



# SAXLINGHAM NETHERGATE PARISH COUNCIL

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23 January 2023

Dear Sir,

**Hill House, Saxlingham Nethergate**  
**Application No. 2022/2086**

## Introduction

1. This letter is by way of reply to your letter dated 8 December 2022 concerning this CLEUD application no. 2022/2086 only. We shall reply in respect of the three other Hill House pending applications separately in due course.
2. This particular application having been validated on 2 December 2022, we understand the 8-week period within which the authority are required to give notice of their decision under article 39(10) has been extended by agreement with the applicant to 17 February 2023.
3. On 8 December 2022, you invited us to provide any information or knowledge relating to this development which confirms or contradicts the information submitted by the applicant, also noting that you would be particularly interested in any information or knowledge we have about how long the development has been present.
4. On 3 January 2023, and in view of what we regarded as inconsistencies and confusion in the the application form and supporting evidence, we asked you for clarification of (a) your understanding of the reason for the application in terms of the definition of "lawful development" in s191(2), and (b) the basis upon which the authority had validated the amended application.
5. On 12 January, we sent you a further 10-point agenda to discuss at a meeting arranged for Monday, 16 January, which we would have found helpful before replying to your 8 December letter. Unfortunately, the proposed meeting was cancelled at short notice as there were evidently some matters which you wished to clarify and explore first.

Chairman: Roger Stocks

Councillors: Chris Clements, Marie Francis, William Goff, Michael Haslam, David Moore, Jo Stevenson, Elsjie Stocker, Zoe Yarham

6. In view of the limited amount of time remaining available before the decision end- date, we have decided to reply to your 8 December letter now without further delay. We are assuming for this purpose that the applicant's claim has been made and validated on the basis that the time for enforcement of any past breaches of planning control has expired, and hence your particular interest in how long the development has been present. If we are mistaken, please let us know as soon as possible so that we can explain in good time before your decision why we would say that the alternative basis – that activities at the property did not involve development or require planning permission – would be equally objectionable.

7. In and for the purposes of this letter, "**s191(2)**" and other similar references relate to sections in the Town & Country Planning Act 1990, as amended; "**article 39**" refers to article 39 in the Town & Country Planning (Development Management Procedure) (England) Order 2015; and "**Ocado**" refers to the Approved Judgment in the Planning Court of Mr. Justice Holgate dated 7 June 2021 in the case of **R (Ocado Retail Ltd), Islington LBC & Others [2021] EWHC 1509**.

8. As the legislation does not require the authority to carry out any public consultation on an application under s191, we are grateful for an opportunity to participate in the consultation process on this occasion. As you are aware, certain activities at Hill House have become hugely controversial in the community, and concerned local residents have formed an action group under the banner of S.T.O.N.E. (or "Saxlingham Tired of Noisy Events") with a view, as they see fit, to funding and participating in any judicial review or other legal proceedings which the authority's decision in this case may necessitate. As noted in Ocado, paragraph 41:

*"It is beneficial to the quality of decision-making on s191 applications, which deal with past events, that persons or bodies with relevant information on the grounds or seeking a CLEUD should be able to be involved, whether supporting or opposing an application. If they are not, there is potentially an increased risk of any certificate granted becoming the subject of an application for judicial review, or revocation under s193(7), with consequential delays for a landowner wishing to rely upon that decision. If on the other hand public participation results in the refusal of a CLEUD, the applicant is entitled to pursue the matter on appeal, where the evidence can be examined and tested".*

### The legislative framework

Our understanding of the relevant statutory provisions is as follows (emphasis added):

9. The starting point is s171A(1) which defines two types of breach of planning control. One of these is “carrying out development without the required planning permission”, development being defined to include “a material change of use”.

10. S171B(3) provides in effect that, where there has been a breach of planning control consisting of a material change of use without the grant of planning permission, “no enforcement action may be taken after the end of the period of ten years beginning with the day of the breach”.

11. Under s191(1), anyone wishing to ascertain whether or not an existing use of buildings or other land is lawful at any time may make an application for this purpose to the local planning authority. Uses are defined as “lawful at any time” if no enforcement action may then be taken in respect of them, for example “because the time for enforcement action has expired”. In other words, once a qualifying 10-year immunity period expires, what was previously a breach of planning control becomes “lawful at any time” (with an exception which does not apply here).

12. S191(4) provides that:

“If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate; and in any other case they shall refuse the application.”

13. By virtue of s191(5) the certificate is required, among other things, to give reasons for determining the use, operations or other matter to be lawful. Conversely, where an application is refused, the notice of decision must “state clearly and precisely the authority’s full reasons for their decision” – article 39(13).

### The factual background

14. On **10 April 2003**, the applicant, Mr. Swayne, purchased Hill House and adjoining land from the Rush family as “a fine example of a listed Tudor Manor house in

about five acres of gardens and paddocks in an attractive rural setting on the edge of this popular village” (Strutt & Parker and Jackson-Stops & Staff sales brochures).

15. With effect from **1 April 2009**, the property was re-listed for rating purposes as “self-catering holiday unit and premises”.

#### The change of use refusal on 16 May 2012

16. On **16 May 2012**, Mr. Swayne was refused planning permission for the change of use of Hill House to a “mixed use of wedding venue and holiday let use” (application no. 2012/0590/CU). The case officer’s assessment in paragraph 4.5 of her recommendation to the planning committee was that “the property is presently residential which is let short term and therefore the noise and disturbance which will be generated by the proposed use would be significantly different”. The application was refused on the ground (among others) that “the proposed change of use would be detrimental to the residential amenities of adjacent properties by reason of noise and general disturbance from activities associated with the wedding venue”. The residential status of the property therefore remained its lawful use for planning purposes.

#### Other activities

17. In the years following the refusal decision, a number of other activities were gradually introduced onto the site with increasing frequency and intensity, particularly it appears from 2017 and 2018 onwards, as evidenced in Hill House Facebook posts, and in director’s reports in the accounts of Mr. Swayne’s company, Elsewhere (UK) Ltd.

18. For example, in respect of the year ended 31 March 2018, the director’s report which was signed on 10 December 2018 states: “This year we have taken the business to new heights and have been setting the scene for many years to come.,” and later: “We believe that we have everything in place to deliver strong growth and high margin. We look forward to strong future cash flow generation that will come from this last year of out-sized investment”. The report refers to “our core glamping product”; “Christmas initiatives ... and next year will be the first year when this business area gets monetised”; and “we have also taken catering in-house”.

19. In respect of the year ended 31 March 2019 (signed on 11 October 2019) and the nine-month period ended December 2019 (signed on 13 March 2020), references are made to “outdoor Summer events, Christmas parties, corporate conferences and weddings”, weddings being mentioned as a “key business driver” and a “core

competency” notwithstanding the 16 May 2012 change of use refusal.

*The certificate of existing lawful use application*

20. On **12 October 2022**, Mr. Swayne sought advice or assistance from the authority’s compliance team about an application for a certificate of lawfulness of existing use that he wished to make under s191(1). His subsequent application form stated that: *“after an extensive on-site discussion with Andy Baines and Petra Maryon – a summary of what was required was established. I have provided the evidence bundle attached to this application to Andy Baines to establish that enough information was contained”*.

21. The application was submitted to the authority on **4 November 2022** in respect of an “existing use” described in the application form as:

*“Hill House – Manor House building and grounds (house curtilage) – venue for get-togethers, events, hen and stag parties and corporate use, on-site catering provision along with the provision of ancillary services, including team building and activities such as archery and tennis coaching”* (referred to below as **“the Existing Use”**)

22. The application form stated that the Existing Use began on 1 October 2007, that it had not been interrupted since then, that there had not been any material change of use since the start of the use for which a certificate was sought, that the grounds under which the certificate was being sought was that the use “began more than 10 years before the date of this application”; and the reason why a certificate should be granted was that “we have been operating successfully for over 10 years”.

23. On **2 December 2022**, the authority’s compliance officer proposed, and Mr. Swayne readily agreed, that the description of the Existing Use in the application form be amended for the purposes of validation to:

*“A mixed use as a dwelling house, venue for get-togethers, events and corporate use, and provision of ancillary services”*

24. Notwithstanding the contradictory and confusing information in the application form itself, the generalised and ill-defined framing of the amended description of the Existing Use, and the obvious inadequacy of the supporting evidence as explained in paragraphs 28 to 30 below, the application was validated by the authority following a telephone conversation and exchange of emails, evidently all on the same day.

### Evidence verifying the application

25. It is axiomatic that the burden lies upon an applicant to demonstrate that a breach of planning control has become lawful, applying the civil standard, i.e. on the balance of probability. It is only if the applicant provides the authority with information which satisfies them of the lawfulness of the matter as defined in s191(2) and specified in the application form that the authority should grant a certificate – Ocado, paras. 61 and 63.

26. An application is required by virtue of s193(1) to “be verified by such evidence” as may be required by the authority. Article 39(2) speaks of the application being accompanied by “such evidence verifying the information included in the application as the applicant can provide”.

27. Government planning guidance published on 6 March 2014 also calls for an application having to describe precisely what is being applied for and the land to which the application relates, and refers to the need for the applicant’s evidence to be sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.

28. The evidence accompanying the application in this case consisted of twenty-two pages of material (briefly noted in **Annex 1**), of which fifteen (nos. 1-6, 8, 9, 13, 14, 16, 19-22 printed in red for ease of reference) relate to a period **before 16 May 2012**, being the date when a legitimate residential planning use was re-affirmed in the case officer’s assessment in the change of use refusal decision referred to in paragraph 16 above.

29. Of the remaining seven pages, which relate to a period **after 16 May 2012**:-

- nos. 7 and 15 are partly illegible extracts from Hill House web pages in October 2012 and August 2016;
- nos. 10, 11 and 12 covering the period from July to October 2012 refer to Facebook postings about various activities at the property, such as “the Banksey Heist that Elsewhere runs at Hill House”; “hiding clues for a game of Cluedo”; “the secret to creating an authentic Cuban Mojito”; the dismantling of “our F1 car in the drawing room”; “1 of 7 venue partners in the Elsewhere corporate offsite portfolio”; “our F1 simulator”; and “an amazing children’s activity” laid on by the team from Right Angle Events”;

- nos. 17 and 18 are partly illegible sample booking forms for a hen party and Baby Friendly Boltholes in November 2012.

30. The entirety of this bundle of evidence appears to have been thrown together at random, in no particular chronological order, and with scant regard for legibility. Read as a whole, it is substantially irrelevant and wholly inadequate for the purpose of establishing, as a matter of fact and degree, when any material change or changes of use may have occurred, and hence when a relevant qualifying period of ten years may have started to run.

31. By contrast, the case officer's assessment in the "mixed wedding venue/holiday let" application is clearest possible evidence, corroborated by the conservation officer, of a legitimate residential use continuing to prevail as at 16 May 2012, which therefore serves as the earliest hypothetical commencement date for the accrual of a 10-year period of immunity.

#### Planning authorities' powers in relation to the provision of information

32. Under article 39(9), a local planning authority may by notice in writing require the applicant to provide such further information as may be specified to enable them to deal with the application. We are unaware of any such request having been made in this case.

33. If an authority considers that there may have been a breach of planning control, they may serve a "planning contravention notice" under s171C requiring specified information to be provided as to (amongst other things) any use or activities being carried out on the land and when any such use or activities began, which in the event of non-compliance can give rise to criminal sanctions – Ocado, para. 64.

#### Judicial review

34. If an authority should grant a certificate on sparse or materially inadequate information, there is a risk of aggrieved citizens, for example in this case the S.T.O.N.E. action group, or other interested parties applying to challenge the decision by judicial review, where it might be argued that the authority had failed to take reasonable steps to obtain further information – Ocado, para. 66.

### Revocation

35. A local planning authority may also revoke a certificate in certain circumstances set out in s193(7), including where “any material information was withheld”. As noted in *Ocado*, paras. 87 and 88 (and more fully discussed in paras. 89 – 108):

*“The width of the meaning to be given to “withheld” in s193(7) must depend on its context. A CLEUD confers an important and valuable right which impacts on the future exercise of planning control. The local planning authority is entitled to be satisfied with the adequacy of the information provided by the applicant to justify the grant of a certificate. The power to revoke a certificate is an important safeguard for dealing with false information or non-disclosure”.*

### Qualifying immunity period – the “key principle”

36. The “key principle” for the purpose of determining whether a qualifying immunity period has occurred is set out in paras. 132 and 134 of the judgment of Mr. Justice Holgate in *Ocado*, as follows:

*“132. I turn to the nature of the right which accrues under s.191 and with the breach of planning control from which it derives. The key principle [upon which the decisions in *Thurrock*, *Swale* and *North Devon* are based] is that time does not run for the purposes of s171B during periods when the local planning authority would be unable to take enforcement action because the breach of planning control has ceased. It is for that reason that a breach of planning control must continue throughout the immunity period. If, for example, a breach of condition ceases, the clock stops. If the condition is breached again a fresh breach of planning control occurs, and the clock starts all over again. This requirement of continuity is not explicitly stated in the legislation; it is a judicial principle”.*

*“134. It is plain that the application of this requirement of continuity does not differ between a breach of planning control based upon a material change of use and one based upon a breach of a condition prohibiting that use. If in either case*

*the use ceases or is interrupted during the immunity period, time ceases to run and if the use recommences a fresh breach of planning control occurs.”*

### Interruption

37. In **Miles v National Assembly of Wales [2007] EWHC 10 (Admin)**, the court was concerned with the closure of large areas of the Welsh countryside because of the foot and mouth disease in 2001, which had caused motorcycling activities on a farm to cease for between 12 and 18 months. It was held by Mr. Justice Lloyd Jones (as he then was), upholding the decision of the planning inspector, at para. 34:

*“During the period of the foot and mouth outbreak there could have been no question of enforcement action. Accordingly this period cannot count towards the stipulated period for the accrual of immunity”;*

And in para. 38, it was: *“immaterial for present purposes that the interruption in the use was not the result of a freely made choice on the part of the claimant. In the present context what matters is that the objectionable use actually ceased and there was no longer any need or opportunity for the local planning authority to take enforcement action”.*

### Summary and conclusions

38. For the purpose of ascertaining whether the requirement for a qualifying 10-year period has been satisfied in this case, we consider the following conclusions may be fairly and reasonably drawn on the balance of probability:

- (a) on 16 May 2012, at the time of the mixed use wedding venue/holiday let refusal decision, a lawful residential use existed at the property for planning purposes (paragraph 16);
- (b) as a matter of fact and degree, none of the activities within the pre-amended description in the application form of “Existing Use” were in existence at the property on 16 May 2012 for the purpose of identifying the start of a qualifying 10-year immunity period (paragraphs 16, 28, 29 and 31);

- (c) the lockdown and other measures introduced under powers in the Coronavirus Act 2020 constituted a break in the qualifying immunity period because any breaches of planning control then ceased and the authority would have been unable to take enforcement action (paragraphs 36 and 37);
- (d) as at 25 March 2020, (being the date when the Coronavirus Act received Royal Assent), any period of accrual of immunity starting after 16 May 2012 could not have been greater than 7 years 10 months when the clock stopped;
- (e) if and to the extent that, following the lifting of all Omicron restrictions on 2 January 2022 and the expiry of the 2-year lifespan of powers under the Coronavirus Act, the Existing Use resumed, a fresh breach of planning control occurred and the clock started all over again (paragraph 36);

39. For these reasons, we consider that no uninterrupted 10-year period of immunity was achieved at any time, and that the application should be refused.

40. Please acknowledge receipt.

Yours faithfully,

A handwritten signature in blue ink, consisting of a large, stylized initial 'J' followed by a series of loops and a long horizontal stroke extending to the right.

Julie King  
Parish Clerk

## ANNEX 1 – HILL HOUSE, SAXLINGHAM NETHERGATE

### SUMMARY OF SUPPORTING EVIDENCE

#### Pre-16 May 2012 items in RED

##### Document no.

- 1 - Rural Retreats invoice (largely illegible)
- 2 - Marketing brochure (Chef & Butler Service – launched 2008)
- 3 - Independent on Sunday review: *Stay the night* - 21 June 2009
- 4 - HH Linked-In page: June – November 2011 reviews
- 5 - Council Tax notice of deletion from Valuation List from 1 April 2009
- 6 - Notice of alteration to 2005 Rating List – “Self-Catering Holiday Unit and Premises” with effect from 1 April 2009
- 7 - 26 August 2016: Hill House website – Corporate Page (partly illegible)
- 8 - 8 Sept 2011 - Visit England Five Star Award – Self-Catering
- 9 - Rating Demand Notice 2009/2010: “Self-catering Holiday Unit and Premises”
- 10 - July/Oct 2012 – Banksey Heist/Cluedo (FB posts)
- 11 - July 2012 - “Authentic Cuban Mojito” “Talking of F1” (FB)
- 12 - June/July 2012 – “Elsewhere porAolio”/F1 (FB)
- 13 - 8/4/2012: On-site catering - “Teamed up with Elsewhere” (FB)
- 14 - Jan – Nov 2011 – Fish & chips/Visit England Award (FB)
- 15 - Hill House website – 22 October 2012 (partly illegible)
- 16 - Motorola Chef & Butler dinner – Feb 2011 (Flickr)
- 17 - Sample booking – hen party – Nov 2012
- 18 - Sample booking – Baby Friendly Boltholes – Nov 2012
- 19 - Sample booking – typical weekend stay – April 2012
- 20 - Sample booking – one-week holiday – Nov 2011
- 21 - Sample booking – stag group – April 2012
- 22 - Sample booking – corporate stay – Oct 2011