

GPC contacted the Hampshire Association of Local Councils on Thursday 13<sup>th</sup> May 2021 to seek advice about the way EHDC have managed planning application reference SDNP/21/00667/APNB.

Hampshire ALC put the Clerk in touch with a planning specialist who spent some time going through all the documentation on the SDNPA web portal and speaking to the Clerk to obtain additional background information.

The following advice was then provided on 18<sup>th</sup> May 2021 by email.

Dear Jane

It was good to speak to you on the phone and I understand the controversy this issue is causing locally. Unfortunately, it involves an area of planning law where there is some uncertainty, and as I am not a lawyer I would certainly not offer any view on how that should be resolved. What I would offer are the following comments which may be of practical assistance.

1. It is without doubt that East Hants or South Downs (or both – I will just refer to ‘the LPA’) made an administrative error in failing to determine the prior approval ‘in time’. They have acknowledged this. The applicant lawfully benefits from the error (because it is nothing to do with him) but only in so far as it goes – he cannot use it to excuse any action he chooses. A complaint could be made by a resident to the Local Government Ombudsman regarding the error but no finding from the LGO will have any bearing on the planning position.
2. As yet the LPA has not provided the parish council with some of the information which it can reasonably expect to see in order to understand what has happened. In particular, the formal decision notice refusing prior approval and requiring a full planning application cannot be the last exchange between the applicant and the LPA because we know that that decision has been set aside. In her ‘explanatory’ email to you (and now published on the EHDC file for the application) the planning officer says in opening:

**Thank you for your email. Unfortunately the ‘SDNP/21/00667/APNB’ Prior Notification has deemed consent, that is the work can be carried out as submitted (my underlining)**

This suggests that the LPA has decided that the work is authorised (but provides no explanation of why of course). Is this statement the actual position of the LPA and in what form has it been conveyed formally to the applicant? The parish council needs to know what has been said and the reasoning behind it. The question of whether or not, when considering an application for prior approval, the LPA is also bound to consider or is deemed to have considered whether the proposed development does actually benefit from the claimed permitted developments rights is not, as I understand it, a settled legal matter. The NewWorld Payphones case your correspondent refers does indeed say what is quoted. However, it is contrary to the view which has been understood from the previous leading cases and is not it considered definitive as it did not directly address those cases and precedence has not been firmly established. This is further complicated by a more recent case still which appears to revert back to the previous position. So, the question of what advice the LPA is relying on is one that you can reasonably expect to have answered.

3. In any event, the LPA did not determine the prior approval, it was deemed, and there is no final position statement on record (only the faulty decision notice which is presumably null and void). We are back to the question of what does the LPA think the position is and what has it formally told the applicant?
4. If the position, for any reason, is actually that the LPA consider that the development does not benefit from PD rights, then it may still take enforcement action. As you know, the LPA has wide discretion on this and should follow its published enforcement policy. Were it to turn on the question of the actual

size of the agricultural unit this might not be the strongest platform for enforcement action and will be challenged back of course.

5. If the LPA considers that the development does benefit from PD rights, as it would seem to do, then provided it is constructed within the scope of those rights they are obviously not going to be able to take enforcement action. I believe you would be out of time for Judicial Review proceedings regarding the “decision either way” although you should consult a lawyer if you were considering the possibility of a challenge.
6. If the LPA does not commence enforcement action the applicant, either before or after construction, could seek a lawful development certificate to resolve any lingering doubts about the status of the development.

I would suggest that a reasonable course of action (and something which is needed before you can go further) is to ask the LPA for the correspondence with the applicant subsequent to the issue of the faulty decision notice. It is unsatisfactory that they have not given this to you and not placed it on the public record. A short, informal, email from the LPA is nowhere near enough in the circumstances. You may also want to ask the LPA for an explanation of the chain of events. Knowing what is and is not common ground between the LPA and the applicant is essential. Whilst this may not seem like a particularly ‘bold’ response, in my experience it is essential where you seem to be getting conflicting statements and messages from different sources within the LPA. With that information to hand a proper assessment can be made of any possible further action, even if that is only a complaint regarding the administration of the process. It will also help the LPA to straighten out their thinking which might be useful to everyone involved.

Jane – I’m very happy to take a call in respect of clarifying any aspect of this email of course. If I can be of further assistance to the parish council then I would be happy to do so although given the time constraints it would need to be on an arrangement beyond the HALC advice service.

**Steve Tilbury MSc AssocRTPI**

Steve Tilbury Consulting Ltd

**JI additional notes:** This is an email that we have been privy to from Nick Upton, EHDC Planning, which contradicts Danielle Hall’s email regarding the decision:

EHDC Planning Officer: I’m aware the applicant for this scheme wanted us to go beyond our remit and issue a decision on whether their development strictly meets the permitted development criteria. However, that approach is not correct and I’ve advised the applicant that our function in determining a Prior Notification under Part 6 of the GPDO relates solely to the impact on its surroundings and does not extend to confirming the lawfulness of a development. As ever, if the building does not meet the permitted development criteria and is not used for purposes permitted by Part 6 (eg agriculture) then it would not be lawful.

### **Recommendations from Informal Meeting of Councillors 20<sup>th</sup> May 2021**

Councillors attended an informal meeting on 20<sup>th</sup> May and made the following recommendations to the Clerk under the delegation scheme. The Clerk will now carry out the following actions:

1. Write a letter of complaint to Mark Webb, EHDC Planning Relations Manager, regarding actions taken by EHDC relating to planning application SDNP/21/00667/APNB. The letter of complaint will outline the background to the events leading up to deemed consent being given and will then cover the main issues as we see them: lack of communication with parish council and residents when deemed consent was given; failure to upload any documents on the web portal showing that deemed consent has been given; and conflicting advice from EHDC planning officers as to whether permitted development rights apply.

The complaint will also be sent to Tim Slaney, SDNPA and Julia Mansi, EHDC Planning Development Manager with a series of questions as follows:

- a) Is the correspondence between EHDC and the applicant to advise that EHDC got the dates wrong and confirming they now have deemed consent going to be published?
  - b) What has EHDC formally told the applicant about permitted development rights?
  - c) What is EHDC's formal position on whether the applicant has permitted development rights as two planning officers have given conflicting information?
  - d) Why was the correspondence confirming deemed consent not published?
  - e) Where is the formal withdrawal of the decision notice for refusal?
  - f) How exactly did the failure in the SDNPA system happen? Was it an input error or a system error? Who was overseeing the system and were there any checks in place?
  - g) When Danielle Hall says in her email of 11<sup>th</sup> May that the system has now been changed, what system has changed and how? And is this a control process change or a technical change?
  - h) How can we be sure that this kind of failure will not happen again?
  - i) Can you tell us all the other applications this has affected?
  - j) Why did the Planning Officer not contact Greatham Parish Council to update them on the change of status of the application to deemed consent?
2. A Freedom of Information request will be sent to both EHDC and SDNPA asking for all correspondence relating to SDNP/21/00667/APNB including, but not limited to:
- a) Correspondence between EHDC and the applicant and/or his agent;
  - b) Correspondence between officers of EHDC;
  - c) Correspondence between officers of EHDC and the SDNPA; and,
  - d) Correspondence between officers of EHDC and District Councillors from Whitehill, Hogmoor and Greatham ward

Once we have responses to the above questions and seen the information provided under FOI, the Council will meet again to decide next steps.