**APPEAL A: APP/H1033/C/22/3297854 by Mr Gary Stephen Cullen**
**APPEAL B: APP/H1033/W/21/3272745 by Treville Properties Ltd**

**LOCAL PLANNING AUTHORITY: High Peak Borough Council**

**APPEAL A against an enforcement notice alleging, without planning permission, the alteration of a building ("the classroom block") comprising the raising of the roof and steepness of the pitch of the roof, the insertion of three dormer windows on the eastern roof slope and changes to fenestration on the eastern elevation.**

**APPEAL B against the non-determination of an application for planning permission for the demolition of the existing building known as "Taxal Edge" and the detached garage building and the erection of 7 no. dwellings.**

**Land at Taxal Edge, 184 Macclesfield Road, Whaley Bridge SK23 7DR**

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# OPENING POINTS ON BEHALF OF THE APPELLANT

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## INTRODUCTION

1. These Opening Points are structured to follow the eight issues identified in the Inspector's CMC Summary.

2. Mr Richards ("HR") was kind enough to share his Opening Statement and Legal Submissions in advance of the Inquiry. We shall address some of his points in opening but most will be better addressed through evidence and Closing Submissions.

## The Enforcement Notice ("EN")

3. The App's starting point is that the EN is a nullity. The requirements of the EN oblige the App to lower the height and pitch of the roof to that shown on the drawings attached to the EN. Similarly, there is a requirement to replace windows with windows of the size, height and position shown in EN05, another drawing.

4. The images at EN04 and EN05 (with which the Notice requires compliance) lack any scale or dimensions that would enable the App to understand how the roof should be altered and/or to be sure they undertake the work in compliance the EN. The images also give rise to issues with enforceability as without specified measurements or dimensions for the required works, the LPA would not be able to check that the roof had been altered correctly. See ***Dudley Bowers Amusements Enterprises Ltd v SoSE*** (1986) 52 P. & C.R. 365: if a notice is ambiguous in stating what the recipient must do to comply, and that ambiguity is incapable of resolution, the notice will be a nullity. For the above reasons the EN is ambiguous. Similarly, the absence of any scaled plans or drawings showing the Classroom prior to the alleged breaches means that the EN cannot be amended. It is therefore a nullity.

5. The App relies on Grounds (a), (c), (d), (f) and (g). He only needs to be successful on either Ground (a) or (c) or (d) in order for the appeal to be allowed and the EN quashed.

**Issue (i): whether the matters alleged constitute a breach of planning control. This is pertinent to the ground (c) appeal on Appeal A.**

6. The LPA's starting point is that the use of the Classroom as a dwelling is not lawful and therefore does not enjoy any permitted development ("PD") rights. This is an entirely new point, not raised during the abortive hearing in March 2022. It is also entirely misguided:

    a. Planning permission HPK/2009/0689 authorised the change of use of the Classroom to a dwelling and it was lawfully implemented; and in any event
    b. The conversion works necessary to allow the residential occupation of the Classroom and its use as a dwellinghouse commenced more than 10 years prior to the issue of the EN; and in any event

c. The EN is not directed at the use of the Classroom as a dwelling. Indeed, if the Council was serious about this point then surely it would have sought to prevent the use of the Classroom as a dwelling. As such, it can continue to be occupied as such.

7. The LPA seek to rely on the absence of evidence such as registration for Council Tax or with United Utilities. Whilst that sort of evidence may be probative of residential occupation, it is certainly not a prerequisite. The App's evidence and statutory declarations are sufficiently clear and unambiguous.

8. If the EN is not a nullity, it is abundantly clear that the following alterations did not constitute breaches of planning control:

a. The insertion of dormer windows. The dormers are authorised by virtue of Class B, Part 1, Sch. 2 to the GPDO;
b. The replacement windows. Either the windows did not materially affect the external appearance of the Classroom and did not comprise development *per* s.55(2)(a) TCPA or they were PD under Part 1A of Sch. 2 GPDO.

**Issue (ii): if the matters alleged do constitute a breach of planning control, whether it is too late for enforcement action to be taken. This is pertinent to the ground (d) appeal on Appeal A.**

9. It is common ground that the relevant immunity period for operational development is 4 years *per* s.171B(1) TCPA. This would be the case irrespective of whether the use of the Classroom as a dwelling is immune from enforcement action.

10. The photographic and documentary evidence is unequivocal: the alterations to the roof and the insertion of the dormer windows took place by no later than 4th November 2017, which is more than 4 years before the issue of the EN (31st March 2022). These operations are consequently immune from enforcement action.

11. It is accepted that the replacement of the windows took place within less than 4 years prior to the issue of the EN. However, for the reasons set out above they are not unauthorised.

12. The LPA have placed all of their eggs in the 'substantial completion' basket, arguing that the works to the Classroom were not substantially complete until the insertion of the windows or, indeed, that the project is still not complete. It is agreed that the question of substantial completion is a matter of judgement for the Inspector, having heard the evidence (see HR Opening §17). However, the evidence of the App will show that each of the instances of operational development identified within the EN were separate, akin to the sort of works that home owners undertake from time to time.

13. It will be demonstrated that the operational development, save for the replacement of the windows, is immune from enforcement action.

**Issue (iii): whether the appeal site is an appropriate location for residential development having regard to local and national planning policy. This is pertinent to Appeal B**

14. We should proceed on the basis that only those policies cited in the RfRs are said to be breached: *i.e.* there is compliance with all other policies in the development plan. Dealing with each policy in turn:

a. **S1**: this is a generic development management policy. The Scheme meets most of the 'principles'. The only principles which are said to be breached are the 4th, 5th and 6th bullet points. They relate to landscape effects and providing an appropriate mix of tenures;
b. **S1a**: this enshrines the previous version of the presumption in favour of sustainable development into the Local Plan;
c. **S2**: this policy directs development to the most sustainable settlements. Whaley Bridge is in the highest tier of settlements. The Appeal Scheme accords with this objective. The policy also says that "*New development should be focused within the settlement boundaries of the Market Towns, Larger Villages and Smaller Villages in accordance with their scale, role and function unless otherwise indicated in the Local Plan.*" In this case, the "otherwise indicated in the Local Plan" requires a cross reference to H1, which allows development outside settlement boundaries as well as to S1, which contemplates development adjacent to settlements, and to S1a which applies the tilted balance where housing supply is lacking;
a. **S6**: the only possible relevance of this policy is the apparent requirement to protect and/or enhance landscape character and the setting of the National Park. There is

no claim of harm to the setting of the National Park. "Protects and/or enhances" must be read as avoiding harm, not requiring a positive impact. If the Scheme does not harm landscape character then this policy is satisfied. NB – where H1 applies, this policy must be read in the context of the Local Plan's acceptance of some development in the open countryside;

b. **H1**: See below;
c. **EQ2**: this is a generic landscape policy.
d. **EQ6**: an overlap with EQ2 but with a greater focus on detailed design. Again, there is reference to the setting of the National Park, a point not taken by the LPA;
e. **EQ7**: this seeks conserve heritage assets so it is difficult to see how it is relevant in the present case. Although the OR refers indirectly to the main building as potentially being a non-designated heritage asset there is no formal assessment as such. Further, there is no specific allegation of heritage harm in the RfRs;
f. **EQ9**: this policy relates to trees, woodland and hedgerows. Again, it is difficult to see how this policy is breached given the detailed landscaping scheme and the fact that the design and layout of the housing is landscape-led.

## Locations for Housing

15. The App's primary case is that the Scheme complies with the development plan taken as a whole with policy H1 being key. A sensible reading of H1 indicates a number of routes to compliance:

a. The LPA are meant to "*ensure provision is made for housing*" by doing a number of things including "*promoting the effective reuse of land by encouraging housing development including redevelopment, infill, conversion of existing dwellings and the change of use of existing buildings to housing, on all sites suitable for that purpose*". The Appeal Site involves either or both 'redevelopment' and 'infill'. The only other requirement is that the site is 'suitable'. Neither the policy nor its reasoned justification provides assistance with what this means. However, given that the Appeal Site is (i) sustainable in terms of its location; (ii) builds on previously developed land; (iii) the LPA have signalled their acceptance that new build is appropriate on this site; and (iv) that the landscape and visual effects are not significantly harmful then the Scheme must be 'suitable'; or

b. The Council will 'give consideration to approving sustainable sites outside the defined built up area' provided that a number of criteria are satisfied:

i. **Adjoining the built up area.** The LPA originally accepted that this was satisfied but changed their tune in the November 2020 OR. HR's latest submissions (Planning Balance Submissions) accept that the Site adjoins (at least in part) the settlement boundary. That should be sufficient: H1 does not say that all parts of a development site should adjoin the settlement boundary. However, the LPA appear to maintain their position that some physical connection is required. This is not correct: the requirement to 'adjoin' refers to the spatial relationship between an existing settlement and the Site so that isolated proposals in the open countryside are not inadvertently allowed: see also need the *Cornwall* case [CD8.10], which provides a useful guide to assessing whether a site 'adjoins' an existing settlement;

ii. **Appropriate scale for the settlement**: this is a relatively small scheme compared to the existing settlement within a self-contained area. It is hard to imagine that the scale is inappropriate, especially given the LPA's previous acceptance of residential development on the Site;

iii. **Prominent intrusion into the countryside**: 'countryside' in this context can have two meanings: either that it is land outside the settlement boundary or that it is countryside in a landscape sense. On either basis, the policy simply cannot work if an overly restrictive approach is adopted. H1 presupposes that some development in the 'countryside' (*i.e.* outside the settlement) will be acceptable; that is the starting point. In the present case, even the Council accepts that the Site is (in part) PDL. It is not a prominent intrusion from a landscape perspective given the limited visibility. From a spatial perspective, it is not prominent because it is redevelopment of a Site with existing built development;

iv. **Significant adverse impact on the character of the countryside**: similar points can be made but the key argument is that it is only where the harm is 'significant' that this criterion will be breached. Although the OR talks about harm, it does not seem to argue that there will be a significant adverse impact;

v. **Reasonable access**: this criterion is met;

vi. **Local and strategic infrastructure:** this criterion is met.

16. H1 is the key here. The Scheme unlocks both of the potential routes to policy compliance through policy H1.

**Issue (iv): the effect of the matters alleged and the proposed development on character and appearance of the site and surrounding area. This is pertinent to the ground (a) appeal on Appeal A and Appeal B**

17. This will be addressed through a combination of the site visit and the landscape witnesses' evidence. However, we should underline a number of points:

a. It is unclear on what basis the former DCC Officers were instructed to consider the scheme in the context of the Appeal;
b. The LPA's reliance on the Areas of Multiple Sensitivity ("AMES") is wholly misguided. The AMES work was only ever meant to be high level and cannot represent a substitute for a more fine grained assessment. Moreover, it was criticised by the Council's consultants who produced the landscape evidence base for the local plan;
c. The LPA have not provided any independent assessment of the landscape character and visual impacts but have confined themselves to criticising Mr Folland's work;
d. Any assessment of landscape impact has to be seen through the prism of H1.

**Issue (v): the effect of the proposed development on the residential amenity of future occupiers. This is pertinent to Appeal B.**

18. The key points to note are:

a. There are no adopted amenity standards in High Peak;
b. There is no specific requirement that amenity space should be provided at the rear of properties;
c. Under the 2010 planning permission, the levels of amenity would have been demonstrably worse for occupiers of the apartments or the residents of the converted garage;

d. The daylight/sunlight study shows that these houses will have sufficient natural light;
e. Insofar as any trees *may* be lost, their loss will more than adequately be compensated for by the tree planting as part of the landscaping proposals.

**Issue (vi): whether or not there are 'other considerations' that exist and the weight that should be afforded to them, regarding what, if any, fallback position is being relied upon, what basis any fallback position has, the contribution to boosting the supply of housing, and any other potential benefits. This is pertinent to Appeal B.**

**Fallback**

19. The 'fallback' position in this case has become unnecessarily complicated. Indeed, HR appears to recognise this in his Opening: see §26 and 27. The starting point now appears to be an acceptance by the LPA that residential development of the Appeal Site would be acceptable; as such it is a material consideration that must weigh in favour of the Appeal Schemes. Indeed, the only difference between the parties relates to the erection of 2no semi-detached houses in place of the now demolished gymnasium: see HPK/2009/0689.

20. As the App has made clear all along, there are two 'fallbacks': (i) the ability lawfully to complete planning permissions that have been implemented (or are capable of being implemented; or (ii) an obvious acceptance by the LPA that a certain number of residential units are appropriate for this site or that residential redevelopment is acceptable. The focus has been on the latter 'fallback'; essentially a baseline level of residential development that the LPA have deemed to be acceptable.

21. HR's Legal Note suggests that <u>both</u> of the 2010 and 2013 planning permissions cannot be relied upon (Note §9). He is correct about this and we have never suggested otherwise.

22. The fallback or baseline is 7 dwellings: 5 in the main building and 2 new semi-detached houses.

23. Irrespective of the status of the 2010 and 2013 permissions, the LPA have accepted that the construction of new dwellings (including 2no semi-detached houses closer to existing

houses than the proposed dwellings) in this location is acceptable. As such, there can be no 'in principle' objection to residential development on the Appeal Site nor to 7no dwellings.

**Issue (vi): whether the steps required to be taken by the notice exceed what is necessary to remedy the breach of planning control, or as the case may be, the injury to amenity. This is pertinent to the ground (f) appeal on Appeal A.**

24. This issue is addressed through the evidence of Mr Gascoigne.

**Issue (vii): whether the length of time to complete the steps required by the EN are excessive. This is pertinent to the ground (g) appeal on Appeal A.**

25. It is now agreed that 12 months is an appropriate period for compliance.

15th November 2022

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