

## Philip Birch

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**From:** dcplanning shared  
**Subject:** FW: Planning Application - 19/00431/agr  
**Attachments:** FINAL TILE BARN ADVICE 23.07.20.pdf

**From:** Emma Montlake  
**Sent:** 23 July 2020 12:23  
**To:** Daniel Power  
**Subject:** RE: Planning Application - 19/00431/agr

Dear Daniel,

I am attaching the newly named substitute advice – so there can be no confusion, it is dated today's date. This is the one that should go up on the portal.

The headline from this and extracting from Counsel's advice is that:-

- a. the documents and details provided suggest that the development that is proposed here would, when built out, include the restructuring and/or re-routing of an existing farm track within 25m of the B2198;
- b. if that transpires, irrespective of whether prior approval is granted based upon the drawings provided (which show no works in relation to the existing farm track), the totality of the development would not benefit from permitted development rights because part of it includes development within 25m of the B2198, in breach of condition;
- c. it would be sensible for the Council to advise SAC that this development, if built out, would probably be unlawful and liable to enforcement;
- d. when considering the siting of the development, it would be irrational and unlawful for the Council to ignore the concerns that are raised in respect of the proposed access via the B2198 in relation to highways safety;
- e. the officer's report that has been prepared adopts a legally erroneous approach in being premised on the assumption that the Council's remit is to identify the most suitable location for the proposed store on the site, in light of the various constraints that apply. The report fails to recognise that is open to the Council
- f. to withhold prior approval on the basis that the proposed location is not an appropriate siting for the store, notwithstanding that there may be no better locations for the store elsewhere on the farmholding.

Thanks for your help with this and sorry to have gone rather round the houses. I am grateful to you.

Best wishes,

Emma Montlake  
ELF

itored or recorded to secure effective system operation and for other lawful purposes.

## **Proposal for a grain and machinery store**

**Hundredsteddle Farm, Bell Lane, Somerley, Chichester**

### **Prior approval**

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#### **ADVICE**

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#### **Introduction**

1. I am instructed by Emma Montlake of the Environmental Law Foundation on behalf of the Tile Barn Lane Residents' Association (TBLRA) to advise in respect of a proposal by Somerley Agricultural Contractors (SAC) to develop a grain and machinery store at Hundredstreddle Farm.
  
2. In particular, I am asked to advise on the considerations that pertain when Chichester District Council (the Council) decides whether to grant prior approval for the proposal, in particular whether highways safety issues are relevant to the siting of the proposal, and to advise whether the officer report that has been prepared adopts a legally adequate approach in its considerations of the issues that arise.
  
3. By way of short summary, my advice is that:
  - a. the documents and details provided suggest that the development that is proposed here would, when built out, include the restructuring and/or re-routing of an existing farm track within 25m of the B2198;
  - b. if that transpires, irrespective of whether prior approval is granted based upon the drawings provided (which show no works in relation to the existing farm track), the totality of the development would not benefit from permitted development rights because part of it includes development within 25m of the B2198, in breach of condition;
  - c. it would be sensible for the Council to advise SAC that this development, if built out, would probably be unlawful and liable to enforcement;
  - d. when considering the siting of the development, it would be irrational and unlawful for the Council to ignore the concerns that are raised in respect of the proposed access via the B2198 in relation to highways safety;
  - e. the officer's report that has been prepared adopts a legally erroneous approach in being premised on the assumption that the Council's remit is to identify the most suitable location for the proposed store on the site, in light of the various constraints that apply. The report fails to recognise that is open to the Council

to withhold prior approval on the basis that the proposed location is not an appropriate siting for the store, notwithstanding that there may be no better locations for the store elsewhere on the farmholding.

## **Background**

### Prior approval application

4. SAC intend to rely on permitted development rights conferred by Part 6, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO) to erect the proposed grain and machinery store. Where the intention is, as is the case here, to rely on Class A permitted development rights to erect a building and private right of way, the GPDO requires an application to be made to the local planning authority for determination as to whether its prior approval is required in relation to the siting, design and external appearance of the proposal (GPDO, Part 6, Class A, A.2 (2)(i)).
5. In accordance with that condition, several applications have been made by SAC to the Council for determination as to whether its prior approval is required in relation to the proposal. The design of the building and associated landscaping has developed during these applications. The Council is currently considering what I understand is the third application for prior approval, the reference to which is 19/00431/AGR.
6. By a delegated decision made by one of its officers, the Council on 8 February 2019 determined that its prior approval is required in relation to this proposal. Accordingly the development cannot lawfully proceed unless the owner secures the approval of the Council as to the siting, design and external appearance of the building and the siting and means of construction of the private way (GPDO, Part 6, Class A, A.2 (2)(iii)).
7. The agricultural justification statement enclosed with the application states the purpose of the building as being to enable storage of grain and farm machinery. It is suggested that the existing buildings towards the north of the farmholding are unsuitable for these purposes and the access to these buildings, via Hundredstrettle Lane, is unsuitable for articulated HGVs. The proposed building would be large enough to be suitable for grain and machinery whilst also capable of being accessed by articulated HGVs.
8. Access to the proposed building is proposed via a gap in the southern boundary hedgerows on an existing gravel track, a picture of which is included in the Agricultural Justification document. The proposed siting plan (drawing no. 5 rev. E) shows that a

new track would be constructed connecting to the existing gravel track, and a turning area would be constructed next to the proposed building. That drawing indicates 25m distances from the adjacent B2198, in order to demonstrate that the new track, which would connect to the existing one, and the building proposed would be more than 25m from a classified road.

9. SAC nevertheless accepts that the existing farm track, which drawing no.5 shows to be partially within 25m of the B2198, will need restructuring to be suitable to accommodate articulated HGVs. That is unsurprising given the appearance of the surface of the track shown in the picture I describe above. In the further information it submitted on 2 July, SAC recognises that:

“To facilitate better access for HGV lorries, the current farm track leading from Tile Barn lane will be suitable re-structured to better facilitate HGV use and avoid encroachment onto any other area of land to enable manoeuvres to be completed” (sic).

10. A site plan showing one method of re-structuring the existing farm track was set out in an earlier application for prior approval under reference 1803294PNO (drawing no. 5 rev. A). On the basis of this plan which shows the resurfacing and rerouting of the existing farm track, constituting development within 25m of the B2198, the Council decided, in relation to that earlier application, that the development proposed would not benefit from permitted development rights due to the prohibition in GPDO, Part 6, A.1 (h).
11. No plan or details describing the proposed re-structuring of the existing farm access appear to have been provided in relation to the latest application. The siting plan (drawing no. 5 rev. E) provided with the present application shows no restructuring or rerouting with respect to the existing farm track, and no development within 25m of the B2198.
12. One of the key concerns TBLRA have raised in relation to the proposals concerns highways safety, in particular the safety of articulated HGVs accessing the grain store through the access described above. Several documents and submissions have been presented to the Council on this point, and these have generated responses from SAC. TBLRA has additionally submitted swept path analysis to demonstrate the possibility of HGV access via Hundredstrettle Lane to the existing buildings. The position of SAC throughout this process has been that the Council may not lawfully consider highway matters when determining whether to grant its prior approval to the proposal.

13. In support of its position, SAC provided to the Council an opinion from counsel, David Lintott, dated 1 October 2019, which advises that the Council is extremely limited in what it can consider under the prior approval application and in particular cannot consider highway matters.

#### Officer report

14. A detailed officer report has been prepared which outlines the concerns that have been raised in relation to the proposals, including in relation to design & appearance and highways safety. It summarises the concerns raised by highways officers. Ultimately the report recommends that prior approval is granted, notwithstanding the concerns raised. I understand that the Council's planning committee will make the final decision on the application in due course.

15. In relation to highways matters, the officer report cites the views of the highways authority in relation to the proposals, and in particular notes the highways authority's view:

- a. that access "will result in large farm vehicles being required to perform a hairpin turn manoeuvre if access the site from the north or leaving the site and heading north" (sic);
- b. agreeing with the principal findings of a technical note prepared by Highway Planning Ltd, on behalf of TBLRA, which raises concerns as to the safety of the proposed access; and
- c. that "the documents provided to date do not allow for determination that safe and suitable access is achievable".

16. The relevant highways issues are analysed in the officer report at para 8.8. The report draws attention to the constraints noted by SAC in relation to Hundredstreddle Road, the existing access to the buildings to the north of the farmholding, in particular its narrow width, and concludes that facilitating safe access by HGVs to those buildings would require a new access road from the southern end of the farm, which would have an unacceptable impact on the landscape and the conservation area. This analysis is challenged by TBLRA.

17. The concerns raised by the highways authority as to the proposed access to the barn at the south of the unit are noted, however the report goes on to dismiss those concerns for the following reasons (underlining added):

“there are no preferable existing access points to the farm that could accommodate the required vehicular movements and would result in a better or safer access. As the principle of the development is established through the GPDO the remit of the Local Planning Authority is limited to establishing the most favourable siting of the building, rather than the consideration as to whether the principle of development in itself is acceptable.”

18. Later at paragraph 8.12 the officer report repeats the proposition that the Council's remit is in identifying the most desirable location and access for the proposed grain store, taking account of all relevant considerations and site constraints.

“The principle of the development is considered acceptable under Part 6 of the GDPO, the only matters to consider are sitting, design and external appearance of the building. In considering these matters the council considered other locations for the development, while having regard to the constraints of the existing farm complex, access and highways implications, ecological matters, light pollution and neighbouring impact. It is therefore considered that given the development is acceptable in principle, under Part 6 of the GDPO the sitting, design and external appearance of the building would result in the least harm having regard to those matters.”

### **Legal framework**

19. It has been held that a planning authority considering whether to grant prior approval is not tasked with considering whether the proposal would in fact meet the conditions for the class of permitted development in question. Its role is limited to considering whether to grant approval in relation to the siting, design and external appearance of the proposal. Lang J in *R (Marshall) v East Dorset DC* [2018] PTSR 1508 said as follows at [44-45]:

“... The appropriate time for the local planning authority to consider [whether or not the proposed development comes within the description of the relevant class in the GPDO] is in response to an application for a certificate of lawfulness of existing use or development under section 191 of the TCPA 1990 or proposed use or development under section 192 of the TCPA 1990 or an application for planning permission. If no such applications are made, the authority has power to consider whether a development is within permitted development rights in the context of enforcement proceedings”.

20. However, it is permissible for the authority, when determining a prior approval application, to advise the applicant of its views as to whether the proposed development is likely to constitute permitted development, provided it does not purport to decide the matter (*ibid* [46]).

### **Advice**

21. The documents and details provided suggest that the development that is proposed here would, when built out, include the restructuring and/or re-routing of the existing farm track which is within 25m of the B2198. In my view, irrespective of whether prior approval is granted based upon the drawings provided, which only show the proposed grain store and new access track but not the upgrading/re-routing of the existing track, the totality of the development would not benefit from permitted development rights if part of it includes development within 25m of the B2198.

22. The strategy may be to secure planning permission for the re-routing / re-structuring of the existing farm track, following determination of the prior approval application. That salami-slicing approach would not in my view be legally acceptable. For one thing that would make a farse of the condition on Class A prohibiting all development from qualifying as permitted development if part of it is within 25m of a classified road. For another, if the proposed grain store is given prior approval, this will not be tantamount to a grant of planning permission for that proposal. There are two important points that flow from that reality.

23. First, any future development on the site will need to meet the conditions set out in Class A in order to be permitted development and lawful. Thus, if the development actually carried out includes development within 25m of the B2198, as appears to be the intention, the totality will not comply with the conditions set out under Class A, and will be unlawful and liable to enforcement action. Furthermore, the planning authority when determining any future planning application on proposed works to upgrade / re-route the existing farm track, to reach a lawful decision, would need to do so on the correct premise that the proposed store which the access would serve does not benefit from planning permission.

24. Second, any future development would need to be carried out in accordance with the details provided to the Council when making its determination on prior approval to benefit from permitted development (GPDO, Part 6, Class A, A.2 (2)(v)). That would include amongst other things the proposed siting plan (drawing no. 5 rev. E) which

shows no works in relation to the existing gravel track. Thus the construction of the grain store with a greater extent of access works than is shown within that drawing would not constitute permitted development.

25. For these reasons, the development that is proposed does not appear to meet the conditions set out in Class A to constitute permitted development. The case-law confirms that the Council is not entitled to withhold prior approval on the basis that the development, when constructed, will not meet the conditions set out in Class A (Lang J in *R (Marshall) v East Dorset DC* [2018] PTSR 1508 said as follows at [44-46]). It is however open the Council to advise the applicants in relation to this application that the proposal advanced here falls outside the scope of Class A permitted development rights, and if the grain store is eventually constructed together with works to the field track within 25m of the BS2198, that development would be unlawful and liable to enforcement action by the Council.
26. In relation to the matters that are relevant to the Council's determination of prior approval, the relevant considerations are set out in the GPDO, namely the siting, design and external appearance of the proposal. In disagreement with Mr Lintott's advice, my view is that highway considerations can in principle be relevant when considering the siting of a proposed building. Whether or not highways considerations are relevant to the siting of a proposal will depend upon the circumstances of the development in question and that will be a matter for the planning judgement of the planning authority.
27. There is no case-law I am aware of establishing this proposition. Nor is there any case-law that I am aware of that establishes highways concerns are, in principle, irrelevant when considering siting, or that (as Mr Lintott implies) siting is limited to considerations of visual impact. The term siting is not defined in the GPDO. The normal meaning of the word siting, it seems to me, is relating to location. It seems to me that highways matters may be considerations that are important when considering the appropriateness of the location of development. It matters not in my view that highways matters are not explicitly listed in the GPDO as relevant matters for the authority to consider when considering whether to grant prior approval. On that point, in the case cited above, Mrs Justice Lang at [58] accepted that the impact of a proposal upon a neighbouring Grade II listed building may be a relevant consideration when considering the siting, design and external appearance of the proposal, notwithstanding that there is no express legislative basis to take account of heritage

impacts. Heritage impacts could be relevant if they relate to the siting, design and external appearance of the proposal. Likewise, highways matters can be relevant if they relate to the siting of a proposal.

28. Furthermore, it seems to me that this is a case where it would be irrational to ignore the concerns that have been raised in relation to highways safety when considering the acceptability of the siting of this proposal. The concerns might (as is suggested) make the proposed location of the grain store, at the south of the farmholding, unacceptable, and consequently they have considerable relevance.
29. I furthermore note that the justification for the siting of the grain store in this location advanced by SAC is premised on the highways constraints that it states apply in relation to access to the existing buildings via Hundredstredde Lane. If highway constraints in relation to the existing access are relevant to siting, it is in my view inconsistent to suggest the constraints that apply to the proposed access are not relevant to siting. These are all relevant matters in my view and they should be considered by the Council when making its decision on the proposal.
30. For these reasons, my view is that the Council would be liable to err in law were it to decide that the concerns raised in relation to highways safety are irrelevant to its consideration of the siting of the proposal. That is not however what the officer's report appears to have done. The officer report highlights and considers the concerns in relation to the proposed access, which is correct as a matter of approach. However, whilst those concerns are considered, the report ultimately adopts a legally erroneous approach in my view by basing its analysis on an erroneous premise.
31. At paragraphs 8.8 and 8.12, copied above, the author of the report assumes incorrectly that the remit of the Council is establishing the "most favourable siting" or the siting that would result in the "least harm", in light of the site constraints that exist in relation to this farmholding. That in my view is a legally erroneous approach. It presupposes that it is not open to the Council to conclude that there is no adequate location on the farmholding in which the building could be located, considering siting, design and external appearance matters and the constraints of the farmholding.
32. It appears in this regard that the author has conflated the nature of permitted development rights under the GPDO with that of outline planning permissions. Whilst there are some similarities between these concepts, one difference is that in the case of outline permissions a determination has already been made that the development

is in principle acceptable on the site in question. Following a grant of outline permission it is no longer open to the authority to decide that the development is not acceptable on the site in principle.

33. By contrast, where prior approval is required for Class A agricultural development, the GPDO does not require the authority to start from the premise that the agricultural unit in question can appropriately accommodate the proposed development, and its remit is limited to identifying the most favourable location and access having regard to siting, design and external appearance. The authority can lawfully find that there are no acceptable locations on the agricultural unit for the proposed development, having regard to siting, design and external appearance.

34. For these reasons, my view is that the officer report adopts a legally erroneous approach.

### **Conclusion**

35. My advice is set out above.

**Horatio Waller**  
**Francis Taylor Building, Inner Temple**  
**14 July 2020**