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 "Taxel Edge" and the detached garage building and the erection of 7 no. dwellings.

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

OPENING STATEMENT AND LEGAL SUBMISSIONS

BY THE LOCAL PLANNING AUTHORITY[1]

Introduction

1. Two appeals are being determined at this inquiry:

    a. **Appeal A** against the issuing of an enforcement notice on 31/3/22 [CD5.1] ("EN") alleging unlawful operational development: "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." The appeal proceeds on grounds (c), (d), (a), (f) and (g) in s174(2) of the TCPA 1990 ("the Act") [CD5.2].

    b. **Appeal B** against the non-determination of an application for full planning permission for the demolition of the existing building known as "Taxel Edge" and the detached garage building and the erection of 7 no. dwellings. In fact, the Council 'determined' the application by notice dated 19/4/21 [CD3.4] containing a single reason for refusal before the appeal was validated.

[1] Because the Opening Statement contains legal submissions, it was disclosed to PINS and the Appellant on Friday 11 November 2023.

2. The inspector's post-CMC note identified 8 main issues in this case. This statement and submissions are structured to deal with each in turn.

Main issue 1: whether the matters alleged constitute a breach of planning control. This is pertinent to the ground (c) appeal on Appeal A.

3. There is no ground (b) appeal, and RG (proof #6.22 & 6.24) accepts the detail of the works that have been caried out. There may still be a dispute as to how much the ridge height of the building was raised.

4. The Appellant's grounds of appeal [CD5.2, p8] averred "A number of the matters alleged in the Notice do not constitute a breach of planning control as they either do not involve material changes to the building, or else fall within the scope of permitted development rights under Schedule 2, Part 1 of the [GDPO]".

5. The Appellant's Statement of Case ("SoC") [CD5.3, #4.2+] indicates that the "matters" are:

    a. The Appellant made no changes to the height/pitch of the roof; he avers that such alterations were made by the previous owner before he moved in in 2016.
    b. On that basis the insertion of the dormers would be permitted development ("PD") under Class 1, Part B of Schedule 2.
    c. New windows were inserted in existing openings which were not enlarged and they did not materially effect the external appearance of the building and so are excluded from the definition of "development" – see s55(2)(a) of the Act. In the alternative it was PD under Part 1A of Schedule 2.

6. In RG's Proof of Evidence [p018, #6.1+] it is averred:

    a. The building benefits from "normal householder permitted development rights".
    b. The raising of the roof does not (after all) benefit from PD rights (but is immune from enforcement - #6.4-5).
    c. If the raising of the roof was not PD or is not immune from enforcement, then the insertion of the dormers was not PD (#6.6).
    d. The position on the insertion of new windows in the SoC is maintained (#6.8-9). It is denied that the appellant has enlarged the window openings (with the exception of one of them), but in any event their insertion was not development as it did not materially affect the external appearance of the building.
    e. In the alternative (if it was development), it was PD on the basis of Class A.1 and compliance with condition A.3(a) (#6.10-11).

7. The Council's case is that:

    a. On 29/3/10 planning permission HPK/2009/0689 [CD9.3s] granted permission for the change of use of the classroom block to a dwellinghouse. Although described as "conversion" on the face of the permission, there were no external building works proposed or approved. So, the permission itself did not authorise any physical works to the classroom block.
    b. It is obvious that when Gary Cullen refers to the "conversion" of the classroom block (see eg RG p188, #2, 4, 5) he means its change of use.
    c. All of the works alleged in the EN made a material alteration to the external appearance of the building and were therefore development requiring planning permission.
    d. No express grant of planning permission in respect of these works was ever sought or granted.
    e. Unless the works were PD they constitute a breach of planning control.
    f. The GPDO only grants planning permission for PD in respect of a building that is in lawful use as a dwellinghouse.
    g. Mr Butler says he moved into the classroom block in late spring/summer of 2010 (see below). However, the building has never been registered for Council tax, registered as an address on the electoral register, registered as an address for utilities (see SG-R #8.1.36). The address for Mr Butler was the 'main building' throughout. The Council does not accept that it has been shown that the change of use took place within the lifetime of the permission.
    h. But even if the building was in use as a dwellinghouse, the height of the roof and eaves were raised, the roof pitch is not the same, there are new windows in the side elevations, there was no prior approval where required, the cubic volume of the roofspace has been increased beyond that allowed. This is not PD for reasons set out by SG-R at #8.1.19-34.

8. The Council's case is that the appellant has failed to make good his ground (c) appeal.

Main Issue 2: 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 first important to establish the facts of what building works were carried out when. There are a number of evidence sources:

    a. The Statutory Declaration of Raymond Butler dated 17/10/22 (RG proof appx EP5, p164).

b. The Statutory Declaration of Gary Cullen dated (RG proof appx EP7, p188)
c. Documents produced by the Appellants and the Council, including
d. Photographs.

10. Tribunals of fact (such as Judges or Planning Inspectors) often treat recollection evidence with some circumspection. Mr Justice Leggatt, in the case of *Gestmin SGPS S.A. v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) [CD8.12], explained why (emphasis added):

> "**Evidence based on recollection**
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> 15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the **unreliability of human memory**.
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> 16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of **psychological research into the nature of memory** and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
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> 17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, **psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved**. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. **Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).**
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> 18. **Memory is especially unreliable when it comes to recalling past beliefs.** Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and

alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to **powerful biases.** The nature of litigation is such that **witnesses often have a stake in a particular version of events.** This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. **Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial.** A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. **The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say.** The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that **the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.**

22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place

little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to **base factual findings on inferences drawn from the documentary evidence and known or probable facts**. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. **Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth**.

23. It is in this way that I have approached the evidence in the present case."

11. An oft-quoted remark of Lord Bingham (a former Lord Chief Justice, Master of the Rolls and Senior Law Lord) is pithy:

> "The ability to tell a coherent, plausible and assured story, embellished with snippets of circumstantial detail and laced with occasional shots of life-like forgetfulness, is very likely to impress any tribunal of fact. But it is also the hallmark of the confidence trickster down the ages."

12. PPG advice to decision-takers in LDC cases (the same issues arise in a ground (d) appeal) (again, emphasis added):

> "Who is responsible for providing sufficient information to support an application?
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> The applicant is responsible for providing sufficient information to support an application, although a local planning authority always needs to co-operate with an applicant who is seeking information that the authority may hold about the planning status of the land. A local planning authority is entitled to canvass evidence if it so wishes before determining an application. If a local planning authority obtains evidence, this needs to be shared with the applicant who needs to have the opportunity to comment on it and possibly produce counter-evidence.
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> 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**.

In the case of applications for proposed development, an applicant needs to describe the proposal with sufficient clarity and precision to enable a local planning authority to understand exactly what is involved.

Paragraph: 006 Reference ID: 17c-006-20140306"

13. A Statutory Declaration is a formal written statement of fact affirming that it is true that is signed in the presence of a Solicitor, a Notary of the Public, a Justice of the Peace, a Commissioner for Oaths, or any other qualified person. A false statement which is known at the time to be untrue can give rise to imprisonment or a fine. This should be explained at the time the declaration is made.

14. So, the reader of a statement made in the form of a statutory declaration has the benefit of knowing that the author was warned as to the importance of telling the truth. But that does not mean that the author was not a 'confidence trickster' (see above) or was actually telling the truth. But, where a statutory declaration tells a "probable" story, it is legitimate to expect the decision-maker will attach weight to it.

15. As well as whether the author is telling the truth, the reader of the statutory declaration in a LDC case also needs to decide whether what is being said is "sufficiently precise an unambiguous" (see PPG above).

16. The physical works to the building alleged in the EN comprise raising of the roof and alteration of the pitch, insertion of dormers in the roof, and insertion of new (elevational) windows. There is no ground (b) appeal. This inquiry proceeds on the basis that these works alleged have been carried out. The issue is when they were "substantially complete". This gives rise to a further issue – were they (as the Council alleges) one project, so that the date of substantial completion is the end of the project, or were they (as the appellant alleges) more than one project, so that the date of substantial completion of each element is they key date.

17. This is a matter of fact and degree for the inspector. The Council accepts that it is relevant to consider the nature of the project, the operations themselves, and the purposes of them.

18. The Council's case is that the ground (d) appeal has not been made out.

Main issue 3: 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.

19. There is no dispute that Whalley Bridge is, in principle, an appropriate location for development. Indeed, local plan policies S2 and S6 direct housing development towards it.

20. This issue requires an analysis of the planning policy. In particular:

    a. The "adjoining" issue in policy H1
    b. The previously developed land / curtilage issue in policies H1 and EQ3.
    c. The 'limited infilling' issue in policy EQ3.
    d. The conclusions on main issue 4 have 'locational' policy implications.

Main issue 4: 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.

21. This is the issue between Mr Cannell and Mrs McGuire for the Council, and Mr Folland for the appellant.

22. The inspector will visit the site and its surroundings.

23. Very little more need be said in opening other than to note that in Appeal B the Appellant relies on the classroom block's current appearance as setting part of the local vernacular. The Appellant takes some "architectural cues" from it in order to justify the mass / design of the new dwellings [CD2.5e] that will be absent in the event the EN is upheld.

Main issue 5: the effect of the proposed development on the residential amenity of future occupiers. This is pertinent to Appeal B.

24. This is the amenity space / 'shadowing' issue at plots 1, 2 and 3 only.

Main issue 6: 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.

25. This (the fallback position) is relevant because:

    a. Under main issue 3, if the conclusion is that it is not an appropriate location for residential development, the appellant will say that ability

to complete some residential development is already established by previous grant(s) of planning permission.

b. Under main issue 4, if the conclusion is that the appeal B scheme is harmful to the character and appearance of the area, the baseline for comparison is the fallback position.

26. While not strictly a "fallback", but accepted as a material consideration (see RS #5.54-5.55) is that HPBC would not, in principle, resist a further planning application for:

a. Conversion of the main building into apartments.
b. The extension of the main building to provide further apartments.
c. Residential conversion of the remaining outbuilding (the garage).
d. A garage for the classroom block.

In addition

e. The classroom block as altered by the requirements of the EN.

27. It may be that given the Council accepts this material consideration as a baseline, the Appellant might reflect on whether the legal complexities of the fallback position need trouble the inquiry further. However, in the event that a fallback is to be relied on, the following submissions are made by the Council.

28. Although the Appellant's case on a fallback position was set out in its Statement of Case [CD4.2] and Appeal Statement July 2021 [CD4.3] (under Proposition 3) its current position is taken to be that set out in RG's proof of evidence.

29. Under 'Planning History' (p011, #4.1-2) RG avers:

a. Both HPK/2009/0689 and HPK/2013/0503 remain extant and can be relied on (#4.1).
b. The Appellant relies on HPK/2013/0503 for 5 apartments in the main building (#4.3) and (it is assumed) the conversion of the old garage into a detached house.
c. And HPK/2009/0689 for 2 semi detached dwellings in place of the former gymnasium.

30. The legal requirements for establishing a fallback position are well known:

a. Works permitted by a planning permission were carried out sufficient to commence development.
b. But having discharged any pre-commencement conditions.
c. The permission can continue to be relied on having regard to, in particular, the lawful implementation of any later permission on the

same site and whether it is physically possible for the two permissions to co-exist.

31. In this case the two planning permissions are:

    a. HPK/2009/0689 [CD9.3] (conversion to 7 apartments, classroom block to 1 dwelling, garage block to 1 dwelling) (Permission A). This was a permission to develop what we might call the whole site. The approved plans showed the gymnasium to be "removed". Permission was therefore granted for its demolition, but not its replacement with any structure.
    b. HPK/2013/0503 (Permission B) [CD9.4] (conversion to 5 apartments, 2 semi-detached dwellings on site for demolished gymnasium). This was a permission that did not cover the whole of the Permission A site. The approved plans again showed the gymnasium to be "removed". Permission was therefore granted for its demolition, and this time its 'replacement'.

32. The first issue is whether the two permissions relied on as fallbacks were lawfully implemented within the relevant 3 year period.

    a. Permission A. The issue is whether the change of use took place as a matter of fact. The Council is not satisfied that it did.
    b. Permission B. No application for the discharge of conditions precedent were ever received by the Council (RS #5.50). In such circumstances, the permission was not lawfully implemented and cannot now be relied upon (in the vernacular, it has 'lapsed'). RG is his proof (p056) does not address the matter of discharge of conditions precedent.

33. **If** there are two lawfully extant permissions, can they both be relied on in the future to complete the 'fall back' position claimed? The law has been very recently clarified in *Hillside Parks Ltd v Snowdonia NPA* [2022] UKSC 30 [CD8.11] (emphasis below added).

> [1] This appeal raises issues of importance in planning law about the relationship between **successive grants of planning permission for development on the same land and, in particular, about the effect of implementing one planning permission on another planning permission relating to the same site**.
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> [26] **The scope of a planning permission depends on the terms of the document recording the grant**. As with any legal document, its **interpretation is a matter of law for the court**. Recent decisions of this court have made it clear that planning permissions are to be interpreted according to the same general principles that apply in English law to the interpretation of any other document that has legal effect. **The exercise is an objective one, concerned not with what the maker of the document subjectively intended or wanted to convey but**

with what a reasonable reader would understand the words used, considered in their particular context, to mean: see *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85, paras 33-34 (Lord Hodge) and para 53 (Lord Carnwath); *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] 1 WLR 4317, paras 15-19.

[27] Differences in the nature of legal documents do, however, affect the scope of the contextual material to which regard may be had in interpreting the text. Because a planning permission is not personal to the applicant and enures for the benefit of the land, **it cannot be assumed that the holder of the permission will be aware of all the background facts known to the person who applied for it**. Furthermore, a planning permission is a public document on which third parties are entitled to rely. These characteristics dictate that **the meaning of the document should be ascertainable from the document itself, other public documents to which it refers such as the planning application and plans and drawings submitted with the application, and physical inspection of the land to which it relates**. The reasonable reader of the permission **cannot be expected to have regard to other material such as correspondence passing between the parties**. See eg *Slough Estates v Slough Borough Council (No 2)* [1971] AC 959, 962 (Lord Reid); *Trump International Golf Club*, para 33 (Lord Hodge). In this case, we are concerned with grants of full planning permission, in relation to which it is to be expected that a reasonable reader would understand that the detailed plans submitted with the application have particular significance: *Barnett v Secretary of State for Communities and Local Government* [2008] EWHC 1601 (Admin), [2009] JPL 243, para 24 (Sullivan J); affirmed [2009] EWCA Civ 476, [2009] JPL 1597, paras 17-22 (Keene LJ); R Harwood, *Planning Permission* (2016), para 28.9.

[28] As counsel for the Developer have emphasised in their submissions, the planning legislation is intended to operate as a comprehensive code. There is, however, no provision of the legislation which regulates the situation where two or more planning permissions granted for development on the same site are, or are claimed to be, mutually inconsistent. **The courts have therefore had to work out the principles to be applied**.

[31] Where two separate applications are granted in respect of the same site, one of them is then implemented, and the question then arises - as it did in the *Pilkington* case - whether it is lawful to carry out the development contemplated by the other permission, Lord Widgery stated the test as being **"whether it is possible to carry out the development proposed in that second permission, having regard to that which was done or authorised to be done under the permission which has been implemented"** (p 1532B). …..

[41] The principle underlying the *Pilkington* case can be analysed further. In the passage of his judgment quoted at para 36 above Lord Widgery said that his decision was based on the "physical impossibility" of carrying out what was authorised by the unimplemented planning permission; and elsewhere in his judgment he used the phrase "practical possibility" (see p 1532C). Two points arise from this. First, it is

important to recognise that **the test of physical impossibility applies to the whole site covered by the unimplemented planning permission, and not just the part of the site on which the landowner now wishes to build**. Thus, in the *Pilkington* case, as pointed out in later cases, it remained perfectly possible to build a bungalow in the position authorised by the earlier, unimplemented planning permission, as that part of the site remained vacant. The reason why it was not physically possible to carry out the development authorised by the earlier permission was that the proposal for which permission was granted involved using the rest of the land as a smallholding and this could not be achieved when part of that land was occupied by the first bungalow: see *R v Arfon Borough Council C Ex p Walton Commercial Group Ltd* [1997] JPL 237; *Staffordshire County Council v NGR Land Developments Ltd* [2002] EWCA Civ 856; [2003] JPL 56, para 56; and *R (on the application of Robert Hitchins Ltd) v Worcestershire County Council* [2015] EWCA Civ 1060; [2016] JPL 373, para.

[42] A second point to note concerns Lord Widgery's formulation of the relevant test (in the passage quoted at para 31 above) as "whether it is possible to carry out the development proposed in that second permission, having regard to that which was done *or authorised to be done* under the permission which has been implemented" (emphasis added). The words "or authorised to be done" ought, we think, to have been omitted as they are not consistent with the ratio of the decision.

[45] In essence, the principle illustrated by the *Pilkington* case is that a planning permission does not authorise development if and when, as a result of physical alteration of the land to which the permission relates, it becomes physically impossible to carry out the development for which the permission was granted (without a further grant of planning permission). Unlike a doctrine of abandonment, this principle is consistent with the legislative code. Indeed, as Lord Scarman observed in *Pioneer Aggregates* at p 145C, it serves to "strengthen and support the planning control imposed by the legislation". Where the test of physical impossibility is met, the reason why further development carried out in reliance on the permission is unlawful is simply that the development is not authorised by the terms of the permission, with the result that it does not comply with section 57(1).

[50] The aspect of the case which Winn J left out of account in his analysis is that **planning permission for a multi-unit development is applied for and is granted for that development as an integrated whole.** In deciding whether to grant the permission, the local planning authority will generally have had to consider, and may be taken to have considered, a range of factors relevant to the proposed development taken as a whole, including matters such as the total number of buildings proposed to be constructed, the overall layout and physical appearance of the proposed development, the infrastructure required, its sustainability in planning terms and whether the public benefits of the proposed development as a whole outweigh any planning objections. **In granting permission for such a scheme, the planning authority cannot be taken (absent some clear contrary indication) to have authorised the developer to combine building**

only part of the proposed development with building something different from and inconsistent with the approved scheme on another part of the site. Therefore, it is not correct to interpret such a planning permission as severable, as Winn J did.

[71] We agree with the view expressed by the Court of Appeal in this case that where, as here, a planning permission is granted for the development of a site, such as a housing estate, comprising multiple units, **it is unlikely to be the correct interpretation of the permission that it is severable**: see [2020] EWCA Civ 1440, para 90. That is for the reasons given in para 50 above.

[72] The scheme for development of the Balkan Hill site on the Master Plan which was the subject of the 1967 permission seems to us to be a paradigm instance of such an integrated scheme which cannot be severed into component parts. It follows that carrying out under an independent planning permission on any part of the Balkan Hill site development which departed in a material way from that scheme would make it physically impossible and hence unlawful to carry out any further development under the 1967 permission.

[73] **The Developer's third argument**, on which the appellant's leading counsel, Charles Banner KC, put most emphasis in his oral submissions, seeks to avoid this conclusion by asserting that the development on the Balkan Hill site since 1987 has been carried out under planning permissions which were not independent of the 1967 permission. Rather, he submitted, **these permissions were intended to operate along with the 1967 permission by authorising what were, in effect, local variations of the original development scheme on particular parts of the site while leaving the 1967 permission otherwise unaffected**. Mr Banner pointed out that in the *Pilkington* case Lord Widgery excluded from the scope of the court's decision cases where one planning application expressly refers to or incorporates another (see para 30 above). He submitted that the post-1987 permissions are all of this kind as they refer either specifically or by clear implication to the 1967 permission and must therefore be read with it. Mr Banner also submitted that it would cause serious practical inconvenience if a developer who, when carrying out a large development, encounters a local difficulty or wishes for other reasons to depart from the approved scheme in one particular area of the site cannot obtain permission to do so without losing the benefit of the original permission and having to apply for a fresh planning permission for the remaining development on other parts of the site.

[74] **In our view**, that is indeed the legal position where, as here, a developer has been granted a full planning permission for one entire scheme and wishes to depart from it in a material way. It is a consequence of the very limited powers that a local planning authority currently has to make changes to an existing planning permission. But although this feature of the planning legislation means that developers may face practical hurdles, the problems should not be exaggerated. Despite the limited power to amend an existing planning permission, **there is no reason why an approved development scheme cannot be modified by an appropriately framed additional planning permission which covers the whole site and includes the**

necessary modifications. The position then would be that the developer has two permissions in relation to the whole site, with different terms, and is entitled to proceed under the second.

[75] The Authority has argued that, because the planning legislation does not confer any power on a local planning authority to make a material change to an existing planning permission, a later planning permission cannot have the effect of modifying in any material way the development scheme authorised by an earlier permission.

[76] The trial judge, HHJ Keyser QC, did not find this argument persuasive and nor do we. We agree with him that, although there cannot strictly be a variation of a planning permission (save as mentioned in paras 24 above), there is "no reason why a grant of permission might not, on its true construction, authorise development in accordance with an earlier permission (eg the Master Plan) but with specified modifications": para 48. That seems to us to be how, at least prima facie, a planning permission described as a "variation" of an earlier planning permission would reasonably be understood. The legal analysis which best gives effect to the expressed intention is to construe the permission described as a "variation" as a permission to carry out the development described in the original permission as modified to accommodate the development specifically authorised by the new permission (and as modified by any previous such "variations"). **However, if an application for a permission described as a "variation" is properly to be analysed in this way, ordinarily it would have to be accompanied by a plan which showed how the proposed new permission incorporated the changes indicated into a coherent design for the whole site.** Mere use of the "variation" label by itself is not sufficient to show how the new permission ought properly to be interpreted, when read as a whole and having regard to the relevant context.

[77] Where an application for a variation of a previous permission is properly to be regarded as an application for a fresh permission for the whole site, this may of course mean that the application is required to be accompanied by certain documentation relevant to the whole site, such as an environmental impact assessment. Where the variation is comparatively minor and circumstances have not changed, it may be possible to re-use or update such documentation submitted in support of the application for the previous permission. Whether this is possible or not will depend upon the particular circumstances.

[78] Each of the additional planning permissions granted after 1987 (listed at para 11 above) states that the Authority hereby permits the development briefly described in the permission notice "in accordance with the plans and application submitted to the Authority". **To ascertain the effect and precise scope of the permission, it would therefore be relevant to examine the plans and application submitted to the Authority by the Developer**. …..

[81] Of the six post-1987 planning permissions listed at para 11 above which have been implemented, three (permissions A, B and E) are expressed on their face to be "variations" of the original 1967 permission. However, the development which took place under each of

them is substantially at variance from what was shown in the Master Plan. Without sight of the applications or evidence that they were accompanied by plans of the kind referred to in para 76 above, it cannot be said that these permissions authorised a new development scheme for the whole site. A reasonable reader would have understood them to relate only to specific sites within the Balkan Hill area.

[100] The courts below were right to hold that the 1967 permission was a permission to carry out a single scheme of development on the Balkan Hill site and cannot be construed as separately permitting particular parts of the scheme to be built alongside development on the site authorised by independent permissions. **It is possible in principle for a local planning authority to grant a planning permission which approves a modification of such an entire scheme rather than constituting a separate permission referable just to part of the scheme.** The Developer has failed to show, however, that the additional planning permissions under which development has been carried out on the Balkan Hill site since 1987 should be construed in this way. Therefore, that development is inconsistent with the 1967 permission and has had the effect that it is physically impossible to develop the Balkan Hill site in accordance with the Master Plan approved by the 1967 permission (as subsequently modified down to 1987). Furthermore, other development has been carried out for which the Developer has failed to show that any planning permission was obtained. This development also makes it physically impossible to develop the site in accordance with the Master Plan approved by the 1967 permission (as subsequently modified). The courts below were therefore right to dismiss the Developer's claim and this appeal must also be dismissed.

34. On the assumption that Permission A was lawfully implemented (by the change of use of the classroom block) it is physically impossible to complete it (5 dwellings) once Permission B is lawfully implemented by the demolition of the gymnasium and the pouring of foundations for the new semi-detached dwellings.

35. The question arises as to whether Permission B ought to be described as a 'drop in' which, properly construed, "varies" Permission A leaving intact the development already approved on the remaining part of the Permission A site (ie the classroom block and the garage conversions).

36. In these circumstances *Hillside* confirms:

    a. Development lawfully carried out to date in reliance on Permission A is lawful (change of use of the classroom block, any work to the garages) but the development begun cannot lawfully be completed.
    b. Whether Permission B is a 'drop in' is to be determined by properly construing Permission B.

37. In so doing, the Council submits:

a. The approved plans in Permission B do not indicate that at all. There is no annotation on the layout plan [CD9.4b], for example, showing the area covered by Permission A such that Permission B is to be 'droped in'.
b. While the garage block outside the red line on the site plan [CD9.4b] is annotated "Proposed Dwelling" there is no indicated as to whether it is "proposed" as a result of an existing permission or a future permission. The same applies to the "Proposed House" annotation on Site Plan 2 [CD9.4k]

Main issue 7: 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 pertinant to the ground (f) appeal on Appeal A.

38. The point here is whether permission ought to be granted for some but not all of the changes to the classroom block alleged in the EN. The Council's case is "no".

Main issue 8: Time for compliance with the EN. This is pertinant to the ground (g) appeal on Appeal A.

39. The Council agrees to amending 6 months to 12 months as the time for compliance.

Conclusion

40. On the Council's case, subject to the position on Appeal A, ground (g), both appeals should be dismissed.

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