

- 1.2.4 The applicant has been advised that any decision taken on the basis of the Report as drafted would be unlawful. Additionally, any refusal of the application based on the current Report would have very real prospects of being successfully appealed. Given the fundamental legal flaws with the Report, we suggest that application is deferred from Monday's Committee and legal advice is taken on requirement to consider the fallback position. The applicant reserves the right to make more detailed submissions on these points, prior to any deferred Committee date.

2. THE EXISTENCE OF THE FALLBACK POSITION

- 2.1 The Council granted outline permission for holiday accommodation, comprising 14 units, site manager's living accommodation and 2 detached dwellings (i.e. the same description of development applied for under the 2016 Planning Application) on the 26 July 1991 pursuant to Application Reference HPK/0003/0011 (the **"1991 Permission"**). Reserved Matters were granted in relation to the 1991 Permission on 27 October 1994 under Application Reference HPK/0003/3787 (the **"Reserved Matters Consent"**).
- 2.2 A letter from the Council dated 8 May 1996 confirms in relation to the Reserved Matters Consent that *"as the access road into the site has been constructed to base course level, then the development is considered to have commenced. The planning permission will not therefore expire on 26th July 1996, but is regarded as extant"*. This is also reflected at paragraph 7.2 of the Officer's Report. As such, the fact that the 1991 Permission is extant is not in question.

3. OFFICER'S CONSIDERATION OF THE FALLBACK POSITION

- 3.1 As part of the Applicant's planning statement in support of the 2016 Application, a comparison of the 1991 Permission and the 2016 Application was undertaken. The comparison assessment concluded that in terms of layout, setting and design, the 2016 Application represented a substantial improvement on the 1991 Permission proposals.
- 3.2 The officer's purported consideration of the Fallback Position is found within paragraph 7.3 of the Officer's Report, which stated *"Notwithstanding the applicant's argument...it is noted that the [1991 Permission] was issued over 20 years ago and, apart from the access that development has never been built out. The planning policy framework has moved on significantly since the previous consent, including the adoption of the Neighbourhood Plan for the area and new Local Plan as well as the publication of the NPPF in 2012. Accordingly, it is considered appropriate to determine the current application on its own merits against the current policy framework."*
- 3.3 It is clear from this passage that the officer failed to take into account the potential existence of a fallback position, on the erroneous basis that the lapse in time since the 1991 Permission's implementation, was a determining factor. No further permission or consent would be required to build out the holiday homes under the 1991 Permission and there is a real possibility (or a 'more than theoretical' possibility) that the 1991 Permission will be taken up. The correct legal test to be applied in assessing if there is a fallback position is set out in paragraph 21 of *Samuel Smith Ltd v SCLG [2009] EWCA Civ 333 (CD 126)* which establishes: *"in order for a prospect [of a fallback] to be a real prospect, it does not have to be probable or likely: a possibility will suffice"*.
- 3.4 There is clearly a very real possibility that the development permitted pursuant to the 1991 Permission will come forward if the 2016 Application is not granted as:
- 3.4.1 the proposals under the 2016 Application are for an identical holiday home use;

- 3.4.2 no alternate proposals for the Site have been suggested by the Officer that are likely to come forward in replacement of the development permitted pursuant to the 1991 Permission; and
 - 3.4.3 the Council accepts that there is no factual dispute that the 1991 Permission remains capable of being implemented in full.
- 3.1 As far as we are aware, there is no evidence to dispute these facts and as such, the fallback position is a material consideration which the Council ought to consider in determining the 2016 Application
- 4. **PROPER CONSIDERATION OF THE FALLBACK POSITION**
- 4.1 The primary question is whether or not there is a fallback use, which the courts have established is to be decided by applying the test of 'real possibility' or 'more than theoretical' possibility. Once that question has been answered in the affirmative, the decision maker ought to take the fallback use into account as the baseline. Its weight in any planning balance or comparative exercise will not depend on whether it is very likely, quite likely or relatively unlikely to be taken up, but on its effects if it is taken up, which may happen.
- 4.2 So in this case, the 1991 Permission should be set as the baseline, and a comparative assessment made with the 2016 Application proposals. If the Committee agrees with the Applicant that the more fine-grained design and layout of the proposals are more easily assimilated into the landscape than the fallback use, then that would be a matter of some significance for the overall planning balance.
- 4.3 The development permitted pursuant to the 1991 Permission comprises a fallback therefore as:
 - 4.3.1 no further permission or consent would be required to build out the development given that the 1991 Permission and Reserved Matters Consent have been granted;
 - 4.3.2 the Council has confirmed that the Reserved Matters Consent has been implemented and it is extant; and
 - 4.3.3 there is a real possibility (or a 'more than theoretical' possibility) that the development permitted pursuant to the 1991 Permission will come forward.
- 5. **CONCLUSION**
- 5.1 There is a real possibility that the development permitted pursuant to the 1991 Permission will come forward if the 2016 Application is not granted which will result in a scheme being built out which is more harmful and detrimental to the local area.
- 5.2 We therefore respectfully request that the Council takes the fallback position into account in determining the 2016 Application and invite it to conclude that the 2016 Application represents a substantial improvement on the 1991 Permission proposals; and should therefore be consented..

Pinsent Masons LLP May 2017

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7.2 A letter from the Local Planning Authority dated 8 May 1996 confirms that the access road into the site, permitted as part of HPK/0003/3787, has been constructed to base course level and the development is considered to have commenced and the planning permission is regarded as extant. The applicant argues that the fall-back position outlined above represents a very important material planning consideration in that a similar development could be constructed in accordance with the extant consent. Furthermore, the applicant considers that this application represents a substantial improvement on the extant scheme in terms of a site layout which sits better within the surrounding landscape and much better property designs, both internally and externally.

7.3 Notwithstanding the applicant's argument above, it is noted that this consent was issued over 20 years ago and, apart from the access that development has never been built out. The planning policy framework has moved on significantly since the previous consent, including the adoption of a Neighbourhood Plan for the area and new Local Plan as well as the publication of the NPPF in 2012. Whilst the proposed development must be considered against the current policy framework and on its own merits, the fall back position of the extant consent represents an important material consideration.

Planning policies / Principle of development

7.4 The determination of a planning application is to be made pursuant to section 38(6) of the Planning and Compulsory Purchase Act 2004, which is to be read in conjunction with section 70(2) of the Town and Country Planning Act 1990.

7.5 Section 38(6) requires the local planning authority to determine planning applications in accordance with the development plan, unless there are material circumstances which 'indicate otherwise'. Section 70(2) provides that in determining applications the local planning authority "shall have regard to the provisions of the Development Plan, so far as material to the application and to any other material considerations." The Development Plan currently consists of the adopted Chapel-en-le-Frith Neighbourhood Plan and the High Peak Local Plan 2016.

7.6 Given the adoption of the High Peak Local Plan in April 2016, it is considered that there is a 5 year supply of housing land because the sites identified to come forward in the Local Plan in the next five years are in a suitable location for development, are viable and there is a reasonable prospect that housing on these sites will be delivered within the next five years (as required by NPPF Para. 47, Footnote 11).

development has been significantly reduced by way of the amended plans, from the siting of 2 dwellings to access drives and gardens only. Given the fall back position represented by the extant consent, which would result in more harm to the openness and special characteristics of the Local Green Space than the current proposal as revised, it is considered on balance that there are very special circumstances relating to this scheme which outweigh any harm to the designated Local Green Space.

8.5 The proposed development could be considered to be unsustainable by reason of its location, with substantial separation distances from the nearest local facilities. and the development does not demonstrate safe walking and cycle routes in the immediate area of the site. Whilst the site is unsustainably located, given the fallback position of the extant consent for the same quantum of development, in the same location, scheme and it would be difficult to sustain such a reason for refusal at any subsequent appeal.

8.6 It is considered that the proposed development does not represent high quality design in that the layout, scale and design of the development are at odds with the surrounding area. In this respect, the development proposals would not meet the terms of Policy EQ6 of the Local Plan or Section 7 of the NPPF.

8.7 Whilst it is acknowledged that there is a fall back position here in terms of an extant consent from 1994 for 14 holiday units and managers accommodation, this does not outweigh the harm arising as a result of the layout and design of the current scheme. The applicant's argument that the current scheme is much better in design terms than the extant consent is not accepted. The approved scheme had the appearance of a series of traditional stone-built workers cottages, farmhouse and a range of outbuildings. This cluster of development would have sat much more comfortably in this landscape than the current proposal, which as detailed above is out of character with its rural setting. The current scheme is sufficiently environmentally harmful to warrant refusal, and when combined with the changes in development plans and the introduction of the NPPF outweighs the fall back position.

8.8 Overall, for the above reasons, the benefits associated with this development are not considered to outweigh the conflict with the relevant policies of the adopted Development Plan and the NPPF.

9. RECOMMENDATIONS

A. REFUSE, for the following reason(s):

1. The local planning authority places significant emphasis on the design quality for new developments, especially where developments are situated in particularly sensitive locations. The application site occupies a sensitive location within the open

APPENDIX 8 – EXTRACT OF INSPECTORS REPORT (26TH September 2018)

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find that the proposal would conflict with Policy E6 of the Local Plan and Policy TM1 of the CNP in respect of the location of the proposal.

25. As stated previously in my reasoning, I consider that the 1991 permission provides a fallback position. That fallback position is a material consideration to which I attach substantial weight. Accordingly in this regard I find that the conflict with the policies referred to in paragraphs 21 to 24 above would be outweighed by other material considerations, namely the fact that the site could lawfully be developed to provide a scheme for 14 holiday units, site manager's accommodation and two dwellings, in accordance with the extant 1991 permission.

Other matters

26. Local residents object to the proposal on a wider basis, including concerns regarding the impact of the proposal on the highway network, flooding, impact on the SSSI, living conditions of neighbouring occupiers. We spent time discussing these matters at the hearing. However, on the basis of the evidence before me, these matters are not determinative in my conclusion. I am dismissing the appeal on other substantive matters, and I do not need to consider these matters further in this regard.

Conclusion

27. Planning law requires that applications for planning permission should be determined in accordance with the development plan unless material considerations indicate otherwise.
28. I have found that the proposal would conflict with the development plan.
29. The conflict with those policies which seek to allocate land for development for housing or tourism would be outweighed by the material consideration of the fallback position.
30. However, I do not consider that material considerations, with specific consideration of the fallback position, exist that would outweigh the conflict with the development plan in respect of the harm to the character and appearance of the area.
31. Therefore the proposal would conflict with the development plan as a whole, and material considerations have not been demonstrated that would outweigh that conflict. For the reasons given above, and taking into account all other matters raised, the appeal should be dismissed.

J Ayres

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