

THRINGS

SOLICITORS

FAO Mr Steve Weaver
Havant Borough Council
Public Services Plaza
Civic Centre Road
Havant
Hampshire
PO9 2AX

6 December 2019

Via email only: steve.weaver@havant.gov.uk

Your Reference:

Our Reference: MCK/A4274-3



Dear Sirs

Representations on Planning Application APP/18/00943

Tournerbury Woods, Tournerbury Lane, Hayling Island

We refer to the representations of even date made by Mr Michael Knappett BSc BTP MRTPI of the Bryan Jezeph Consultancy Ltd on the above matter on behalf of A.G. Phillips and Son Limited of Tournerbury Farm, Tournerbury Lane, Hayling Island PO11 9DL.

Please ensure that the representations of Bryan Jezeph Consultancy Ltd are fully considered by legal officers in advance of the determination of the application.

The letter dated 8 November 2019 [REDACTED] raises a number of issues. To avoid a prolix response we respond to there as briefly as possible. It is trite law that the focus of a planning application ought to be confined to land use planning issues and matters of planning judgement. Planning applications ought to be determined in accordance with the development plan unless material considerations indicate otherwise. The planning matters are dealt with by Mr Michael Knappett BSc BTP MRTPI.

A number of non-planning issues are raised. Officers are best placed to identify their degree of irrelevance to their recommendation. We do not intend to make detailed submissions in this correspondence about how misplaced non-planning representations are to the question of the discharge of the local planning authority's statutory duties. It is plain as a pikestaff that such submissions are not relevant. There is no need to remind the Council's professional officers that a mistaken reliance upon a non-planning aspect of a representation may lead the local planning authority becoming vulnerable to a successful legal challenge to a grant of planning permission.

There is also a great deal in [REDACTED] letter that is said about private rights of way. Legal submissions are offered by that firm to which we say:

Stuart Court ■ Salisbury Road ■ Romsey ■ SO51 6DJ ■ Tel: 01794 310 300 ■ DX 45902 ROMSEY
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- An express right of way is not in dispute but the issue in dispute is excessive use. This issue is subject to litigation, which is to be determined.
- What is set out in [REDACTED] letter is only one side of the story, which is not accepted by A.G. Phillips and Sons Limited.
- It is not for the officers or the planning committee to make a determination about this private law issue. The matter is for the courts only.

Accordingly, we respectfully suggest that in the context of this determination, the local planning authority would be best advised to disregard [REDACTED] commentary in respect of the private right of way. In any event, there is planning permission for an alternative route.

The issue of appropriate assessment is critical. Natural England has clearly objected to the proposal and that objection has not been withdrawn. How could an objection of this nature be withdrawn when an appropriate assessment is not carried out? The conclusions drawn in Natural England's objection and the legal implications that flow from them ought to be relied upon by the local planning authority, since Natural England is a specialist consultee.

In the unlikely event that all the other planning objections might be capable of being overcome, the failure of the applicant to submit an appropriate assessment at this stage, together with the overriding duty of the local planning authority to determine the planning application, results in the inexorable conclusion that the planning application ought to be refused. The local planning authority must grapple with the Habitats Directive issue expeditiously, not least to prevent a situation where development in contravention of the protections afforded by the Directive leads to immunity for the development in domestic law. This could arise from a failure to determine the planning application, a failure to take planning enforcement action and by the effluxion of time. If immunity in domestic law arises when it might have been avoided, then the resulting contravention of European Law in a sensitive location could lead to the local planning authority being subject to a legal challenge that may result in even greater difficulties. For example, a court may order the Council or the Secretary of State to commence expensive discontinuance proceedings to avoid the planning system perpetuating a continuing breach of the Directive or to mitigate the risk of infraction proceedings.

If there is a negative assessment of the implications of the development for the SPA then all compensatory measures necessary must be taken to ensure the overall coherence of Natura 2000 is protected. If there are no alternative solutions then a plan or project may only be carried out for imperative reasons of overriding public interest. These are the requirements of the Directive, and a local planning authority having proper regard to the seriousness of its legal duty is not conducting an exercise in gold plating. Planning Policy Guidance summarises the position:

When may appropriate assessments be required in the planning process?

If a proposed plan or project is considered likely to have a significant effect on a protected habitats site (either individually or in combination with other plans or projects) then an appropriate assessment of the implications for the site, in view of the site's conservation objectives, must be undertaken (Part 6 of the Conservation of Habitats and Species Regulations 2017). This does not apply to plans or projects directly connected to the conservation management of the features for which the site was designated.

A significant effect should be considered likely if it cannot be excluded on the basis of objective information and it might undermine a site's conservation objectives. A risk or a possibility of such an effect is enough to warrant the need for an appropriate assessment.

The conservation objectives relate to each of the habitats and species for which the site was designated and will be provided in more detail by Natural England. A competent authority must consult Natural England for the purposes of the assessment and must have regard to any

representations that Natural England may wish to make within a reasonable time (as specified by the competent authority). Natural England's formal advice on conservation objectives is publicly available for both European terrestrial sites and European marine sites.

It is our submission that if no Habitats Regulation Assessment has been undertaken at all, these considerations are incapable of evaluation. Accordingly then, we say it is only right that the planning application ought properly be recommended for refusal to avoid the local planning authority falling into the trap of making an error of law.

Please kindly acknowledge receipt of this correspondence.

Yours faithfully

