CRAVEN DISTRICT COUNCIL

HELLIFIELD FLASHES

Re Planning History and Enforcement Issues

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EXTRACT FROM ADVICE

EXECUTIVE SUMMARY

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Summary and Conclusions

169. I am asked to advise Craven District Council, the local planning authority, on a variety of issues relating to the development of land to the west of Hellifield, in particular

   a. Whether outline planning permission (the 2003 consent) or the approval of reserved matters in 2005 should have been subject to EIA;

   b. Whether the approval of reserved matters in 2005 was given in excess of the authority delegated to the Head of Planning;

   c. Whether the 2003 consent was implemented; and

   d. Whether the Council has taken a lawful approach to its enforcement function in relation to the site.

170. I have discussed these issues with my client and reviewed a large number of documents relating to a period of more than twenty years. I have included within the foregoing Advice description of events over that period, drawing on the documentary evidence provided.

171. My conclusions on the legal position follow in summary terms.

EIA – the 2003 consent

172. If the development proposed in 2002 was Schedule 2 development (as defined by the 1999 EIA Regulations) it should have been the subject of a screening opinion. Since no screening opinion was adopted, the essential question is whether the development was Schedule 2 development.

173. The only candidate for the development in question is category 12(c) "*Holiday villages and hotel complexes outside urban areas and associated development*."

174. There is no published guidance on this category and no judicial authority of which I am aware. I have considered the way the phrase "hotel complex" is used in planning appeals, and the natural meaning of the words chosen. It is not possible, without more

research on the different linguistic interpretations of the parent Directive, to reach a conclusive view on the question whether the development fell within this category.

175. In my opinion, it is quite possible that the development was Schedule 2 development, and (had a screening process been carried out) it is also possible that the Council would have concluded that the development was EIA development. If it was Schedule 2 development, then

    a. The Council should have adopted a screening opinion when processing the application which led to the 2003 consent. I note that in 2013 an Officer of the Local Planning Authority set out the view that a screening opinion should have been carried out.
    and
    b. The Council's failure to screen the development was a procedural error and the 2003 consent might (had an application for judicial review been made at the time) have been quashed.

176. However, it is also important to note that errors of this kind were often made at the time, when the true reach and scope of EIA requirements were often misunderstood, even by the UK Government. Moreover, the prospect of a legal challenge being successful now is vanishingly small. As long ago as 2013, the Council admitted errors of law had been made, and since then decisions as to local planning policy and a host of other decisions have been taken on the assumption the site benefits from a valid consent.

EIA – the RM Approval

177. Here, one must add yet more hypothetical scenarios to those considered above. If the development was Schedule 2 development, since it was not screened in 2003 it should have been screened in 2005.

178. However, there was in 2005 no domestic legal framework within which to undertake a screening opinion. More significantly still, the Government's advice in Circular 2/99 was that EIA could not be required at reserved matters stage. It was not until the following year (2006) that the ECJ confirmed that the Directive does apply to such applications. The state of the law in England in 2005 was the subsequently overturned Court of Appeal decision in *Barker v Bromley* which was consistent with the Government's advice in Circular 2/99 and the approach taken by the Regulations.

179. Naturally enough, therefore, if an error was made in 2005 it was in relation to the Directive not UK law, and it was being made by many others across the country.

180. The prospect of the courts re-opening that decision 15 years later is, in my opinion, at least as unlikely as it is in relation to the 2003 consent.

Delegated authority to approve reserved matters

181. On 25 July 2005 the Planning Committee resolved to delegate authority to approve the application for reserved matters to the Head of Planning and Building Control subject

to a process involving prior discussions and agreement with the EA, EN, and applicant regarding retention of the wetland area as opposed to the creation of a lake.

182. It seems there was some suspicion that the Gallaber Flash (already referred to as a lake by the EA) would be turned into a lake full of water all year round by the developer's proposals (perhaps a fishing lake, an amenity for the proposed hotel), and thereby damage its conservation interest. That was the harm, as I understand it, that the Committee sought to avoid.

183. Between that meeting and approval on 20 September, both English Nature and the EA set out in writing (a) the essential qualities of the existing lake, namely its ephemeral characteristics; and (b) that they were satisfied with the outline conservation management plan submitted by the applicant.

184. In other words they agreed that the plan would retain the wetland "as opposed to the creation of a lake". I see no possible basis for concluding that officers (and/or the Head of Planning) acted in excess of the authority given to them on 25 July 2005.

Implementation of the 2003 consent

185. I have looked closely at every submission and every decision to discharge pre-commencement conditions imposed on the grant of planning permission, and am satisfied that there is no proper basis to question the judgment reached by the Council on 7 February 2008 that the permission was lawfully implemented.

186. In those circumstances, it is trite law that the development permitted in 2003 and 2005 remains lawful if carried out in accordance with the conditions imposed on those two consents.

187. An enforcement officer explained the position of the car park in the NW of the site in an email dated 6 June 2019, and in my opinion this discloses no error of law. Plan P07B, submitted in order to discharge condition 11, shows levels including "145" marked on the car parking area in the NW corner. I note this was 5m above the water level approved for Gallaber Flash.

Enforcement issues

188. Given the many concerns that have been expressed over the years by local interest groups and individuals, I have looked critically at the way the Council has carried out its enforcement functions. The first question in each case is, of course, whether there is a breach of planning control. This may be development carried out without the requisite permission, or it may be a breach of condition.

189. The main concerns which are raised by the documents I have been sent are:-

    a. Whether the diversion of Kell Well Beck in 2011 was handled correctly by the Council as planning authority. So far as I can tell the Council's advice on this issue (in 2013) was sound; and reflects a genuine attempt to help concerned residents navigate the complex intersection of statutory responsibilities. I have found no grounds to criticise the Council in this respect.

b. Whether the breach of condition governing the settlement facility (straw bales) was handled lawfully in 2013. In my view the Council acted promptly and in an appropriate way to ensure that the settlement facility approved in 2008 was put in place. The matter was discussed in depth at the time and the Council's approach was set out fully in correspondence. I have found no error of law; on the contrary, the Council acted promptly and proportionately to resolve the breach of planning control.

c. Whether there has been a breach of the archaeology condition [2003 consent condition 6] when carrying out works within the NW section to construct a car park. In my view, both the District and County Councils might have been criticised for failing to insist on a more rigorous response to condition 6, but the developer's failure to bring an archaeological watching brief to the NW portion of the site when works were undertaken there did not amount to a breach of condition.

d. Whether there has been a failure to provide the requisite visibility splays at the junction with the A65, and whether that remains an enforceable breach of condition. I can find no reference to whether these were provided or not and, notably, I have seen no sign of any concern about visibility splays. The condition was not a pre-commencement condition of the kind that goes to the heart of the consent. If they were not provided at the time stipulated by the condition, the failure to do so was a breach of condition and might remain enforceable today.

e. Whether the provision of the access road constructed in 2013 was a breach of planning control. I have seen no evidence capable of contradicting the judgment of officers reached in 2013 that the access road under construction was in the alignment permitted and not a breach of planning control.

f. Whether there were any breaches of planning control in relation to the Environmental Management Plan [RM approval condition 12] and if so whether they remain enforceable. The condition does not say when the provisions of the plan are to be carried out, save by reference to the occupation of a building. It would be an enforceable breach of condition to occupy a building without also undertaking and continuing the provisions of the plan. However, the condition has little to say about protective measures during the construction period. The EMP's long term objectives are to be met through control of water levels, grazing management and pest control. These measures are described in the most general terms and I have not identified a breach of the EMP in any of the incidents to which my attention has been drawn in the correspondence. As I have explained, the permission might be criticised for its light touch regulation of the conservation interest of this sensitive site, precisely because the Council has very little scope for intervention where development is delayed as this has been.

g. Whether the apparent lack of a legal right to deliver the approved scheme for access to Hellifield Station engaged the planning authority's enforcement powers. In my view it did not: while it would be a breach of condition to develop the site without providing the approved details, there was no obligation to demonstrate ahead of time that the condition would be capable of being met when the time came. The advice given by the Council in 2013 was correct and there is no breach of planning control in this respect.

h. Whether the works carried out in 2013, 2019, and 2020 involving the importation of material have involved a waste disposal operation or other breach of planning control. It will be recalled that the approved level of the car park is 145 AOD, some 4-5m above the approved water level of Gallaber Flash. I have read descriptions of tipping that have some of the hall marks of a waste disposal operation, but if the land required raising to comply with the approved levels then it is perfectly proper to interpret the same works as part of the construction of the car park. I have not read anything, nor seen any photographs which suggest to me that the judgment of officers is flawed in any way.

190. I have explained that the 2003 consent (with RM approval) does not provide the level of transparency and supervision that might be expected in order to protect the ecological interest in the site during an extended construction stage of development.

191. It also leaves the Council with little data or other knowledge of the baseline against which to assess the impact of the development currently proposed (unless the ES for the new application does this, which it is hoped it does).

192. Drawing the above points together and for the reasons I have given in more detail within the main Advice, the view taken by the Council (that as yet there is no breach of planning control to enforce against) appears to me to be lawful. That view is dependent on the facts as set out in detail within this Advice, and in particular the judgment of enforcement officers that the importation of waste materials is undertaken in a manner and location that suggests construction of the approved car park or other element of the approved development.

Mrs Harriet Townsend

Cornerstone Barristers

14 September 2020