

**IN THE MATTER OF AN APPLICATION FOR A CERTIFICATE OR LAWFULNESS UNDER SECTION 191
TOWN AND COUNTRY PLANNING ACT 1990 APP/19/01292 ('the Application')**

NOTE

A. INTRODUCTION

1. Thrings acts for A.G. Phillips and Son Limited (AGP) of Tournurbury Farm, Tournurbury Lane, Hayling Island PO11 9DL.
2. This note provides comment on the application but the focus is upon issues arising from the first part of the application APP/19/01292 seeking to obtain a certificate for:

‘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’
3. In respect of the other matters listed as 2, 3 and 4 seeking certification of operational development the representations on withdrawn certificate application APP-19-00889 on behalf of AGP dated 28 October 2019 are repeated and these stand as representations for those aspects of this application.

A1. THE LEGISLATIVE REQUIREMENTS

4. Uses and operations are only lawful under section 192(2) of the Town and Country Planning Act 1990:
 - (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
 - (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
5. Failure to comply with any condition or limitation is only lawful if (section 191(3)):
 - (a) the time for taking enforcement action in respect of the failure has then expired; and
 - (b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition of notice then in force.

6. The time for taking enforcement action has not expired if the time limits in s.171B have not passed or any extended time period because of a potential or actual planning enforcement order has not expired. Where there is or may be a planning enforcement order because a breach has been deliberately concealed then special time limits apply.

7. The application ought to identify the applicable Use Class at the date of the application. Where an application seeks the certification of two or more uses, operations or other matters, the plan which accompanies the application must indicate to which part of the land each such use, operation or matter relates: art. 39(4) Town and Country Planning (Development Management Procedure) (England) Order 2015. The burden of proof is firmly on the applicant on the balance of probabilities.

A2. RELEVANCE OF THE USE DESCRIBED IN THE CERTIFICATE

8. In this application the applicant appears to not distinguish between the uses. However, there is a key enquiry for the local planning authority to ensure that any changes in any mix of uses during the relevant period is identified having regard to the introduction, intensity and cessation of individual uses.

9. The applicant has listed a number of uses under the umbrella of leisure/tourism. It is not clear if this is a proposed mixed use or whether the lawful uses are comprised of one or more other uses. Establishing the chronology of uses having regard to the relevant period is critical not least because the introduction of new uses into a established mixed use resets the clock in terms of determining a continuous breach of planning control over a relevant period.

10. The applicant ought to be able to prove on the balance of probabilities with an appropriate threshold of evidence that the specific mixed use was established on or before the date of the making of the certificate and that the use then continued without significant interruption for at least 10 years after the date of the change. In practice, the question is whether it would have been open to the Council to take enforcement action at any time during that period.

11. For example, a camping site for a holiday is *sui generis* and for a recreational organisation camping use is Use Class D2. A leisure park or leisure plot is distinguishable *sui generis* uses. Self-catering accommodation is Use Class C3 but this is distinguishable from cases in which accommodation is provided with additional services, because a holiday centre is a *sui generis* use. A holiday village and associated development falls within Use Class C1. Furthermore permitted development rights are available under Part 4 and Part 5 of the Town and Country Planning (General Permitted Development) Order 2015 the exercise of which would not amount to a breach of planning control.

12. The introduction of any new uses in the relevant period will give rise to a fundamental change in the character of the use of the planning unit and will break the continuity of the mixed use.

13. The test is:

(1) whether there has been a continuous breach of planning control throughout each year for the necessary period of ten years (*North Devon District Council v Secretary of State for the Environment* [1998] PLCR 356; *Lynch v Secretary of State for the Environment* [1999] JPL 354; *Revenue and Customs Comrs v Tallington Lakes Ltd* [2007] EWHC 1955 (Ch), [2008] STC 2734, [2007] All ER (D) 64 (Aug); and see *Miles v National Assembly for Wales* [2007] EWHC 10 (Admin), [2007] All ER (D) 126 (Jan)); and

(2) to compare the present use with the previous use, or use at the earliest time within the time limit, and assess whether there has been any material change since that time (*Thurrock Borough Council v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 128, [2001] All ER (D) 286 (Feb); affd [2002] EWCA Civ 226, [2002] All ER (D) 373 (Feb)).

14. Our client's position is that the applicant's evidence has failed to demonstrate a continuity of use, and that in cases where there is a continuity of use it has not continued for ten years. The evidence presented by the application demonstrates a material change of use (by the introduction of several new uses) since the earliest time within the time limit.

15. We agree with the local planning authority's assessment that the lawful use of the land was agriculture and a dwellinghouse used for holiday lettings.

A3. RELEVANCE OF IDENTIFYING THE CORRECT PLANNING UNIT

16. It is axiomatic that the determination of any lawfulness of use, and in considering whether a material change of use has taken place, the local planning authority should identify the appropriate planning unit. This is the most appropriate physical area against which to determine whether a material change of use has taken place.

17. The principles to be applied by Bridge J in *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207 are in summary:

1. Where it is possible to recognise a single main purpose of the occupiers use of his land the whole unit of occupation should be considered.
2. It may be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say one is incidental or ancillary.
3. Within a single unit of occupation two or more physically separate and distinct area areas occupied for substantially difference and unrelated purposes.

18. Our client has identified historically two or more physically separate and distinct areas, being:

- The Woods Cottage with a very limited curtilage.
- The remaining woodland in agricultural use.

19. These are the most appropriate physical areas against which to determine whether a material change has taken place.

20. Within the last ten years the use of the land has changed in such a manner that the newly introduced uses could be characterised as amounting to physical separate and distinct areas occupied for three separate and distinct uses:

- a. a planning unit best described as the woodland areas outside the dwellinghouse and the new planning unit at paragraph 3 below with a mixed use of agricultural use and use for shooting events into which a *sui generis* camping use; separate *sui generis* wedding celebratory use; and *sui generis* commercial use appear to have been introduced within the last ten years to become a planning unit with a mixed use of agriculture, shooting, wedding celebratory use and commercial use.
- b. the planning unit comprising Woods Cottage has changed from a Use Class C3 holiday let use into which a *sui generis* wedding celebratory and separate *sui generis* commercial event use appears to have been introduced within the last ten years to bring about a changed use with an increased physical curtilage to become a mixed use encompassing a C3 holiday let use; *sui generis* wedding celebratory and *sui generis* commercial event use. However, it should be noted that our client is not of the view that the increased curtilage extends to the area proposed by the applicant.
- c. the creation of a new planning unit within the last ten years comprising a new and distinct area with a mixed use for *sui generis* wedding events; *sui generis* wedding celebratory events and *sui generis* commercial events which is formed of land previously of two planning units, the first being Woods Cottage and its curtilage and the remaining land that was previously in agricultural use. Where there is a composite or mixed use, there is a material change of use if one component use absorbs the entire site to the exclusion of the other: *Wipperman v Barking London Borough Council* (1965) 64 LGR 97, 17 P & CR 225, DC. It is plain that the operational development comprising the hardstanding, the marquee and the car park has made physical changes to land that are relevant to determining the question of whether a new planning unit has been created. It is not unreasonable to conclude that these changes have facilitated a material change of use of the land which has had the effect of excluding the agricultural use of the land. So at some time during the ten year period the applicant has excluded the agricultural use from this parcel of land. Our submission on withdrawn application for the operational development on this site explains why this is unauthorised operational development. It is relevant too that the extent of the alleged curtilage of the dwellinghouse appears to have had

the effect of excluding the agricultural use of the land in this particular area, and would have prevented the exercise of the '28 day rule' in this area.

21. It is our client's position then, that prior to any consideration of the applicant's claim that Woods Cottage now enjoys an extensive curtilage comprising a single continuous and unchanged mixed use over the past ten years, the first task of the local planning authority is to determine the appropriate planning unit at the point ten years before the making of the application and to judge the materiality of the introduction of uses introduced from that time onwards against these two planning units.

22. If it is not correct that there were two planning units at the date ten years before the date of this application, it is submitted the only alternative is that there was one planning unit which comprises the entirety of the red line and is not confined to Woods Cottage and its 'environs'. It is necessary to look at the estate as it was in 1800 onwards. And in any event the most striking changes to the curtilage appear to have taken place in the most recent period, in which some sort of event area appears to have been constructed with a car park. It is impossible and perhaps even beyond credulous to argue, even having regard to recently reaffirmed case law, that the creation of an extensive car park is within the curtilage of a dwellinghouse of this size. It begs the question of whether these physical changes in the recent past have changed the appropriate planning unit and curtilage.

A4. CONTINUITY OF USE

23. Our client has prepared a witness statement with reference to tables they have created. The tables set out their understanding of the evidence presented by the applicant in this matter, by reference to the approximate year and date. We have attached these tables.

24. In many cases, our client has been unable to identify a tie from the evidence to a specific date or period. We would urge the local planning authority to fully scrutinise and link each piece of documentary evidence presented to a specific date or dates. In some cases, it would appear that multiple invoices or records relate to a single date or a single period.

25. It is not an efficient or effective use of our client's resources to set out an analysis of each piece of evidence presented by the applicant, particularly in circumstances where the local planning authority has a legal duty to interrogate the evidence and doubtless will be instructing senior Counsel to defend its position at a public inquiry.

26. Nevertheless, the evidence presented by the applicant as analysed by our client and illustrated by the tables draws out the following themes which we respectfully suggest indicate that it is not appropriate to issue a certificate in the terms applied for or at all:

- a. 2010 – the number of nights at Woods Cottage are indicated by invoices that are not set out having regard to dates; the use of Woods Cottage as a holiday let is not a breach of planning control. If there were three other events their duration would be under 28 days and would

benefit from permitted development rights. This is not a breach of planning control. This conclusion is consistent with the use of Woods Cottage in 2009. It is submitted that the Council would not have been able to serve a planning enforcement notice in the course of this calendar year.

b. 2011 – The Woods Cottage holiday let is lawful, so our client's analysis of the evidence presented for activities for this year does not appear to indicate a breach of planning control in the year. It is submitted that the Council would not have been able to serve a planning enforcement notice in the course of this calendar year.

c. 2012 – Leaving to one side the lawful use of the Woods Cottage holiday let, there appears to be insufficient other activities to indicate any breach of planning control taking into account the '28 day rule'. We do not think the extent of the curtilage claimed is credible. Furthermore, even if there was an exceedance of the 28 day rule in any particular year, which is not indicated, then the breach would appear to be referable to a mixed use or venue hire or a corporate event. For example, it is not clear if the venue hire and the corporate event hires are referable to one event or a number of events. There is no evidence of camping. It is submitted that the Council would not have been able to serve a planning enforcement notice in the course of this calendar year.

d. 2013 – If the camping and shooting are relied upon by the applicant to demonstrate a material change of use in this year, as they appear to be, then taking into account the analysis of our client it appears that the camping amounts to the introduction of a new use. Either that is correct, or the applicant placed reliance on the lawfulness of exercising rights under the '28 day rule' which does not amount to a breach of planning control. It is submitted that the Council would not have been able to serve a planning enforcement notice in the course of this calendar year.

e. if it is accepted that the materiality of the uses introduced over the period 2010 to 2013 ought to be judged not against the applicant's chosen land area of Woods Cottage and its environs and instead against (1) Woods Cottage and (2) the remainder of the woodland land in the ownership of the applicant then it is plain that the activities are not sufficiently material in comparison to the woodland. Secondly, there has been no material change of use of Woods Cottage in the period between 2010 and 2013.

f. in respect of the year 2014, if the holiday lets of Woods Cottage are ignored, our client's analysis does not appear to indicate a breach of the '28 day rule' for the other activities. Indeed, to the extent to which the activities on specific days take place on specified days, one might conclude they are either (a) a mixed use of land for holiday let and ancillary venue hire with ancillary camping, or (b) a mixed use of venue hire and camping with a separate use of Woods Cottage for a lawful holiday let. So for example, the invoice of Tournerbury Holdings Ltd

dated 7 February 2014 indicates that the venue hire is the primary use of the land, with the activities in Woods Cottage being ancillary to the primary use. This may be contrasted to invoices in 2013, where the primary use of Woods Cottage appears to be a lawful and conventional seven night holiday let. The contrast with the stated purposes of the majority of the invoices between 2010 and 2014 onwards could not be clearer.

27. Our client does not have the resources to present an absolute comprehensive analysis of activities of every year between 2009 and 2020. However, it is plain that any alleged material changes of the use of the land took place in the relevant period and it is possible to conclude that when one compares the present use with the previous use, or use at the earliest time within the time limit, it is plain there has been a material change since that time.

28. The changes appear to have introduced breaches in drips and drabs comprising separate uses in separate years after 2012. These amounted to a fundamental change in the character of the woodland planning unit. If that is correct, then the applicant fails the test of continuity by the later introduction of new uses on the land since 2012. The turning point appears to have been the use of the land as an event venue in 2016 almost to the exclusion of any other use. This is not sufficient to enable the applicant to demonstrate immunity from planning enforcement action at the date of this application. The applicant has not discharged the evidential burden to displace that conclusion, and accordingly the certificate ought to be withheld and the application refused.

B. FRAMEWORK AND CONTEXT OF REPRESENTATION

29. Our client does not accept that the term Woods Cottage and its environs is a useful tool in determining the appropriate planning unit. We deal with the curtilage issue raised by the applicant elsewhere. In our view the appropriate areas to consider for the planning unit at the date ten years before the making of this application are the Bury Wood and the Plantation in addition to the area shaded in grey on Exhibit EB0878. Furthermore, we are of the view that the historic curtilage of Woods Cottage would be an appropriate indication of a dwellinghouse, and not any wider area.

30. With respect to the applicant's solicitor note at paragraph 6.2, it is suggested the first question is more accurately – what is the relevant planning unit against which any material change of use ought to be judged, were there to be any evidence of a change of use? The next question is determining if that change is material in planning terms. This is not the same process as first assuming a material change of use and then deciding against which area that material change of use has taken place. We would suggest the primary consideration is first identifying the relevant planning unit.

31. In respect of the applicant's decision not to include the access, it is submitted that the contention there is a 'comprehensive right of way' is rejected: see representations on withdrawn certificate application APP-19-00889.

C. RELEVANCE OF AREA OF CHANGE OF USE: CURTILAGE

32. It is highly unusual for an application for a certificate seeking confirmation of the lawfulness of a number of uses over the relevant period not to deal with the question of identification of the relevant planning unit in favour of presenting an analysis of the curtilage of a dwellinghouse.

33. The first point that there is a question for the local planning authority as to the degree of relevance of raising the issue of the curtilage of Woods Cottage where the first task is to define the planning unit within which the alleged material change of use is to be judged. It may be relevant only in that it prevents the existence of the '28 day rule' preventing a breach of planning control during many of the years comprising the relevant period.

34. *Challenge Fencing Ltd v Secretary of State for Housing Communities and Local Government* [2019] EWHC 553 (Admin) is a case on which the applicant appears content to rely. At paragraph 31, Lieven J. points out, albeit obiter, the trite proposition that there are fundamental conceptual differences between determining a curtilage and a planning unit:

"There may well be situations where the planning unit is different (and almost certainly larger) than the curtilage of the building. The two concepts are not the same, and many of the factors that go into defining the planning unit will not apply to determining curtilage."

35. Since the extent of the curtilage of Woods Cottage has a relatively limited utility in determining the application before the local planning authority, and is generally related to questions of the lawfulness of activities or operations in the context of permitted development rights, it is suggested that the applicant's submissions in this regard ought to be treated as irrelevant to the relevant legal and factual matrix. Instead the starting point ought to remain the identification of the planning unit. One reason why there may be no fences and walls surrounding Woods Cottage may be that a farm cottage ordinarily has a very limited curtilage, the surrounding land ordinarily given to agriculture.

D. CONTINUITY OF MARQUEE

36. It is plain the erection of associated operational development was to facilitate the introduction of the uses now suggested as having become lawful by effluxion of time. The submissions made in connection with earlier withdrawn certificate application APP-19-00889 on behalf of AGP dated 28 October 2019 as these are enclosed stand as representations for this application and apply in equal force to rebut the propositions averred by the applicant. It is not necessary or helpful to re-assert them in this note.

E. CONFLICT OF EVIDENCE

37. On the applicant's own case as now presented, the supporting information to demonstrate a breach of planning control relating to various uses over a number of years has been available to him for a great

deal of time. Indeed, there is no indication that he ever presented any indication to the local planning authority that the activities which he now suggests could have been enforced against by the local planning authority required regularisation.

38. There are documents supporting planning applications made by the applicant that indicate any activities during the relevant period were below the threshold because they were being carried out in accordance with the '28 day rule'. This is inconsistent with the assertion now of a greatly extended curtilage. Our client suggests that the applicant ought to be taken as having a full understanding of this permitted development rule, having relied upon it in the past.

39. It is a matter for the local planning authority to determine whether given the paucity of the evidence presented for the period up to 2016, that any less credence ought to be given now to the historic recollections of the applicant at the time he related the history of the site in the course of making earlier planning application submissions.

F. SUMMARY

40. There appears to have been changes to the uses comprising any proposed mixed use on the land since at least 2012 onwards. The legal test for granting a certificate has not been met.

Thrings

13 February 2020