



Appeal Decision

Hearing held on 12 November 2019

Site visit made on 12 November 2019

by JP Tudor BA (Hons), Solicitor (non-practising)

an Inspector appointed by the Secretary of State

Decision date: 19 December 2019

Appeal Ref: APP/J1860/W/17/3186916

Agricultural Building off B4211, Tunnel Hill, Upton upon Severn WR8 0QL

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required under Article 3 (1) and Schedule 2, Part 3, Class R of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).
 - The appeal is made by Mr N Baldwin against the decision of Malvern Hills District Council.
 - The application Ref: 17/01079/GPDR, dated 3 July 2017, was refused by notice dated 29 August 2017.
 - The development proposed is described as 'notification of Prior Approval for the change of use of a agricultural building and land to commercial a use'.
 - This decision supersedes that issued on 14 March 2018. That decision on the appeal was quashed by order of the High Court.
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Decision

1. The appeal is dismissed.

Procedural Matters and Background

2. As indicated above, the original appeal decision which allowed the appeal was quashed following a successful challenge in the High Court by the Upton Historic Parkland Conservation Group (UHPCG), an interested party. The quashed decision is treated as if it had not been made. Therefore, my role is to redetermine the case rather than to review the previous appeal decision. However, aspects of the previous appeal decision and the court judgment quashing it may form material considerations.
3. The provisions of Schedule 2, Part 3, Class R of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO) permit the change of a building and any land within its curtilage from a use as an agricultural building to a flexible use falling within certain classes of use as defined in the Schedule to the 'Use Classes Order' (UCO).¹
4. The description of development in the banner heading above is taken from the Council's decision notice and the appeal form. Although the application form and the 'supporting statement' referred to therein lack clarity, the 'supporting statement' indicates that the first use intended is as a commercial personal storage facility, a Class B8 (storage and distribution) use. The Council Officer's report also indicates that the Council assessed the proposal on that basis. The

¹ The Town and Country Planning (Use Classes) Order 1987 (as amended).

parties accepted that position at the hearing and I have also considered the appeal on that basis, notwithstanding that there have been subsequent separate applications for a Class C1 hotel use which were granted and may now be the ultimate intended use.

5. It is recognised that for the purposes of the UCO and the GPDO, after a site has changed use under Class R it is to be treated as having a sui generis use.² Furthermore, that the change of use under Class R, in relation to paragraph R.3(b), does not of itself permit 'associated operational development' which may be reasonably necessary to use the building or land for the use proposed.
6. The Council originally refused the proposal on the basis that, in its view, the evidence suggested that the building was not used solely for an agricultural use as part of an established agricultural unit on or before 3 July 2012. Therefore, it considered that the proposal did not comply with paragraph R.1(a) of Class R of the GPDO and was not permitted development. That was the central issue considered in the first appeal, which was dealt with via the written representations procedure. As indicated above, the original appeal decision was quashed by the High Court, as a result of a legal challenge by an interested party, UHPCG.
7. A new issue, not considered in the original appeal, was raised by UHPCG during the course of the redetermination, relating to the effect of Article 3(6) of the GPDO. The appellant stated that as the issue was not considered previously, was not a reason for refusal and is not the reason that the original appeal decision was quashed, it should not be considered at this late stage. It is regrettable that the issue was not raised during the original appeal. With regard to the High Court judgment³ quashing the appeal decision, the Court would have considered the issues put to it and in dispute between the respective parties at the time. However, as the new issue derives from the content of the statutory instrument, the GPDO, and goes to the fundamental question of whether the proposal can benefit from the permitted development rights within Class R, it is highly material, and I must consider it.
8. Although the appellant has expressed dissatisfaction about the amount of time that was available to respond to this new matter, it was raised almost three weeks before the date of the hearing. I consider that there was a reasonable period of time for the appellant and his agent to respond and seek specialist advice, if necessary. Indeed, both the appellant and the Council have provided written responses prior to the hearing. If the appellant had believed that additional time was required to respond, ultimately, he could have asked for the hearing to be postponed. No such request was received, and the appellant indicated at the hearing that although he considered it, his preference was for this longstanding appeal to be resolved without further delay. Therefore, I do not consider that any party has been prejudiced. I have taken the written submissions of the appellant and the Council, along with the further discussions on the matter at the hearing, into account in reaching my decision.
9. While the Council maintains its position that the development does not meet the relevant agricultural use criteria, within paragraph R.1.(a) of Class R, it does not agree that Article 3(6) of the GPDO precludes the development from being permitted development. The appellant takes the same view regarding

² GPDO, Schedule 2, Part 3 Class R, paragraph R.2(b)

³ Upton Historic Parkland Conservation Group v SSHCLG [2019] EWCH 797 (Admin)

Article 3(6) but maintains that the requirements regarding agricultural use on or before the relevant date are met.

10. As alluded to above, I have also been made aware that following the original appeal decision, since quashed, two further prior approval applications were made for change of use to C1 use as a hotel, which were granted by the Council.⁴ In addition, a planning application to carry out operational development works to facilitate the change of use to a hotel, in association with the prior approval⁵, was also granted planning permission.⁶ Subsequently, a separate full planning application was made for the provision of visitor accommodation (C1 use), re-using the original structure of the barn, which was also granted.⁷ All four of those consents are subject to ongoing judicial review proceedings in the High Court instigated by UHPCG. My understanding is that they have been stayed via a consent order pending the outcome of this appeal.
11. The floor space of the building to change use exceeds 150 square metres. Therefore, if the proposal is considered to be permitted development, a determination will be necessary under paragraph R.3(1)(b) of Class R, as to whether prior approval is required as to: (i) transport and highways impacts of the development; (ii) noise impacts of the development; (iii) contamination risks on the site; and (iv) flooding risks on the site.

Main Issues

12. The main issues are:

- whether the proposal requires the material widening of a means of access to an existing highway which is a classified road and, if so, whether, taking into account Article 3(6) of the GPDO, it can benefit from the permitted development rights under Schedule 2, Part 3, Class R; and;
- whether the building was not used solely for an agricultural use as part of an established agricultural unit on or before 3 July 2012, as referred to within R.1(a), Schedule 2, Part 3, Class R of the GPDO.

Reasons

Whether the proposal would be permitted development in relation to Article 3(6)

13. The appeal site comprises a sizeable portal framed barn which is mainly open-sided and a small area of surrounding land. The barn is accessed via a short track leading from a classified road, the B4211, just to the west. The speed limit on the B4211 is 40mph. The access track also serves three existing adjacent residential properties. The proposal is to change the use of the building and land to a flexible use, with the first intended use as a commercial personal storage facility (Class B8 storage and distribution), under the permitted development rights detailed in Schedule 2, Part 3, Class R of the GPDO.
14. By virtue of Article 3(1) of the GPDO, planning permission is granted for the classes of development described as permitted development in Schedule 2. However, in addition to relevant exceptions within each class, which detail

⁴ 18/01133/GPDR and 18/01324/GPDR

⁵ 18/01133/GPDR

⁶ 18/01402/FUL

⁷ 18/01872/FUL

development not permitted, Article 3 itself also includes some general exceptions. One of those exceptions is detailed in Article 3(6) which provides that the permission granted by Schedule 2 of the GPDO does not, except in relation to certain other classes within Parts 9 and 18 which do not apply here, *'authorise any development which requires or involves the...material widening of a means of access to an existing highway which is a trunk road or a classified road.'*

15. Counsel for UHPCG maintained that the only possible meaning of Article 3(6) is to remove the general permission provided by Article 3(1) of the GPDO, in those cases where the geography, layout and nature of the site and the development are such that it requires or involves the material widening of a means of access to an existing trunk or classified road. UHPCG hold that the purpose of that policy approach is to avoid permitting developments which are likely to have an effect on the operation of busy roads, without them being subject to the greater rigour likely to be associated with a full planning application.
16. It is further submitted by UHPCG that the logic of that interpretation of Article 3(6) is supported by the exclusion within the same provision of Classes A, B, D and E of Part 9 and Class A of Part 18 of Schedule 2 of the GPDO. Those classes relate variously to development by highway authorities, the Secretary of State or a strategic highway company, toll road facilities, repairs to unadopted streets and private ways required for their maintenance or improvement and development under local or private Acts or Orders approved by Parliament. Therefore, given that those developments would largely be undertaken by highway authorities or sanctioned by the Secretary of State or Parliament, the inference is that highway safety would already have been properly and fully considered.
17. The Council and the appellant take a different view regarding the relevance of Article 3(6) to this appeal and presented three strands of argument. At the hearing, Counsel acting for the local planning authority maintained that the development under Class R consisted purely of a change of use of the building to a flexible use and, if viewed in those strict terms, the 'development', i.e. the change of use, does not 'require' or 'involve' the material widening of a means of access. Indeed, Class R does not of itself sanction any associated operational development reasonably necessary to use the building or land for the use proposed under Class R, which would require a planning application. The appellant also stressed that the appeal proposal does not explicitly propose or request the widening of the site access on to the B4211.
18. I note the views of the Council and the appellant. However, giving the words in Article 3(6) their plain meaning, while the development is a change of use, if it 'requires' the material widening of an access to a trunk or classified road, it seems to me that it would be caught by Article 3(6). Moreover, if it was intended that other classes, such as a change of use permitted under Class R, should be excepted from Article 3(6), in addition to certain classes within Parts 9 and 18 which are specified within it, it would have been perfectly possible to have specified those other classes within the provision itself. Therefore, I do not agree with the first strand of the case put by the Council and the appellant.
19. The second strand of argument presented within the Council and appellant's submissions, is that the extent of the widening does not constitute a 'material

- widening' of the access and that, therefore, Article 3(6) of the GPDO does not apply for that reason. The highway authority, Worcestershire County Council, indicated that to avoid potential congestion at the site access, which could affect highway safety on the B4211, the access should be widened to accommodate a two-way traffic flow. Therefore, it recommended a condition requiring the existing access to be widened to a minimum width of 5.5 metres for the first 10 metres, measured back from the carriageway edge.
20. A Technical Note (TN) provided by Mr Bamber of Railton TPC Ltd, a transport consultant instructed by UHPCG, states that the existing access has a width of 9 metres at the point it meets the B4211 but that this reduces to a width of 3.4 metres at about 5 metres back from the highway. The TN also confirmed that, currently, it would not be possible for two light vehicles to pass each other on the access, which is in accord with the view of the highway authority and with what I saw on my site visit. Those aspects have not been disputed.
21. Given the above, although the access tapers, the recommendation for it to be increased to a minimum of 5.5 metres in width for 10 metres back from the road, translates to about a 2 metre increase, at least from the point 5 metres back where the existing width is 3.4 metres. In my view, given the relative dimensions, that increase does constitute a 'material widening' of the existing access. That view is reinforced by the practical effect and purpose of the widening which would be to change the access from single track to dual track, thus enabling two vehicles to pass each other. Therefore, the recommended alteration is also a 'material' change in that sense.
22. The third aspect of the Council and the appellant's submissions is that the widening of the access could be addressed by means of a condition attached to the prior approval. Both refer to section W of Schedule 2, Part 3 of the GPDO, which details the procedure for applications for prior approval under Part 3. Paragraph W(13) states that: *'The local planning authority may grant prior approval unconditionally or subject to conditions reasonably related to the subject matter of the prior approval.'*
23. Although it did not suggest a condition requiring the widening of the access in relation to the original appeal, the Council now holds that, should prior approval be granted, such a condition could be imposed in relation to the transport and highways impacts of the development referred to in paragraph 3(1)(b) of Class R. Indeed, it has included such a condition within its list of suggested conditions. The appellant takes a similar view, although he questions whether such a condition is actually necessary or reasonable. However, both the Council and the appellant argue that Article 3(6) does not apply because, in principle, any requirement for material widening of the access could be addressed by such a condition.
24. While I note those submissions, in the case of Schedule 2, Part 3, Class R of the GPDO, it is necessary first to consider if the development would be permitted development in relation to the limitations or restrictions specified within the Class or as set out in the articles to the GPDO, which includes Article 3(6). It is only then, when it has been concluded that the development is permitted development, that it is possible to move on to an assessment of whether to grant prior approval, including whether any conditions should be imposed in relation to the prior approval matters.

25. Although transport and highways impacts are one of the prior approval considerations, that could encompass a range of possible issues beyond those specified in Article 3(6). Consequently, I do not agree that there is necessarily any intrinsic illogicality in providing the power to impose conditions reasonably related to prior approval matters, on the one hand, and the application of Article 3(6), excluding some specific forms of development or requirements associated with it from the permitted development rights under Schedule 2 of the GPDO, on the other.
26. Therefore, it is not possible to make the leap suggested by the Council and the appellant, which appears to seek to resolve the question of whether the development is permitted development under the relevant parts of the GPDO by attaching a condition. The imposition of conditions, in addition to those already contained within Class R, relates to the subject matter of the prior approval and cannot address whether this development is permitted development in the first place.
27. The appellant also says that the highway authority did not object to or comment on a previous similar prior approval application for change of use to a commercial use, which was in any case refused on other grounds. I do not know what the reason for that may have been and none was offered at the hearing. However, the highway authority did respond to the appeal proposal and in similar terms to a subsequent prior approval application relating to the site.⁸
28. A separate full planning permission, subsequently granted in April 2019, for the provision of visitor accommodation (C1 use)⁹, also incorporates the widening of the site access to the same standard originally required by the highway authority. Notwithstanding that the appellant says that there is an intention for the widening to be carried out in relation to that permission, which is the subject of JR proceedings, the access is currently unaltered.
29. In any event, whilst I note those factors relating to previous and subsequent proposals, the redetermination of this appeal must be considered in its own terms under the GPDO and taking account of the evidence presented in relation to it. That includes the recommendations of the highway authority which remain relevant.
30. Having carefully considered the opposing interpretations of the meaning and correct application of Article 3(6) of the GPDO, for the reasons already given, I consider that, giving the words in the article their plain meaning, it is relevant to the proposed change of use under Class R. Therefore, the next critical question in this appeal is whether the proposal 'requires' the material widening of the existing access to the B4211, a classified road.
31. It is clear from the highway authority's consultation response¹⁰ that it considers that the proposed use requires the widening of the access to enable a two-way flow of traffic. It recommended a condition to that effect, with the reason for it given as '*in the interests of highway safety*'. Therefore, while the highway authority did not object to the proposal, that was subject to the condition being

⁸ 18//01324/GPDR

⁹ 18/01872/FUL

¹⁰ Dated: 20 July 2017

- imposed. It is reasonable to place significant weight on the professional view of the highway authority in this regard.
32. The highway authority has also maintained that position in relation to subsequent prior approval and full planning applications at the site. Although the subsequent full planning application, 18/01872/FUL, incorporated the widening of the access as part of the proposal, the highway authority still recommended a condition to ensure that the widening should be completed prior to occupation. Therefore, its position in relation to the requirement for the access to be widened for a change to a commercial use appears to have been largely consistent.
33. Moreover, the same view is expressed by Mr Bamber, a transport consultant, within his TN, albeit on behalf of UHPCG. The TN concludes that: *'Both hotel and warehousing uses of the site materially increase vehicle movements at the access and will lead to a significant increase in the likelihood of vehicles being forced to wait on the B4211, vehicles stopping suddenly while attempting to turn into the access or vehicles reversing back onto the B4211 to allow a departing vehicle to clear the access. In both cases the access would require to be widened over some distance to allow vehicles to pass on the access road. Both uses are also likely to increase the use of the access by heavy vehicles also requiring works to widen the access to safely accommodate the swept paths of larger vehicles.'* Mr Bamber also gave evidence in person at the hearing confirming his professional opinion.
34. As I saw on my site visit, the narrow entrance to the site is not prominent when travelling along the B4211. Drivers approaching from the south travel around a relatively sharp right-hand bend in the road and, notwithstanding the 40mph speed limit, would have very limited time to react and stop for vehicles either turning right into the site or emerging from it. Although visibility for drivers approaching the site from the north is better, the single-track nature of the access would also mean that an arriving vehicle may be forced to stop suddenly to allow a vehicle to emerge from the site or may need to reverse back out on to the road. Both would involve the risk of being struck by another vehicle travelling along the B4211 from behind.
35. There was debate at the hearing about the likely level of increase in vehicle movements that would result from the proposed development, over and above existing movements associated with the adjacent residential properties, which the access also serves, and that associated with the existing use of the barn. The fact that no speed survey on the B4211 has been carried out was also acknowledged. Similarly, although there was no survey of traffic volumes using the B4211, it is a two-lane highway which appeared relatively busy on the two occasions I visited the site¹¹, although I recognise that they only constitute snapshots in time.
36. The TN finds, based on TRICS (Trip Rate Information Computer System) data, that the use of the building for commercial storage would be likely to generate around 20 vehicle movements per day which, in addition to the estimated 14 two-way movements associated with the existing residential properties, would increase vehicle movements to around 34 per day. According to the TN the peak hour trip generation would increase, from the 1-2 associated with the

¹¹ One unaccompanied site visit viewing from the highway on 11/11 and an accompanied site visit on 12/11 after the hearing

- current residential properties, to 3-4. The TN also advises that the proposed storage use would be *'likely to lead to a significant increase in the use of the access by heavy vehicles'* and that *'typical trip generation rates suggest that a development of 297sqm would generate 5 heavy vehicle movements per day'*.
37. The parameters used to generate the relevant TRICS report were discussed at the hearing. Although the gross floor area of some of the sites within the TRICS report sample are substantially larger than the appeal building, Mr Bamber, the transport consultant, explained that it was necessary to use a reasonable range of facilities in order to generate a meaningful report and stood by the basic integrity of the report.
38. The appellant takes a different view and refers to the Council Officer's report which stated: *'It is noted that the development would attract some traffic, however by its nature trips to the building are unlikely to be frequent and could possibly be lesser than that associated with the building in an agricultural use. It is initially proposed that there will be 13 bays for storage, however it is noted that any operational development would require planning permission and the proposal would be considered at the time of that submission.'*
39. However, the Council also acknowledged that whilst the local highway authority did not object to the proposal, that was subject to the imposition of a condition that required the widening of the existing access to avoid disruption to the adjacent highway which could be caused by traffic waiting to enter the site via the current single-track access. The Council's view at the time appeared to be that aspect could be dealt with when a subsequent planning application for operational development to convert the building was submitted. More recently, it has suggested that such a condition is attached to the prior approval, if this appeal were allowed. Therefore, I am not convinced by the Council's stance which appeared on the one hand to suggest that there would be no significant change in traffic volumes but on the other that a condition to widen the access could be attached to a future consent, with the implication that it may be necessary and reasonable.
40. The appellant suggests that the extent of the likely increase in traffic, even at peak hours is not significant. While I note the appellant's opinion of the clear advice of the highway authority and the content of the TN, I consider that the evidence supports the view that the proposed 13 bay commercial personal storage unit would materially increase traffic levels using the access. Furthermore, that a significant proportion of the additional traffic transporting items to a commercial personal storage facility is likely to consist of larger vehicles. Consequently, I am of the view that the proposal would increase the risk to highway safety if the access remained unaltered.
41. Overall therefore, particularly given the clearly expressed view of the relevant highway authority, I conclude that the development does require the material widening of a means of access to an existing highway which is a classified road. Therefore, given the content of Article 3(6) of the GPDO, the proposal is not permitted development and cannot benefit from the permission granted by Article 3(1) and Schedule 2, Part 3, Class R of the GPDO.

Agricultural use as part of an established agricultural unit

42. Whether the building was not used solely for an agricultural use as part of an established agricultural unit on or before 3 July 2012, as referred to within

paragraph R.1(a), Schedule 2, Part 3, Class R to the GPDO, was the main issue in the original appeal.

43. It is appreciated that extensive evidence has been submitted by the parties with regard to that issue which was discussed in some detail, along with relevant case law, at the hearing. However, given my clear conclusion above that the development would not be permitted development under the GPDO, there would be no purpose in me considering whether the proposal meets the relevant criteria within Class R.1(a), as it would not affect the outcome of the appeal.

Other Matters

44. Although not referred to by the highway authority, the TN questions whether there would be sufficient visibility for drivers emerging from the access onto the highway. However, that issue is not directly connected to the requirement for the material widening of the existing access and would have been more appropriately considered within the prior approval matters, which include the transport and highways impacts of the development. Notwithstanding, as I have already concluded that the development is not permitted development, equally there is no need for me to consider the prior approval matters referred to within paragraph R.3 (1)(b) of Schedule 2, Part 3, Class R of the GPDO.

Conclusion

45. For the reasons given above, and having regard to all other matters raised, I conclude that the appeal should be dismissed.

JP Tudor

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Neil Baldwin	Appellant
Simon Fidoe	Appellant's brother
Oliver Rider	Rider Planning Limited

FOR THE LOCAL PLANNING AUTHORITY:

Nina Pindham	Counsel, No5 Chambers
Clare Bull	Assistant Planning Officer, Malvern Hills District Council
Ciaran Power	Area Planning Officer, Malvern Hills District Council

FOR THE INTERESTED PARTY - UHPCG

Yaaser Vanderman	Counsel, Landmark Chambers
Bruce Bamber	Railton TPC Limited
Sylvia Partridge	Chairperson – UHPCG
David Hunter	UHPCG

DOCUMENTS SUBMITTED AT THE HEARING:

Recommended Conditions put forward by the Council

Amended Statement of Facts and Ground on behalf of the Claimant (relating to an Application for Judicial Review of 18/01402/FUL)

The Town and Country Planning (General Permitted Development) (England) Order 2015 (fully copy)