Kay Neild

From: Ben Pycroft <>
Sent: 06 November 2020 09:50
To: Haywood, Ben; Colley, Jane; Simpkin, Rachael.
Cc: Rawdon Gascoigne
Subject: RE: HPK/2020/0301 - Taxal Edge, Macclesfield Road, Whaley Bridge

Thanks Ben

Yes please upload the recent opinion and the previous one. Given the difference between us it is important that members read both opinions please.

On another note – how has the confidential information been treated. We assume that members are aware of the tragic history of the site as it has been widely covered in the press, but have they seen our letter on this as it is not in the public domain?

Many thanks

Ben Pycroft BA (Hons) Dip TP MRTPI
Director

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From: Haywood, Ben
Sent: 05 November 2020 18:50
To: Ben Pycroft >; Colley, Jane <>; Simpkin, Rachael.
Cc: Rawdon Gascoigne <
Subject: RE: HPK/2020/0301 - Taxal Edge, Macclesfield Road, Whaley Bridge

Hi Ben
AS previously we can't circulate this to members but I am happy to provide a summary of the main points in the update report and a link to it on the website if you are happy with that. Please confirm and I will sort this out tomorrow
Ben

Ben Haywood
Head of Development Services
Staffordshire Moorlands District Council / High Peak Borough Council

From: Ben Pycroft
Sent: 05 November 2020 13:57
To: Haywood, Ben <Colley, Jane <; Simpkin, Rachael. <
Cc: Rawdon Gascoigne <
Subject: HPK/2020/0301 - Taxal Edge, Macclesfield Road, Whaley Bridge
Importance: High

Ben / Jane / Rachael

Please find attached a further legal opinion which responds to the latest committee report on our application.

Please review and reflect on it in your update to committee. Please also send it to members along with the previous opinion.

Kind regards

Ben Pycroft BA (Hons) Dip TP MRTPI
Director

Emery Planning is proud to support the Keaton Emery Memorial Foundation. To find out more about the charity or to make a donation, please visit www.keatonemeryfoundation.com

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Kay Neild

From: Alysia Davidson =
Sent: 06 November 2020 17:05
To:

Cc: Ben Pycroft; Rawdon Gascoigne
Subject: HPK/2020/0301 - 184 Taxal Edge, Macclesfield Road, Whaley Bridge, SK23 7DR
Attachments: Taxal Edge Opinion (Nov 2020).pdf; Taxal Edge Opinion (September 2020)(final).pdf; Letter to Members -061120.pdf

Dear Councillors,

We write in relation to the above application for the demolition of the existing building known as "Taxal Edge" and the detached garage building and the erection of 7 no. dwellings, which is due to be presented to the meeting of the Development Control Committee on Monday 9th November 2020.

Please find attached our letter dated today and Counsel's Opinions of 30th September 2020 and 4th November 2020.

Should you have any queries, please do not hesitate to contact Rawdon Gascoigne or Ben Pycroft.

Kind regards,

Alysia Davidson
Professional Support

IN THE MATTER OF

LAND AT TAXAL EDGE, MACCLESFIELD ROAD, WHALEY BRIDGE

OPINION (November 2020)

INTRODUCTION

1. I have previously advised on a number of issues arising out of a planning application submitted by Treville Properties Ltd for the demolition of an existing building known as Taxal Edge and its replacement with 7 dwellings ("the Application"): see Opinion dated 30th September 2020, which focused principally on whether Treville Properties enjoyed a fallback position which should be taken into account in determining the Application.

2. As a consequence of my previous Opinion, High Peak Borough Council ("the Council") withdrew consideration of the Application from its Planning Committee. Further discussions have taken place between my instructing consultants and officers of the Council but it appears that officers are set on recommending refusal of the Application. In this respect, I have been provided with an Officer's Report ("OR") to be presented to Planning Committee on 14th November 2020.

3. The OR recommends that the Application is refused for 4no reasons. In summary, they are as follows:

    a. Conflict with policies designed to protect the countryside;
    b. Impact on trees;
    c. Inappropriate housing mix;
    d. Inadequate outdoor amenity space.

4. I am bound to observe that the OR takes a different position on a number of important issues compared to the withdrawn OR.

5. I have also been provided with copies of correspondence passing between my instructing consultants and the Council. I have paid particular regard to the letter dated 30th October 2020.

6. There are various issues, such as design and layout, in the most recent OR which call principally for the application of planning judgement. I do not propose to offer a view on those matters since they fall outside the scope of my expertise but I will consider whether the approach adopted in the OR is legally sound. Members should be aware that without a lawful decision taking framework, the planning judgements they reach are likely to be legally flawed.

7. For the avoidance of doubt, nothing I have read in the latest OR causes me to alter my Opinion from 30th September 2020. On the contrary, my instructing consultants letter dated 30th October 2020 further supports the conclusion that there is highly material fallback position in the present case.

THE ISSUES

8. I have been asked to address four principal issues, two of which are entirely new points raised by the Council's case officer. Whilst I appreciate that officers are entitled to change their minds I cannot help but recall the injunction in the NPPF that decision takers should "*work proactively with applicants to secure developments that will improve the economic, social and environmental conditions of the area*"[1]. The officer in the present case does not seem to have followed that clear guidance and appears intent on identifying problems rather than discussing solutions.

[1] NPPF §38.

(1) Policy H1

9. At §7.11 of the OR, policy H1 of the High Peak Local Plan (2016) ("HPLP") is mentioned by the case officer. Policy H1 provides (so far as relevant) as follows:

> "*The Council will give consideration to approving sustainable sites outside the defined built up area boundaries, taking into account other policies in this Local Plan, provided that*
> - *The development would adjoin the built up area boundary and be well related with the existing pattern of development and surrounding land uses and of an appropriate scale for the settlement; and*
> - *the development would not lead to prominent intrusion into the countryside or have a significant adverse impact on the character of the countryside; and*
> - *it would have reasonable access by foot, cycle or public transport to schools medical services, shops and other community facilities; and*
> - *the local and strategic infrastructure can meet the additional requirements arising from the development.*"
>
> (my emphasis)

10. At OR §7.12 the officer offers the following comment:

> "*In turn, the PROW and its associated land create a distinct c.12.0m wide channel of countryside between the Built up Area Boundary and the application site. Accordingly, the application site cannot adjoin the built up area boundary to the northwest of the Whaley Bridge Settlement and categorically fails the first element of the H1 LP Policy test as set out above*."

11. Despite the Application having been submitted many months ago, it is quite amazing that the officer has raised this point for the first time, never having mentioned it previously.

12. There are two fundamental problems with the officer's approach: one of interpretation of the policy; the other relating to the decision-making process.

13. Before addressing these points, I should consider the factual position. It is summarised neatly in my instructing consultants' letter dated 30th October 2020 as follows:

"*The access to the site from Macclesfield Road directly coincides with the built up area boundary. The remainder of the eastern boundary of the red line is only separated from the built up area boundary line as shown on the proposals map by a footpath. Beyond the footpath are dwellings which front onto the Rise, Beech Rise and Linglongs Avenue.*"

Interpretation of Policy H1

14. Members (and officers) will know that the interpretation of planning policy is a matter of law. The classic statement is contained in *Tesco Stores Ltd v Dundee*: "*policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.*"[2]. Importantly for current purposes "*planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean*"[3].

15. In the present case, the issue of interpretation turns on the meaning of the following expression: *"the development would adjoin the built up area boundary"*. Although the term "built up boundary" is not defined in the HPLP, it seems to be common ground that the "built up area boundary" is that defined by the HPLP proposals map, delineating the edge of Whaley Bridge. There is no other logical meaning.

16. The OR opines that a "*PROW and its associated land create a distinct c.12.0m wide channel of countryside between the Built up Area Boundary and the application site*" and, as such, creates a barrier between the application site and the settlement boundary. As I have already said, this is a view expressed for the first time in the November OR.

17. The word "adjoin", is commonly held to describe something that is "very near, next to, or touching"[4]. Given that the application site is separated from the boundary of Whaley Bridge only by a footpath, it is undoubtedly the case that it is 'very near' to that boundary. Indeed, it is difficult to conceive how one could reach the conclusion that it is not 'next to' the built-up area. The interpretation offered in the OR suggests that there should be some physical connection between the development site and the settlement boundary, without which the policy H1 test cannot be satisfied. This is plainly incorrect and fails to recognise the multiplicity of situations where proposed development sites are physically

[2] [2012] UKSC 13 at §18
[3] *Tesco* at §19
[4] https://dictionary.cambridge.org/dictionary/english/adjoin.

separated from a settlement boundary by a road or a path yet they will be read as part of the settlement once developed.

18. Further, one must properly understand the context in which policy H1 should be read. The relevant part of H1 recognises that there may be circumstances in which it will be appropriate to accept housing development outside settlement boundaries; technically development in the countryside. However, in order to maintain a spatial relationship between the proposed development and the existing built up area policy H1 requires that such sites should 'adjoin' the built up area. I can readily understand the rationale behind that approach since it avoids development in the open countryside away from the settlement, which may well be harmful to landscape character.

19. Once this context is appreciated, policy H1 becomes easier to interpret. The issue, in planning terms, is whether there is a close spatial relationship between an application site and the proposed development site. Put another way, will the proposed development site be read as an extension to the existing settlement once completed? If the issue is expressed in such terms it becomes absolutely obvious that our client's development will be read spatially as forming an expansion to the built up area of Whaley Bridge.

20. For the above reasons I consider that the interpretation of policy H1 in the November 2020 OR is wrong. In this next section I shall identify two other occasions in which it has been concluded that the application site 'adjoins' the built up area of Whaley Bridge.

Consistency in Decision Taking

21. It is a trite principle of planning law that there should be consistency in decision taking in order to secure public confidence in the development management system[5]. This does not mean that all like cases must be decided alike but a decision taker must have regard to the general principle of consistency and, if departing from a consistent approach, must give reasons for a departure[6].

22. In the present case, the case officer's view expressed in the previous OR dated 5th October 2020 was that the scheme would satisfy the criterion relating to the site adjoining the built

[5] *North Wiltshire DC v Secretary of State for the Environment* [1993] 65 P&CR 137.
[6] *Ibid.*

up area boundary[7]. Similarly, in recommending planning permission be granted for a previous proposal (Ref: HPK/2013/0503) the Council concluded that the site fell within the countryside but acknowledged that it adjoined the built up area of Whaley Bridge. Thus, the consistent position until the most recent OR was that the development site adjoins the settlement boundary. There have not been any material physical changes since 2013 or since October 2020 that might cause one to reach a different conclusion.

23. The officer ends §7.12 of the most recent OR with the statement that "*This matter represents a correction of the earlier published 5th October DC Committee officer report*". With respect, it is not a correction but a diametrically opposite conclusion from that reached by the same officer only one month ago. This change in opinion calls for an explanation. The only reasoning in the OR relates to the rather strained "*c.12.0m wide channel of countryside*" which has been relied upon to defeat reliance on policy H1. With respect to the officer and for the reasons I have already given, that is an incorrect approach to that policy.

24. The OR fails to have proper regard to the principle of consistency and is flawed for that reason.

(2) Housing Mix (H3)

25. Policy H3 requires residential development to provide:

"*.. a range of market and affordable housing types and sizes that can reasonably meet the requirements and future needs of a wide range of household types including for the elderly and people with specialist housing needs, based on evidence from the Strategic Housing Market Assessment or successor documents.*"

26. At OR §7.16 – 7.19 the officer considers that the Application fails to meet the housing mix requirements identified in the HPLP policy. I offer a few comments on this conclusion but would align myself entirely with the views on this issue expressed by my instructing consultants in their email dated 1st October 2020:

    a. Read sensibly, policy H3 cannot apply to all residential proposals of whatever size. OR §7.15 accepts that the scheme does not breach the threshold for the provision of affordable housing. Given that policy H3 is aimed at ensuring a mix of both

[7] 5th October OR §7.12 and 8.1.

market and affordable housing, it must follow that the same or similar thresholds should apply for housing mix purposes under this policy. By way of illustration, the Council's approach in the OR would entitle it to refuse planning permission for 1 – 2 house schemes on the basis they did not reflect the housing mix identified in the Strategic Housing Market Assessment ("SHMA"). It would therefore be nonsensical to apply H3 at all in the present circumstances or at least with the degree of rigour outlined in the November OR;

b. The SHMA upon which the Council has based its housing mix request dates from 2014 but is based on a housing needs survey which is now over 10 years old. I am not aware that this piece of evidence has been updated to reflect changing circumstances or delivery of certain house types and sizes. It is out of date and must be afforded reduced weight.

27. I do not consider that refusal relying on policy H3 would be justified in the circumstances.

(3) <u>Amenity Space</u>

28. §7.45 OR expresses the following view:

"The site plan and more limited section information both serve to demonstrate that an inadequate and limited rear amenity space would be provided for each family dwelling house. Resultant overbearing and shading impacts would be exacerbated by the proposed retaining walls with tree embankment above."

29. It is then alleged that there is conflict with HPLP Policy EQ6, the Residential Design SPD and the NPPF. My first point is that a generalised assertion of conflict with the NPPF is virtually meaningless. In any event, policy EQ6 makes no express reference to private amenity space, less still any standards that must be applied. There can therefore be no breach of policy EQ6. Similarly, I have read the Residential Design SPD and cannot find any measurable standards for gardens (front or rear). There is no breach of the SPD. This proposed reason for refusal is also misguided.

30. To the extent that the size of the proposed gardens is relevant, I would make the following points. **First**, the location of the Application site means that future residents would have ready and easy access to public rights of way and countryside as well as existing public

open space in Whaley Bridge. It is hardly a location where access to land for recreation is in scarce supply. **Second**, the site layout shows that the properties will benefit from substantial front gardens. The location of the site, the relatively small overall scale of development together with the disposition of houses on the plots all indicate very strongly that the amount of amenity space associated with the proposed dwelling will be more than adequate. I note in passing that the OR mentions only the rear gardens of the properties.

(4) The Fallback Position

31. §7.36 of the November OR sets out the officer's view on the fallback position, which was the focus of my September Opinion and which caused the Application to be removed from the Planning Committee:

"*Turning to the fallback position regarding the 2009 and 2013 permissions. Officers have requested the applicant to evidence in detail the works undertaken to implement either of these schemes including the classroom 'conversion'. Notwithstanding this, however, even if a robust fallback position can be established for the 2009 and 2013 schemes (i.e. conversion of existing buildings without significant engineering works can be demonstrated), it is clear that the proposed scheme is fundamentally different. As such it should be assessed on its own merits, including against the provisions of Policy H1. Accordingly it is not considered that the fallback position carries any weight as a material consideration in the planning balance or sets any precedent to overcome such LP Policy H1 objections.*" (emphasis added)

32. It is highly regrettable that the latest OR fails to grapple with the issues raised by my instructing consultants and by my September Opinion. There are a number of serious flaws in the November OR.

33. **First**, at §3.5 OR the officer comments that a legal Opinion was submitted in relation to the fallback position but then singularly fails to address any of the points raised in that Opinion from an evidential or legal perspective. We therefore have no idea what view the officer takes as to the lawful use of the site.

34. **Second**, the officer concludes that the fallback position would be irrelevant even if a "robust" fallback position could be established in relation to the 2009 and 2013 planning

permissions. That is the wrong test. In *Mansell v Tonbridge and Malling BC and others*[8] (a case I cited in my September Opinion), having reviewed the legal authorities, the judge held that "*for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice*"[9]. The OR sets the bar too high.

35. **Third**, the effect of the OR is to discount entirely the fallback position as a material consideration in determining the Application. This is a fatal flaw. The Officer's objection to the Applicant's development rests on an assertion that it will be a prominent and harmful intrusion into the countryside. By omitting any consideration of the fallback position, the OR deprives Members of making a fair and proper comparison between what is proposed by the Application and what could be developed under the 2009 and/or 2013 planning permissions. Ultimately a decision maker may be able to conclude that a fallback position is less harmful than a new proposal but he or she cannot lawfully come to that conclusion without drawing a proper comparison between the two. The OR fails to make that comparison.

36. **Fourth**, the effect of the officer's rejection of the fallback position suggests that the entirety of the application site is treated as countryside in a landscape sense, as opposed to a policy designation. This is illustrated by the fact that the OR makes no reference whatsoever to the fact that the majority of the site should be treated as previously developed land. The OR consequently ignores an important plank of national planning policy, which enjoins developers and local authorities to make "*as much use as possible of previously-developed or 'brownfield' land*"[10].

37. **Finally** and in any event, it is entirely unclear against which benchmark the officer has judged the impact of the proposed scheme. When reading the OR, it is quite impossible to know whether the officer considers the lawful use of the site to be as a children's home (as in the October 2020 OR) or for some other use.

[8] [2017] EWCA Civ 1314
[9] See judgment §27.
[10] NPPF §117.

CONCLUSIONS AND NEXT STEPS

38. The Council's consideration of the current planning application, as set out in the OR, is deeply flawed. The approach to the fallback position is wrong in law and fails to take into account clear and convincing evidence that the land may be used for residential purposes. This creates a fault line running through the entire OR.

39. If Members refuse planning permission on the grounds set out in the OR, a number of things will happen:

    a. The Applicant will have a strong case for an award of costs on an appeal;
    b. Given that the starting point for the Council's assessment of the application is wrong, its evidence is likely to carry substantially reduced weight with an Inspector.

40. I advise accordingly but please do not hesitate to contact me if any matters require clarification or if anything further arises.

4th November 2020

JONATHAN EASTON
KINGS CHAMBERS
MANCHESTER-LEEDS-BIRMINGHAM

IN THE MATTER OF

LAND AT TAXAL EDGE, MACCLESFIELD ROAD, WHALEY BRIDGE

OPINION

INTRODUCTION

1. Next week a planning application submitted on behalf of Treville Properties Ltd for the demolition of an existing building known as Taxal Edge and its replacement with 7 dwellings ("the Application") is due to go before the Planning Committee of High Peak Borough Council ("the Council"). The Officer's Report ("OR") recommends the refusal of the Application for three reasons.

2. I am asked to advise on the lawfulness and merits of the proposed reasons for refusal ("RfR"). I shall address the RfRs broadly in reverse order.

3. In coming to my conclusions I have considered the wealth of material provided with my instructions, including the supporting documentation for the current planning application and details of the site's previous planning history. I have also read carefully the OR.

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6 November 2020

EP ref: 19-429

Ben Pycroft
T: 01625 442 799
benpycroft@emeryplanning.com

Dear Councillor

Re: HPK/2020/0301 - Taxal Edge, Macclesfield Road, Whaley Bridge

We write in relation to the above application for the demolition of the existing building known as "Taxal Edge" and the detached garage building and the erection of 7 no. dwellings, which is due to be presented to the meeting of the Development Control Committee on Monday 9th November 2020.

The application was due to be presented to the October meeting of the Development Control Committee however it was withdrawn from the agenda so that officers could consider the written opinion of our Counsel, Mr Jonathan Easton dated 30th September 2020. Please find a copy of the opinion, which concludes that the report to the October committee was deeply flawed. This is because it failed to consider the fallback position at the site, namely that the whole site has extant permissions to be redeveloped for 11 no. dwellings (1 no. dwelling in the converted classroom, 7 no. apartments within the building known as Taxal Edge, 1 no. detached dwelling in place of the garage building and 2 no. semi-detached dwellings).

The application is now going to be presented to the November committee with a recommendation that planning permission should be refused. Regrettably, the report to committee still fails to properly consider the fallback position, the opinion from Counsel dated 30th September 2020 or any of the information we have submitted to your officers in terms of the extant permissions and housing mix. As a result, please find enclosed a further opinion from our Counsel dated 4th November 2020, which again concludes that the report to the November committee is deeply flawed. This is because it fails to take into account clear and convincing evidence that the land may be used for residential

purposes and this creates a fault line running through the entire report. Once the fallback position is properly considered, then the proposed reasons for refusal in terms of conflict with policies designed to protect the countryside and housing mix fall away.

The opinion from Counsel also addresses the proposed reason for refusal in terms of amenity and concludes that the report to committee is misguided in that there would be no breach of policy EQ6 or the residential design SPD. Future residents of the scheme would have ready and easy access to plenty of open countryside and open space in this location and would benefit from substantial front gardens.

Counsel concludes by stating that if members refuse planning permission on the grounds set out in the officer's report the following will happen:

> *"a. The Applicant will have a strong case for an award of costs on an appeal; and*
>
> *b. Given that the starting point for the Council's assessment of the application is wrong, its evidence is likely to carry substantially reduced weight with an Inspector"*

We respectfully request that members read the two opinions from Counsel before Monday's meeting.

In terms of the fourth proposed reasons for refusal, the Applicant has worked with officers from the Council and Derbyshire County Council and has now submitted all of the relevant outstanding information in relation to trees.

Once the opinions from Counsel have been properly considered, there is no reason for planning permission to be withheld at this site. I will be speaking in support of the application at the meeting and would welcome any questions you may have.

Yours sincerely
Emery Planning

Ben Pycroft

Ben Pycroft BA (Hons), DIP TP, MRTPI
Director

Enc – Counsel's opinions of 30th September and 4th November 2020

PREVIOUS LAWFUL USE (RfR3)

4. RfR 3 reads as follows:

> "*The definitive lawful use of the site appears as a children's home, where no definitive evidence has been provided that the existing use is no longer financially or commercially viable and that there are no other means of maintaining the facility, or an alternative facility of the same type is available or can be provided in an accessible location. As a consequence the proposal fails to accord with Policy CF5 of the Adopted High Peak Local Plan and the National Planning Policy Framework.*"

5. This RfR contains a number of elements:

   a. That the 'definitive' lawful use of the site 'appears' to be as a children's home; and as such
   b. Policy CF5 of the High Peak Local Plan ("HPLP") in relation to community assets applies; and
   c. The Applicant is required to demonstrate that the 'existing use' is no longer financially or commercially viable in order to gain planning permission for an alternative use.

6. By way of an introductory remark, my instructing consultants wrote to the Council on 18th September 2020 addressing the fallback position and the current lawful use in considerable detail. There is no attempt in the OR to engage with the points raised in this letter, which is one of many flaws in the report. For the avoidance of doubt – and as will become clear – I agree with the conclusions in Emery Planning's letter.

7. Policy CF5 can only possibly apply where the 'existing use' of a building or site is for community purposes. Self-evidently, if the site is in a different, non-community use it policy CF5 cannot apply.

8. It is clear to me that the current lawful use of the site is residential, not that of a children's home.

9. **First**, as the OR acknowledges, planning permission was granted on 29th March 2010 for the following development:

"*Conversion of single dwelling house to provide seven apartments and conversion of classroom block and disused garage into two detached houses at 184 Taxal Edge Macclesfield Road Taxal Edge Whaley Bridge*".

10. It is obvious from the description of development that the Applicant considered the then use of the main building to be a 'single dwelling house'. In granting planning permission the Council plainly accepted that the use of the main building was as a single dwellinghouse. I have read the delegated report. Although the report does mention the *former* use as a children's home, there is no analysis of the current lawful use. Importantly however, there is no suggestion that the description of the proposed development ("single dwellinghouse") was incorrect.

11. Moreover, although the OR for the current scheme acknowledges that planning permission was granted under HPK/2008/0069 for a change of use from a boarding hostel to use as a single family dwelling, there is absolutely no analysis of whether that planning permission was ever implemented. The 2008 planning application was made on the basis that the existing use was as a residential institution. However, the 2010 application was made on the basis that the then existing use was as a dwellinghouse. In my judgement, one can draw a plain inference that the Council accepted that (i) the 2008 permission was implemented; and (ii) when the 2010 application was submitted, the lawful use of the site was for residential purposes. The OR completely ignores this obvious point.

12. These conclusions point strongly to the lawful use of the site being residential, not a children's home.

13. **Second**, at §2.5 OR the Officer makes the following comment:

"… *this permission has not yet been lawfully proven to be extant to be considered as a fall-back position in the event of refusal of the current application. This would require a Certificate of Existing Lawful Use or Development as the applicant has been advised.*"

14. The notion that a fallback use can only be considered where a Lawful Development Certificate ("LDC") exists is a fundamental misunderstanding of the legal position and a rather extraordinary error for an officer to make. A LDC issued under s.191 TCPA merely certifies the lawfulness of a particular use as at the date of the LDC application[1]. It confirms an existing state of affairs; it does not create one. If it is too late to take enforcement action by virtue of s.171B TCPA, a use is lawful irrespective of whether a LDC exists.

15. The Officer's error is to conclude that in the absence of a LDC that the only lawful use of the site is as a children's home. To illustrate the fallacy of this position there appears to be no LDC confirming the former use of the site as a children's home. Taking the Officer's approach, the absence of a LDC for that use would be fatal to establishing its lawfulness. This is plainly incorrect.

16. Given this flawed approach the OR wholly ignores the wealth of evidence demonstrating that the site can lawfully be used for residential purposes.

17. **Third**, the evidence already available to the Council demonstrates unequivocally that the current lawful use of the site is for residential purposes:

    a. In accepting the description of the existing use as a 'single dwellinghouse' in 2010, the Council must have been satisfied that that use was lawful. Given that it was the 2008 planning permission which authorised the change from a residential institution to dwellings, the only tenable conclusion is that the Council considered that that permission had been implemented lawfully;
    b. I am instructed that Mr Butler has been living in Taxal Edge as a dwelling since 2008 and that he has been paying Council Tax on the property since then. Indeed, §1.4 of the Design and Access Statement ("DAS") supporting the current proposals states categorically that the main building has been in use as a single dwelling since 2008. It is therefore quite extraordinary that the OR makes no reference to this evidence nor attempts any sort of analysis of the evidential and legal position. I also understand that there has been little, if any, engagement by the case officer. This may provide an explanation for the lack of rigour in the Council's approach. If the Applicant's evidence is correct, the main building has been used as a dwelling for in excess of 4 years and is therefore immune from

[1] *M & M (Land) Ltd v SSCLG* [2007] EWHC 489 (Admin) §20

enforcement action under s.171B(2) TCPA[2]. This is the position irrespective of whether the 2008 planning permission was lawfully implemented;

c. Planning permission under HPK/2009/0689 was granted in March 2010. Although the OR makes a passing reference to alleged breaches of planning control[3], my understanding is that no enforcement action has been taken or even threatened. On the contrary, the careful analysis in Emery Planning's letter of 18th September 2020 supports the conclusion that the conditions attached to the 2010 permission were discharged and that permission was implemented lawfully. The OR does not even begin to engage with these points;

d. A further planning permission was granted in 2013 under HPK/2013/0503 for the conversion of Taxal Edge to form 5no apartments and to construct 2no semi-detached dwellings on the site of the existing gymnasium. I have read the delegated report into this proposal, which confirms that work had started on the measures necessary to implement the 2010 planning permission and that the permission was 'extant'. Whilst there is no analysis of the lawful existing use, reading the delegated report as a whole it is clear that the officer considered it to be residential.

18. Although we are not concerned with a LDC application here, I consider that the guidance in the PPG is of some relevance. The PPG gives the following advice as to the evidential burden on applicants:

"*In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.*"[4]

19. In this case, the evidence from the Applicant as to Mr Butler's occupation of the main building, the Council's approach to planning applications in 2010 and 2015 and the complete absence of any contrary evidence persuades me that this test is more than satisfied. Thus, if a LDC application seeking confirmation of the residential use of the site was made, it would be impossible for the Council to refuse it:

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[2] "*Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.*"
[3] OR §2.5
[4] Paragraph: 006 Reference ID: 17c-006-20140306

a. The occupation of the main dwelling has taken place continuously since 2008 and is therefore immune from enforcement action under s.171B(2) TCPA; and
b. The works to the former classroom and some conversion works in the main building have taken place. There is no evidence that any conditions precedent have been breached and, as such, it must be taken that the 2008 and 2010 planning permissions were implemented and may still be relied upon; and
c. To the extent that any of the operational development associated with the conversion works to the main building were unauthorised[5], it seems that these works took place more than 4 years ago and are therefore immune from enforcement action in any event[6].

20. **Fourth**, and independent of my conclusions above, the existence of the 2010 and 2013 planning permissions are material considerations in their own right. The Council considered in 2010 and 2013 that the use of the site for residential development (including new buildings) was acceptable in planning terms. The OR wholly ignores this factor as a material consideration.

21. Drawing matters together I am able to conclude that RfR3 is unfounded, unreasonable and is based upon a complete misunderstanding of the legal position concerning established uses. Policy CF5 of the HPLP **does not and cannot apply** in this case. Indeed, if the Council continues to rely upon this policy, it will have adopted an unreasonable position that is likely to sound in costs if our client appeals any refusal of planning permission.

22. To illustrate the extremely poor analysis set out in the OR, we should consider the requirements of policy CF5. The third criterion resists proposals involving the loss of community assets unless it can be demonstrated that they are "*no longer financially or commercially viable and there are no other means of maintaining the facility*." Applying this criterion to Taxal Edge, I draw the following conclusions:

[5] OR §2.4
[6] S.171B(1) TCPA

a. There would be no loss of a community asset. Since 2008 the main building has been in use (lawfully) as a dwellinghouse. In its consideration of subsequent planning applications the Council has accepted as much;
b. Stockport Metropolitan Borough Council, which owned and operated the site as a children's home plainly reached the decision that that operation was not financially or commercially viable and sold it. There is really no need to delve further into that issue;
c. The Officer's application of CF5 means that some 12 years after the children's home was sold and despite the fact that it has been used as someone's home during that time, it is nonetheless necessary to apply this criterion in CF5. That is an astonishing approach.

23. Finally on this issue, I conclude that the Applicant benefits from a fallback position in the following terms:

a. The main building can lawfully be used as a single dwellinghouse or as 7no or 5no apartments (depending upon whether the 2010 or 2013 planning permission is relied upon);
b. The former classroom block can be used as a dwellinghouse given its conversion;
c. The erection of 2no semi-detached dwellings can lawfully be completed since the former gymnasium was demolished in accordance with the 2013 planning permission.

Encroachment into the countryside (RfR1)

24. Having established the fallback/lawful position, it is now possible to consider properly RfR1 which asserts that the scheme is unacceptable in principle because it "*would comprise a form of development which would encroach into, and erode the open countryside*". It is apparent that this RfR has been influenced strongly by the Officer's erroneous opinion that the only lawful use of the site is for a children's home on the current footprint.

25. The evidential burden for establishing a fallback position is slight; there must be a real prospect of the fallback being initiated. In *Mansell v Tonbridge and Malling BC and others*[7],

[7] [2017] EWCA Civ 1314

having reviewed the legal authorities, the judge held that "*for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice*"[8]. Drawing these matters together, the task for the decision maker is to consider (i) whether there is a real prospect of the fallback scheme being implemented; and if so (ii) to consider the level of harm caused by the fallback scheme in comparison with the proposed scheme. The comparison is **not** to be made between the existing development and the proposed scheme.

26. My instructions are that the Applicant will seek to complete either the 2010 or 2013 developments (or both, providing that they are not incompatible with each other). From a commercial perspective one can readily understand why the Applicant would take this approach. Consequently, there is a real prospect of the fallback position(s) being implemented.

27. In the circumstances, the Council should have drawn a comparison between the fallback position and the proposed scheme but palpably failed to do that. One of the most useful tools to make this comparison is the comparative site sections shown in Drawing 411179/25/P1. These sections compare the outline of the approved scheme (in 2010) and the proposed development. Whilst I appreciate that this comparative exercise and the conclusions to be drawn from it depend upon planning judgement, I would make the following points:

    a. In general, the proposed development sits lower than the approved development, reducing ridge heights and minimising the visual impact on the wider countryside;
    b. In each of the sections the approved scheme appears bulkier and more dominant than the proposed scheme.

28. As such, the notion that the proposed development would encroach into and erode the open countryside appears fallacious when compared to the fallback position.

29. There are a number of additional difficulties with this RfR.

30. **First**, policy H1 of the HPLP expressly contemplates residential development outside settlement boundaries on sustainable sites. There can be no 'in principle' objection to the

[8] See judgment §27.

application site, which directly abuts the Whaley Bridge settlement boundary. Policy H1 lays out a number of criteria for development of this type:

a. The relationship to the existing settlement. The OR accepts that this criterion is satisfied[9];
b. Whether there would be a prominent intrusion into the countryside or significant adverse impact on the character of the countryside. I note that the OR considers that this criterion is not met. However, the OR does not carry out any comparison between the proposed and fallback positions and on that basis the analysis is flawed and cannot be relied upon;
c. Reasonable accessibility to services and facilities by sustainable modes of transport. In concluding that the scheme meets the requirements of HPLP policy CF6 (sustainable access)[10], the OR must be satisfied that this criterion is met;
d. Whether local and strategic infrastructure can meet the requirements of the new development. There is little, if any, analysis of this criterion in the OR. However, in the concluding section of the OR it is only the second criterion which is said to be breached[11].

31. **Second**, policy EQ3 of the HPLP applies to the site given that the Plan designates land outside settlement boundaries as 'countryside'. There is no substantive consideration of EQ3 in the OR, nor is there any alleged breach of EQ3 in the RfRs. This is curious to say the least given that the policy is plainly relevant.

32. In certain circumstances new residential development is permitted under EQ3 including:

"*Re use of redundant and disused buildings and/or the redevelopment of a previously developed site, where it does not have an adverse impact on the character and appearance of the countryside. Where the existing building is in an isolated location the development should lead to an enhancement of the immediate setting.*"

33. The site is not 'isolated', nor has the Council ever suggested that it is.

[9] OR §7.12
[10] OR §7.36
[11] OR §8.1 and 8.2

34. However, given its history and the disposition of buildings and hardstandings the site is unquestionably 'previously developed'. Thus, the only issue is whether the proposed development would have an adverse impact on the character and appearance of the countryside **compared to the fallback position**. Whilst this is a matter of planning judgement, it is difficult to see how the proposed development would have a materially worse impact than the approved scheme(s).

35. Policy EQ3 does not set up an 'in principle' objection to these proposals. On the contrary, it is strongly arguable that the requirements of EQ3 are satisfied. The failure to consider policy EQ3 properly in the OR is yet another of its weaknesses.

36. **Third**, the other policies listed in RfR1 (or the relevant parts of them) relate to the impact of the development on the character of the area:

    a. Policy S1a is a local plan policy of its time. It does not more than enshrine the NPPF presumption in favour of sustainable development in the HPLP. I do note however that S1a includes a promise that the Council "*will always work pro-actively with applicants jointly to find solutions which mean that proposals can be approved wherever possible*". Given the lack of engagement by officers in this case, that promise has not been honoured;
    b. S1 is an overarching policy that encourages sustainable development. Although the Council relies upon those aspects of policy which protect character and appearance, consideration of matters such as the re-use of PDL[12], making efficient use of land[13] or the sustainability of location[14] is singularly lacking in the OR. There is no balanced consideration of this policy;
    c. Other than the Council's erroneous conclusion that the proposals fail to comply with policy H1, it is difficult to see how policy S2 is breached;
    d. The only possible breach of policy S6 relates to the impact on landscape character;
    e. EQ6 is a general design and place making policy and does not advance matters much further. However, it is notable that the OR does not allege any harm to residential amenity[15];

[12] Bullet point 2.
[13] Bullet point 3
[14] Bullet point 8
[15] OR §7.36

f. EQ7 seeks to prevent the loss of buildings and features that make a positive contribution to character of an area, albeit with a clear focus on protecting heritage assets. The development does not affect any heritage assets.

37. I have listed these policies to illustrate the following point: the Officer's objection to the Applicant's development rests on an assertion that it will be a prominent and harmful intrusion into the countryside. This point could have been made by reference to any one of the policies listed in RfR1 but the Council has chosen to stack the deck with eight development plan policies. If, as I have concluded, a decision maker considers the fallback position in this case and concludes that the proposed scheme does not have a significantly greater adverse impact than the fallback on the character of the area, RfR1 and all of the referenced policies fall away.

Trees (RfR2)

38. RfR2 reads as follows:

"*By damage caused to existing mature trees, inadequate proposed replanting, and insufficient information provided regarding planting of new trees, the proposal fails to ensure tree protection on the application site. Furthermore the development fails to ensure that healthy, mature trees and hedgerows are retained and integrated within the proposed development. As a consequence the proposal fails to accord with Policy EQ9 of the Adopted High Peak Local Plan and the National Planning Policy Framework.*"

39. The issues identified in this RfR are perfectly capable of being resolved through discussions with the Applicant and the team: the alleged insufficiency of information can be addressed through the Council stating precisely what it requires and the Applicant providing it. In any event, a robust landscaping condition requiring details of species, location and longer term management would ensure that a replanting scheme is acceptable.

40. Further, my understanding is that the Council's arboricultural officer may not have visited the site. During Covid restrictions this may be understandable but a desk-based assessment is no substitute for a site visit.

41. It is also apparent that there has been no comparison with the fallback position(s).

CONCLUSIONS AND NEXT STEPS

42. The Council's consideration of the current planning application, as set out in the OR, is deeply flawed. The approach to the fallback position is wrong in law and fails to take into account clear and convincing evidence that the land may be used for residential purposes. This creates a fault line running through the OR, infecting RfR1 and 2.

43. The only option for the Council is to withdraw the application from Committee, to engage proactively with the Applicant's team (as promised by HPLP policy S1a) and to reconsider the application. If Members refuse planning permission on the grounds set out in the OR, a number of things will happen:

    a. The Applicant will have a strong case for an award of costs;
    b. Given that the starting point for the Council's assessment of the application is wrong, its evidence is likely to carry substantially reduced weight with an Inspector.

44. The Council has the opportunity to respond sensibly and appropriately to this Opinion and is well advised to do so.

45. I advise accordingly but please do not hesitate to contact me if any matters require clarification or if anything further arises.

30th September 2020

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