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Attn. S. Weaver Esq.

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Your Ref: APP/16/00021
Our Ref: AT/Mason
Date: 12 April 2016

Dear Sir,

**Our Clients: Dr and Mrs D Mason, of Hollybank Cottage, Long Copse Lane, Emsworth,
Hampshire Re Land Adjoining Hollybank Cottage Long Copse Lane Emsworth Hampshire
Re Planning Application APP/16/00021**

Our clients wish to object to Planning Application APP/16/00021. A full objection has been prepared by planning consultants and has already been submitted. This letter concerns a number of discrete legal matters in relation to this application.

The Location of the Stable

The existing stable on the Site has been constructed in purported compliance with planning permission granted under Application Number 10/74070/000. The permission was made subject to compliance with plans and other documents submitted with the application.

However, we have become aware that the stable was not constructed in accordance with the submitted plans. The current location of the



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stable is shown on Drawing No 01297/2C, annexed to this letter as Annex A. This location is considerably to the west of the approved location of the stable, as per the submitted plans, annexed to this letter as Annex B. The stable was constructed without the benefit of planning permission. It is straightforwardly in breach of planning control.

Attached to this letter as Annex C is a Land Registry MapSearch Snapshot, which shows the various plots of land along Long Copse Lane. According to the submitted plans, the stable should have been constructed within Title Number HP337117. However it appears, contrary to the Certificate A submitted with Application Numbers 10/74070/000 and APP/14/00381, that Mr Madgwick does not own this land. Furthermore, the decision in APP/14/00381 was made on the basis that the application was for an extension of a stable in a particular location, whereas it was not in fact located there. The permissions under 10/74070/000 and APP/14/00381 were granted on an erroneous basis.

Previously-Developed Land

The Design and Access Statement ('DAS') drafted by Dr Angus Murdoch in support of this application argues that the application site is to be considered a previously developed land for the purposes of the National Planning Policy Framework, and Planning Policy for Traveller Sites. We dispute that:

- (1) the Site, as is relevant, constitutes previously developed land;
- (2) even if the Site does constitute previously developed land, this is relevant to the present application.

The Definition in the NPPF

The most complete definition of 'previously developed land' is found in the NPPF. The Glossary to the NPPF includes:

***'Previously developed land:** Land which is or was occupied by a permanent structure, including the curtilage of the developed land (although it should not be assumed that the whole of the curtilage should be developed) and any associated fixed surface infrastructure. This excludes: land that is or has been occupied by agricultural or forestry buildings; land that has been developed for minerals extraction or waste disposal by landfill purposes where provision for restoration has been made through development control procedures; land in built-up areas such as private residential gardens, parks, recreation grounds and allotments; and land that was previously-developed but where the remains of the permanent structure or fixed surface structure have blended into the landscape in the process of time.'*

Planning Policy for Traveller Sites does not define 'previously developed land'.

The Site as a Whole is not Previously Developed Land

Although it is not clear from the DAS, Dr Murdoch's argument appears to be that because the stable has been constructed, the whole of the Site constitutes previously developed land, as it falls within the curtilage of the stable. This is incorrect, for three main reasons:

- 1) The curtilage of the stable does not extend to the whole of the Site;
- 2) The use of the Site for horses pre-dates the existence of the Stable, and therefore it is not to be treated as within the curtilage of the Stable simply because the Site and the Stable both have purposes related to horses;
- 3) The Site itself is subdivided, and the Application includes part of the Site which is physically separated from the stables by fencing.

Sullivan J (as he then was) considered the curtilage of a stable in **Withers v Secretary of State for Transport, Local Government and the Regions** [2002] EWHC 2425 (Admin), and stated at para. 12:

'even if it can sensibly be said that grazing paddocks are within the curtilage of a stable...'

Whilst Sullivan J did not need to reach a fixed conclusion on this matter, for reasons which we consider further below, this does demonstrate a considerable doubt as to whether grazing paddocks can sensibly be considered as being within the curtilage of a stable. This doubt is well-justified. The concept of curtilage is more commonly applied in relation to a dwelling-house, or similar building such as a hotel, rather than a stable. Indeed, the question may more often arise as to whether a stable is within the curtilage of a dwelling-house. The concept applies less naturally to a functional building such as a stable.

In **Methuen-Campbell v Walters** [1979] QB 525, Buckley LJ held at pp.543-544:

What then is meant by the curtilage of a property? In my judgment it is not sufficient to constitute two pieces of land parts of one and the same curtilage that they should have been conveyed or demised together, for a single conveyance or lease can comprise more than one parcel of land, neither of which need be in any sense an appurtenance of the other or within the curtilage of the other. Nor is it sufficient that they have been occupied together. Nor is the test whether the enjoyment of one is advantageous or convenient or necessary for the full enjoyment of the other. A piece of land may fall clearly within the curtilage of a parcel conveyed without its contributing in any significant way to the convenience or value of the rest of the parcel. On the other hand, it may be very advantageous or convenient to the owner of one parcel of land also to own an adjoining parcel, although it may be clear from the facts that the two parcels are entirely distinct pieces of property. In my judgment, for one corporeal hereditament to fall within the curtilage of another, the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter.

The Site was used as a horse-field prior to the construction of the stable. Therefore, the construction of stables is not necessary to the use of the Site for horses. It can be used for horses

independently of the stable. The enclosed field on the Site is not so intimately connected with the stable such that it forms part and parcel of the stable.

The Site is currently divided by secure fencing. The Application includes proposed development on either side of this fencing. The proposed static homes are to be sited on the far side of the fencing. This clearly is not included within the curtilage of the stables, due to the intervention of secure fencing. The paddock in *Methuen-Campbell v Walters* which was held not to form part of the appurtenances of the house (the appurtenances being confined to the curtilage of the house), was fenced off. Goff LJ (as he then was) held at p.538:

'What is within the curtilage is a question of fact in each case, and for myself I cannot feel that this comparatively extensive piece of pasture ought to be so regarded, particularly where, as here, it was clearly divided off physically from the house and garden right from the start and certainly at all material times.'

At p.545, Buckley LJ held:

'The evidence established that the garden has at all material times been surrounded by a fence, fencing it in with the house and separating it from the paddock, a fence in which there was a gate until the date which has been mentioned in Goff L.J.'s judgment. But the presence of the gate does not in my judgment detract from the fact that the garden was separated physically from the paddock by a fence. The garden no doubt serves the intimate domestic purposes of the house, and the enjoyment of those uses of the garden is an integral part of the enjoyment of the house as a residence. The enjoyment of the paddock serves, as I say, to provide what may be a valuable amenity and convenience but is not, I think, a use of a kind such as to negative the fact that the paddock was at all material times separated from that plot of land, namely the garden, within which the house is situate.'

Likewise, notwithstanding our position that the stable does not have a substantial curtilage, that curtilage does not extend beyond the secure fencing.

The Consequences of being Previously-Developed Land

We accept that whether the Site is within the curtilage of the stables is a question of fact and degree, subject to the correct interpretation of the meaning of 'curtilage'. Our position is that it does not. However, in case the Local Planning Authority is not persuaded of this, our submission is that it is clear that the status of the Site being previously developed land would not assist the applicant in any event.

In the Glossary to the NPPF, it is made clear in the passage in parentheses that *'it should not be assumed that the whole of the curtilage should be developed'*. An argument that this consideration was ignored was dismissed on the facts in *R (Dartford Borough Council) v Secretary of State for Communities and Local Government* [2016] EWHC 635 (Admin). In *Withers*, Sullivan J considered the policy in PPG 3. At para. 12, Sullivan J held:

'It has to be borne in mind that even if it can sensibly be said that grazing paddocks are within the curtilage of a stable, the footnote¹ makes it perfectly clear that it is only that part of a curtilage where there are building footprints which should be redeveloped in accordance with the advice in Annex C as previously developed land. Even if the Inspector had concluded that the paddocks were within the curtilage of the stables, he would immediately have reminded himself that it did not follow that they should be regarded as being developable given the remaining text of the footnote.'

Similar considerations apply here, albeit in the slightly different policy context of the NPPF. Even if the Local Planning Authority concludes that the Site is within the curtilage of the stable, it does not follow that they should be developable. This is so for the following reasons:

- 1) The basis for the policy support for development of previously developed land is to diminish the use of undeveloped greenfield sites by encouraging development upon land which has already been developed, and to ensure the re-use of sites and therefore that they do not fall derelict. There is much less planning harm to building on a site in place of an existing building, than where there is no existing building.
- 2) The application would result in a large open site being subject to development and considerable intensification of use, far in extent of the use of the Site as the curtilage of the Stables. The vast majority of the Site is not in fact built upon. The development proposed by the application is in not referable in type or scale to the existing stables.
- 3) As mentioned above, the construction of the stables in their present location is unlawful. It would be an unjustifiable interpretation and application of policy were a landowner to be able to construct a building on an open site without planning permission, to claim that the rest of the site falls within the building's curtilage, and then use that argument to justify the redevelopment of the whole site. The Site would clearly not be within the curtilage of the stable had it been constructed in accordance with the planning permission (the Site is fenced off from the field which has the planning permission for the location of the stables, and it appears that they are in separate ownership).
- 4) There is no indication that (at least prior to the unauthorised installation of caravans), the Site has been kept in anything other than good order. The land is kept tidy. It is in no sense derelict. The use and appearance of the Site was previously entirely fitting with its location and surroundings. There is no need to grant planning permission for otherwise undesirable development in order to improve the appearance of the Site.

¹ *'The curtilage is defined as the area of land attached to a building. All of the land within the curtilage of the site (as defined above) will also be defined as previously-developed.'*

However, this does not mean that the whole area of the curtilage should therefore be redeveloped. For example, where the footprint of a building only occupies a proportion of a site of which the remainder is open land (such as at an airfield or a hospital) the whole site should not normally be developed to the boundary of the curtilage. The local planning authority should make a judgment about site layout in this context, bearing in mind other planning considerations, such as policies for the protection of open space and playing fields or development in the countryside, how the site relates to the surrounding area, and requirements for on-site open space, buffer strips, landscaped areas etc.'

- 5) On the facts of the present case, there is no justification for the grant of planning permission for a stable to be used as a stepping-stone for a traveller site in this location.

As such, even if the Site falls within the definition of 'previously developed land', this in no way supports the application.

Human Rights

We contend that allowing this application would constitute an unlawful interference with our clients' rights under Article 8 of the European Convention on Human Rights. By virtue of s.6 of the Human Rights Act 1998, the Council is required to act in compliance with the Article 8 ECHR, including in decisions such as whether to grant planning permission under this application.

Article 8 of the ECHR provides:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

In ***Lough and others v First Secretary of State*** [2004] 1 WLR 2557, the Court of Appeal held that a decision to grant planning permission which would be harmful to amenity is capable of engaging Article 8. At para. 43, Pill LJ held:

'It emerges from the authorities: (a) article 8 is concerned to prevent intrusions into a person's private life and home and, in particular, arbitrary intrusions and that is the background against which alleged breaches are to be considered. (b) Respect for the home has an environmental dimension in that the law must offer protection to the environment of the home. (c) Not every loss of amenity involves a breach of article 8(1). The degree of seriousness required to trigger lack of respect for the home will depend on the circumstances but it must be substantial. (d) The contents of article 8(2) throw light on the extent of the right in article 8(1) but infringement of article 8(1) does not necessarily arise upon a loss of amenity and the reasonableness and appropriateness of measures taken by the public authority are relevant in considering whether the respect required by article 8(1) has been accorded. (e) It is also open to the public authority to justify an interference in accordance with article 8(2) but the principles to be applied are broadly similar in the context of the two parts of the article. (f) When balances are struck, the competing interests of the individual, other individuals, and the community as a whole must be considered. (g) The public authority concerned is granted a certain margin of appreciation in determining the steps to be taken to ensure compliance with article 8. (h) The margin of appreciation may be wide when the implementation of planning policies is to be considered.'

Considering the factors set out in this paragraph:

- (a) It is clear that the proposed development would constitute an intrusion into our clients' private life and home. They would be subject to a degree of overlooking, noise and disturbance which previously they have avoided.
- (b) The environment of our clients' home would be adversely affected by the development proposal.

Long Copse Lane has been designated as a road of special rural character. The proposed development would harm the open rural character of the area.

The use of the Site for residential purposes would have a considerable impact upon our clients in terms of noise.

There would be potential for a large number of cars to be parked at the Site (the DAS refers to 'parking provision for up to 4 vehicles per pitch on the site'). The east side of our clients' house and their patio is only around 10 metres from the gravel drive leading to the Site gate. There would be potential for considerable disturbance by virtue of this traffic.

- (c) Given the proximity and potential intensification of use at the Site, the loss of amenity affecting our clients would be sufficient such as to engage their rights under Article 8(1) ECHR. At para. 4.1 of the DAS, it states:

'By the imposition of suitable planning conditions no unacceptable effect on the amenities of nearby residence will occur.'

The clear implication is that there would be an unacceptable effect on amenity if suitable planning conditions cannot be imposed. In our submission, this sentence is far too vague to give the Council any confidence that suitable planning conditions can be identified.

- (d) The same factors as set out above under (c) apply.
- (e) The circumstances, including the level of impact, the planning policy context, and the fact that the stable itself does not have the benefit of planning permission, means that the interference with our clients' rights would not be justified under Article 8(2) ECHR.
- (f) The correct proportionality balance applies in favour of a refusal of planning permission. The applicant has not provided an explanation as to why this particular site is necessary as a traveller site. The applicant does not assert that the Site is allocated, or that there is a shortfall in traveller sites in the Borough. Any claim that permission should be granted as 'previously developed land' should be rejected for the reasons given above.

Given that the current stage of the process is a decision to be made by the Council as primary decision-maker, as opposed to a challenge to such a decision, paragraphs (g) and (h) do not apply.

Enforcement Action

As indicated above, the stables as constructed do not have the benefit of planning permission. They are therefore in breach of planning control. We note that the Officer Report for application APP/14/00381 states:

'To the west of the application site is Hollybank Cottage, a large detached residential dwelling. The stables would be sited in the south-east corner of the site and over 70m from this neighbouring residential property. The stables were sited in this location as it was the furthest point away from Hollybank Cottage.'

It appears that the location of the stables was of central importance. Despite this, the stables have been constructed in a completely different location, much closer to Hollybank Cottage. In our view, it would be expedient to take enforcement action in these circumstances, and the Council should consider doing so. Obviously the permission in 10/74070/000 was granted some time ago, but to the best of our knowledge, the period for enforcement under s.171B of the Town and Country Planning Act 1990 would not have expired. Nevertheless, the Council should consider exercising its powers on an urgent basis.



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ANNEX A

DRG. No. 01297/2C



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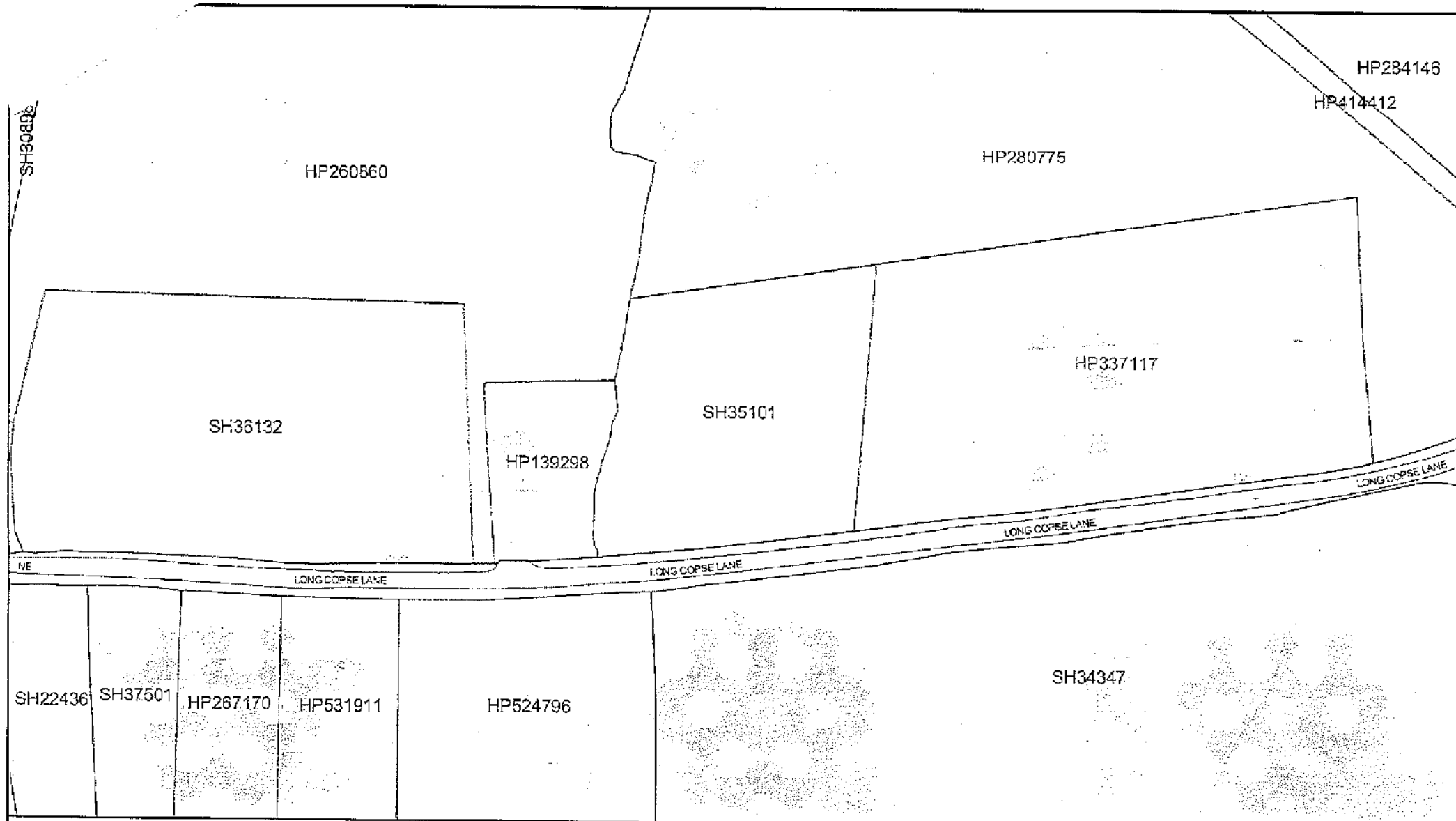
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ANNEX
C

MapSearch Snapshot

Page 1



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