

**Case Name:** *Smolas, R (On the Application Of) v Herefordshire Council* [2021] EWHC 1663 (Admin) (21 June 2021)

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**Commentary:**

This was an unsuccessful challenge by way of judicial review of two decision notices issued by Herefordshire Council; the first refused prior approval for the erection of an agricultural building under paragraph A, Part 6, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the "GPDO") and the second was a notification to the claimant that planning permission was required for the building.

Part 6 of Schedule 2 of the GPDO makes provision for permitted development on land used for agricultural and forestry purposes. Prior to beginning the permitted development, the developer is required to apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to various matters relating to the proposed development (a "Prior Notification Application"). Development may not commence until either the local planning authority confirms that such prior approval is not required, confirms that prior approval is required and gives such approval or 28 days have passed since the local planning authority has received the Prior Notification Application without making any determination as to whether approval is required or notifying the applicant of their determination.

The claimant in this case argued that the Council had misdirected itself as to its powers in respect of its Prior Notification Application and erroneously purported to determine the questions as to whether prior approval should be granted and whether the proposed development required planning permission. Further, or alternatively, the claimant argued that the Council had reached an irrational conclusion when determining the Application, namely that the building was not 'reasonably necessary for the purposes of agriculture' (this being a requirement of the permitted development right).

The Council resisted the claim on the basis that, in determining a Prior Notification Application, a local planning authority first had to determine whether the development met the definitional requirements of the relevant class of permitted development. 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. Further, the irrationality of its finding that the building was not 'reasonably necessary for the purposes of agriculture' was also disputed.

The judge identified the following four main issues to be determined, namely:

1. 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;

2. 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;
3. 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 prior approval refused; and
4. 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.

On the first issue, Lang J held (relying on Hickinbottom LJ's judgment in *New World Payphones Ltd v Westminster City Council* [2019] EWCA Civ 2250) that, in determining whether prior approval is required, the local planning authority is bound to consider and determine whether the development otherwise falls within the definitional scope of the particular class of permitted development. She disagreed with the claimant's contention that this did not apply where (as here, by virtue of the reference to 'reasonably necessary') the permitted development right included a subjective element in the definitional requirements.

On the second issue, Lang J held that Part 6 of Schedule 2 of the GPDO envisaged a two stage process; first, the prior notification decision, then the prior approval decision. Notwithstanding this, she found that the language used in the GPDO does not point to this being a mandatory requirement and, as such, 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. She identified the following relevant considerations in determining this: 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.

On the third issue, Lang J concluded that the Council had not acted irrationally. She found that the application 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. She found that the Council was entitled to conclude that it had insufficient evidence to satisfy it that the building was reasonably necessary for the purposes of agriculture, as the onus of establishing permitted development was on the Claimant. Once the Council had concluded that the Claimant's application could not progress further because definitional requirements were not met, it was rational for it to exercise its discretion to determine the application for prior notification and prior approval on the same occasion.

On the fourth issue, Lang J held that the challenge made by the Claimant under ground 1, alleging that the Council had acted outside its powers, could only have been made in a claim for judicial review and a statutory appeal would not have been a suitable alternative remedy.

Accordingly, the claim was dismissed.

*Case summary prepared by Victoria McKeegan*