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.

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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