evidence in support of the CLEUD Application, together with witness evidence. It is an evidence-base whose detail and magnitude is highly unusual in support of such an application and whose substance has not been

refuted by any third party making representations which are actually corroborated by documentary evidence.

9. In March 2021, my clients spent in excess of 100 hours undertaking a further evidence-gathering exercise to corroborate the witness and earlier documentary evidence. My clients and I have also spent significant time in seeking to bring clarity to a complicated matter: as your letter of 10 March 2021 and my letter of 24 March disclose, it is not a straightforward exercise when it comes to "counting" events. It is necessary to adopt a framework which is referential to the CLEUD Application as made, the law as it should be properly interpreted, and the events and uses as they actually took place at this particular events venue.
10. Thrings LLP suggest, at para.5.3 of their Further Representations, that the Council should treat the evidence made available on 24 March 2021 "with appropriate caution". The evidence principally comprised bank statements which were generated by a third party (Barclays Bank PLC): it is difficult to see how their integrity or substance can be impugned; nor, indeed, that they reasonably require further verification. My letter of 24 March 2021, at section C, contained submissions and a key to the interpretation of the evidence (paras.10-14): it was not itself a vehicle for witness evidence. If the Council, nevertheless, feels that it needs statements of truth from my client to corroborate the contents of para.17.3 and from Chris and Julia Makin to confirm that they provided the photographs of the shoot, then they can readily be provided, but that rather goes to emphasise the point: that the Council can safely place reliance on the significant body of further evidence submitted on 24 March 2021.
11. Thrings LLP also ask you to prefer the evidence of the directors of AG Phillips & Son Ltd because they have a "front row seat" as to what has been going to and from my clients' land. Unless there are many hitherto-undisclosed incidents of trespass by them, they have not, however, had a "front row seat" as to the use of the land itself, which is the subject of the CLEUD Application. Given the nature of the land (woodland), there is no unimpeded view through from Tournerbury Farmyard to Woods Cottage and the venue at any time of year. That is quite aside from the caution with which the Council should treat their evidence: see para.12 below.

Improper purpose

12. At paras.7.1 and 7.2, Thrings LLP give the game away: the Council should (they submit) condition the retrospective application to require use of the "new" or "alternative" route which their client has partially built, but not completed. As to which:
 - 12.1 In determining the CLEUD Application, that is not a relevant consideration.
 - 12.2 AG Phillips & Son Ltd's "alternative access" is, in any event, problematic, not least as it is the subject of enforcement action by the Council.
 - 12.3 The Council is all too obviously being asked to help AG Phillips & Son Ltd engineer a situation which it could seek to exploit. The Council should be wary about this generally, but should consider the evidence from the directors of AG Phillips & Son Ltd in that light.

Fairness

13. Whatever approach the Council has adopted to consultation as a matter of its own policy, the Town and Country Planning (Development Management Procedure) (England) Order 2015/595 does not contain publicity or consultation requirements in relation to CLEUD Applications. That is for good reason as a matter of public policy: the only matter for the local planning authority (LPA) is whether the development is lawful or not, having regard to the substance of the particular application. There is no want of fairness here, as Thrings LLP and Mrs Knowles suggest.
14. The significant volume of documentary material has been provided to the Council in a form which it can fairly scrutinise in order to determine the CLEUD Application. The Council should now determine the CLEUD Application.



JAMES PAVEY
PARTNER

For and on behalf of IRWIN MITCHELL LLP