

THRINGS

SOLICITORS

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Dear Mr. Weaver,

Representations on an application for planning permission under section 70 of the Town and Country Planning Act 1990 ('the principal Act')

APP/21/01310 | Change of Use of land and woodland (retrospective) as a wedding and events venue, including retention of permanent ancillary buildings and structures, the erection of removable structures (including marquees and temporary facilities), and the use of the land as a campsite in association with events. | Tournerbury Woods, Tournerbury Lane, Hayling Island ('the Application')

Tournerbury Woods, Tournerbury Lane, Hayling Island ('the Application Land')

The following representations on the Application are made on behalf of A.G. Phillips and Son Limited ("AGP") of Tournerbury Farm, Tournerbury Lane, Hayling Island Hampshire P011 9DL. AGP have owned Tournerbury Farm neighbouring Tournerbury Woods, Tournerbury Lane, Hayling Island ("the Application Land") during the entirety of the period specified in the application. Mr Graham Phillips is a director of AGP.

Relevance of Earlier Representations

These representations make highly material legal points and are additional to the representations on planning policy and material considerations made by Mr Michael Knappett BSc BTP of Messrs. BJC Planning and those of Mr and Mrs Phillips. The LPA is requested to also consider the first-hand material from AGP in response to planning application reference APP/18/00943 and the documentary, photographic and video material submitted for the appeal which it has in its possession.

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We invite the LPA to consider all the information that has already been provided on the appeals because in our submission, nothing has changed, and the matters raised in relation to those applications and outstanding appeal are just as relevant to this application. If the local planning authority requires a resubmission of those representations and the inquiry materials then we are happy to oblige. However, we are of the view that not demonstrably taking those representations and these into account in the course of the determination of this application would constitute a gross error of law.

The application must be refused: there is no change in material circumstances

The points made here are of critical importance for the local planning authority. Individually and collectively the considerations indicate strongly in only one direction: the Application cannot be granted in its current form and must be refused. The LPA's main reason for refusal on the previous application was the amenity impact on AGP. The "mitigation" suggested by the Applicants is unrealistic, unenforceable and fails the planning practice tests.

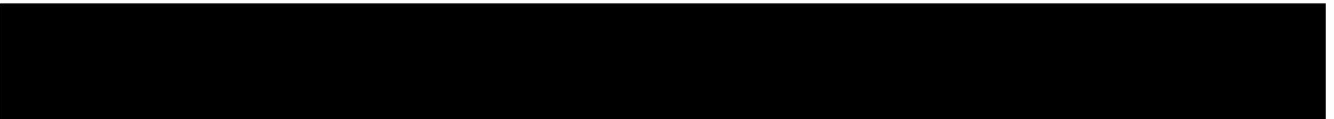
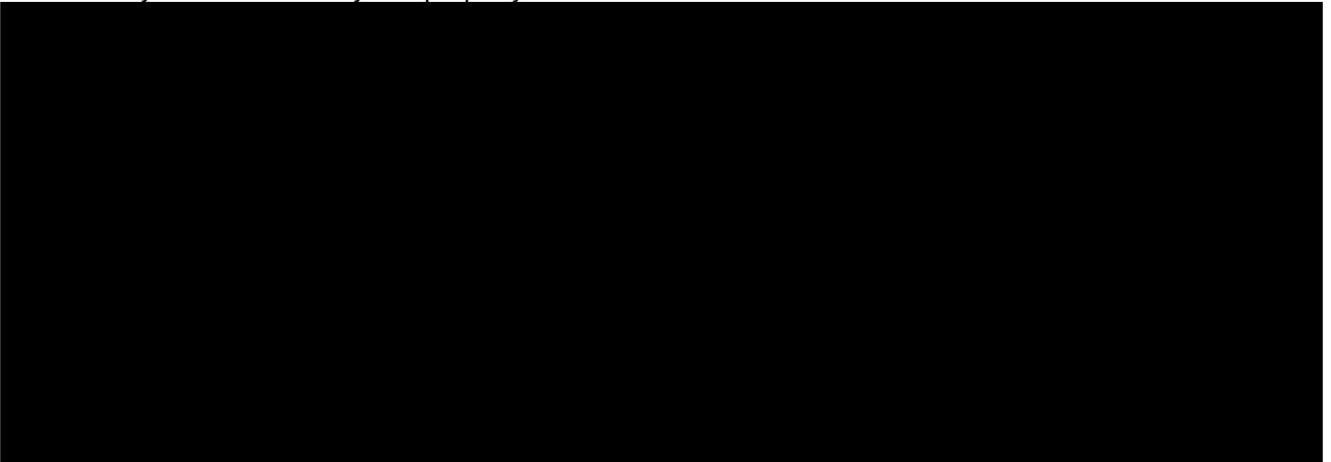
The only way that the impact of the development can be mitigated is by giving AGP a meaningful involvement on the proposal which as a matter of law, can only be achieved by a planning obligation.

Even if the Application were resolved to be granted against the planning history, and against the relevant legal and policy considerations, in circumstances where there was no change in planning material planning considerations, the only lawful manner in which any necessary planning mitigation on AGP's land may be delivered is by planning obligation to be completed in advance of the grant of planning permission. To be effective and to bind all the interests then AGP must be a party to that planning obligation.

The local planning authority ought to be mindful of the narrow legal requirement to grapple with the earlier reason for refusal.

Legal and Factual clarification

There are any number of legal matters relating to the Application and its supporting documents which individually and cumulatively can properly be said to be errors of fact and errors of law.



[REDACTED]

We enclose the correspondence to the applicant at Enclosure 1 to which this firm has had no response other than a request it is send electronically, and to which Mr Phillips of AGP and his wife have had this response at Enclosure 2.

Enclosure 1 is the opening offer from AGP about access to the alternative access track. It demonstrates a perfectly normal commercial basis and even-tempered starting point for negotiation; it is an offer conveyed by Savills. This is a highly reputable professional firm and the writer is a respected leader in his field.

The response at Enclosure 2 was not to AGP's agent or AGP's solicitor. It was directly to Mr and Mrs Phillips.

[REDACTED]

Second, the expansive definition of track relied upon by applicant is wrong as a matter of law.

We wrote to the LPA on 18 December 2020 to explain that it is legally incorrect that Appellant's rights are as broad as he suggests. We rely on those representations here - we have also written to the Appellant on a number of occasions to set out the same.

The law on easements is highly complex. We urge the local planning authority not to change its decision on the basis of a false prospectus; the position on the property dispute between the parties has not changed since the refusal of planning application.

Accordingly, the proposed mitigation cannot be delivered by the Applicant. It follows that there has been no change in material considerations since the refusal of planning application reference APP/18/00943.

The local planning authority will find itself in great difficulty if it proceeds on the basis that the proposed mitigation is deliverable and that the phantasmic promise of amelioration amounts to a lawful basis to conclude there is a material change in circumstances. It may end up granting planning permission for public access to a place which remains unsafe: see *Kane v New Forest District Council* [2001] EWCA Civ 878. The local planning authority is referred once again to AGP's commissioned report on this which is referred in the planning submission.

The local planning authority must not follow the Applicant down a rabbit hole that encourages it to accept the Applicant must both manage visitors and keep them safe off on the land and environs of the Application Land, but at the same time accept the Applicant can manage visitors or keep them safe on area of the Application Land and its environs beyond its control. The local planning authority must avoid falling into the trap of exercising powers ultra vires to create a de facto public highway on AGP's land,: see *DB Symmetry Limited v Swindon BC and SSHCLG* [2020] EWCA Civ 1331

We make the following general observations to the points made regarding “easements” which might assist the local planning authority in reaching a balanced view on the Applicant’s assertions in respect of whether they have any realistic basis for their confidence they can deliver any mitigation without an express agreement with AGP.

It is simply not correct that the Applicant can ensure the sight lines necessary for safety. The Applicant cannot install apparatus, signs or other works. A cursory recitation of the following non-exhaustive list of principles below make it plain the Applicant’s promised are impossible without agreement with AGP; a change to the easement; and a further application for planning permission to carry out those works.

Third, easement and ancillary rights arising thereto, must be construed for the intended purpose of the grant; here that is a matter of dispute between the parties. Planning law cannot be used to interfere with private property rights (DB Symmetry).

The following legal points regarding easements are important:

Terminology in land and planning law are not interchangeable and indeed, to rely on it as though it were, is misleading see: *Risegold Ltd v Escala Ltd* [2008] EWCA Civ 1180).

The local planning authority ought to prefer the interpretation of the landowner than the Applicant, and deal with the Application accordingly in the case of an obvious dispute.

The grant of an easement is subject to excessive user and cannot interfere with other persons having a like right see: *Jelbert v Davis* [1968] 1 WLR 589). The user contemplated by this permission would constitute an interference.

An easement cannot be used to access an enlargement of the dominant tenement. Moreover, there is no right of elbow room on a track such as this: it is restricted to the exact width of the way (*Minor v. Groves* (2000) 80 P&CR 136 at 143). The owner of land abutting a way may build right up to the edge of the way and AGP will restore the obstruction to the sight lines and reverse the Applicant’s summer trespass.

The upshot for the local planning authority is that there is no realistic basis for the upgrading unless it is agreed by AGP with the Applicant and required by a section 106 legal agreement. The Applicant has not even consulted AGP on the proposals, despite the fact it shall have to obtain AGP’s consent.

It should be recalled that the cutting back of vegetation was a trespass on AGP’s land, and accordingly the visual sightline as presented by the applicant is wholly illusory. Were the local planning authority to proceed upon the basis that the current sightline can be maintained would be incorrect, because it was achieved in a manner that does not reflect the legal reality, or the reality that delivery on the ground can only be with the consent of AGP. The Appellant was written to at the time, we enclose the correspondence for your reference.

Fourth, whatever the scope of the agricultural grant or easement, it also does not equate to planning permission to carry out works on AGP’s land.

Plainly, for the type of works set out in the Visitor Management Strategy (VMS), and which the applicant concedes is necessary planning permission would be required. The fact is that whatever the Applicant may argue, the land in AGP's ownership is not theirs to develop.

We would remind you that AGP properly obtained planning permission for their alternative track, the basis on which the Applicant intends to carry out work on the track without any planning permission being sought for the same is wholly unclear. At the very least, the tracks should be treated consistently; including landscaping, surface materials. All of this enhancement would require grant of planning permission in respect of AGP's land – just as was required for the alternative track.

Fifth, there is no right to resurface.

The easement provides no general right to metal or resurface the track, or to install signs or marshal visitors. To suggest otherwise is fanciful and to say the least, serves as an archetype for a case of the Applicant putting hope before any reasonable expectation. The local planning authority must reject that assertion.

Sixth, limitation on planning permission: the operational words and attachment of conditions

As a matter of law, no planning condition may compel or require works outside the operational terms of the planning permission. Planning conditions should not create a burden on AGP's land, we summarise relevant passages from the DB Symmetry case below.

The Law on Planning Conditions - Generally

A condition will be struck down where the people who would use the access track would be so numerous that they would in effect constitute the 'public', with the result that a highway or quasi-highway would have been built.

The local planning authority will be aware that highways or quasi-highways may only be constructed under other statutory provisions relating to the acquisition of land and the payment of compensation.

The Applicant has already said on their own case that they are of the view any person permitted by the Applicant can use the track. This is false, the effect of a grant of planning permission would change the position irrevocably in planning terms. The local planning authority action were it to grant planning permission might cement a situation where the Applicant could invite the public to use the track.

Accordingly, even if planning permission were granted against the development plan and all material considerations, it is obviously clear that a Grampian condition is not appropriate. It is equally clear that it must be conceded that were there to be a resolution to grant planning permission that excluded and prevented any changes to the track at all but required the Applicant and AGP to enter as parties into a planning obligation with the local planning authority, this would not amount to an exercise in compulsion. If the resolution was subject to the requirement for a planning obligation to which AGP was a party, then AGP being a party is more likely to avoid AGP having to take action against the local planning authority for unlawful exercise of its powers or acting beyond its powers.

An unenforceable condition will go to unreasonableness (Bromsgrove DC).

Planning conditions may only be attached under section 70(1) of the principal Act for regulating the development or use of any land under the control of the applicant. It is for the appellant to prove the existence, extent and rights arising under the track. As explained elsewhere, is a matter of dispute between the parties and it would be inappropriate for the local planning authority to work on the basis that it has sufficient information to reject AGP's analysis and accept that of the Applicant.

The attachment of the VMS as a planning condition would be a mistake, and not simply because it would be imprecise and probably unenforceable. In considering the imposition of conditions the Applicant needs to show that he will be able to implement the mitigation measures or VMS within the time limit imposed by the condition (*British Railways Board v Secretary of State for the Environment and Hounslow LBC* [1994] JPL 32).

This is highly unlikely to happen without the agreement of AGP. If the applicant were to adopt a more commercial and conciliatory approach to sensible negotiation, then a planning obligation and change to the terms of the easement might possible. However, at the time of writing that is simply not the Applicant's point of reference and is not the basis upon which the Application has been made.

In *DB Symmetry Limited v Swindon BC and SSHCLG* [2020] EWCA Civ 1331 the Court of Appeal affirmed the long standing principle that a planning condition attached to a permission will be invalid if its effect is to destroy private proprietary rights, such as to require the construction of an ancillary road on the application site and to make it available for use by owners of adjoining properties, effectively requiring its dedication as a highway without compensation.

The imposition of any planning condition that required the work proposed by the Applicant to facilitate safe public access would be unlawful for any number of reasons including these; it requires the grant of rights over land rather than merely regulating the use of land; it is a misuse of a power to achieve an objective that the power was not designed to secure; it is irrational in the public law sense, and it is disproportionate.

Allegations

It is the Applicant and not AGP that is having to manage the consequences of a failure to obtain planning permission before embarking on a business enterprise. The local planning authority should be slow to reward that behaviour unless it ensures that has cast iron mechanisms available for itself and for AGP to force the Applicant to behave appropriately in the future. At the present time, there is no sound basis upon which the local planning authority can reach that conclusion.



Precedent

The local planning authority is unable to proceed upon the basis that there is a history of activity similar to that for which permission is applied for in this Application that has become lawful by the effluxion of time. It is legally irrational to proceed on that basis where the certificate of lawfulness was rejected and a planning enforcement notice has been issued.

Were the local planning authority to accept by the grant of planning permission, without any history of lawful use, that commercial activities of the scale and nature sought by the Applicant are in principle acceptable, then it would drive a coach and horses through the application of the development plan policy in this locality.

AGP would be bound to consider if there was any commercial opportunity by a change in position adopted by the local planning authority arising from the grant of a planning permission for full commercialisation of neighbouring land and the attempt to change an agricultural track into an effective public right of way across land in their ownership. It would force AGP to reevaluate the range of planning uses that may be available to them, taking into account that they will be left with land in their ownership that is criss-crossed by two accessways permitted for wholly and unbridled commercial use by a neighbouring landowner.

Planning permission granted on the basis that the local planning authority accepted the Applicant's false submissions that planning uses at AGP's farm are a largely commercial use premises with dwellings, instead of an agricultural use enterprise with residential dwellings would be highly significant. It may irreversibly change the balance of material planning considerations in the locality. This policy risk ought not be discounted by officers or councillors. It is not a course of enquiry that AGP would necessarily want to follow, but it would be churlish for any enterprise to resist the temptation to re-evaluate the situation based upon a new planning landscape in which a commercial event venue hosting thousands of people a year was permitted by the local planning authority.

The general land use planning and ecological considerations are acute and have been explained by AGP and the Harbour Conservancy. As part of the development falls within a sensitive area, and it is a project for an urban development and/or campsite screening pursuant to the is required (the Schedule

2 Column 2 thresholds do not apply)¹. The local planning authority is asked to make an assessment and reach a screening opinion.

There is demonstrable harm to residential amenity on the basis of evidence related to the actual use - this is not a consideration simply based upon hypotheses. Accordingly, the authority is urged to look beyond the immediate considerations arising from this planning application and think about the long-term.

Notification

AGP are the owners of the land, but we are instructed they received no notification of the making of the Application as required by the Town and Country Planning (Development Management Procedure) (England) Order 2015. Given that the application form the Applicant completed may have both indicated information that they were the only owner of the land and also completed a Certificate B, the local planning authority ought to establish the correct position in respect of compliance with the legal requirements. It might usefully verify among other things whether and at what time the residential occupiers of AGP's land were notified of the making of the Application².

Conclusion

There are a host of legal obstacles in planning and private law that mean that the local planning authority is bound to reach the view that the Applicant is not presenting a deliverable or lawful scheme. There are a host of completing planning reasons why the Application must be rejected. In all the circumstances the Application must be refused.

Yours sincerely,



Enc: marked Enclosure 1, Enclosure 2, Enclosure 3 and Enclosure 4.

¹ The EIA Directive is currently implemented by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (the 2017 Regulations); a 'sensitive area' is defined in the 2017 Regulations. Planning Policy Guidance confirms that it is not possible to formulate criteria or thresholds which will provide a universal test and the question must be considered on a case by case basis. Also see *British Telecommunications plc and another v Gloucester City Council* [2001] EWHC 1001 (Admin) per Elias J. at [58] as to screening. An Ecological Impact Assessment is not an Environmental Impact Assessment within the meaning of the 2017 Regulations.

² There are a number of assertions on the application form that are questionable. For instance, the existing use as a wedding and events venue. When 120 car parking spaces have been created for the integral purpose of a material change of use without planning permission those spaces ought not to be considered a lawful baseline.