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Your ref UTT/22/2278/FUL
Our ref MJH/TEE&TEE 272633.0001
Date 6 September 2022

Dear Sirs

PLANNING APPLICATION: UTT/22/2278/FUL
LAND TO THE NORTH OF CORNELLS LANE, WIDDINGTON

The Applicants Dr and Mrs Tee request that we write to you concerning Permitted Development and the access 'fallback' position insofar as this relates to the proposed site access from Cornells Lane. The Applicants wish to ensure that the current application is determined properly and lawfully – in part to avoid an unwanted and costly appeal (again) – and having seen some of the public comments wish to respond to these.

Since the making of the application there has been a material development; namely, on 25th July 2022, the LPA granted a Certificate of Lawful Use or Development ('CLOPUD') under application reference UTT/22/1523/CLP, with the description:

'Certificate of lawfulness for the proposed formation, laying out and construction of a means of access to Cornells Lane, in connection with the use of land (up to 14 days per calendar year) for the purposes of the holding of a market'.

In taking that decision, the Uttlesford District Council ('UDC') had considered third party objections, including those from a Barrister (QC) advising Widdington Parish Council providing arguments why the CLOPUD should not be granted. UDC sought its own independent legal advice, as evidenced in the officer's delegated report, the outcome of which supported the grant of the Certificate/CLOPUD. This confirms the legal advice which we had provided in support to that application as set out in our letter dated 12 April 2022.

We are not aware of any challenge to the lawfulness of UDC's decision/the CLOPUD – and we express our belief that there can be no challenge in law/any challenge would be deficient in merit.

The Fallback position

Case law says that decision makers are obliged to have regard to a "fallback" position, namely what could be carried out without a fresh planning permission. We can provide a full account of legal precedents should this be helpful (please let us know). However, to summarise case law, the approach is:

a) Is there a fallback regarding a development or use/activity? – i.e. in this case, is there a lawful ability to undertake works to form the means of access?

b) If yes, is there a likelihood or real prospect of those works occurring?

c) If yes to 'b', a comparison must be made between the proposed development and the fallback works.

These shall be considered in turn.

Is there a fallback (a)?

Yes – which has been confirmed by the grant of the CLOPUD.

Hence, if works are carried out for the holding of a market and the access is provided in the form as set out in the Application for the CLOPUD then that access would be lawful, and moreover, "conclusively presumed" to be lawful (per s192(4) Town and Country Planning Act 1990).

More generally, there is a fallback to provide a means of access to a highway under Class B of Part 2, Schedule to the to Town and Country Planning (General Permitted Development)(England) Order 2015 ('the GPDO')('the PD Right'). The PD Right exists as any means of access to Cornells Lane will be permitted where that access is required in connection with development permitted by any class in Schedule 2 to the GPDO.

Both the fallback confirmed by the CLOPUD but also the more general right granted by the PD Right are material considerations capable of attracting weight in the decision-making process; this is because the CLOPUD confirms the 'principle' that, where 'required' in connection with any temporary use rights granted under Schedule 2, Class B, Part 4 of the GPDO, the formation, laying out and construction of a means of access to Cornells Lane may lawfully be undertaken in accordance with the PD Right.

Is there a likelihood or real prospect of works occurring (b)?

We note that the Applicants' Planning, Design and Access Statement August 2022 comments on the fallback position and cross refers to Paragraphs 7.46 and 7.47 of the Appeal Statement of Case which sets out relevant Judgements. These indicate that the fallback position will be a material consideration if there is 'a greater than theoretical possibility' of the fallback works taking place ('Gambone'); and that 'The basic principle is that "for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice ('Samuel Smith Old Brewery').

Again, the answer to (b) is "yes" – the Applicants' clear and stated intention (per letter of 12 April 2022) is to provide the access to enable the holding of a market on the Application Land in due course. To facilitate the same, the approved means of access must first be constructed. It may be the case that the access, in its constructed form, is or can be used in connection with (and required by) other temporary uses permissible by the GPDO.

It has been unequivocally and conclusively proven, by the grant of the CLOPUD, that such works may be lawfully carried out in connection with the use of land for the purposes of the holding of a market (and up to 14 days per calendar year). The Applicants need not have sought a CLOPUD but simply relied upon the PD Right, the fact that a CLOPUD has been sought (and obtained) is of relevance to an assessment of the fallback position being invoked.

Third party objectors have (erroneously) asserted that the access works cannot be carried out lawfully because the holding of a market cannot occur without a licence from Saffron Walden Town Council ('SWTC') and local objectors have presumed, given representations of SWTC to the (approved) CLOPUD application, that such licence when applied for would not be granted. However, this is a moot point, because the construction of the access, which could commence at any time, does not depend on the authority of SWTC and any private law rights that SWTC do/may have are not material to the position in planning law/capable of being a material consideration for the determination UDC is required to make under the 1990 Act.

Furthermore, the Applicants have not yet made any application for a market licence to SWTC. When they do make such application, it shall be ensured that the relevant policy is complied with. Until the licence application is made and formally considered, it would be inappropriate for SWTC to pre-judge the outcome; in fact, any proven pre-determination by a licencing authority would be both improper and unlawful and potentially subject to legal challenge through the Courts.

Moreover, and importantly, the ability to construct a means of access is not solely dependent upon the holding of a market on the Application Land.

There are wide and multiple temporary uses, most for up to 28 days per calendar year, which could take place - Schedule 2, Class B, Part 4 of the GPDO grants permitted development rights as follows:

> The use of any land <u>for any purpose</u> for not more than 28 days in total in any calendar year, of which not more than 14 days in total may be for the purposes of—
>
> (a)the holding of a market;
>
> (b)motor car and motorcycle racing including trials of speed, and practising for these activities,
>
> and the provision on the land of any moveable structure for the purposes of the permitted use.

On behalf of the Applicants, there are a few comments that we wish to make here.

Firstly, some third-party objectors argue that if the holding of a market cannot occur then the 'only' other temporary use available under the GPDO is for the purpose of motor car and motorcycle racing including trials of speed, and practising for these activities. The same objectors go on to speculate whether this use would (or could) occur and whether such use represents a fallback position. UDC will be well-aware that temporary uses may be wide and varied (see below) but it would be correct that markets and motor racing etc events are subject to a limit of 14 days in any given year.

Secondly, the objectors appear not to appreciate that if the means of access is 'required' in planning law [GPDO] then it can first be constructed before the temporary use of land is enacted.

Third, examples of uses of temporary use of the Application Land (which is over 3 acres) include the following:

- Family Fun Days – to include, by way of example only, "bouncy castles", games, "petting zoo", displays and other activities
- War Gaming
- Paintball
- Dog Shows
- Music concerts
- Circus
- Car Shows, Clubs, Societies and Rallies

- Outdoor Sports Events
- Outdoor Recreation for clubs/societies
- Boot camp
- Outdoor Theatre
- Clay Pigeon Shooting
- Company days/events
- Charitable Events
- Beer Festivals
- Fun Fair

All of the above would undoubtedly 'require' a new/improved access to allow for equipment/chattels to be delivered, installed, dismantled and removed and with an improved access for the safe arrival and departure of guests/visitors/customers/clients in their private vehicles. The variety of uses are available under the GPDO for 28 days each calendar year and provide (some of) the other realistic options for the use of the land by our client.

[NB – the above is not an exhaustive list, but is merely used to show the wide range of temporary uses allowable, several of which will require moveable structures e.g. marquees, etc, allowed under the GPDO temporary use rights.]

Fourth, the chattels to be delivered to/taken from site may include tents, marquees (to include a "big top" in the case of a circus), attractions, toilets, seating, provision of ancillary food stalls etc. – all of which likely to be delivered on site by large vehicles/HGVs. Given the likely amounts and/or types of vehicular traffic generated by these uses, a means of access which is at least the size/specification of that already benefitting from the CLOPUD approval would be required. Again, the same would not 'need' a CLOPUD to be granted - as such is/would be Permitted Development under the GPDO – but, if sought/granted, a fresh CLOPUD would re-confirm the lawfulness of a means of access for [X] use in any event; [X] being the temporary use for which the access is required in connection with.

Simply put, as the Applicants have many temporary use options, not just the holding of a market, they can construct a means of access under the PD Right and weight must be given to this.

Fifth, Objectors may well speculate whether any temporary uses of land that could take place would be commercially viable – this is not a planning consideration and, as such, irrelevant. The Applicants fully intend to put in an access and exercise temporary use rights, for up to 28 days a year, which is of itself sufficient justification to/for the Applicants. It does not matter if Objectors believe that they would take a different view (for reason of commerciality/costs or whatever) to the Applicants if they were in the "same shoes".

Moreover, we are instructed that the Applicants wish to construct such access, irrespective of the outcome of the current planning application or planning appeal, as such will provide a safer access than the existing track and which will be suitable to serve the land for the legally available uses, including temporary uses, in future years to come. We can confirm that the Applicants are liaising with Essex Highways but also potential contractors (constructors) as to the proposed access. The Applicants' stated intention(s) could not be clearer therefore.

To conclude, there is more than a mere 'possibility' of the PD Right being invoked and a new access arising in fact - the Applicants' intentions are clear and highly credible (especially given the inadequacies of the existing access and desire to find uses for the land the access serves). Therefore, the provision of a new access is a lawful and material fallback position; to which weight should be given and, given the likelihood of such access being provided, on behalf of the Applicants we say that considerable weight should be given to this fallback.

Comparison of an access under the PD Right (per the CLOPUD) and as proposed in the current planning application (c)

The Applicants have taken great care (and incurred considerable expense) in scoping an access to the Application Land; the preferred access/solution for any temporary/lawful use of the Application Land being that proposed and confirmed as lawful by the CLOPUD. Hence, the CLOPUD plans are/will be an illustration of any access installed in exercise of the PD Right.

It is evident from comparison of the drawings for both the CLOPUD and the planning application that the built form of the access (e.g. size, siting, etc) would be identical. This is perhaps unsurprising given the constraints of the Application Land/site but also best design and planning principles. Accordingly, the comparison of the proposed and fallback positions are constrained in turn.

It follows that:

- the lawful construction of the means of access would have near identical impact upon the character and appearance of Cornells Lane. UDC must therefore provide a significant degree of weight to these facts as a material consideration under the Planning Acts; simply put it is not tenable to find that the building of an access, if in conflict with planning policy, is a good or sufficient reason for refusing permission given that an identical access can be provided by exercise of the PD Right.
- To be more specific, given the similarities of the proposed access to the fallback works, if the LPA were to refuse permission (as per the appealed application) under Policy ENV9/NPPF Para 203 on the basis of harm to the Protected Lane, this would therefore be unreasonable and, in our view, inadvisable.
- We accept that consideration may be given to the use of the access between that which may arise in exercise of temporary use rights/the GPDO and those arising under the permission, as to which:
    - Visibility etc will be identical;
    - Form/appearance of the development [access road], to include visibility splays, kerb line, gradients and banking, will be identical;
    - Use in connection with "events" etc. may be more "peaky" (i.e. intensive) and, as such, there may be more issues as to highway capacity and safety of its users;
    - Event traffic would be more infrequent but, as above, the magnitude of such use materially greater;
    - Event traffic may likely be larger, slower-moving and noisier vehicles (e.g. HGVs and low-loaders) and hence more disruptive to neighbouring landowners;
    - Simply put, a comparison is to be made between infrequent, high-intensity uses (e.g. "event traffic") and low-level but regular use associated with occupiers of the proposed residential dwellings. We venture that the latter is unlikely to give rise to harm, or material harm, to occupiers of neighbouring properties – private motor cars leaving for work, or a weekly shop, etc. are unlikely to add materially to the number of vehicles using the adjacent highway. That situation can be contrasted with HGVs setting up an event for, say, an open-air theatre with seating, lighting and amplified sound, and a "procession" of visiting (and departing) theatregoers. To summarise, on any given day a residential use of the access track is unlikely to materially erode neighbouring amenity or overburden the adjacent highway – in contrast, traffic associated with an "event" could foreseeably place considerable burden on the highway, in addition to detrimentally eroding neighbouring amenity through the nature and volume of traffic generated by any given "event".

On behalf of the Applicants we say that there is a fallback, of significant materiality, and one which leads to the construction of an identical access to the Application Land, with the only issue for consideration being the impact of the use of the same. UDC may well form the view that the impact of the use of the access is less in connection with four residential dwellings than for "events".

Other

We note third party objections refer to an appeal case in *Portland* where the Inspector gave only limited weight to the fallback position as he did not have adequate assurance that it was a real prospect. The objectors then try to equate the principles of that appeal to the Applicants' fallback position.

In the Portland appeal case, the facts are that the fallback position related to a planning permission some 18 years ago which the Inspector was not convinced had been lawfully commenced. Furthermore, the fallback concerns a planning permission for a building of multiple uses which did not correspond with the singular restaurant use that was appealed. None of this compares with the facts in the Applicants' case, where the means of access may be lawfully provided by exercise of PD Rights, an example of which has been confirmed by a very recent CLOPUD, which the clients wish to undertake and which will, in its built form, compare in an identical way to the access proposed in the planning application (and appeal) scheme but the nature of the use may be less detrimental if use is for residential (and purposes ancillary thereto) only.

Summary/Conclusion

In light of the above, matters can be summarised as follows:

- There is and was a material fallback under the GPDO for the provision of an access in connection with the exercise of temporary use rights.
- The Applicants have now obtained the CLOPUD for one example of a permissible temporary use which confirms that a new access may be provided by exercise of the PD Right (i.e. for the holding of a market).
- The access proposed in the current application is identical to that which may be provided by exercise of the PD Right and as outlined in the CLOPUD (upon which the Applicants may rely).
- The consequence of the above is that the sole issue, insofar as the access is concerned, is the planning impact of the use to which that access is put.
- UDC may well form the view that the use of an access in connection with four private residences will not have a material impact to neighbouring properties, whereas use in connection with an "event" may well do.

We trust you will take the contents of this letter into account in considering the current application and the representations made by third parties.

Yours faithfully

[redacted]

HOLMES & HILLS LLP

Cc – The Applicants – Dr and Mrs Tee

- *Springfields Planning and Development (Mr C Loon)(Planning agent) – by email only*