Neutral Citation Number: [2021] EWHC 1663 (Admin)

Case No: CO/1877/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 June 2021

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN	**Claimant**
on the application of	
PAUL SMOLAS	
- and -	
HEREFORDSHIRE COUNCIL	**Defendant**

- -
- -

Daniel Stedman Jones (instructed by **Attwells Solicitors LLP**) for the **Claimant**
Andrew Byass (instructed by **Legal Services**) for the **Defendant**

Hearing date: 11 May 2021

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Approved Judgment

Mrs Justice Lang:

1. In this claim for judicial review, the Claimant challenges two decision notices by the Defendant ("the Council"), both dated 9 April 2020. The first decision refused prior approval for the erection of an agricultural building at Llanerch Y Coed, Dorstone, Hereford HR3 6AG ("the Site") under paragraph A, Part 6, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO"). The second decision notified the Claimant that planning permission was required for the building.

2. Permission to apply for judicial review was granted on the papers on 30 June 2020.

Grounds of challenge

3. The Claimant's grounds of challenge may be summarised as follows.

Ground 1

4. The Defendant acted unlawfully, and contrary to the authorities, by:

   i) misdirecting itself as to its powers on the Claimant's prior notification application, in which he sought a determination as to whether its prior approval as to siting, design and external appearance of the building was required, pursuant to paragraph A.2(2)(i), Part 6, Schedule 2 of the GPDO;

   ii) erroneously purporting to determine the questions whether (i) prior approval should be granted; and (ii) whether the proposed development required planning permission; and

   iii) issuing *ultra vires* decision notices.

Ground 2

5. Further or alternatively, the Council reached an irrational conclusion when determining the application for prior notification procedure under paragraph A.2(2) of the GPDO, that the building was not "reasonably necessary for the purposes of agriculture" for the purposes of paragraph A of the GPDO. The reasons given by the Council for its decision did not relate to the application for prior notification which the Claimant had made. It relied upon a lack of evidence as to the reasons why the building was reasonably necessary, which was an impermissible reversal of the burden of proof. The Claimant had provided sufficient information for the Council to determine his prior notification application. Furthermore, there was no statutory right of appeal against a local planning authority's decision on a prior notification application.

6. In summary, the Council resisted the claim for the following reasons.

Ground 1:

7. In determining a prior notification application as to whether or not prior approval was required, a local planning authority first had to determine whether the development met the definitional requirements of the relevant class of permitted development when deciding an application for prior notification. It was entitled to give the applicant a formal notification of its decision on that issue. If it decided that prior approval was required, it was lawful for it to proceed to make a decision on the grant or refusal of prior approval on the same occasion, in the same decision notice.

Ground 2

8. It was not irrational for the Council to conclude that the proposed development was not "reasonably necessary for the purposes of agriculture" for the purposes of paragraph A of Part 6 of the GPDO, on the material available to it. In any event, the Claimant should have exercised his statutory right of appeal to the Secretary of State under section 78(1) Town and Country Planning Act 1990 ("TCPA 1990"), since it was a suitable alternative remedy, and judicial review is a remedy of last resort.

Facts

9. The Claimant is the owner of the Site, together with his wife. The Site is some 40 acres or 16 hectares in size. They run a farm at the Site, breeding commercial sheep. They also run a holiday business at the Site, comprising "glamping" and 3 holiday cottages.

10. The Statement of Facts and Grounds referred (at paragraph 8), to the Claimant's witness statement, dated 21 May 2020, in which he explained their intention to expand the farming business because the Covid-19 pandemic was threatening the viability of his tourism business. They intended to increase the organic vegetables and flower production, and to breed specialist breeds of animals, and needed a new barn to store machinery, equipment and fodder.

11. On 4 March 2020, the Claimant made a prior notification application for the erection of an agricultural building at the Site under paragraph A, Part 6, Schedule 2 of the GPDO. He completed a form headed:

> "Herefordshire Council
>
> Application to determine if prior approval is required for a proposed Erection, Extension or Alteration of a Building for Agricultural or Forestry Use
>
> The Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended) – Schedule 2, Part 6"

12. The form, which was based on the national Planning Portal's template, was available via a link on the Council's website.

13. In response to the questions in the form, the Claimant stated that the proposal was for a new general purpose building for storage of machinery and fodder. He provided details of its size and design. He confirmed that the Site was 40 hectares in size (he meant to say 40 acres), and had been in agricultural use for 10 years. He stated that the building was reasonably necessary for the purposes of agriculture, in order to store machinery and fodder. In response to the question "Is the proposed development designed for the purposes of agriculture?", he ticked "Yes" and explained that "The building is a suitable size and height for storing machinery and fodder. The building has been designed to look more traditional than modern agricultural buildings and to be in keeping with the surrounding[s] particularly considering the tourism aspect of Drovers Rest at Llanycoed". He attached a plan and illustrations of the proposed materials.

14. The Claimant's application was considered by Council planning officers on 9 April 2020. In the "Delegated Decision Report" ("the Report"), also dated 9 April 2020, the Site was described as follows:

> "The site is an isolated farmstead in a remote and sensitive landscape. The site is some distance from the nearest designated settlement, Dorstone, which is 3.3 miles away to the east and accessed via a local road network of single width country lanes. Hay on Wye is 3.1 miles away to the west. The landscape character type is Ancient Timbered Farmlands and adjacent to High moors and Commons. Both of these are high quality and highly sensitive to change. The area contains some of the oldest field patterns in the county. This small scale, intimate landscape relies on the topography, hedgerows and tree cover.
>
> The site comprises a farm holding which includes an agricultural field and a number of unlisted stone agricultural buildings which are arranged around a farm yard area comprising existing hardstanding area and feature the unlisted farmhouse adjoining that yard. Permission was granted for the conversion of the barns to for *(sic)* 3 residential holiday let cottages through P132192/F. Access is gained from an unclassified no through road which is also a bridleway."

15. Under the heading "Appraisal", the Report stated:

> "As set out in Class A, Part 6 Schedule 2 above, the first test is whether any works for the erection of a building is considered to be reasonably necessary for the purposes of agriculture within that unit.
>
> In 2015 permission was granted for the conversion of the redundant farm buildings at the site to holiday accommodation. The result of this is that currently the majority of the surrounding buildings to the application site are no longer under an agricultural use. The proposed building would therefore be separate to other buildings under an agricultural use associated with the unit.

> The justification for the building is limited to details of its proposed use as a store for machinery and fodder. However, the design of the building is not functional in nature and appears overly designed for its stated agricultural purpose. Furthermore the scale of the openings and height of the eaves at the sides of the barn will limit the ability to operate or store any modern agricultural machinery.
>
> Given the above there is insufficient evidence to satisfy officers that the building is reasonably necessary for the purposes of agriculture within the unit. It is a binary test whereby the proposal does not qualify for the proceeding permitted development rights. As such it is unnecessary to undertake the review of the proposal against A.1 (a-k) and A.2. Prior approval is therefore refused and planning permission is required."

16. The Council accepted the recommendations in the Report. It concluded that there was insufficient justification for the proposed building to be considered reasonably necessary for the purposes of agriculture within the unit, and so the requirements of paragraph A, Part 6, Schedule 2 to the GPDO were not met. On 9 April 2020, it issued two decisions which respectively refused prior approval and notified the Claimant that planning permission would be required for the proposed agricultural building. The first decision notified the Claimant of his right to appeal to the Secretary of State against the refusal of prior approval.

17. The material parts of the first decision notice stated:

> "**AGRICULTURAL AND FORESTRY BUILDINGS AND OPERATIONS**
>
> **REFUSAL OF PRIOR APPROVAL**
>
> **Proposed development:**
>
> **Site: Llanerch Y Coed, Dorstone, Hereford HR3 6AG**
>
> **Description: Prior notification for proposed new agricultural building**
>
> "THE COUNTY OF HEREFORDSHIRE DISTRICT COUNCIL hereby gives notice in pursuance of the provisions of the above Act and Order that PRIOR APPROVAL has been REFUSED for the development described above for the following reasons:
>
> The Local Planning Authority does not consider the proposal to be reasonably necessary for the purposes of agriculture within this unit. There is insufficient justification for this type of building in this location to be considered reasonably necessary. As such, it is not considered the requirements of Schedule 2, Part

> 6, Class A, A. b) of the Town and Country (General Permitted Development) Order 2015 (as amended) are met.
>
> Informative:
>
> The proposal has been considered in relation to the application form (dated '04/03/2020') and plans (KI 5594 1 & Ki 5594 2 Site Plan)."
>
> Notes:
> If you are aggrieved by the decision of the local planning authority not to grant prior approval for the proposed development or to grant it subject to conditions, then you can appeal to the Secretary of State under Section 78(1) of the Town and Country Planning Act 1990……"

18. The material parts of the second decision notice stated:

> "**AGRICULTURAL AND FORESTRY BUILDINGS AND OPERATIONS**
>
> **PLANNING PERMISSION IS REQUIRED**
>
> **Proposed development:**
>
> **Site: Llanerch Y Coed, Dorstone, Hereford HR3 6AG**
>
> **Description: Prior notification for proposed new agricultural building**
>
> THE COUNTY OF HEREFORDSHIRE DISTRICT COUNCIL hereby gives notice PLANNING PERMISSION IS REQUIRED for the carrying out of the development described above for the following reasons:
>
> The Local Planning Authority does not consider the proposal to be reasonably necessary for the purposes of agriculture within this unit. There is insufficient justification for this type of building in this location to be considered reasonably necessary. As such, it is not considered the requirements of Schedule 2, Part 6, Class A, A. b) of the Town and Country (General Permitted Development) Order 2015 (as amended) are met.
>
> Informative:
>
> The proposal has been considered in relation to the application form (dated '04/03/2020') and plans (KI 5594 1 & Ki 5594 2 Site Plan)."

Statutory framework

19. Section 57(1) TCPA 1990 provides that planning permission is required for "the carrying out of any development of land."

20. By section 58(1)(a) TCPA 1990, planning permission may be granted by a development order made by the Secretary of State under section 59 TCPA 1990. By section 60(1) or 60(2) TCPA 1990, planning permission may be granted by development order either conditionally or subject to limitations as specified in the order or unconditionally.

21. By Article 3 of the GPDO, planning permission is granted for the classes of development described as permitted development in Schedule 2 to the GPDO. Article 3 provides, so far as material:

> "(1) Subject to the provisions of this Order and regulations 75 to 78 of the Conservation of Habitats and Species Regulations 2017 (general development orders), planning permission is hereby granted for the classes of development described as permitted development in Schedule 2.
>
> (2) Any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2.
>
> (3) References in this Order to permission granted by Schedule 2 or by any Part, Class or paragraph of that Schedule are references to the permission granted by this article in relation to development described in that Schedule or that provision of that Schedule.
>
> (4) Nothing in this Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part 3 of the Act otherwise than by this Order."

22. Part 6 of Schedule 2 makes provision for permitted development on land used for agricultural and forestry purposes.

23. Paragraph A provides for permitted development on units of 5 hectares or more:

> "**A. Permitted development**
>
> The carrying out on agricultural land comprised in an agricultural unit of 5 hectares or more in area of—
>
> (a) works for the erection, extension or alteration of a building; or
>
> (b) any excavation or engineering operations,

which are reasonably necessary for the purposes of agriculture within that unit."

24. The scope of the permission granted by paragraph A is limited by paragraph A.1, which describes development which is not permitted. By sub-paragraph (d), development is not permitted if "it would involve the provision of a building, structure or works not designed for agricultural purposes".

25. Permitted development under paragraph A is subject to the conditions in paragraph A.2. Paragraph A.2 provides, so far as is material, as follows:

> "**A.2.— Conditions**
>
> Development is permitted by Class A subject to the following conditions –
>
> ……
>
> (2) Subject to sub-paragraph (3), development consisting of—
>
> (a) the erection, extension or alteration of a building;
>
> ..….
>
> is permitted by Class A subject to the following conditions—
>
> (i) the developer must, before beginning the development, apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to the siting, design and external appearance of the building, the siting and means of construction of the private way, the siting of the excavation or deposit or the siting and appearance of the tank, as the case may be;
>
> (ii) the application must be accompanied by a written description of the proposed development and of the materials to be used and a plan indicating the site together with any fee required to be paid;
>
> (iii) the development must not begin before the occurrence of one of the following—
>
> (aa) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;
>
> (bb) where the local planning authority give the applicant notice within 28 days following the date of receiving the applicant's application of their determination that such prior approval is required, the giving of such approval; or

> (cc) the expiry of 28 days following the date on which the application under sub-paragraph (2)(ii) was received by the local planning authority without the local planning authority making any determination as to whether such approval is required or notifying the applicant of their determination;
>
> (iv) where the local planning authority give the applicant notice that such prior approval is required, the applicant must—
>
> (aa) display a site notice by site display on or near the land on which the proposed development is to be carried out, leaving the notice in position for not less than 21 days in the period of 28 days from the date on which the local planning authority gave the notice to the applicant; and
>
> (bb) where the site notice is, without any fault or intention of the applicant, removed, obscured or defaced before the period of 21 days referred to in sub-paragraph (iv)(aa) has elapsed, the applicant is treated as having complied with the requirements of that sub-paragraph if the applicant has taken reasonable steps for protection of the notice and, if need be, its replacement;
>
> (v) the development must, except to the extent that the local planning authority otherwise agree in writing, be carried out –
>
> (aa) where prior approval is required, in accordance with the details approved,
>
> (bb) where prior approval is not required, in accordance with the details submitted with the application;
>
> ………"

26. By Article 7 of the GPDO, a local planning authority must determine an application for prior approval under Part 6 within 8 weeks of receipt of the application, as no period is specified in Schedule 2.

27. Paragraph D of Part 6 includes the following relevant definitions:

> "(1) For the purposes of Classes A, B and C—
>
> "agricultural land" means land which, before development permitted by this Part is carried out, is land in use for agriculture and which is so used for the purposes of a trade or business, and excludes any dwellinghouse or garden;

> "agricultural unit" means agricultural land which is occupied as a unit for the purposes of agriculture, including—
>
> (a) any dwelling or other building on that land occupied for the purpose of farming the land by the person who occupies the unit, or
>
> (b) any dwelling on that land occupied by a farmworker;…."

28. There is a right of appeal under section 78(1) TCPA 1990 from a local planning authority's refusal of prior approval, or a grant of prior approval subject to conditions. The time limit for lodging an appeal is 6 months from the date of the decision notice. There is no express right of appeal against a decision by a local planning authority that prior approval is required, nor that planning permission is required.

29. The Planning Practice Guidance ("PPG") has replaced Annex E to PPG7 as the applicable guidance in respect of prior notification and approval procedures. The material parts of the PPG are as follows:

> "**Is it necessary to apply for planning permission where there are permitted development rights?**
> Where a relevant permitted development right is in place, there is no need to apply to the local planning authority for permission to carry out that work. In a small number of cases, however, it may be necessary to obtain prior approval from a local planning authority before carrying out permitted development. Permitted development rights do not override the requirement to comply with other permission, regulation or consent regimes.
>
> Paragraph: 022 Reference ID: 13-022-20140306
> Revision date: 06 03 2014
>
> **Is it necessary to contact the local planning authority before carrying out work under permitted development rights?**
> For the purposes of planning, contact with the local planning authority is generally only necessary before carrying out permitted development where:
>
> - prior approval from the local planning authority is required in advance of development
> - …..
>
> The relevant Parts in Schedule 2 to the General Permitted Development Order set out the procedures which must be followed when advance notification is required.
>
> Paragraph: 023 Reference ID: 13-023-20140306
> Revision date: 06 03 2014
>
> **What if it's not clear whether development is covered by permitted development rights?**

If it is not clear whether works are covered by permitted development rights, it is possible to apply for a lawful development certificate for a legally binding decision from the local planning authority.

Paragraph: 024 Reference ID: 13-024-20140306
Revision date: 06 03 2014

…..

What is prior approval?
Prior approval means that a developer has to seek approval from the local planning authority that specified elements of the development are acceptable before work can proceed. The matters for prior approval vary depending on the type of development and these are set out in full in the relevant Parts in Schedule 2 to the General Permitted Development Order. A local planning authority cannot consider any other matters when determining a prior approval application.

Paragraph: 026 Reference ID: 13-026-20140306
Revision date: 06 03 2014

What types of development require prior approval?
Prior approval is required for some change of use permitted development rights. Certain other types of permitted development including the erection of new agricultural buildings, demolition and the installation of telecommunications equipment also require prior approval. The matters which must be considered by the local planning authority in each type of development are set out in the relevant Parts of Schedule 2 to the General Permitted Development Order.

Paragraph: 027 Reference ID: 13-027-20140306
Revision date: 06 03 2014

Is a prior approval application like a planning application?
The statutory requirements relating to prior approval are much less prescriptive than those relating to planning applications. This is deliberate, as prior approval is a light-touch process which applies where the principle of the development has already been established. Where no specific procedure is provided in the General Permitted Development Order, local planning authorities have discretion as to what processes they put in place. It is important that a local planning authority does not impose unnecessarily onerous requirements on developers, and does not seek to replicate the planning application system.

Paragraph: 028 Reference ID: 13-028-20140306
Revision date: 06 03 2014

> **What kind of information will the developer have to supply in connection with a prior approval application?**
> This will vary according to the particular circumstances of the case, and developers may wish to discuss this with the local planning authority before submitting their application. Local planning authorities may wish to consider issuing guidance, taking into account local circumstances and advice provided by the relevant statutory consultees. For example, this could set out whether a flood risk assessment is likely to be required.
>
> Paragraph: 029 Reference ID: 13-029-20140306
> Revision date: 06 03 2014
>
> …..
>
> **Can a refusal of prior approval be appealed?**
> If an application for prior approval is refused, the applicant has a right to appeal the decision under section 78(1)(c) of the Town and Country Planning Act 1990. More information on this is available in guidance on planning appeals.
>
> Paragraph: 032 Reference ID: 13-032-20140306
> Revision date: 06 03 2014"

<u>Grounds 1 and 2</u>

30. It is convenient to consider Grounds 1 and 2 together, because of the overlap between them.

Submissions

31. Under Ground 1, the Claimant submitted that a local planning authority has limited powers upon a prior notification application made under paragraph A.2(2) of Part 6. It may only make a decision as to whether prior approval is needed. Therefore the Council was not empowered to determine the question whether, in its view, prior approval should be granted, nor whether the proposed development fell outside the scope of paragraph A and therefore planning permission was required. In support of this submission, the Claimant relied upon the wording of Part 6, and the authorities of *Murrell v SSCLG* [2010] EWCA Civ 1367; [2012] 1 P & CR 6, *Harrogate BC v Crossland* [2012] EWHC 3260 (QB), *Keenan v Woking BC* [2017] EWCA Civ 438; [2018] PTSR 697 and *R (Marshall) v East Dorset DC* [2018] EWHC 226 (Admin); [2018] PTSR 1508.

32. The Claimant sought to distinguish the case of *New World Payphones Ltd v Westminster City Council* [2019] EWCA Civ 2250, relied upon by the Council. He submitted that there were clear differences between the provisions in the GPDO for applications for prior notification and prior approval in Part 6, compared with those in Part 16 of the GPDO. In particular, under Part 6, a two stage procedure was required,

and the failure to comply with this requirement deprived the Claimant and any interested parties of the opportunity to make representations to the Council on whether prior approval should be granted, in advance of the Council's decision.

33. The Claimant further submitted that any power to consider, as part of the prior approval procedure, whether the definitional requirements were met, would depend upon the requirements of the Part of the GPDO under which the application had been made. In *New World Payphones,* the question whether or not the proposed development was permitted under paragraph A of Part 16 was objectively verifiable, on the evidence available. In contrast, the question under paragraph A of Part 6, namely, whether the proposed development was "reasonably necessary" for the purposes of agriculture included both subjective and objective elements (per Lindblom LJ in *Keenan* at [38]). The Claimant explained in his application form for prior notification why the proposed development was reasonably necessary. The case of *Murrell* and the PPG emphasise that the prior approval procedure is intended to be a light touch process with the minimum of formalities. The Council was not in a position to rebut the Claimant's explanation at this stage, as to do so would require further investigation and evidence.

34. In the event that he was unsuccessful in establishing that the Council acted beyond its powers, the Claimant submitted in the alternative, under Ground 2, that the Council's decision was irrational. The Claimant had explained the proposed agricultural use of the building, and for the Council to find that his evidence was insufficient was an impermissible reversal of the burden of proof. If the Council had legitimate planning-related concerns regarding siting, design and external appearance, it should have determined that prior approval would be required and then considered those matters through the eight-week period for determination, afforded by Article 7 of the GPDO. That would also have triggered the requirement that the Claimant post a site notice in order to invite representations on the proposals. The Council could then have requested further information regarding the building if it doubted the design of the proposed development in planning terms. If not, it should have determined that prior approval was not required and the development could have proceeded.

35. The Claimant had no right of appeal against the Council's determination of his prior notification application, nor against its decision that planning permission was required because the proposed development did not meet the definitional requirements in Part 6.

36. In response, the Council relied on the case of *New World Payphones* in which the Court of Appeal held that a local planning authority was required to determine whether the development met the definitional requirements of the relevant class of permitted development when deciding an application for prior notification, and explained why the judgment of Lindblom LJ in *Keenan v Woking Borough Council & Anor* [2018] PTSR 697, when correctly interpreted, was consistent with that conclusion. On appeal by New World Payphones to the Secretary of State, against the refusal of prior approval, Westminster Council had argued that the proposed development fell outside the definitional requirements of Part 16, and that submission was upheld by the Courts.

37. The Council submitted that the Report contained sufficient information upon which the planning officers could properly determine whether the proposed development was reasonably necessary for the purposes of agriculture. It was up to the Claimant to judge how much information to provide with his application. The Claimant's distinction between objectively verifiable and subjective elements of the definitional requirements

in Class A was not to be found in the GPDO or the case law. It created an artificial and unworkable distinction for planning decision-makers.

38. The Council further submitted that the prior notification application form and supporting documents submitted by the Claimant provided sufficient information upon which the Council could proceed to determine the issue of prior approval. The Council relied upon the letter of 12 November 2020 from the Planning Inspectorate to the Claimant's solicitors which stated it was not uncommon for local planning authorities to simultaneously decide that prior approval was required and that prior approval was refused. This practice was illustrated by the case of *New World Payphones*, which concerned an application for prior notification and an application for prior approval both of which were determined in the same decision notice, without any criticism from the parties or the Court.

39. The Claimant had a suitable alternative remedy by way of an appeal to the Secretary of State under section 78(1) TCPA 1990, which was notified to him in the prior approval decision notice. The Court will normally refuse to grant a remedy where an adequate alternative remedy existed which the claimant could or should have used (see the cases cited in the *White Book* at paragraph 54.1.10 and R. *v Secretary of State for the Home Department Ex p. Swati* [1986] 1 WLR 477).

40. Once the Defendant had decided that the proposed development did not meet the definitional requirements in paragraph A of Part 6, the only decision rationally available to the Defendant was to refuse to grant prior approval. There was no point in examining the detail of the development in a prior approval application if it did not qualify as permitted development.

Authorities

41. The case of *Murrell v Secretary of State for Communities and Local Government* [2010] EWCA Civ 1367; [2012] 1 P & CR 6 concerned the prior approval process for agricultural buildings under the GPDO's predecessor, the General Permitted Development Order 1995 ("GPDO 1995") and the superseded guidance in PPG7. The statutory provisions were materially the same as the GPDO of 2015. Richards LJ described the prior notification and prior approval process as follows:

> "29. The prior approval procedure for Class A permitted development, as set out in para.A2(2) itself and explained in Annex E to PPG7, is attended by the minimum of formalities and should be simple to operate. The application for determination as to whether prior approval is required does not need to be in any particular form and does not need to be accompanied by anything more than a written description of the proposed development and of the materials to be used and a plan indicating the site, together with the required fee (see para.A2(2)(i) and (ii)). In practice it will be advisable to use an up-to-date standard form and to provide the information referred to in the standard form, because that will facilitate the council's consideration of whether prior approval is needed and, if so, whether it should be given, and will minimise the need for the provision of further

> information at a later stage. It is not, however, mandatory to use the standard form or to provide any information beyond that specified in para.A2(2)(ii).
>
> 30. When an application is submitted, it engages a two-stage process, the nature of which is set out clearly in Annex E (see, in particular, paras E12-E20). The first stage involves consideration of whether prior approval is required. If the council determines that it is not required, it should notify the applicant accordingly. If it determines that prior approval is required and notifies the applicant of the decision, it moves into the second stage, in which it has eight weeks or such longer period as may be agreed in writing to decide whether to give approval (see art.21 of the Town and Country Planning (General Development Procedure) Order 1995 , which applied to applications for approval other than those under Pt 24 of Sch.2 to the GPDO ; now replaced by art.30 of the Town and Country Planning (Development Management Procedure) (England) Order 2010). The existence of a discrete second stage is underlined by the requirement in para.A2(2)(iv) as to the display of a site notice where the local planning authority has given notice that prior approval is required.
>
> 31. The council can request further details at any time, though Annex E appears to contemplate that they will generally be called for only at the second stage, after it has been determined that prior approval is required."

42. In *Harrogate BC v Crossland* [2012] EWHC 3260 (QB), Coulson J. held that, on a prior notification application under Class A of the GPDO 1995, a local planning authority is empowered to:

> "42.…do one of three things: first, it might say that prior approval was not required; secondly, it might say that prior approval was required; or thirdly it might fail to do anything at all, which inaction would mean that, following the expiry of 28 days from the application having been received, planning permission would be deemed to have been granted. If the LPA were required to give prior approval to the siting, design and external appearance of the building, they would consider whether or not such approval should be given and notify the developer in writing."

43. In *Keenan v Woking Borough Council & Secretary of State for Communities and Local Government* [2017] EWCA Civ 438, [2018] PTSR 697, the appellant applied for prior notification as to whether or not prior approval was required for construction of a hard core track, as permitted agricultural or forestry development. The local planning authority did not respond to the application, which the appellant took to mean that he could proceed with the works, and duly did so. The local planning authority's case was that it had invalidated the application, as both a site location plan and a block plan were missing. It did not communicate this decision to the appellant.

44. The local planning authority served an enforcement notice in respect of part of the track, on the grounds that it was not reasonably related to agriculture or any of the other purposes appropriate in the Green Belt and the track undermined the openness of the Green Belt and had a detrimental effect on visual amenity.

45. On his appeal against the enforcement notice under section 174(2)(c) TCPA 1990, the appellant submitted that the track was lawful as permitted development under Class A, Part 6, Schedule 2 of the GPDO 1995, as it was reasonably necessary for the purposes of agriculture.

46. The appellant further argued that he was entitled to construct the track by virtue of paragraph A.2.(2)(cc), Part 6, Schedule 2, as he had made an application for prior notification, and the Council had not responded to his application within the requisite 28 day period.

47. The Inspector dismissed the appellant's appeal. I dismissed the appellant's appeal to the High Court under section 289 TCPA 1990, holding that the Inspector was correct to conclude that a local planning authority's failure to determine or respond to a request for prior notification could not have the effect of bypassing the need to fulfil the definitional requirements of Class A.

48. The appellant's appeal to the Court of Appeal was dismissed. Lindblom LJ, giving the only judgment, with which Lewison LJ agreed, said at [36] – [38]:

> "36. The condition in paragraph A.2(2)(i), which required the developer, before beginning the development, to apply to the local planning authority for a determination as to whether its "prior approval" would be required to the "siting and means of construction" of the "private way", did not impose on the authority a duty to decide whether or not the development in question was, in fact, permitted development under Class A - albeit that the guidance in paragraph E14 of Annex E to PPS7 might have been read as encouraging it to do so. Nor did it confer upon the authority a power to grant planning permission for development outside the defined class of permitted development. The sole and limited function of this provision was to enable the local planning authority to determine whether its own "prior approval" would be required for those specified details of that "permitted development". If the authority were to decide that its "prior approval" was not required, the condition would effectively have been discharged and the developer could proceed with the "permitted development" - though not of course with any development that was not "permitted development". If, however, the authority failed to make a determination within the 28-day period, again the developer could proceed with the "permitted development", but again not with any development that was not "permitted development". The developer would not at any stage have planning permission for development that was not, in fact, "permitted development".

> 37. The first condition imposed -by paragraph A.2(2)(i) in Class A of Part 6, and by paragraph A.2(1)(a) in Class A of Part 7 - simply prevents the "permitted development" in question being begun. By the condition in paragraph A.2(2)(v) in Class A of Part 6, and the corresponding condition in A.2(1)(e) in Class A of Part 7, if "prior approval" is required, the development must then be carried out in accordance with the details approved, or if "prior approval" is not required, in accordance with the details submitted with the application. But even that condition is, and can only be, a stipulation attached to the planning permission granted by article 3(1) and the "Permitted development" provisions of the relevant class.
>
> 38. The provisions relating to conditions in Class A of Part 6 and Class A of Part 7 effectively define the ambit of the local planning authority's jurisdiction in respect of the several kinds of "permitted development" within the relevant class. They do not expressly, or implicitly, engage any other question, such as whether the development is "reasonably necessary", respectively, for the purposes of agriculture within the agricultural unit or for the purposes of forestry. The local planning authority does not have the power, under the provisions for conditions in either of these two classes, to vary the terms of the "permitted development" rights within the relevant class. Those provisions do not empower an authority to consider whether permission should be granted for development which is not of the specified type and description: for example, in the case of agricultural buildings and operations, development on an agricultural unit smaller than the specified minimum size of five hectares. The fact that the question of whether development is "reasonably necessary" for the relevant purposes is not merely an objective matter, but involves an element of judgment, does not displace that principle."

49. It is noteworthy that the local planning authority in *Keenan* did not, at prior notification or prior approval stage, purport to determine whether the proposed development was within the scope of permitted development under paragraph A. It only addressed the scope of the permitted development rights subsequently, in the different context of the enforcement proceedings.

50. In *R (Marshall) v East Dorset DC* [2018] EWHC 226 (Admin); [2018] PTSR 1508, the claimant challenged the local planning authority's decision that a building to shelter livestock was permitted development, as paragraph A.1(i) did not permit the erection of a building to house livestock within 400 metres of a protected building. The interested party (a farmer) had applied to the local planning authority for determination as to whether prior approval was required for the building under paragraph A of the GPDO. The local planning authority failed to determine the application within 28 days, and so paragraph A.2(iii)(cc) of Part 6 applied. In its decision notice, the local planning authority stated that it had considered the application and determined that prior approval was not required, and that the development constituted permitted development. In an

informative, it explained that the 28 day period within which the local planning authority could request the submission of details for prior approval had expired, and advised the farmer of the restrictions in paragraph A.1(i) on keeping livestock within 400 metres of protected buildings.

51. At the hearing, the local planning authority submitted that, following *Keenan*, it had no power to determine whether or not the proposed development was permitted development when considering an application for prior approval, and therefore that part of its decision notice was ineffective. The claimant did not dispute this analysis.

52. The local planning authority submitted that the appropriate time for it to consider whether the proposed development was permitted development was in response to an application for a certificate of lawfulness of existing use or development under section 191 TCPA 1990, or proposed use or development under section 192 TCPA 1990, or an application for planning permission. If no such applications were made, the authority had power to consider whether a development was within permitted development rights in the context of enforcement proceedings.

53. I accepted the local planning authority's submissions and held that it had exceeded its powers, and therefore acted unlawfully, when purporting to decide that the farmer's building constituted permitted development under Part 6, as its function was limited to determining the issue of prior approval. I also observed that it was permissible for a local planning authority to advise an applicant of its views as to whether the proposed development is likely to constitute permitted development (as this authority had done in its informative), provided it did not purport to decide the matter.

54. In *Westminster City Council v Secretary of State for Housing, Communities and Local Government & New World Payphones Ltd* [2019] EWCA Civ 2250, the operator of an electronic communications network applied to Westminster Council for a determination as to whether prior approval for the replacement of two telephone boxes with a single new kiosk was required under paragraph A.3(4), Part 16, Schedule 2 GPDO 2015. It also applied for consent for the display of an advertisement panel. Westminster Council refused both applications. In a decision notice dated 6 September 2017, it determined that (1) prior approval was required; and (2) that approval was refused because the kiosk would be harmful to visual amenity. On the operator's appeal to the Secretary of State, Westminster Council was granted permission to rely on an additional ground of refusal, namely, that the application for prior approval did not meet the definitional requirements in Part 16 as it was not for the purposes of the operator's communication network. The inspector allowed the operator's appeal.

55. On an application for statutory review by the local planning authority under section 288 TCPA 1990, the High Court quashed the inspector's decision on the basis that the new kiosk was not wholly "for the purpose of the operator's electronic communication network", being partly also for the purpose of advertising. Therefore it fell outside the scope of paragraph A of Part 16.

56. The Court of Appeal upheld the judgment of the High Court and dismissed the operator's appeal. Hickinbottom LJ said, at [48] and [49]:

> "48 …..

> (i) The GPDO describes classes of "permitted development" for which planning permission is granted without the requirement for a planning application to be made under Part 3 of the 1990 Act. To fall within a class, development not only has to comply with a class description, but also has to satisfy a series of conditions and limitations unique to that class. If it does not do so, then it is not permitted under the GPDO; and planning permission can only be obtained on the basis of a full application.
>
> (ii) To take the advantage of being permitted development, the proposed development must fall entirely with the scope of the GPDO…
>
> 49. …. I should deal specifically with the strands of argument relied upon by Mr Stinchcombe which I have already identified. I do so in the same order.
>
> (i) It is, rightly, common ground that NWP's subjective purpose in pursuing the development is irrelevant: what is relevant is the use or purpose of the proposed physical structure that comprises the development. In any event as I have explained, the form of the application cannot determine whether any proposal falls within a permitted development class. In *Keenan* (at para 36), Lindblom LJ said that an application to a local planning authority for a determination as to whether its "prior approval" would be required does not impose on the authority a duty to decide whether the proposed development is in fact permitted development under the GPDO. But the thrust of that paragraph of Lindblom LJ's judgment was that, by requiring a developer to seek prior approval limited to restricted planning issues, that did not confer upon the authority a power to grant planning permission for development outside the defined class of permitted development. On an application to an authority for a determination as to whether its "prior approval" is required, then the authority is bound to consider and determine whether the development otherwise falls within the definitional scope of the particular class of permitted development."

57. In *R (Mawbey) v Cornerstone Telecommunications Infrastructure Ltd* [2019] EWCA Civ 1016, Lindblom LJ confirmed the correct approach to construing the provisions of the GPDO, at [20]:

> "The correct approach to construing provisions of the GPDO was aptly described by Mr Neil Cameron Q.C., sitting as a deputy judge of the High Court in *Evans v Secretary of State for Communities and Local Government* [2014] EWHC 4111 (Admin) (at paragraph 17): "[the] ordinary meaning of the language used is to be ascertained when construing the development order in a broad or common sense manner". To put it as did Mr Vincent Fraser Q.C., sitting as a deputy judge of the High Court, in *Waltham Forest London Borough Council v*

> *Secretary of State for Communities and Local Government* [2013] EWHC 2816 (Admin) (at paragraph 17), "one would expect common words to be given their common meaning unless there was something which clearly indicated to the contrary". So, as Mr Andrew Parkinson submitted on behalf of Mr Mawbey, to ascertain the true meaning of the word "mast" in paragraph A.1(2)(c) one must begin with a straightforward interpretation of it in that provision, giving it its natural and ordinary meaning; and then consider whether there is anything in the legislative context to displace that meaning. This should not be an unduly complicated exercise."

Conclusions

58. I have identified four main issues to be determined, namely:

    i) whether the Council acted unlawfully in deciding that the proposed development fell outside the scope of paragraph A of Part 6 and therefore planning permission was required;

    ii) whether the Council acted unlawfully in proceeding to refuse prior approval on the same occasion as it considered the Claimant's application for prior notification;

    iii) whether the Council acted irrationally in deciding, on the application for prior notification, that the definitional requirements of paragraph A of Part 6 were not met, and so planning permission was required;

    iv) whether the right of appeal under section 78(1) TCPA was a suitable alternative remedy which the Claimant ought to have pursued, instead of the claim for judicial review.

Issue 1

59. The first issue for consideration is whether or not the Council acted unlawfully in deciding that the proposed development fell outside the scope of paragraph A of Part 6 and so planning permission was required, and prior approval should be refused.

60. The Claimant submitted that the Council acted beyond its powers in determining that the proposed development did not meet the definitional requirements of paragraph A, because the judgment of Lindblom LJ in *Keenan* established that an application for a determination as to whether "prior approval" was required "did not impose on the authority a duty to decide whether or not the development in question was in fact permitted development under Class A" (at [36]); and the prior approval provisions in Class A "do not expressly, or implicitly, engage any other question, such as whether the development is "reasonably necessary" …. for the purposes of agriculture with the agricultural unit" (at [38]). The Claimant also relied upon my application of *Keenan* in *Marshall*. He noted that whilst the previous guidance, Annex E to PPG7, expressly advised that on a prior notification application a local planning authority should be used

to "verify that the intended development does benefit from permitted development rights", there was no such advice in the current guidance in the PPG.

61. In my judgment, this submission cannot succeed because of Hickinbottom LJ's judgment in the *New World Payphones* case, in which he held that:

> "On an application to an authority for a determination as to whether its "prior approval" is required, then the authority is bound to consider and determine whether the development otherwise falls within the definitional scope of the particular class of permitted development."

Hickinbottom LJ also explained why he considered that Lindblom LJ's judgment in *Keenan* was not inconsistent with this approach, as "the thrust of [paragraph 36] of Lindblom LJ's judgment was that, by requiring a developer to seek prior approval limited to restricted planning issues, that did not confer upon the authority a power to grant planning permission for development outside the defined class of permitted development". I note that Lewison LJ sat in both *Keenan* and the *New World Payphones* case, and agreed with Hickinbottom LJ's judgment.

62. The Claimant seeks to distinguish *New World Payphones*, submitting that the question whether or not the proposed development was permitted under paragraph A of Part 16 was objectively verifiable, on the evidence available to the Council when considering the application for prior notification and prior approval. In contrast, in this case the question whether the proposed development was "reasonably necessary" for the purposes of agriculture, under paragraph A of Part 6, included both subjective and objective elements (per Lindblom LJ in *Keenan*, at [38]). The Council was not in a position to rebut the Claimant's statement in his application form that the building was "reasonably necessary" for the agricultural purposes of storing machinery and fodder.

63. I accept the Council's submission in response that the distinction between objective and subjective elements in the definitional requirements is not consistent with the judgment in *New World Payphones* in which Hickinbottom LJ held unequivocally that the local planning authority is bound to consider and determine whether the proposed development falls within the scope of the relevant class of permitted development. This part of his judgment was not confined to Part 16 of the GPDO, and the Court would have been well aware that *Keenan* concerned Part 6 of the GPDO, which clearly had a subjective element in the definitional requirements. I also agree with the Council's submission that the distinction between objective and subjective elements is not to be found in the GPDO or the case law or the guidance, and that it would be artificial and difficult for planning decision-makers to apply in practice.

Issue 2

64. The second issue for consideration is whether or not the Council acted unlawfully in proceeding to refuse prior approval on the same occasion as it considered the Claimant's application for prior notification.

65. On my reading of paragraph A.2 of Part 6, it is clear that it provides for a two stage procedure, as explained by Richards LJ in *Murrell*:

> "30. When an application is submitted, it engages a two-stage process, the nature of which is set out clearly in Annex E (see, in particular, paras E12-E20). The first stage involves consideration of whether prior approval is required. If the council determines that it is not required, it should notify the applicant accordingly. If it determines that prior approval is required and notifies the applicant of the decision, it moves into the second stage, in which it has eight weeks or such longer period as may be agreed in writing to decide whether to give approval (see art.21 of the Town and Country Planning (General Development Procedure) Order 1995, which applied to applications for approval other than those under Pt 24 of Sch.2 to the GPDO ; now replaced by art.30 of the Town and Country Planning (Development Management Procedure) (England) Order 2010). The existence of a discrete second stage is underlined by the requirement in para.A2(2)(iv) as to the display of a site notice where the local planning authority has given notice that prior approval is required.
>
> 31. The council can request further details at any time, though Annex E appears to contemplate that they will generally be called for only at the second stage, after it has been determined that prior approval is required."

66. On my reading of paragraph A.3 of Part 16, it also envisages a two stage process: first, the prior notification decision, then the prior approval decision.

67. The Claimant correctly submitted that paragraph A.3 of Part 16 of the GPDO, which was in issue in the *New World Payphones* case, sets out a different procedure to Part 6, since notification of the proposed development, to interested parties and members of the public, takes place prior to the decision as to whether prior approval is required, instead of afterwards, as in Part 6. Sub-paragraph A.3(4) of Part 16 makes provision for an applicant to apply to the local planning authority for a determination as to whether prior approval will be required as to the siting and appearance of the development. However, before any application is made under sub-paragraph (4), paragraph A.3(1) requires that the applicant must give notice of the proposed development to the owner of the land. Once the local planning authority receives the application for prior notification, it must undertake a consultation procedure, in accordance with sub-paragraph (6). By sub-paragraph (7), the local planning authority must take into account any representations made to them as a result of the consultations or notices when determining the pre-notification application in sub-paragraph (4).

68. Both Part 6 and Part 16 specify the trigger events, following which development may take place. Sub-paragraph A.2(iii) of Part 6 provides:

> "(iii) the development must not begin before the occurrence of one of the following—
>
> > (aa) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;

> (bb) where the local planning authority gives the applicant notice within 28 days following the date of receiving the applicant's application of their determination that such prior approval is required, the giving of such approval; or
>
> (cc) the expiry of 28 days following the date on which the application under sub-paragraph (2)(ii) was received by the local planning authority without the local planning authority making any determination as to whether such approval is required or notifying the applicant of their determination;"

69. Sub-paragraph A.3(8) of Part 16 provides:

> "(8) The development must not begin before the occurrence of one of the following—
>
> (a) the receipt by the applicant from the local planning authority of a written notice of their determination that prior approval is not required;
>
> (b) where the local planning authority gives the applicant written notice that prior approval is required—
>
> > (i) the giving of that approval to the applicant, in writing, within a period of 56 days beginning with the date on which the local planning authority received the application in accordance with sub-paragraph (5);
> >
> > (ii) the expiry of a period of 56 days beginning with the date on which the local planning authority received the application in accordance with sub-paragraph (5) without the local planning authority notifying the applicant, in writing, that such approval is given or refused; or
>
> (c) the expiry of a period of 56 days beginning with the date on which the local planning authority received the application in accordance with sub-paragraph (5) without the local planning authority notifying the applicant, in writing, of their determination as to whether such prior approval is required."

70. If the local planning authority decides prior approval is required, sub-paragraph A.2(iii)(bb) of Part 6 applies, and when read with Article 7, gives the local planning authority a period of 8 weeks to determine the application for prior approval. Similarly, sub-paragraph A.3(8)(b)(i) in Part 16 gives the local planning authority 56 days (8 weeks) to make its prior approval determination. These provisions envisage that the determination of the prior notification application and the determination of prior approval, if required, will be separate decisions.

71. In Part 6 and Part 16, there is no provision for a separate application for prior approval. It appears to be envisaged that the application for prior notification will also serve as

the application for prior approval, if required. However, I cannot see any reason why an applicant could not add supplementary information to his application, once he is notified that an application for prior approval is required. Also, Richards LJ observed in *Murrell* (by reference to the superseded PPG7), that generally further details will be called for at the second stage, after it has been determined that prior approval is required.

72. In a letter dated 12 November 2020, the Planning Inspectorate informed the Claimant's solicitors:

> "In our experience it is not uncommon for an LPA to determine such an application by simultaneously decided that a) its prior approval is required for the proposed development and b) the prior approval is refused."

73. On my interpretation of Part 6 and Part 16, whilst a two stage process is envisaged, the language used in the GPDO does not point to it being a mandatory requirement. In my judgment, local planning authorities may, in the exercise of their discretion, determine both prior notification and prior approval on the same occasion, if in the particular circumstances, it is appropriate and procedurally fair to do so. Relevant considerations are likely to be whether a local planning authority has sufficient information to determine the application for prior approval; whether the applicant has had a fair opportunity to address any matters arising for consideration in the application for prior approval; and whether the public notification/consultation requirements have been met e.g. the public notification requirements under paragraph A.2(iv).

74. By way of illustration, in the *New World Payphones* case, Westminster Council sent a single decision letter which incorporated two decisions. The first was that prior approval was required and the second was that prior approval was refused. Neither the parties nor the Court criticised the amalgamation of the two decisions into a single decision notice issued on the same date. There was no evidence that the operator was prejudiced by the procedure adopted, and under Part 16, the necessary notifications to the public and interested parties took place before the prior notification decision was made.

Issue 3

75. I now turn to consider the third issue, namely, whether the Council acted irrationally in deciding, on the application for prior notification, that the definitional requirements of paragraph A of Part 6 were not met, and so planning permission was required, and that prior approval should be refused.

76. In the first decision notice the Council failed to make an express determination that prior approval was required, and proceeded directly to refuse prior approval. This decision notice was poorly drafted, in comparison with Westminster Council's decision notice in the *New World Payphones* case. However, the title referred to "prior notification for proposed new agricultural building", and I accept that it can be inferred that the Council did determine the application for prior notification by deciding that prior approval was required, and then proceeded to refuse prior approval.

77. In my judgment, the questions in the application form were clearly designed to address the definitional requirements of paragraphs A and A1, for example:

    i) whether the proposed building was new, or an extension, or an alteration;

    ii) whether an agricultural building had been constructed on this unit within the last two years;

    iii) whether the proposed building would be used to house livestock, slurry or sewage sludge;

    iv) whether the proposed building would cover an area exceeding 1000 square metres;

    v) the size of the agricultural unit;

    vi) how long the land on which the proposed building was to be located had been in use for agricultural purposes;

    vii) whether the proposed development involved any alteration to a dwelling;

    viii) whether the proposed development was more than 25 metres from a metalled part of a trunk or classified road or within 3 km of an aerodrome;

    ix) whether the proposed development was reasonably necessary for the purposes of agriculture;

    x) whether the proposed development was designed for the purposes of agriculture.

78. The Claimant answered all these questions briefly, but clearly. He provided details of the size and appearance of the building, and answered the questions concerning other constructions in the past two years. He explained that the proposed building was a "General purpose building for storage of machinery & fodder". When asked whether the proposed development was reasonably necessary for the purposes of agriculture, he answered "yes", repeating that it was for "storage of machinery and fodder". When asked whether the proposed development was designed for the purposes of agriculture, he answered "yes", and explained that:

    > "The building is a suitable size and height for storing machinery and fodder. The building has been designed to look more traditional than modern agricultural buildings and to be in keeping with the surrounding particularly considering the tourism aspect of Drovers Rest at Llanycoed". (Drovers Rest is the name for the holiday accommodation at the Site).

79. The form also required an applicant to submit details of siting, design and external appearance, which the Claimant duly did, supplemented by a plan, and with details and illustrations of the materials he proposed to use.

80. The Claimant signed the declaration at the end of the form which stated that "I/we hereby apply for planning permission/consent as described in this form and the accompanying plan/drawings and additional information…..".

81. I consider that the form gave the Claimant the opportunity to provide the information which the Council required to decide (1) whether the proposed development met the definitional requirements; (2) whether prior approval was required; and (3) whether prior approval should be granted, with or without conditions, or refused. The Claimant could have provided more detail as to why he needed an agricultural building, by reference to plans to diversify and expand the agricultural side of the business, but he did not do so.

82. The Claimant relied upon the guidance in the PPG that prior approval is a "light touch" process and should not place onerous requirements on developers. However, the complexity of the requirements in the GPDO, and in the Planning Inspectorate's application form, mean that, in reality, these applications are far from straightforward. In my view, it would assist applicants if the form included an informative to the effect that the information provided in the form could be used by local planning authorities to determine whether the definitional requirements for permitted development were met and, where appropriate, whether prior approval was required, and if so, whether it should be granted or refused.

83. In this case, in accordance with standard practice, the Report took into account the planning history of the Site and the planning officer's knowledge of the layout of the Site. The Report included the following appraisal:

> "In 2015 permission was granted for the conversion of the redundant farm buildings at site to holiday accommodation. The result of this is that currently the majority of the surrounding buildings to the application site are no longer under an agricultural use. The proposed building would therefore be separate to other buildings under an agricultural use associated with the unit.
>
> The justification for the building is limited to details of its proposed use as a store for machinery and fodder. However, "the design of the building is not functional in nature and appears overly designed for its stated agricultural purpose. Furthermore the scale of the openings and height of the eaves at the sides of the barn will limit the ability to operate or store any modern agricultural machinery.
>
> Given the above there is insufficient evidence to satisfy officers that the building is reasonably necessary for the purposes of agriculture within the unit. It is a binary test whereby the proposal does not qualify for the proceeding permitted development rights. As such it is unnecessary to undertake the review of the proposal against A.1 (a-k) and A.2. Prior approval is therefore refused and planning permission is required."

84. In my view, this appraisal was a legitimate exercise of the planning officer's judgment, which the delegated decision-maker accepted when making the decision. The Council was entitled to conclude that it had insufficient evidence to satisfy it, as the onus of establishing permitted development was on the Claimant. Contrary to the Claimant's submission, the Council did not reverse the burden of proof. Whilst the Claimant

disagrees with the judgment made, I do not consider that he can overcome the high bar set for irrationality challenges to planning decisions.

85. Once the Council had concluded that the Claimant's application could not progress further because the proposed development fell outside the scope of the permitted development in paragraph A of Part 6, it was rational for it to exercise its discretion to determine the application for prior notification and prior approval on the same occasion. There was no purpose in going on to consider whether to grant prior approval for siting, design and external appearance at a later date, when the application did not come within the scope of permitted development under paragraph A of Part 6.

86. On behalf of the Claimant, Mr Stedman Jones did not put forward any other matters which the Claimant could or would have submitted to the Council, if he had been given the opportunity to do so. The claim was not pleaded or argued as procedural unfairness.

87. The Claimant filed a witness statement dated 21 May 2020, for the purposes of the costs limit, in which he described how the Covid-19 pandemic, and the loss of bookings at his holiday accommodation, had resulted in a significant reduction of income, and placed him in a precarious financial position. Therefore he and his wife intended to expand and diversify their agricultural activities. As his application for prior notification was made on 4 March 2020, before the first lockdown, he would not have appreciated the impact which the pandemic was going to have at the date of his initial application. However, he would have been able to submit a fresh application at any time subsequently, and submit further evidence to support his application that the new building was reasonably necessary for the purposes of agriculture because he intended to expand and diversify his agricultural activities, in the light of the economic impact of the pandemic.

Issue 4

88. The fourth issue is whether the right of appeal under section 78(1) TCPA 1990 was a suitable alternative remedy which the Claimant should have pursued instead of the claim for judicial review.

89. The Planning Inspectorate advised the Claimant's solicitors in its letter of 12 November 2020 that the Claimant had a right of appeal on the basis that the Council had refused prior approval. On the Appeals Casework Portal, the reason for the appeal "3. Refused prior approval of permitted development rights" would apply. However, the Claimant was out of time to pursue an appeal and an extension would not be granted. The letter did not spell out whether, on appeal, the Inspector would have jurisdiction to consider whether the definitional requirements were met and whether prior approval was required. I note that in the *New World Payphones* case, the Inspector did decide that the definitional requirements of Part 16 were met, and that prior approval should be granted, on an appeal against refusal of prior approval under section 78(1) TCPA 1990, which indicates that these matters are treated as being within the remit of an appeal against the refusal of prior approval.

90. However, I consider that the challenge which the Claimant made under Ground 1, alleging that the Council had acted outside its powers, could only have been made in a

claim for judicial review. The statutory appeal would not therefore have been a suitable alternative remedy.

Final conclusion

91. In conclusion, for the reasons set out above on Issues 1 to 3, the claim for judicial review is dismissed.