IN THE MATTER OF THE TOWN AND COUNTRY PLANNING ACT 1990 AS AMENDED

AND IN THE MATTER OF LAND NORTH OF 49, CONISTON WAY, GOOLE, EAST RIDING OF YORKSHIRE, DN14 6JL

OPINION

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1. I have been asked to provide an Opinion for Mr Kevin Pullan of Kremer Properties, owner of the above named site in relation to his application for a certificate of lawfulness under the Town and Country Planning Act 1990.

Background

2. The site benefits from outline permission 13/00931/STOUT for the erection of 138 dwellings (all matters reserved), which was granted on 28/05/14. This was a renewal of planning permission 02/04149. The description of the site is well covered in the Appellant's submissions and the Local Planning Authority (LPA's) Officer's Report.

3. Mr Pullan bought the site in November 2016, and had no involvement in the original terms and conditions of the permission. The consent 13/00931 has 42 conditions, 18 of which are styled as "pre-commencement" conditions. Some of these pre-commencement conditions relate to the proposed drainage schemes for the site; both foul and surface water.

4. The justification for the imposition of the original drainage conditions appears to have been a consultation response from Yorkshire Water ("YW") dated 19/3/08 (ref J002166) in which it was stated that the YW network did not have the capacity to take the surface water from the site. This prompted the decision to impose a condition that the surface water should be discharged into the Goole & Airmyn Internal Drainage Board (IDB) drainage system and not the YW sewer. The wisdom of this decision was debateable at the time, and the reasons for this are well set out in Mr Pullan's

submissions for other legal planning proceedings involving the Council, and for this application for a certificate of lawfulness. Matters have moved on considerably since 2014 in any event, and there is no justification for the wording of these conditions at the current time. This will be analysed further below.

5. Mr Pullan submitted the reserved matters application (17/00144/STREM) in January 2017, which was approved to a certain extent on 28/08/17. Further applications have been made since.

6. Condition 3 of the planning consent required that work on site should be begun two years from the date of approval of the last of the reserved matters to be approved, i.e. by 23/8/19. The LPA is of the formal opinion, as set out in the appeal papers, that planning permission 13/00931/STOUT has expired and that no works done to date to implement the permission were effective in achieving lawful implementation. This is because the LPA maintain that the works were done prior to the discharge of pre-commencement conditions, specifically the drainage conditions, which the LPA says go to the heart of the permission. Accordingly, the LPA maintains that there is nothing further to be done with this permission, and no further works can proceed, and no variation of the conditions can be considered.

7. Mr Pullan has submitted this application for a certificate of lawfulness under sections 191 (certificate of lawfulness of existing use or development) and 192 (certificate of lawfulness of proposed use or development) of the Town and Country Planning Act 1990. The LPA should grant a certificate to confirm that works completed before 23/8/19 on the site edged red on the application plan were lawfully implemented and remain lawful now, and that the proposed completion of the works would be lawful. This will enable Mr Pullan to continue to make variations to the conditions that are currently not possible to discharge, for reasons beyond his control. The application is supported by this Opinion, to demonstrate that the LPA is wrong with regard to the expiry of the permission, and that, in fact, the permission has been lawfully implemented and is extant; the pre-commencement conditions were no impediment to that lawful implementation and that works can indeed proceed. On that basis, it would be possible and appropriate for the LPA now to revisit those conditions, and amend them to make them suitable for the current situations that pertain on site.

Pre-commencement conditions

8. There were 42 conditions attached to 13/00931/STOUT, 18 of which were worded as pre-commencement conditions. There is a large body of jurisprudence surrounding the meaning and application of pre-commencement conditions, (also sometimes called "conditions precedent" - there is no practical distinction between the terms for present purposes), which require the completion of a specific step, regarded as being fundamental to the planning permission, before lawful implementation of the permission can proceed. Where a pre-commencement condition "goes to the heart" of the permission [1], then any attempts to implement the permission before discharge of that condition will remain unlawful development. That is the situation that the LPA sees here, and that is what this Opinion refutes. The significance of a true condition precedent is that if it is breached, then any development that has begun in breach of that condition is unlawful in its entirety. The breach of any other kind of condition will simply result in a breach of condition notice, or enforcement notice, which can require the breach to be put right.

9. Of the 18 conditions worded as pre-commencement conditions in this permission, the LPA have been particularly focussed upon the drainage conditions. The argument that I set out in the following analysis is equally applicable to any of the conditions on the permission that might be regarded as true pre-commencement conditions, going to the heart of the permission. No condition on this permission is effective to prevent the lawful implementation of the permission that has taken place.

10. The basis of this Opinion is that it is impossible and therefore unlawful now under public law principles for the LPA to enforce against any of the pre-commencement conditions on this permission. The principle can be stated thus:

"Where it would be unlawful in accordance with public law principles, notably irrationality or abuse of power, for a local planning authority to take enforcement action to prevent development proceeding, the development, albeit in breach of planning control is nevertheless effective to commence development. Enforcement action may still be taken to remedy the breach by requiring compliance with the condition. But the

[1] Per Sullivan J in R (On the application of Hart Aggregates Ltd) v Hartlepool BC (2005) EWHC 840 (Admin)

development cannot be stopped from proceeding….. [there is] no reason why the development which cannot be enforced against should not be regarded as effective to commence development…" [2]

11. The LPA has not enforced against the works constituting implementation of this permission, and has no intention of doing so. Neither would the LPA ever contemplate enforcing the conditions as they stand: nobody regards these conditions as workable. This is not merely inaction on the part of the LPA. This is because it is impossible to require compliance with the conditions as written. Compliance would, in itself, be unlawful, because of the consequences of implementing the conditions as written. It is important to set out some of the background to the conditions, because it is the impossibility and irrationality of compliance with them that highlights their unreasonableness and the LPA's inability to enforce them, which is at the heart of the legal justification for this certificate of lawfulness.

Variation Application 19/02307/STVAR

12. Mr Pullan submitted an application to vary Conditions 7, 8, 9 and 27 (foul and surface water drainage) and removal of Conditions 10 (surface water regulation) and 20 (floor levels). These are the only conditions that would require amendment in order to make the permission implementable under current circumstances. The variation application was validated within two years of the reserved matters approval.

13. The Officer's Report (Andy Wainwright, Strategic Development Services Manager dated 14 January 2020) for the variation application stated:

> "Condition 7 as issued states
>
> 'The site shall be developed with separate systems of drainage for foul and surface water on and off site.'
>
> This condition is imposed in the interest of satisfactory and sustainable drainage"

This may have been the original intention for the imposition of this condition, but it is no longer necessary to have separate systems for foul and surface drainage on and off

[2] Ouseley J, Hammerton v London Underground Ltd [2003] JPL 984.

site in order to achieve this purpose. In fact, it is counter-productive. The condition, in other words, is not necessary.

14. Condition 8, upon which the LPA have predominantly focussed their attention in refusing the variation application reads:

> "No development shall take place until details of the proposed means of disposal of foul and surface water drainage, including details of any balancing works and off-site works have been submitted to and approved by the Local Planning Authority. This shall include provision for site drainage during the construction stage to ensure that there is no increase in flood risk to neighbouring properties or risk of pollution of adjacent watercourses. The scheme shall be implemented before the construction of impermeable surfaces draining to this system unless otherwise agreed in writing with the Local Planning Authority."

15. It is notable that the discharge of this condition is not required to be in writing.

Mr Pullan sought variation of this condition to:

> "Proposed means of disposal of foul and surface water drainage including details of any balancing works and off-site works shall be submitted to and approved by the Local Planning Authority."

Other variations of the remaining conditions follow on from the fundamental changes sought to conditions 7 and 8 to make all the conditions compatible.

16. Mr Pullan avers that some of these conditions, including Condition 8 have already been discharged in any event, at least in part. Mr Pullan argues that, in fact, original Condition 08 was approved as part of condition discharge application 17/00144, as the approval document [40/03 Rev A] discharging condition 3, which includes drainage layout. There will no doubt be issues concerning this which will be explored further in the appeal against the Variation refusal. That is not an argument upon which this Opinion depends.

17. The Officer's Report identified the Applicant's purpose in making the Variation application:

"This application seeks to amend this condition so as to allow surface water to be discharged into Yorkshire Water sewer, and therefore avoid discharge into the IDB perimeter drain. It is suggested that this condition be amended to read: "The site shall be developed with separate systems of drainage for foul and surface water on site." The Appellant wishes to amend the conditions to allow surface water from the Appeal site to be discharged at an attenuated rate of 5l/sec (1l/sec/ha) into the YW public trunk sewer which crosses under the site. This is the key objective."

18. Discharge of surface water from the site could in theory be discharged into either the YW or IDB network. The choice of the LPA at the time of the grant of the permission was for drainage of the surface water to the IDB drains, because of the resistance of YW to receiving it, although it is notable that the IDB always maintained a standing objection themselves to the outline consent 13/00931. In short, neither body wanted to receive the water, and so the LPA made an executive decision. Informatives attached to 13/00931 and 17/00144 confirm that it is necessary to obtain IDB approval and cooperation for water discharge from the site, but this has always been problematic, and then became completely impossible upon the discovery of water vole populations in the relevant drains.

19. In 2019, the IDB ecologist demonstrated the presence of important colonies of water voles (an internationally protected species), which would be affected by the conditioned drainage schemes for the consented development. Discharge of the conditions as framed would have become an illegal act, interfering with the voles. This remains the situation now. The specific circumstances are well known to the LPA, and are described in the OR. It will not be possible to discharge the conditions as written.

20. There is no dispute that the YW network is capable of accepting surface water discharge from the site, or that there is any other over-riding matters which require that the surface water and foul drainage from the site should be into separate systems. YW have in their consultation responses resisted accepting the discharge, and this may be for their own commercial reasons, but in accordance with statute (Water Industry Act 1991) and caselaw[3] where the LPA condition the discharge into the YW sewer, YW is mandated to accept it. YW have accepted in principle in the most recent round of negotiations that the surface water could be discharged into the sewer at 5l/sec from the

[3] Eg: Barratt Homes Ltd v Dŵr Cymru Cyfyngedig [Welsh Water] (No 2) [2013] EWCA Civ 233

site. The Applicant's submissions set out clearly the correspondence and negotiation with the relevant water bodies that demonstrate that the practicalities of amending the systems of drainage could all be satisfied. There are no practical impediments.

21. The LPA's fundamental reason for refusing the variation application was not for any practical purpose, but was because of their belief that 13/00931 had expired, and therefore, from their point of view, they had no choice.

22. The application was refused for the following reasons:

> "1 – This application seeks to amend conditions attached to the original outline permission 13/00931/STOUT. That application expired on 23 August 2019 (two years following the approval of the last reserved matter). The conditions proposed to be amended relate to drainage and therefore are true conditions precedents. As those conditions have not be complied with within the timescale established by the outline permission the application is not capable of being lawfully implemented. Therefore this permission to vary conditions cannot be favourably determined as the permission to which they relate no longer exists and this application is refused.
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> 2 – Notwithstanding the significant material consideration that planning permission has expired, insufficient information has been provided to demonstrate that the proposed scheme can be adequate drained and as such would be in conflict with Policy ENV6
>
> 3 – Notwithstanding the significant material consideration that that planning permission for residential development on this site has expired insufficient information has been provided to adequately demonstrate that the proposed scheme would not have an adverse effect on protected species and so in conflict with Policy ENV4. This site is currently subject to a planning appeal against refusal of variation application."

23. Reasons 2 and 3 are not tenable. The grant of the variations of the conditions would address the adverse effect on the protected species, and the evidence is overwhelming that the proposed site can be adequately drained with appropriately varied conditions. Reasons 2 and 3 are entirely circular, and flow entirely from the LPA's refusal to address the variation application.

Commencement of Development

24. There appears to be no question that there has been physical commencement of development on site. There is ample evidence to confirm a material start occurred pre 23/08/19, in accordance with s. 55 of the TCPA 1990. The operations completed to date include: site security fencing; great crested newts protection barriers; the construction of a 600mm high earth berm along the top of the IDB dyke; excavation for proposed roads to formation level; delivery to site of road stone, (in excess of 390 tonnes); and the laying and compacting of the road base for the partial completion of a new estate access road from the existing highway, all as shown in the application, and in accordance with drawing No 40/301C. All of this work can be fully evidenced. Various LPA enforcement officers have visited the site prior to 23/08/19 and have witnessed the site works, but no enforcement action has ever been suggested. It would not be rational or expedient to do so.

Planning on this Site in Principle.

25. The LPA appear to be taking a new point in the context of the Variation appeal that development in principle is no longer welcome on this site. This is not relevant to the certificate application but, for the avoidance of doubt, this argument is strongly contested by the Appellant. This site has been allocated for development since 1986 and has twice obtained outline consent; indeed 13/00931 was after the first drafts of the current Local Plan. It was consistently allocated for development, and it was only omitted from the 2017 Local Plan as an allocation as it had a live planning consent.

26. There is no realistic objection based on flood risk or drainage concerns on this site, nor for any other reason. The LPA has a chronic housing supply shortage, and cannot demonstrate a five year housing supply. There is no valid argument against the principle of development upon this site. No such argument could be deployed against the grant of the certificate of lawfulness in any event.

Conditions Analysis.

27. It is a pertinent feature of the certificate of lawfulness application as to whether the conditions are lawful, and, specifically, whether they were capable of being

enforced against. If they are not, then non-compliance with them will not have precluded lawful commencement on site.

28. It appears that it is the drainage conditions which cause the LPA consternation. The drainage conditions as written are unenforceable, and were at the time of the variation application in 2019, prior to the expiry of the planning permission. The Case Officer focussed upon condition 8 in the OR. The Officer identified that condition 8 is a "true precedent condition" and therefore concluded that, since it had not been discharged, the start on the site was not lawful and the planning consent has therefore expired.

29. The drainage conditions, taken together (and some of the others for that matter) are in breach of the 6 tests for conditions as set out in the NPPF and the NPPG:

NPPG: "Paragraph 55 of the National Planning Policy Framework makes clear that planning conditions should be kept to a minimum, and only used where they satisfy the following tests:

1. necessary;
2. relevant to planning;
3. relevant to the development to be permitted;
4. enforceable;
5. precise; and
6. reasonable in all other respects.

These are referred to in this guidance as the 6 tests, and each of them need to be satisfied for each condition which an authority intends to apply. See also guidance on the use of model conditions.

Paragraph: 003 Reference ID: 21a-003-20190723

Revision date: 23 07 2019".

The drainage conditions imposed on this permission fail, at the least, tests 1, 4 and 6.

30. Condition 7 is not reasonable. It requires surface water to be discharged into two separate systems. This is no longer necessary or even possible, given the presence of water voles. The LPA should not have ignored the fact, in the context of the Variation application, that the conditions had become impossible and unenforceable. It is outside of the control of Mr Pullan to attempt to arrange for the discharge of surface water from the site into a surface water only system, and nobody would find it desirable for him to attempt to do so. Breach of the condition would never be enforced; an alternative would

be negotiated. It would be irrational and unreasonable for the LPA to take enforcement action requiring discharge of the site surface water into the IDB drains, and this was the case prior to the expiry of the permission, and should have been acknowledged as such by the LPA.

True Condition Precedent Caselaw Analysis

31. The primary reason that the Council refused to acknowledge the practicality of the situation, and allow amendment of the conditions was that they did not believe it was possible, ie: lawful to do so. This involved the Officer's assessment and consideration of pre-commencement conditions and the timing of the application. OR Report:

> "7.6 The principle of the proposed variation of conditions to application 13/00931/STOUT is not only unacceptable in the planning balance but is unlawful. The expiration of the outline permission to which this application is connection must be given significant weight in the planning balance."

The Officer attempted to analyse the pre-commencement conditions with reference to the case authority of ***R (Hart Aggregates) v Hartlepool Borough Council [2005],*** referring to a "condition which goes to the heart of the planning permission". This was the only case that the Officer considered.

32. ***Hammerton v London Underground Ltd [2003] JPL 984 (***Ouseley J***)*** is an important case, and has already been quoted above. ***Hammerton*** was a key stage in the jurisprudential journey for pre-commencement conditions in determining whether operations commenced in breach of condition are effective to lawfully implement a planning permission. It is no longer necessary to see if a case fits into one of the previously labelled "exceptions" to the so-called ***Whitley*** rule, but rather to ask the overall question as to whether the breach of planning control can be enforced against.

33. The Court of Appeal developed this line in ***R (oao)Prokopp v London Underground Ltd [2004] Env LR***, which is a crucial case for present purposes. The Court of Appeal was essentially looking at the same problem as in ***Hammerton***, because it was the same development, and the same interested parties involved.

34. The Court of Appeal in ***Prokopp*** confirmed that where enforcement action is no longer possible, either because the time limit for taking enforcement action has expired or because it would be irrational and therefore unlawful to take enforcement action, the planning permission is to be viewed as having been lawfully implemented, despite the fact that the operations may have commenced in breach of a condition precedent.

35. The problem in the ***Prokopp*** case was that a condition precedent (condition 21) had been imposed upon the planning permission which was impossible to perform (see paragraph [10]). Neither the developer nor the LPA appreciated the difficulty initially, and the developer commenced development without complying with the condition. The LPA would not have minded, nor done anything about it, but two interested parties, who opposed the development, brought judicial review proceedings, claiming that the development was unlawful (for various reasons).

36. In the judgment of Buxton LJ, (starting at paragraph 54), he analysed, at paragraphs 82 – 86 the exception to the ***Whitley*** principle as expounded in ***Hammerton***. He concluded that because it would be impossible for the LPA to enforce the condition that they had imposed, it would therefore be irrational for them to enforce, contrary to public law principles.

He said:

> " 82….. Did that mean, within the approach in the judgment of Woolf LJ in ***Whitley v Secretary of State for Wales [1992] 3 PLR 72***, that even though the first steps in the development of the ELLX had been taken in breach of condition 21, they were nonetheless effective to commence that development before the date of expiry of the planning permission?
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> 83. The "Whitley principle" is that development in breach of a condition is not development relevant to the planning permission, and thus must be ignored for the purposes of deciding whether that permission has been implemented. Woolf LJ however recognised an exception to that principle, in cases where enforcement action in respect of the breach of condition would not be possible: that is, would constitute a breach of the authority's public law obligations……"

He concluded that this was correct, and that the circumstances in which it might be unfair or irrational to enforce could vary, and would be bespoke to the case in question.

37. In the present case, there are similarities with the ***Whitley*** case, in that the LPA and the drainage consultees could and would have varied the difficult drainage conditions in this case, which were no longer fit for purpose, in order to reach a satisfactory outcome to allow the development to proceed. The only practical reason this did not happen is because the LPA believed they were precluded from doing so by law because of the expiry of time. As it happens, had the variation application been determined more expeditiously, the planning permission would not have lapsed before the decision to amend, so there are echoes of the ***Whitley*** situation, where approval sought before the expiry of the permission was only given after expiry. As long as the approval meets all the planning merits of the case, then there should be no reason to refuse it, or to attempt to enforce.

38. Buxton LJ concluded his analysis in this way:

> "85. I would therefore respectfully agree with the view of Ouseley J in ***Hammerton*** that irrationality of enforcement action falls within the public law exception to the ***Whitley*** principle; and with the submission of LUL that this case falls within that rubric. Enforcement action is therefore not available in any event against the continued development of the ELLX."

39. A later case summarised the law clearly:

Ian Norris v Secretary of State and Stoke on Trent City Council [2006] EWCA Civ 12 CA (Civ Div)

Laws LJ:

> "39. Henry Boot Homes was decided in this court only some three weeks after Ouseley J's decision in ***Hammerton***, and the latter is not referred to in Keene LJ's judgment. But it was taken up in this court's judgment in ***Prokopp [2004] Env LR 8, [2003] EWCA Civ 961.***
> Buxton LJ said this:

"83. The ‘Whitley principle' is that development in breach of a condition is not development relevant to the planning permission, and thus must be ignored for the purposes of deciding whether that permission has been implemented.”

Woolf LJ however recognised an exception to that principle, in cases where enforcement action in respect of the breach of condition would not be possible: that is, would constitute a breach of the authority's public law obligations.

“85. I would respectfully agree with the view of Ouseley J in Hammerton that irrationality of enforcement action falls within the public law exception to the Whitley principle"

40. We can see from this line of authority how the ***Whitley*** principle stands today. It is to the effect that unlawful operations cannot amount to the commencement of development under a planning permission. On the face of it, operations undertaken in breach of a condition will be unlawful. But there will be circumstances in which, for one reason or another, operations which on their face violate a condition are not to be treated as unlawful: notably, but not exclusively, where enforcement action taken against such operations would on the facts be irrational within the meaning of the ***Wednesbury*** principle ([1948] 1 KB 223). As the citation from Buxton LJ's judgment in ***Prokopp*** at paragraph 85 shows, the ***Whitley*** principle has heretofore been expressed as a rule that operations in breach of condition cannot suffice to commence development under a planning permission, and then there is recognised exception to the effect that the breach of condition is excused for the purpose of the rule if it could not lawfully be the subject of enforcement process. I venture to think that this formulation fails to catch the principle's true basis. The reason why operations in breach of condition will not ordinarily suffice to commence development is that a developer (like anyone else) should not be advantaged by his own unlawful act. But a breach of condition will not be treated as unlawful for this purpose if it would be irrational, or otherwise legally objectionable, to enforce against it. As it seems to me the true principle, therefore, is that unlawful operations cannot amount to the commencement of development.”

40. This summarises neatly the state of the law that the LPA should have considered before refusing the variation application. The case officer was clearly unaware of this

line of jurisprudence, and simply stopped his analysis with his understanding of ***Hart***, and the meaning of a pre-commencement condition. That was nowhere near enough on the facts of this case. Mr Pullan is clearly not attempting to subvert reasonable conditions nor to benefit by any unlawful acts. He is caught in an impossible situation and is simply trying to find the best way out of it. The LPA are blocking that progress, and unreasonably so.

41. The LPA cannot rationally claim that they would only wish this development to proceed on the basis of conditions 7 and 8, and the other conditions which flow from those. They cannot maintain that they would insist that this development is only sustainable if it has dual systems of drainage, which must include the IDB dykes and drains, and must interfere with the protected vole populations. The LPA cannot maintain that it is impossible or undesirable for this development to drain into the YW sewer, and this is particularly so because YW themselves are not claiming this. YW are able to take the water with negligible impact, and will take the water if they are required to do so. This is becoming ever more apparent from the negotiations that have taken place.

Conclusion

42. The LPA cannot use this "catch 22" situation that Mr Pullan is in, through no fault of his own, to attempt to revisit the principle of development upon this site. The LPA could never rationally have required compliance with the drainage conditions after the discovery of the vole population, which was after commencement of the development and prior to the expiry of the planning permission. The Variation application should have been considered properly, and suitable amendments made to the conditions. The LPA were in error to conclude that they could not do this.

43. The LPA should now analyse the situation again appropriately, in the light of this application for a certificate of lawfulness, and should concede that this development, although on the face of it commenced in breach of pre-commencement conditions, is nonetheless lawful in line with the caselaw set out above.

Sarah Clover

Kings Chambers

Birmingham

14 October 2020

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