

## Appendix A

### **LAWFUL DEVELOPMENT CERTIFICATE**

### **S191 APPLICATION - NARRATIVE**

## **Application for a Certificate of Lawful Development (S191)**

This application is for a certificate to confirm that works completed before 23/8/19 on the site edged red on the attached plan were lawful.

The operations in question are the part completion of a new estate access road from the existing highway Ivy Park Road and the construction of a 600mm high earth berm along the top of the IDB dyke together with a Great Crested Newt barrier all as shown and in accordance with drawing No 40/301C enclosed.

This work was following the granting of planning permissions and in accordance with 13/00931/Stout (renewal of 02/04149/Out), 17/00144. 23/8/17, 17/30449, 19/30072, copies attached. Also attached is a copy of the Application Form for 17/00144.(All in Appendix B)

The reason for this certificate is to clarify that the planning permissions as listed above are extant and that works on site can proceed lawfully.

Planning consent 13/00931 condition 03 requires that work on site shall 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 works completed:-

Site security fencing

Great Crested Newts protection barriers

Earth berm to prevent uncontrolled surface water into the Internal Drainage Board dyke.

Excavation for proposed roads to formation level

Delivery to site of road stone, laying and compacting the road base

Various East Riding officers (LPA enforcement) visited the site prior to 23/08/19 and hence witnesses the site works; email exchanges can be evidenced. The LPA have not issued any enforcement action

Attached Appendix B are the following copy invoices and delivery notes:

Purchase of Heras fencing

Purchase of timber battens and wire mesh (GCN barriers)

Delivery of 390.2 tonnes of road stone

The hauliers delivery notes for the road stone and the suppliers VAT invoices are all dated pre 23/08/19

Also attached (Appendix B):-

Photos of completed road base

Section through road construction

Marked up plan 40/301C showing extent of construction completed.

In order to achieve a Certificate of Lawful Development (S191) the applicant has to not only show that a material start on site occurred, but also that this was lawful, i.e. planning approval compliance.

T&C Act building operations para 55 (1A)(d) and 56 (4)(d) refers to the physical operations quote "any operations in the course of layout or constructing a road or part of a road"

It is considered that there is sufficient evidence to confirm a material start occurred pre 23/08/19.

The issue then becomes whether or not this was lawful, the LPA position is believed to be as the LPA officer report January 2020, attached to the 19/02307 refusal in that the LPA consider condition 08 of 13/00931 has not been complied with, that this is a true precedent condition (LPA quoting Hart V Hartleypool case law) and therefore the start on the site was not lawful and the planning consents have therefore expired.

The Applicant does not consider this LPA position is correct and therefore that the consents are still extant

The applicants schedule of 13/00931 conditions satisfaction is as follows:-

<u>Planning Ref</u>	<u>Decision Date</u>	<u>Approval Details</u>
13/00931	28/05/14	Outline – Residential Development (Renewal of planning permission 02/04149) 42 Conditions (18 pre commencement)
17/00144	23/08/17	Condition 1 – Reserved Matters Condition 4 – Materials Condition 5 – Design & Access Statement Condition 8 – Drainage (See note 1) Condition 10 – Pump Station Condition 13 – Landscaping Condition 15 – Landscaping Condition 16 – Boundary Treatment Condition 19 – Finished Floor Levels Condition 20 – Finished Floor Levels Condition 21 – Construction Condition 27 – Perimeter Drains Condition 29 – Travel Plan Condition 30 – Construction parking and off loading Condition 31 – Junction with highway Condition 32 – Service Road Details Condition 35 – Bus stops Condition 37 – Affordable Housing Condition 42 – Open Space Provision

Note 1

Approval 17/00144 included approval of Site Drainage Layout drawing 40/003 Rev A, submitted 10/07/17 which at that stage resolved drainage concerns and complied with the 13/00931 Informative (Full drainage details are expected at Reserved Matters Stage)

17/30449 02/01/18

Condition 4 - Materials

Condition 22 – Noise Condition 29 – Travel Plan

Condition 30 – Temporary Parking/loading

Condition 31 – Junction details

Condition 35 – Bus stops

19/30072 03/07/19

Condition 13 – Landscaping

Condition 15 – Landscaping Condition 16 – Boundary Treatment

Condition 17 – Landscape management Condition 21 – Construction Methods

Condition 24 – External lighting

Condition 32 – Service road details

Condition 38 – Environmental management plan

Condition 39 – Ecology survey

Condition 40 – Ecology Management

The consent 13/00931 has 42 conditions, 18 of which are pre commencement. In order to achieve detailed consent as above schedules not only has the applicant used architects (Jim Fielding) and planning consultants (Graham Powell & Associates) but the conditions necessitated input from flood risk consultants (JBA Consulting) drainage engineers (Eastwood & Partners Consulting Engineers) ecologist and protected species (Wildscape Sheffield and EcoNorth), Noise Consultants, planning solicitors (Walker Morris)

There has been a previous LDC application reference 20/03448 submitted 19/10/20 withdrawn 3/2/21.

The withdrawal of this application was following two emails from the LPA case officer James Chatfield Strategic Development Management Team Leader dated 31/1/21 and 3/2/21 which quoted in full as follows:-

31/1/21

Mr Pullan

*“Thank you for your patience in this matter*

*I have had the opportunity to look in great detail at the submitted documentation, the detailed planning history and the submitted legal opinion. Further I have discussed this matter with (the) planning manager*

*Regretfully from the information available it is my view that a lawful start cannot be (has not been?) demonstrated due to the drainage conditions not being discharged (due to failure to demonstrate that the drainage conditions have been discharged?) and I have therefore passed my report through to managers recommending refusal.*

3/1/21

Mr Pullan

*Thank you for your email. My email to you on Sunday was to alert you to the Councils proposed course of action in accordance with the provisions of the Planning Practice Guidance. You will of course be sent a copy of the Notice of Decision to explain the reasons for refusal as soon as it is issued.*

The applicant considers that the 20/03448 application and advise as email above is pre-application advise from the LPA in so far as this new application.

From the two email it is taken that the works carried out (e.g. road base) was sufficient for a material start save for the issue of drainage detailed satisfaction. The applicant has not been supplied with a draft of the proposed Officer Report of the 20/03448 previous LDC application, but is lead to believe the LPA concern remains Condition 08 consent 13/00931.

The NPPG para 20140306 – 005 and 006 make it clear that it the applicant is responsible for providing sufficient information to support an application and para 008. The LPA needs to consider on the facts of the case and relevant planning law; the LPA is entitled to obtain external evidence, and any such evidence needs to be shared with the applicant who needs to have the opportunity to comment on it and possibly produce counter evidence.

In the previous LDC application the LPA did not provide any external evidence, specifically no evidence in support of the emails 31/1/21 and 3/2/21 regarding drainage conditions compliance, nor any legal rebuttal evidence to contradict

Sarah Clover legal opinion.

The only conclusion reached by the applicant is that the LPA considered that it did not have sufficient information submitted in order to reach a positive decision. This new LDC application therefore addresses in more detail the drainage satisfaction and the applicant includes legal opinion by Sarah Clover Appendix C which in better detail clarifies the status of the planning approval and achieved conditions satisfaction and gives further weight to the jurisprudence journey from Hart Aggregates (quoted in the Officers Report for the Variation Application 19/023070)

The October 2020 Sarah Clover legal opinion para 16 states:-

*“Mr Pullan advises that some of these (13/00931) conditions including condition 08 have already been discharged.....original condition 08 approved as part of condition discharge application 17/00144, as the approval document (40/03 rev A) discharging condition 03, which includes drainage layout.....That is not an arrangement upon which this Opinion depends”*

Within the new LDC application the issue of drainage conditions previously discharged in expanded as below, and is as the Sarah Clover opinion

The issue and clarification required appears to be principally the drainage conditions satisfied by Notice of Decision 17/00144. This application was accompanied with a suite of drawings and attachment narratives and was validated without amendment to the extent of the Application in February 2017. No amendments to the extent of the application was made on the Notice of Decision, and therefore the Notice of Decision which describes the applicant proposals as (Erection of 138 dwellings following outline permission 13/00931/Stout, All matters to be considered) is an all-inclusive approval of the application details dated 13/1/17.

The case Officer Mrs Susan Hunt left the authority shortly after the approval 17/00144, and subsequent clarification including Informative was dealt with by Mr Peter Atkinson – Solicitor, ERYCC.

ERYCC Letter 25/6/18 (and subsequent 13/7/18) are exhibited, Appendix D

This letter has been referred to subsequently by the LPA and in the absence of any LPA legal clarification regarding extent of conditions satisfaction is exhibited as the LPA position, which the LDC Application analyses as follows:-

- a) The Applicant agrees with the Council solicitors regarding the use of Informatives, as quoted in his letter:-

*“The use of such an Informative is in accordance with Government guidance which says:-*

*Informative notes allow the local planning authority to draw an applicant’s attention to other relevant matters – for example the requirement to seek additional consents under other regimes. Informative Notes do not carry any legal weight and cannot be used in lieu of planning conditions or a legal obligation to try and ensure adequate means of control for planning purposes”*

- b) The Council solicitors letter makes an attempt to clarify conditions which were approved by 17/00144 (2, 5, 19, 37, 42) and those not approved or part satisfied by 17/00144, i.e. as application form (1, 2, 5, 8, 10, 13, 15, 16, 19, 20, 21, 24, 29, 31, 32, 36, 37, 40, 42, 11, 23, 26, 27, 30) Less (2, 5, 19, 36, 42)

The Council solicitor clearly accepts that 17/00144 is a reserved matters plus condition application but then attempts to redefine the Notice of Decision. The Notice of Decision does not specify which conditions have been satisfied and those not approved. Such Notice of Decisions are actually possible, so called Split Decision. The Notice of Decision 17/00144 was not a split decision and did not give part approval nor replace conditions as is stated in the subsequent council solicitors letter. The applicant does not accept the analysis of conditions approval as the council solicitors letter, and further consider that such analysis carry no legal weight.

In addition to the council solicitors letter 25/6/18 the LPA in the Officer Report (OR) to Variation Application 19/02307 has attempted to analyze relevant planning history, but incorrectly (i.e. Not in accordance with the Notice of Decision, nor the earlier council solicitors attempt to clarify). The OR has neglected to include the conditions approval by 17/00144.

- c) The applicant believes that the legal position of interpretation of the meaning of a Notice of Decision is as the following principle:-

*“When a court is concerned with the interpretation of words in a condition in a public document.....it asks itself what a reasonable reader would understand the words when reading the conditions in context of other conditions and the consent as a whole.*

- d) Condition 03, 17/00144 which requires the development to be carried out in accordance with a list of approved plans, including Drainage Layout Plan 40/003 Rev A, received 10/7/17. The Notice of Decision states that this



condition is imposed for avoidance of doubt. Listing of approved drawings was in accordance with the NPPG applicable at the time of approval. Approval of 40/003 Rev A drainage drawing concerns satisfaction of the 13/00931 condition 08 drainage, a condition listed in the 17/00144 application.

- e) Notice of Decision 17/00144 was a favorable decision to the applicant; no onerous conditions, nothing of which on Appeal against the Decision could be made.

If the LPA decision maker on this LDC application considers to take issue regarding a) to e) above, please do so during the period of application to the LPA, and not to defer the consideration to any subsequent Appeal process.

The council solicitors letter comments on conditions 8, 10, 19, 20, but these are after the event (after planning approval) “with hindsight” opinions. Again if the LPA decision maker wishes to take issue, of the applicant’s interpretation of the council solicitors letter please do so, and not defer the consideration.

It is reminded that this new LDC application is to confirm that the works completed on site, i.e. the road construction (400 tonnes) of road stone laid, is a s55 start on site; the LDC application is in accordance with s191.

However, on the basis that the council solicitors letter is the LPA position:- then for background clarity the applicant responds to the details as follows:-

#### Condition 08

It is agreed that the conditions can be broken down into its requirements for details of both surface water and foul drainage. Drawing 40/003 Rev A details both foul and surface water systems.

Before the Notice of Decision approval 17/00144, 23/8/17 the case officer obtained satisfactory responses from Yorkshire Water (31/7/17), LLFA (10/7/17), IDB (28/3, 16/5, 1/8/17) sufficient for her to recommend the application approval.

The Council solicitor in his statements appears to rely on post consent advises from the LLFA (and not the LPA case officer who had left the authority). The Council solicitor appears to have not been fully informed as to the normal procedure for drainage details approval which is predominantly a process which requires the developer to achieve planning consent agreeing with Yorkshire Water details as Sewer for Adoption 6<sup>th</sup> Edition, subsequently entering a Section 104 (1991 Water Industry Act) agreement, which has full details. Prior to use/occupation of the new domestic properties on site planning conditions 09

requires the drainage works to be completed as approved drawings. These drawings are the Section 104 approved drawings. Condition 09 and the Section 104 agreement controls drainage post condition 08 approved (which does not require written approval)

The Yorkshire position is best described as the YW letter to JBA Consulting 3/1/13 which is enclosed with applicants relevant narrative, all in Appendix D

The Council solicitor accepts that drainage drawing 40/003 Rev A was approved by 17/00144. A review of comparable site planning approvals, Rawcliffe Road Goole (Outline 15/00305, reserved matters and conditions approval 19/00225) and Whincroft north east Goole (Outline 07/006679, reserved matters 15/00666 and conditions approval 15/30486) is attached, Appendix E

The comparable approved drawings for Rawcliffe Road and Whincroft show approval details with no more details than is shown on 40/003 Rev A

Condition 10 (refer to Council solicitor letter page 3)

The approved drainage drawing 40/003 Rev A has underground water storage, attenuated to limit the discharge rate, No pumping station is required. Narrative was submitted with 17/00144

The Council solicitor letter states that complying with condition 08 satisfies condition 10. Condition 10 is not necessary and therefore fails the 6 test rule.

Condition 19 and 20 (refer to councils solicitor letter page 3)

Not specifically drainage matters

Approval of reserved matters in any event satisfies condition 19. Floor levels of the building is stipulated on the approved drawings as are the road levels and site boundary levels. The change of level of the site does not exceed 500mm and design of the layout was to allow sizable rear gardens adjacent to the boundaries.

It is not the case that inaccurate drawings were submitted and possibly this concern is more that a small change of level of 500mm over a distance in excess of 100 metres is not noticeable on plan nor section drawings. Condition 19 and 20 compliance does not appear to be an LDC application issue.

Condition 27

Boundary detail including a french drain were shown on the approved drawings both site layout and section drawings. The issue of perimeter drains was considered at length within the 17/00144 process.

It was not accepted neither by ourselves nor the IDB that new dykes were needed

along the southern and western boundaries, nor that any such works would be adopted by Goole and Airmyn Internal Drainage Board.

Condition 27 was approved by the consent 17/00144 and as the boundary details shown on the approved drawings.

The IDB have refused surface water to be discharged into existing network of dykes. It is not conceivable that they would have an interest in adopting new dykes along the site boundaries.

Condition 27 appears to fail the 6 test rule.

In conclusion, the council solicitor is correct regarding the fact that Infomatives do not carry any weight, but the solicitors view of condition satisfaction whilst accepting that 17/00144 is a reserved matters and conditions approval, appears to have made conclusions on conditions approvals which are based on post approval advises from the LLFA and on his interpretation of post approval correspondence. His conclusions are not based on instructions from the LPA case officer (Susan Hunt had left the authority) but his best intentions views, but are not accurate.

This is an LDC application where the LPA have queried compliance with drainage condition 08. It not an analysis of 13/00931 (42 conditions) nor 17/00144 which lists approved drawings including the drainage layout (separate foul and surface water 40/003 Rev A)

The above analysis of the council solicitors letter was for completeness and if necessary further consideration by the applicant can be made. The difference between condition 19 and 20 is finesse and the applicant is not sure what a reasonable person would read into these separate conditions, other than that they appear to be a re-drafting of the same requirement.

It is for Sarah Clover to provide Legal Opinion Appendix C in support of this LDC application, but as it is for the applicant to put forward sufficient information to enable the LPA to make a judgment in this application, and the applicant research lead to the Trump International V Scottish Ministers Supreme Court decision :-

Para 64

*“Denning LJ himself emphasizes the importance in general of such a condition being expressed ‘in plain language’ so that they could understand it.....”*

Para 65

*“I start from the position that this planning permission is not to be construed like a commercial document, but is to be given the meaning that a reasonable reader would give to it having available to him only the permission, the variation, the application form and the Lewis Fryer Report referred to in condition 4 in the planning permission itself.”*

*“The reasonable reader for this purpose is to be contrasted with, for instance, the*

*testator into those armchair the court is enjoined to place itself in order to construe a will, or the position of parties to a commercial contract, having regard to all background information reasonably available to them. This is a public document, to which very different principles apply”*

With respect, the applicant comes to the application and the meaning of the planning consents as a reasonable reader whereas the council solicitor Peter Atkinson appears to be ‘in an armchair’ looking in hindsight 10 months after the approval at the consent document with background information provided subsequent to the decision by council officers. He names Gerry Frisby of the LLFA (who had provided the case officer Sue Hunt with a positive consultation response in July 2017, prior to the 17/00144 approval 23/8/17). Note also that the council solicitor was challenged at the time by this applicant regarding his conclusions, and via subsequent letter 13/7/18 he stated:-

*“I do not propose to carry out exchanging correspondence on additional non-meritorious points.....i see no point for me to attend a meeting.....”*

It is believed that LPA officer in the recent emails 31/1/21 and 3/2/21 all as previous has made his opinion based on the council solicitors letter 25/6/18.

This review of the historic status of (drainage) conditions approval together with the new Sarah Clover legal opinion confirms that the work completed prior to 23/8/17 was not unlawful. (i.e. lawful)

As further background information enclosed Appendix E is an illustration of the standard Yorkshire Water requirements. The process of drainage approval i) planning approval of drainage proposals (e.g. 40/003 Rev A), ii) submission to YW for Section 104 Agreement, detailed drawings with YW on site Inspector, iii) Occupation, with compliance with planning permission condition 09 13/00931. Also as Notice of Decision approval of drainage conditions, Appendix F provides illustrations of ERYCC LPA approvals of two other major sites in Goole, Whincroft and Rawcliffe.

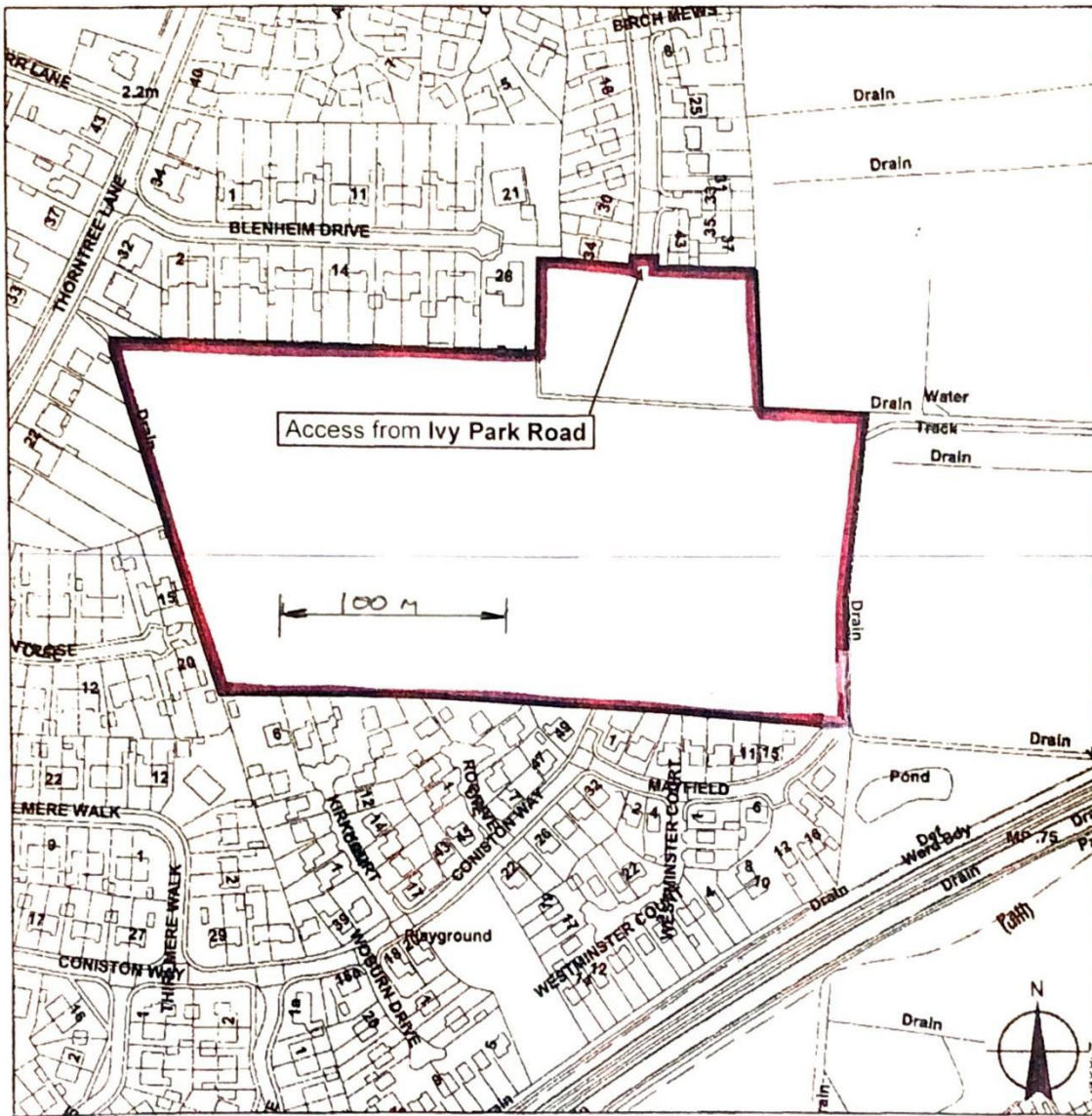
# Land North of Coniston Way



# EAST RIDING

Goole

OF YORKSHIRE COUNCIL



NEWFIELD GOOLE 40/07 12/12/16

Scale : 1:2500

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**NB** This plan was approved 17 March 2009 (ref para 37 of DC/02/04149/OUT/STRAT Notice of Decision) and remains unchanged for the outline consent renewal application in March 2013.

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Department	Development Control
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