

LDC Application (Renewed)



Gary Jackson <[REDACTED]>

Tue, 23 Feb,
14:09 (7 days
ago)

to James.Chatfield

Dear Sirs,

LDC Application (Renewed)

Land at North East Goole

1. We have made a new LDC Application 15/2/21 as attached copy confirmation. The online procedure gave a £Nil fee however the previous application 20/03448 the fee applicable was £234. Please confirm if this is payable on the new application and if so, advise on ERYCC payment reference for bank transfer.
2. Your emails 31/1/21 and 3/2/21 indicate the issue is drainage compliance, and earlier LPA officer advice, including the Officer Report to 19/02307 make specific reference to Condition 08 (13/00931)
3. NPPG guidance requires the LPA to provide copy details of any external consultations, and for LDC Applications allow the applicant the opportunity to respond. ON the basis that the LPA have not provided any legal opinions regarding drainage condition satisfaction on neither 19/02307 nor 20/03448 the assumption is that the LPA did not obtain any advises from either its ERYCC in-house legal services, nor external barrister legal opinion. We have recently written to the head of legal services ERYCC regarding this matter.
4. The Sarah Clover (Kings Chambers) Legal Opinion 14/10/20 stands unchallenged. It is advised that we have asked Sarah Clover to provide an update. The Officer Report to 19/02307 is deficient in so far as it does not include condition compliance achieved by 17/00144.
5. The only ERYCC Legal/LPA correspondence which addresses 17/00144, condition 08 and approved drawing 40/003 rev A is the Peter Atkinson ERYCC Solicitors, letter dated 25/6/18 (PA 25/6/18, additional copy attached) which can be analysed as follows:-
 - a) PA 25/6/18 confirms that Informatives notes do not carry any legal weight.
 - b) PE 25/6/18 confirms that 17/00144 approved conditions 1, 2, 5, 19, 36, 37, 42 (of 13/00931), i.e. PE 25/6/18 confirms that 17/00144 was a reserved matters plus conditions approval.

- c) You will be aware that the application from form 17/00144 (copy attached) included a list of conditions included in the application.
- d) On face value Mr Peter Atkinson has cherry-picked which conditions he considered were approved by 17/00144 and those which were not.
- e) The PA 25/6/18 confirms that the drainage layout plan has been approved by 17/00144. Peter Atkinson amplifies the drainage condition by stating:-

"...the condition cannot be FULLY discharged until the LLFA gives its agreement to your surface water drainage proposals"

The implication is that Peter Atkinson's view was that the drainage condition was PARTLY discharged.

- 6. The issue appears to be that the LPA post the PA 26/5/18 have accepted the Peter Atkinson opinions, yet the notice of decision simply approves the Application, which lists approved drawings including the drainage layout 40/003 Rev A.

To take the matter forward could you confirm that the LPA are still using the Peter Atkinson letter as the basis of its drainage conditions satisfaction position?

For avoidance of doubt this applicant considers that the Peter Atkinson cherry picking of which conditions are approved is fundamentally incorrect and not in accordance with case law (e.g. Trump International), refer to paragraph subsequent.

- 7. If the LPA considered opinion of 17/00144 Notice of Decision has moved forward from PA 25/6/18 please advise. On the face value using the 17/00144 Application form, and the Notice of Decision, and the approval of drainage drawing 40/003 Rev A the only conclusion is that Condition 08, 13/00931 has been satisfied. Your attention is drawn to the Trump International Judgement (attached to the planning application) paragraph 65 which quotes the judgement of Arden LJ '*Carter Commercial para 27 & 28*
- 8. Clear examples of anomalies in the PA 25/6/18 advise (independent of the drainage condition)

I. Condition 04 Approval of Material

Within the application submission 13/1/17 supporting details included brick details (3 No) and Attachment to which gave plot by plot details

Why does the PA 25/6/18 not accept that Condition 04 had not been approved.

It is emphasised that construction materials are a key part due to the “appearance” element of layout, scale, appearance, access and landscaping requirement of reserved matters,

Similar comments can be made specific to landscaping etc.

If a comparable with the Rawcliffe Road site, the approval drawings for materials and landscaping in the reserved matters approval 19/00225 are no more details than those submitted with this application site within reserved matters approval 17/00144

II. Condition 42 – Open Space

Within the application 17/00144 was Attached K which gave a justification that Open Space provision was not required.

III. Condition 37 – Affordable Housing

Within the application 17/00144 was a variability assessment provided which concluded no affordable housing was necessary.

As a converse position to 8) above, i.e. conditions assumed by PA 25/6/18 as not approved, the examples of conditions 42 and 37 are assumed by PA 25/6/18 as approved. Examples conditions 04, 37, 42 etc is cherry picking without reference to the Notice of Decision.

Such approvals and not approved assumptions have no place in a consideration of the meaning of Notice of Decision 17/00144.

Implied or assumed means have no place in the Notice of Decision. Specific to Condition 08 the proposition as PA 25/6/18 that the condition was not FULLY satisfied by approved drawing 40/003 Rev A has no place on the reading of the face value of the Decision Notice. (Case law detailed subsequent)

9. Is it the case that the LPA consider that the PA 25/6/18 is flawed and that 17/00144 did approve the drainage condition 08 but that the failure to achieve IDB approval to the discharge into the IDB dykes somehow cancelled the previous satisfaction of the drainage conditions? This applicant does not believe this to be the LPA position, but please advise.

10. This applicant made two applications to the IDB to discharge into their dykes, with locations, discharge rates, head wall details etc. The IDB will not give their formal approvals (irrespective of the issue of water voles) unless the discharge approvals had prior LPA planning approval.

A case of 'cart before the horse'. You will recall that at the meeting June 2019 there was an assumption that location and rate of discharge into the IDB dyke was already approved (i.e. drainage conditions satisfied). At the commencement of that meeting there was a consensus as to the location and rate of discharge into the IDB dyke, but that the IDB officer's primary concern then became the water vole issue with the production at the meeting of the IDB water vole survey.

In simple terms the procedure is planning condition drainage approval, then subsequently IDB approval, which was the status June 2019, the only conclusion is that as of June 2019 the LPA (and LLFA) concluded that drainage conditions had been satisfied, and that the change of position by the LPA was the water voles making the approved drainage drawing impractical.

A further view is that the IDB were never willing to accept the surface water drainage (as the pre outline consent position) which was instrumental in the variation application.

Your position on the above consideration (e.g. Peter Atkinson assumption, LPA approval before IDB consent) would be helpful

11. An alternative consideration is that the Notice of Decision 17/00144 was a mistake in that it did not list conditions approved and conditions not approved. This was discussed with one officer (Sue Hunt) immediately post the decision autumn 2017 and rejected. The PA 25/6/18 cannot undo the Notice of Decision informally. The PA 25/6/18 which considers 37, 42 approved, 4 not approved (37, 42, 4 are important conditions) etc etc is absurd without undoing the Notice of Decision 17/00144 by use of the T&C Act

12. The Sarah Clover legal opinion October 2020 looks post analysis of the meaning of 17.00144, in effect providing a legal argument which concludes that the 13.00931 consent is extant. The LPA have not provided any counter legal argument. This is the legal position put forward in the LDC application.

13. However, if it is thought necessary to continue with a review of the Notice of Decision 17/00144, the Trump International V Scottish Ministers

I. Conditions must be construed in the context of the Notice of Decision as a whole. The planning consent is for 138 new dwellings on a 5ha field which has been zoned for housing since 1986. The drainage conditions are to facilitate this development, not thwart the principle of the approval.

The drainage conditions are to ensure adequate foul and water surface water drainage of the new dwellings and NOT to prevent the development. The principle of development was achieved in consents 02/04149, 13.00931, with details subsequently approved by 17/00144 drawing 40/03 Rev A etc, and the two subsequent conditions applications

The actions of the LPA (Enforcement) actions by incorrectly informing objectors that planning consent had not been achieved, which lead to

neighbours stopping delivery trucks entering the site was a clear attempt to prevent the principle of the development. Further the ERYCC Solicitors letter PA 25/6/18 adds unnecessary obstacles to the development of the site (i.e the intention of the approval) by hindsight interpretation of the drainage conditions, his incorrect interpretation aided by advice from the LLFA.

The drainage condition were drafted as part of the 02/04149 Notice of Decision and carried over to 13/00931. The authors of the relevant conditions 07, 08, 09, 10 etc are not known, but it is a fact that the Local Lead Flood Authority had not been created at that time. Controversially, the writer states that the LLFA officer advice to the ERYCC Solicitor post 17/00144 was on his firm belief that residential development on the site should not occur in principle, whether this was on his flood risk considerations occur or his support of IDB objections to the development.

For clarity the LLFA was using conditions to prevent development of the site due to their concerns over flooding risk due to the River Ouse; the LPA should not confuse drainage and flooding (e.g. SFRA Level II Goole)

*II. The conditions must be construed in the context of the decision letter as a whole.
The conditions should be interpreted benevolently and not narrowly or strictly
When one construes the conditions as a whole*

The above are extracts from Trump, but incorporate Circular 11/95, the Hulme principles etc

The relevant 13/00931 drainage conditions are 07, 08, 09, 10 which can be and should be read as interconnected group of controls.

Condition 07 is a requirement for the principle of foul and surface water systems on and off site. The 17/00144 and drainage drawing 40/003 Rev A assumed surface water was to be discharged into the IDB dykes and foul into the Yorkshire Water sewer and pre-dates the IDB (water vole) objections.

Condition 08 is a stepping stone in the drainage process between conditions 07 and 09. It is not a stand-alone condition. The drainage design and installation is a process in which Yorkshire Water are the key component. In order that the site drainage is adopted as public sewer, Yorkshire Water have to approve the detailed designs and the developer has to enter a S104 adoption agreement. This agreement includes drainage layouts, calculations all approved by Yorkshire Water (not LPA) and includes on-site inspection of works completed.

The intention of condition 08 is to have a basic layout approved by the LPA against which the S104 drawings can be worked up. Yorkshire Water will not enter an agreement until the planning consent e.g. condition 08 has been achieved. Similarly the IDB will not give consent to discharge into their dykes without an approved layout.

This process including Yorkshire Water and the Internal Drainage Board does not require any LPA approval of drainage details post that approved by the approved layout drawing 40/003 Rev A. The Yorkshire Water letter exhibited in the LDC Application gives details of the role of Yorkshire Water in the process of drainage design. The approved drawing 40/003 Rev A gives the basis of the drawings used in the adoption procedure.

The details included in the drainage drawing is similar to that provided on other residential development sites, hence the inclusion of the Rawcliffe Road and Whincroft comparables.

III. The suite of conditions 07, 08, 09 when construed as a whole contains a mechanism that can enable the LPA to enforce compliance, without any detailed planning submission post 17/00144 and drawing 40/003 Rev A. Condition 09 is the 'before occupation and use' condition, which ensures LPA control.

IV. By comparables (e.g. Rawcliffe Road and Whincroft) and the fact that the drainage layout was approved in 17/00144 it is considered that approval of condition 08 is clear without ambiguity, and with condition 08 listed on the 17/00144 application and approval there is certainty and clarity.

V. The converse would be that this application after reviewing the Notice of Decision 17/00144 that we would have been able to appeal to the Secretary of State against the drafting of conditions attached to 17/00144. The Notice of Decision 17/00144 contained only satisfactory conditions e.g. condition 03 "The site shall be built in accordance with drawings..... 40/003 Rev A Drainage"
The applicant has studied the context of words, strictly and in a far less strict approach and cannot construct an argument of ambiguity or incompleteness, i.e. cannot construct a counter argument that 08 was not satisfied.

VI. Condition 08, 13/00931 does not include the need for written approval. "Written approval" words cannot be introduced later to give the condition efficacy sufficient to make the site works completed not legal.
13/00931 contains 42 conditions of which 18 require consent in writing, and 18 (not exactly the same conditions) are pre-conditions.
The LPA give great weight to which conditions are true precedent conditions, but the specific Notice of Decision does not specify which are not True Precedent Conditions. This application considers that the

suite of conditions 0, 08, 09, are as a whole true precedents, but that 08 only a stage in the drainage condition satisfaction and that 08 is devalued by the lack of 'approval in writing' requirement.

Indeed condition 08 could be omitted with drainage condition 09 the necessary LPA control.

Note in condition 09 'approved' drainage works (foul and surface water) in practice are 'approved' by Yorkshire Water site inspection and not LPA.

Note also, the earth bund protection for risk of pollution to the IDB dykes has been completed for the Phase I build to approved drawings under approval 19/30072.

13/00931 has 42 conditions and on face value many conditions appear to fail the 6 test rule and it is not intended to open this debate unless the LPA continue to use conditions to prevent the development.

VII. It is believed that the ERYCC solicitor in letter PA 25/6/18 guided by LPA officers has incorrectly interpreted condition 08 "details of the proposed means of disposal of foul and surface water" adding the word FULLY, nor considering the meaning of "proposed means". As previous, the common sense approach is to review comparables (e.g. Rawcliffe Road, Whincroft) and the standard mechanism which involves the Yorkshire Water full details requirement. A close comparable is drawings required for a planning consent are not details to the extent of those required for building regulations plan approval.

VIII. This applicant places great importance on the listing of the drainage drawing 40/003 Rev A in the approval drawings condition 03 Notice of Decision 17/00144, which gives clear and unambiguous details of the proposed means of surface water drainage of the development site, i.e. condition 08, 13/00931 satisfaction.

14. It is reminded that the applicant is reliant on the Legal Advice by Sarah Clover, all as previously submitted which does not rely on whether or not condition 08 has been approved.

15. If your concerns regarding the LDC applications are also regarding other conditions compliance, please advise against which the applicant will provide further submission.

It is repeated for emphasis that if the LPA has external legal opinion (whether ERYCC in-house solicitor, or independent barrister) it is hoped that this will be exhibited promptly.

16. As there has already been a considerable delay due to the initial LDC application, at the 8 week stage the Applicant will make a non-determination appeal application.

Yours faithfully