Appeal Ref: APP/H1033/W/21/3272745
Taxal Edge, 184 Macclesfield Road, Whaley Bridge, High Peak SK23 7DR
• The appeal was made on 8/4/21 under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission.
• The appeal is made by Treville Properties Ltd against High Peak Borough Council.
• The application Ref HPK/2020/0301, is dated 22 July 2020.
• The development proposed is the demolition of the existing building known as "Taxal Edge" and the detached garage building and the erection of 7 no. dwellings.

LEGAL SUBMISSIONS OF THE LOCAL PLANNING AUTHORITY

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1. These legal submissions on behalf of the LPA are in response to those of the Appellant as to the fall-back position in this case. In addition they deal with the consequences of the very recent publication by the LPA of an update to its five-year housing land supply position ("5YHLS") and the impact that has on the decision-taking framework.

Fall-back position

2. The term fall-back has acquired a specific meaning in planning law. The Encyclopaedia of Planning Law and Practice states at paragraph 1.002.29:

   "Sometimes an applicant can demonstrate that the grant of a permission will be less harmful than a use or development which has previously been permitted; this is known, unsurprisingly, as fall-back"

3. In *R(Mansell) v Tonbridge & Malling BC* [2017] EWCA Civ 1314, Lindblom LJ considered the status of a fall-back development as a material consideration at [27], confirming that there must be a "real prospect" that it would be reverted to in the event that proposed development was not permitted to proceed.

4. Where there is a lawful fall-back position to be taken into account, then a comparison is made between the impact of the proposed development and the impact of the fall-back position.

5. In this case there are two planning permissions to consider which are relied on as comprising a fall-back position:

   a. HPK/2009/0689 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.

   b. HPK/2013/0503 Conversion of Taxal Edge 184 Macclesfield Road to form 5 apartments and to construct 2 new semi-detached houses in the area of the existing gymnasium at 184 Taxal Edge Macclesfield Road Whaley Bridge

6. The fact that elements of two permissions are relied on as a fall-back raises a second legal issue: can both be implemented together? Can the fall-back include both the converted classroom / converted garage and the 2 new semi-detached houses on the gymnasium site?

7. The red-line area for the 2013 scheme is a 'drop-in' or 'over-lap' so far as the 2009 scheme is concerned.

8. *Hillside Parks Ltd v Snowdonia National Park Authority* [2020] EWCA Civ 1440 confirms the general doctrine established by *Pilkington v Secretary of State for the Environment and Others* [1973] 1 WLR 1527 CA and subsequent cases (the "Pilkington doctrine"), namely that, whilst a landowner can make multiple planning applications for the same piece of land which may be inconsistent with each other, once one of those permissions has been implemented, and development has been carried out which makes it impossible to achieve development under another permission over the same piece of land, then that other permission is no longer valid. Whilst not actually overruling *Lucas*, the Court of Appeal held that the case should be regarded as "having been decided on its own facts", meaning that it cannot reasonably be relied upon in relation to modern planning permissions for large masterplan developments. The Court of Appeal re-asserted that a developer cannot lawfully

"pick and choose" different parts of a development to be implemented. Singh LJ left open the question as to whether earlier development completed lawfully under the earlier permission remains permitted.

9. Therefore the answer to the question at paragraph 6 above must be "no", because it is physically impossible to convert the main house to both 7 and 5 apartments.

10. It would appear that the scheme permitted by HPK/2013/0503 was implemented by the demolition of the gymnasium. This means that the scheme permitted by HPK/2009/0689 can no longer be relied on, at least for further acts of development. In practice, the conversion of the disused garage into two dwellings can go no further.

11. The "conversion" of the former classroom block appears to be substantially complete. If "converted" in accordance with the permission, then its status in law was the question left open by Singh LJ in ***Hillside***. For the purpose of this appeal, the LPA accepts that any works lawfully carried out under permission HPK/2013/0503 in respect of the former classroom should be regarded as being part of the fall-back. That requires the Appellant to show that:

    a. The "classroom" dwelling now on the site was built pursuant to HPK/2013/0503. In particular
    b. The works amounted to a "conversion" and not some other scheme (such as a complete or partial "re-build").

12. Also part of the fall-back will be anything that has been built on the land in breach of either permission and which is now immune from enforcement.

Decision-taking framework

13. Both parties have hitherto prepared for this appeal on the basis that the LPA could demonstrate the required 5YHLS. That position has changed recently. As a result, the 'tilted balance' at paragraph 11d)ii of the NPPF is engaged as a material consideration.

14. It still needs to be determined what the development plan indicates should be the outcome of the appeal as the starting point (see s38(6) of the 2004 Act). There is a

dispute between the parties as to the interpretation of policy H1 and how the proposed development should be assessed against it. The law is straightforward – and was re-stated recently by Dove J in *Tewkesbury BC v SSHCLG* [2021] EWHC 2782 (Admin) at paragraphs 23 to 27 - policy should be interpreted by giving the words used in an individual policy their ordinary and natural meaning in their context, which includes the wider policy framework in which it sites and the factual circumstances of the case.

15. If consideration of the proposed development against the development plan indicates that the appeal should be allowed because the development accords with the development plan (as the Appellant contends) then paragraph 11 of the NPPF advises that permission should be granted without delay. But if that outcome is the dismissal of the appeal (as the LPA contends) then the 'tilted balance' falls to be considered.

16. In the 'tilted balance' the "adverse impacts" will remain unaltered. For example, any harm to landscape character does not become greater as the HLS position changes.

17. What does change is the weight to be given to the "benefits". In a case where there is a shortfall in the required HLS the weight to the benefit of granting further planning permissions obviously increases. The greater the shortfall, the greater the weight is likely to be.

18. Of course, it does not follow that because there is not a 5YHLS that the tilted balance will inevitably fall on the side of allowing the appeal. As a matter of law, it is perfectly possible for adverse impacts to significantly and demonstrably outweigh benefits even in the absence of a 5YHLS – it is simply a matter of planning judgment.

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