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 I am bound to observe that the OR takes a different position on a number of important issues compared to the withdrawn OR.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

- *<u>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</u>; 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) <u>The Fallback Position</u>

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.* <u>*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*</u>." (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.

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[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

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