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**IN THE MATTER OF PERMITTED DEVELOPMENT RIGHTS UNDER THE  
TOWN AND COUNTRY PLANNING (GENERAL PERMITTED DEVELOPMENT)**

**(ENGLAND)ORDER 2015 AS AMENDED. <sup>1</sup>**

**AND IN THE MATTER OF HILLSIDE, LOWES LANE, GAWSWORTH**

**ADVICE**

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1. I am instructed by Stephen Lamb Dip TP MRTPI under the rules governing licensed access to members of the Bar to provide Advice upon a clear and narrow issue of law identified in a letter of instruction dated 28<sup>th</sup> April 2021.
2. The terms of the instruction are clear and need not be repeated.
3. The Facts

I am instructed on behalf of Katarzyna Klodnicka and Ben Pennington who are the owners of Hillside, Lowes Lane, Gosworth, Cheshire which is a residential property ( “ the property” ) within the area for which Cheshire East Council is the Local Planning Authority.

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<sup>1</sup> By the Town and Country Planning (General Permitted Development)(England)(Amendment) (No2) Order 2020/755

4. It is agreed that the property is within the Green Belt.
  
5. An application was made to the LPA under application number 21/1211M for prior approval (householder) for removal of roof and construction of new first floor including new windows throughout under class AA.2 , Class AA, Part 1, Schedule 2, of the Town and Country Planning (General Permitted Development) Order 2015 ( as amended) (“The Order”) .
  
6. The application is dealt with in an uncontroversial manner by the delegated report dated 30<sup>th</sup> April 2021 except in one very important respect. Within the Table in respect of Prior approval under AA.2(3)(a) the following is set out:-

*“ (ii) the external appearance of the dwellinghouse, including the design and architectural features of:-*

*(aa) the principal elevation of the dwelling house;*

*(bb) any side appearance of the dwellinghouse that fronts a highway;*

***Assessment Fails***

*“ In terms of external appearance. The Local Planning Authority should consider the impact upon the Green Belt. The proposed development would be materially larger than what currently exist on the site. Therefore, it is considered that the proposal would harm the Green Belt in terms of openness.”<sup>2</sup>*

7. The balance of the delegated report and the conclusion shows that this is the single and only determining basis for refusal within an otherwise acceptable application for prior approval that would clearly otherwise be accepted. The letter addressed to the owner c/o Matz Architecture also dated 30<sup>th</sup> April and signed by D Evans as authorising officer also makes this clear.

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<sup>2</sup> This is set out in accordance with the original in terms of both spelling and grammar.

## 8. The Law

The legal nature of permitted development under the Order has been usefully explained and elucidated in the judgment of the Divisional Court ( Lewis LJ and Holgate J) in the case of *R(Rights:Community:Action) v SSHCLG* [2020] EWHC 3073(Admin) at §19-43. In relation to PD rights which are subject to some form of prior approval these are dealt with in §40-43. The latter makes clear that the PD right is granted within parameters in the Order and that development outside those parameters is carried out without planning permission. A key prior paragraph is §32 which states:-

*“ 32. Where an application is made to an LPA for planning permission, [section 70\(2\)](#) requires the authority to have regard to the provisions of the development plan so far as is material to that application. It was common ground before us that this duty does not apply to other types of application, such as an application for prior approval under the GPDO 2015. It follows that [section 38\(6\) of the Planning and Compulsory Purchase Act 2004 \(“PCPA 2004”\)](#), requiring a determination to be made in accordance with the development plan unless material considerations indicate otherwise, **does not apply** in the consideration of an application for prior approval. However, development plan policies may still be taken into account in so far as they are relevant to decisions under the controls which that order allows a planning authority to exercise. emphasis added in bold ]*

## 9. The Green Belt is not excluded from the application of permitted development rights.

Pursuant to para 1 of the Order article 2(3) land as defined does not apply to Green Belt. It applies to conservation areas, AONB, specific ecological designations, National Parks and World Heritage sites.

10. Condition AA.2 makes clear that development is permitted by Class AA subject to the conditions in sub-paragraphs (2) and (3). It is agreed that there is no issue in respect of all of the matters in AA.2(2) all of which are complied with. The matter relied upon is concerned with prior approval of AA.2(3) “ the external appearance of the dwellinghouse, including the design and architectural features of the principal elevation of the dwelling house and any side elevation fronting a highway. “
11. The reason for non-approval does not relate to design nor architecture, it does not relate to an identified concern with the principal elevation nor a side elevation fronting a highway it relates to loss of openness because the building as enlarged will be larger than the original.
12. This basis of refusal is wholly misconceived and contains a clear and obvious error in the interpretation of the Order. It is a completely erroneous approach as a matter of law.
13. If it were intended that Green Belt policy were to be applied to or modify these rights the Order could have but does not say so.
14. The Order is expressly dealing with enlargement which inevitably will diminish openness. Accordingly, it is entirely contradictory to acknowledge that the permitted development applies but then completely emasculate the right on the grounds of loss of openness which that enlargement inevitably entails. The title of the Class AA right is as follows:-

“ The enlargement, improvement or other alteration of a dwelling house”

[ emphasis added ] .

15. A bigger dwelling is precisely what the proper application of the Order entails and clearly the permitted development right applies in the Green Belt. This point is very obvious and unsurprisingly there is not much legal authority on the point. Fortunately the case of *Arnold v SSCLG* [2015] EWHC 1197 (Admin) and the approach of Dove J in that case is entirely consistent with this point of true and obvious construction. This case concerned an argument as to whether what was proposed by that application was enlargement pursuant to permitted development or the erection of a new building. The development was in the Green Belt. Both the inspector and Dove J<sup>3</sup> approached the case on the clear basis that enlargement in the Green Belt was capable of being permitted development but found that the permitted development right could not be applied to the facts of the case as what was proposed was not the exercise of a permitted development right but the removal of the original building and replacement with a new dwelling - so that the statutory approach<sup>4</sup> under section 38(6) of the 2004 Act was required to be taken.

16. Pursuant to para AA 3 of the Order as amended the procedure for applications for prior approval is dealt with in AA.3(12) which provides:-

*“(12) The local planning authority must, when determining an application—*

*(a) take into account any representations made to them as a result of any notice given*

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<sup>3</sup> See §31-38 of the judgment.

<sup>4</sup> See para 8 above.

*under sub-paragraph (5) and any consultation under sub-paragraph (6) or (8); and*

*(b) have regard to the National Planning Policy Framework issued by the Ministry of Housing, Communities and Local Government in February 2019, so far as relevant to the subject matter of the prior approval, as if the application were a planning application. “*

17. The requirement to take into account the NPPF is only “so far as relevant to the subject matter of the prior approval”. The NPPF which deals with loss of openness of the Green Belt arising from enlargement within the tolerances of the permitted development right is not relevant to the subject matter of the prior approval for reasons that have been fully explained but in simple terms is encapsulated at paragraph 11 above. The NPPF is addressing loss of openness in respect of proposals which exceed the tolerances set by the Order.
  
18. I will willingly advise further in this matter if so instructed.

**G.A.GRANT**

**KINGS CHAMBERS**

**MANCHESTER-LEEDS-BIRMINGHAM.**

**12<sup>th</sup> May 2021**