The history of how the Pembrokeshire Coast National Park Authority ("PCNPA") got itself to this not very pretty position, and the options for what it can now do to correct things.

"Planning remedy horses, for building blunder courses" !

Where a local planning authority ("LPA") 'discovers' that a building, for which it has already given planning permission, is "going up" in a manner which clearly leads it to appreciate that the finished building will represent a clear breach of local planning policies (as to be found in the *local development plan,* in our case principally the JUDP (Pembrokeshire Joint Unitary Development Plan) then there are in effect (at least) three different ways (under the Town & Country Planning Act 1990 (as amended) – "the Act") in which it might proceed to remedy the situation, depending on the stage in development when it decides to take action, and the party to blame for the error – the person to whom permission was given (" the Developer") or the LPA itself !

s.171 Breach of Conditions

If the builder has proceeded to construct a building, which the LPA deems is clearly larger than that represented by the approved drawings referred to in the planning permission, and the LPA further takes the view that this is not such a minor discrepancy as, in its discretion, it is willing to ignore; then the appropriate remedy is to regard that as '*a breach of planning control'* by way of development *'failing to comply with a condition of planning consent'* (as to which see s171A (1)(*b*) of the Act) and to issue a **planning enforcement notice** ("enforcement notice" - under s.172 of the Act).

The LPA sets out in the Notice those steps which in its view the Developer is required to take in order to make his building now comply with the original condition, subject to which permission was given, and these can include requiring him to ***alter*** (or even remove) buildings or works (see s.173(5)(*a*) of the Act). Naturally, the Developer can, if he chooses, appeal the Notice to a Planning Inspector appointed by the Welsh Assembly Government ("WAG"), but if he losses, or doesn't appeal, he is not eligible for any compensation whatever as respects the costs he incurs in complying with the Notice. After all the blame for the error rests with him, and a failure to comply with a Planning Enforcement Notice, within the period for compliance granted, is a **criminal offence** (see s. 179 of the Act).

In this instance Condition #2 of the Planning Consent granted in October of 2006 (NP/06/076 – "the 06 Consent") is the one which gave effect to the approved plan drawings. It specified that :

> "The development hereby permitted shall be carried out, and thereafter retained, strictly in accordance with the amended plan received by the National Park Authority on 24 July 2006 and subject to any following conditions" (SiC)

This, of course, is the very condition which the Developer now seeks to change retrospectively, so as to instead amend the "approved drawings" to comply with what he has now built (see s.73A of the Act) i.e. effectively the reverse process of an Enforcement Notice.

Accordingly, the Developer himself in this instance, by implication at the very least, acknowledges that he has proceeded *in breach of planning control*. If his current application is successful he will simply be granted an entirely new planning permission, with this year's date on it, and new drawings attached thereto which will reflect what he has now built, rather than any amendment of the existing consent, or the existing drawings, and he can then proceed effectively as if the 06 Consent simply never existed.

If, however, the current application is rejected the only logical course, as respects the extent to which he has built in excess of the development permitted under the 06 Consent, is for the PCNPA to issue an **Enforcement Notice** which, among other matters, requires him to take steps to alter the building to comply with the currently approved drawings instead. In the present instance, in so far as this Developer, has thus clearly built, not in compliance with his approved July 06 plan drawings, it is

stated by the PCNPA that the height to the ridge of the building is higher than it should be by only 0.40m. However there were no levels on the approved plans from which this claim can be made.

The elevations as built are all higher from the external ground level than as shown on the approved drawings. The NE corner of the building for example is 3.5m higher than that approved. 100sq m of lower ground floor space constructed does not appear on the approved drawings. The site plan stamped approved is larger than actually exists so that the building constructed is approximately 10m closer to the entrance and footpaths than shown.

Alas this is not an end of that matter even, since the plan drawings which this Developer's then architect submitted in 2006 showed the various elevations of the proposed development precisely 180° out of aspect with what he wanted and has now built. So that for instance the vast glass wall elevation of his north facing aspect, giving him views out to the bay and up the estuary, were shown even on the approved plans, attached to the 06 Consent by means of this condition (#2), as being a south facing aspect instead, which one could have believed was a feature of so-called "passive solar heating design". This is particularly important when one considers the provisions of JUDP Policy 76 on Design which states (as relevant):

> **JUDP policy 76 Design**
> Development will only be permitted where it is well designed in terms of siting, layout, form, scale, bulk, height, materials, detailing and contextual relationship with existing landscape and townscape characteristics. **The effects of layout** and/or resource efficiency **in building such as orientation,** water conservation, adaptability and the use of environmentally sensitive materials **will also be important considerations in the evaluation of planning applications**.
> (*emphasis added*)

However, even that is not the only planning condition in issue before the Development Management Committee ("DMC") of the PCNPA with respect to Bettws Newydd. There were at least four further conditions attached to the 06 Consent, which are so-called "*conditions precedent*". This means a requirement placed on the Developer to do something (or have something done) by a specific time.

In the case of the PCNPA they always issue 'conditions precedent' by way of requiring that the matters concerned are to be done "*prior to the commencement of…* " usually the development or works. Where these matters require that the PCNPA subsequently approves certain details of the development however, unlike the case with most other LPAs, it does not go further and require that the Developer also receives that approval, before he can then begin the permitted works.
In the case of the 06 Consent the further conditions which were '*conditions precedent*' are as follows:

> "Condition 3 : Following site clearance and **prior to the commencement of any construction work**, site profiles of the external ground and internal finished floor levels shall be set out on site for approval by the National Park Authority.
> . . . .
> Condition 5 – A schedule of external finishes and colours, to be submitted to the National Park Authority for approval, in writing, **prior to the commencement or work**.
>
> Condition6 – Full details of all windows and doors (including their means of opening, glazing bars and framing), dormas, soffits, facias, and verges shall be submitted to the National Park Authority for approval in **writing prior to the commencement to the construction of the dwelling.**
>
> Condition 7 – A suitable and comprehensive scheme for the soft and hard landscaping of the site shall be submitted to the National Park Authority for approval, in writing, **prior to the commencement of work**. Such a scheme shall take full account of the natural tree and shrub species on the site and in the area in general. The scheme should also include measures for the retention and management of the wetland scrub on the site. " (*emphasis added*)

Why the PCNPA feels it has to employ three slightly different variations for the description of the '*precedent element'* of the 'conditions precedent' (as above emphasized) one cannot say , but certainly, in the event, none of these conditions were complied with by the Developer before *the commencement of the works* on site by his builder.

Once again the blatant failure by this Developer to submit details of the windows and glazing design, prior to the commencement of the construction (see condition 6 above), is of course particularly significant with respect to the PCNPA's failure to make this building compliant with good design practice, see again especially the first sentence of JUDP Policy 76 (as above).

However, and yet again extraordinarily so, the PCNPA appears to be taking no notice whatever of this gross failure by this Developer to comply with these further conditions precedent. The Authority's Principal Development Management Officer ("DMO" Catherine Milner) has stated quite emphatically to the DMC that the inclusion of the references to these further conditions in her Report, on the current retrospective planning application, is merely as a background information convenience. Only very latterly was it made clear that, by means of this current retrospective application, is this Developer now also seeking retrospective consent (under s.73A of the Act) to change these further conditions, so that he could also now comply with them retrospectively instead. Apparently the PCNPA feels that there is no particular problem with these planning conditions even now still being 'discharged' (as their jargon has it), meaning thereby satisfactorily complied with. That is, of course, however simply not possible. They are "*conditions precedent*". The requirement to comply with them *prior to the commencement of the works* was a vital component of those conditions. One simply cannot now re-write history.

As respects Condition 3, however, the willingness to overlook the precedent aspect of this condition has already been demonstrated by the PCNPA. The "*progress monitoring notes*" (as held on the Authority's file included with the public register of planning applications) of the PCNPA's Monitoring Officer (D. Griffiths), shows that the site was visited three times in the early part of 2007 (once in January and twice in February). The report of the first Feb. visit (14th) reveals that by then 48 loads of concrete had already been poured, fixing the level of the foundations, and a further 20 loads were expected in the next fortnight. The note of the second Feb. site visit (27th) indicates that an agreement was then reached between the Developer's then architect (Gordon Davies) and the Authority's Principal Assistant Development Manager (Vicki Hirst) to lower the level of these foundations by only some 400-450mm.

No further monitoring notes are held on the file prior to the copy of subsequent formal letter from Ms Hirst to the Developer himself (dated 26th July – i.e. some 5 months later) in which she states:

> "Further to our recent meeting. I am able to confirm that the development is being carried out in accordance with the approved drawings and that Condition3 of the planning permission NP/06/076 (dated 17th October 2006) may now be discharged. However, I should point out that conditions 5,6, and 7 have yet to be fully complied with. I therefore trust that these outstanding matters receive your urgent attention accordingly. "[1]

In the event, the height to the roofline ridge of the building, as now constructed, measured above datum is **6m higher** than the roof ridge of the pre-existing wooden shack (known as Jimmy's Place)

In conclusion on this point, relating to available "planning enforcement measures" as an appropriate remedy, then even limiting ourselves, for the purposes of this remedy, to a comparison between that which has been built, as compared to that which received planning consent in Oct 06, this Developer has proceed in a manner which is very significantly in breach of conditions. Not only has he erected a

[1] Note that none of the approved plan drawings, given effect by Condition #2, in fact illustrate any elevations above a fixed datum in figures, thus leaving the line of the surrounding ground level as the only available datum against which to judge matters approximately.

building very much higher above the surrounding ground level than that illustrated on the approved plan drawings, further he has built it about face to that for which consent was given, and furthermore he has proceed in absolute defiance of the multiple requirements on him to submit detailed plans, with respects to matters ranging from the design of the windows through to the sensitive landscaping of the surroundings and boundaries, prior to the commencement of the works.

With respect to all of this therefore there is more than ample scope for the PCNPA, having refused his current application to 'set things right' by means of the expedience of a simple retrospective application, to instead take prompt and rigorous action by means of a planning enforcement notice to rectify much of the errors which have been made and which lie at the Developer's Door.

Section 97 – Power to modify planning permission, and Section 102 – Power to alter completed building works.

However, in so far as, the development given permission by means of the 06 Consent, was itself a development which manifestly fails to comply with the relevant development policies set out in the development plan ("the JUDP") then the fault for that error rests firmly with the PCNPA itself instead, and the appropriate available remedies differ accordingly.

The relevant parts of the most relevant policies of the JUDP are set out on a separate page (<insert HTML link here>), but in brief they include at least:

> **Policy 56** on **Replacement Dwellings**, specifying that a replacement dwelling should be "*no more visually intrusive than the original dwelling*" ,
>
> **Policy 67** on **Conservation of the Park** prohibiting development which would be detrimental to the Park landscape by "*causing significant visual intrusion*" ,
>
> **Policy 76** on **Design**, already dealt with above,
>
> **Policy 78** on **Amenity** which prohibits development "*of a scale incompatible with its surroundings*", and finally
>
> **Policy 79** on **Development in a Conservation Area** which limits development on land adjoining a conservation area (which this does) to only that which would "*preserve or enhance the setting of that area*".

Taking all of this into account, which the PCNPA ought to have done, in particular the law requires that when making a determination on a planning application a LPA must make it *"in accordance with the ..[development].. plan unless material considerations indicate otherwise"*[2]**,** then it is respectfully submitted that this Consent ought never to have been granted.

A suitably designed, environmentally sensitive, energy efficient, visually unintrusive building, reflecting the "scale and character of the existing dwelling and relating well to other dwellings in the area and the surrounding landscape", "not substantially larger than the dwelling replaced", compatible with the neighbouring properties, respectful of the special character of the Park, in keeping with the surrounding landscape and preserving the setting for the Newport Parrog Buildings Conservation Area, would doubtless have been entirely acceptable to one and all. The development granted planning permission in 06 was not such a building, even had it been built according to those conditions. Much of the explanation for that being so possibly lies in the lamentably inefficient and administratively improper manner in which that Authority chose to deal with this planning application back in 2006. In

[2] See now s.38(6) of the Planning & Compulsory Purchase Act 2004 as that has effect by virtue of s.70(2) of the Act (as amended).

particular, the decision was taken by the DMC in March (22nd) of 2006, to delegate the decision on the granting of this application to the Chief Executive Officer, despite the fact that the PCNPA's own established and published "regime of delegation" prohibits such delegation occurring where:

> "*Any application ... is to be determined contrary to the view expressed by the Community Council, where that view is a material planning consideration*"

and our own Newport Town Council, as the relevant Pembrokeshire Community Council, had objected to the proposal in the following terms

> "The Council wishes it to be clear that it is not opposed to innovative buildings in the National Park, and that this site could well be a highly suitable location for something really modern, but sensitive to its delightful and important position.
>
> This proposal, however, despite some interesting features, does not fulfil the criteria. There is too much glass, especially on the north side, which faces the sea, and the west elevation is reminiscent of a commercial building, rather than a home. Overall the impression is of a building insensitive to its purpose and ecology.
>
> The council recommends rejection of this proposal, but with encouragement for something more suitable to be proposed."

Now it is important to observe that subsequently, in late August of 06, the Town Council wrote in to the PCNPA, giving a very qualified and conditional approval for the development, but only after the DMO had by then informed the Council[3] that the Developer had submitted amended plans for a smaller building, which as we now know he had not.

Next I should note that in the DMO's Report to the DMC in March of 06 at which the delegated authority to grant consent was given, the following was stated :

> "The existing building on the site is a **large** timber clad property**…**
>
> The design ..*[of the proposed building]*.. is modern…..and is of a split level design to take advantage of the drop in levels **with a two storey element to the north and a single storey element to the south and the main public views"**
>
> (emphasis added**)**

Of course, as is now all too apparent from the site itself today, and the pictures on the website, none of this presentation was remotely true. 'Jimmy's Place' was by no means a large property, whereas the "new" Bettws Newydd is of course equally far from being a split two and single storey building, Being generous it is at best a two to three storey building, and many have observed the height is equivalent of a four-storey building.

Finally even the terms of the delegation as granted by the DMC, albeit improperly and outside of the established scheme, were in the event ignored by the Officers. The terms of the Officer's report to the Committee stated that:

> " However, there are details of the design that do need further consideration, in particular the overall height of the structure, the roof balcony and the details of the elevation facing the entrance."

Accordingly, the terms of the delegation by the Committee were as follows :

> "That the application be delegated to the Chief Executive (National Park Officer) to issue consent on the receipt of satisfactory amended plans altering the detailed design..."

[3] NTC minute available

(emphasis added)

However, as we now know, in the event, the Officer subsequently gave consent despite the failure to submit any further plans amending the height of the building by even one inch.
Taking then all of this history into consideration, I have no hesitation in concluding that the development granted consent as a delegated exercise by the Officers of the Authority represented a permission to construct a building wholly outside of and not compatible with the relevant development plan policies, for which they did not receive the requisite consent from the members of the Authority itself, in particular stating what they considered were the material planning considerations justifying a departure from those plan policies in this instance.

Accordingly this is manifestly an appropriate case where, once it becomes apparent to the LPA that frankly an error has occurred, in that a planning consent had been issued where in some measure or part it ought not to have, they need to take prompt action to remedy that error. The first and most obvious remedy is granted by means of s.97(1) of the Act which provides, for present purposes, as follows :

> "If it appears to the local planning authority that it is expedient to .. modify any permission to develop land granted on an application made under this Part, the authority may by order … modify the permission to such extent as they consider expedient."

Nothing could really be simpler. However, the power to modify a planning permission once given carries with it certain most important further ramifications. First, the LPA must submit the order to the WAG for approval. Second, the Developer is then free to question the order by way of an appeal to a WAG appointed Planning Inspector. Finally, if upheld the Developer is nonetheless entitled to full compensation for the loss of any expenditure rendered abortive as a consequence[4], the fault in this instance having lain with the LPA rather than the Developer.

However, all of this is subject to the further consideration that subsection (4) of s.97 provides as follows :

> (4) The … modification of permission for the carrying out of building or other operations shall not affect so much of those operations as has been previously carried out.

Which is to say that the Authority, if to be successful in remedying the error by this means, has to act promptly, in that once the erroneous building works have been carried out, the remedy by way of the s.97 modification order is now longer available.

Now it is important to observe at this point that the matter of this development, and in particular the way in which it was proceeding, was brought back before the DMC in October of 2007, after further extensive letters had been sent to the DMO raising concerns. A further Report was prepared and submitted by her in which she stated that the erection of the steel frame, around which the building was to be constructed, had caused concern in the community and the Town Council. Not surprising since this was the first occasion upon which people in the community will have become aware just how substantial the finished building was going to look.

She goes on to allude in particular to the powers of the LPA under s.97 of the Act, including a quote from s.97(4) as above, and concludes as follows :

> "Thus the fact that the steel structure has been erected in accordance with the approved plan means that that part of the permission having been implemented could not now be revoked."

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[4] See esp. S.107 of the Act.

Of course, from the perspective of some 17 or 18 months later we now know that that assessment was thoroughly misconceived ; since the steel structure clearly was not "*erected in accordance with the approved plan"* , hence the Developer's need to now seek retrospective approval for amended plans instead. However, also from that later perspective we see that we are left wondering if there is any other mechanism under the statutory framework which would even now allow the LPA to correct its errors, even after the erroneous building operations as were permitted by that consent have been previously carried out.

Further examination of this Officer's Report reveals of course that in deed the statutory regime is adequate to the needs. In particular, s.102(1) of the Act provides that :

> "If, having regard to the development plan and to any other material considerations, it appears to a local planning authority that it is expedient in the interests of the proper planning of their area (including the interests of amenity)—
>
> …
>
> (b) that any buildings or works should be altered or removed, they may by order—
>
> …
>
> (iii) require such steps as may be so specified to be taken for the alteration or removal of the buildings or works, "

However, and finally not withstanding that the Authority's own Solicitor quite properly alerted it to this statutory remedy, as long ago as October of 2007, the DMO then chose to dealt with the point as follows :

> "In respect of the development it is a larger property than the dwelling it replaced, but in the wider landscape, even at this stage of its construction, it is not considered to be unacceptable. Accordingly, it is not considered appropriate to take any action to issue a Discontinuance Order."[5]

What the Officer fails to mention, but which the initiated will know from experience was very much on the collective minds of Authority as a whole, is of course that, as with an Order under s.97, the time for which has now alas definitely passed, an Order under s.102 naturally also carries with it the requirement for (*a*) the confirmation of the WAG[6], (*b*) the right to contest it before a WAG appointed planning inspector[7], and most important of all (*c*) the right to full compensation for all expenses and losses incurred by the developer in the event of its enforcement.[8]

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[5] The reference to a "Discontinuance Order" by the DMO here is quite clearly an inappropriately titled reference to an Order under 102 of the 1990 Act, which in this instance would rather be for the alteration of a building.

[6] See s.103(1) of the Act

[7] See s.103(5) of the Act

[8] The entitlement to compensation due to an Order under s.102 of the Act is to be found at s.115 thereof.

Conclusions & Recommendations

Given the above catalogued history of the substantial and consequential plans and drawing blunders, procedural irregularities, administrative errors and quite frankly down-right astonishing assessments made by the professional officers of the planning authority; coupled with the, not entirely unpredictable failures and neglects, on the part of the Developer and his architect and agents, one can begin to see how a mistake of planning practice of such considerable magnitude as this could have occurred.

The fact that it has been allowed to occur, in such a sensitive and special location, cherished and valued by countless local residents and influential visitors alike is evidence of the extent to which the PCNPA has fallen down on its statutory duties in this instance.

The following list sets out the remedial measures now required of that Authority in order to correct and pay for those serious errors:

1. Refuse the Developer's current application for retrospective consent ;

2. Issue forthwith a planning enforcement notice, with sufficient measures by way of alteration steps so as to at least reduce the height by 3.5m and remove the vast expanse of north facing glass ;

3. Issue an Order under s.102 for the further alteration of the building, with especial regard to its scale, sizing, orientation and character so as to comply with all of the relevant policies of the JUDP ; and,

4. Finally, if in the event appropriate apportionment of the compensation for costs incurred in complying with the same cannot be agreed, then submit that matter to determination by the Lands Tribunal.[8]

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[8] As provided for in s.118(1) of the Act