CRAVEN DISTRICT COUNCIL

HELLIFIELD FLASHES

Re Planning History and Enforcement Issues

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ADVICE

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1. I am instructed by Craven District Council to advise on certain planning issues which have been raised in relation to the planning history and allegedly unlawful development at a site of approximately 51 hectares on the western edge of the village of Hellifield ("the site"). Outline planning consent was granted in 2003 for a rural environmental centre on the site ("the 2003 consent").

2. I was initially asked:-

   a. Whether the 2003 consent, or the approval of reserved matters in 2005, should have been subject to Environmental Impact Assessment ("EIA");

   b. Whether the 2003 consent was implemented;

   c. To undertake a review of the Council's approach to the enforcement of planning control at the site, bearing in mind criticisms made by others.

3. Following further correspondence during 2020, I have also been asked to consider whether the approval of reserved matters fell within the scope of the authority given to the Head of Planning and Building Control by the planning committee's resolution.

4. Naturally, I approach these questions as a lawyer, my task being to advise the Council on its position in relation to the law, bearing in mind the Council's planning functions and relevant planning policy. It is no part of my role to endorse the approach taken by the applicant or developer, or to express an opinion on the planning merit of development, positive or negative.

5. I was first instructed in late 2019. It was apparent from the start that I needed to review a large number of documents relating to a period of more than twenty years. As it turned out, it took a long time to assemble these, and I suggested that a site visit and conference would make things easier for all concerned. We arranged that visit for 23 March 2020 – and then had to cancel it due to Coronavirus restrictions on movement.

6. The lack of a site visit has not, in my view, affected the reliability of my advice – but it has made it a lengthier process both to interpret the various plans and planning permissions that affect the site, and to piece together the complex planning history that forms an important part of it.

7. This Advice includes a detailed and independent analysis of events stretching back some 20 years. Its structure is as follows

   a. Factual background

   b. Environmental Impact Assessment

      i. The 2003 consent

      ii. The approval of reserved matters

   c. The Committee's resolution and approval of reserved matters

   d. Implementation of the 2003 consent

   e. Enforcement Issues

8. I have identified the source of my information in footnotes. I am confident that I have seen sufficient to support the opinions I have reached on the essential issues.

Factual background

9. Outline planning permission (5/42/149) was granted in 1991 for the comprehensive development of an area of land to the west of Hellifield to form a Railway Heritage Centre, a Country Club Hotel, golf course, access road and park and ride facilities at Hellifield Station. Reserved matters were never submitted and the permission ultimately lapsed.

10. In 2000, planning permission with reference number 5/42/149C was granted for 'the construction of Hellifield Rural Environmental Centre (Comprising tourism, exhibition, training, equestrian and livestock Buildings)'on the 51 ha site which formed part of the land benefiting from the 1991 consent.

11. The Hellifield Rural Environment Centre Ltd applied to renew this application in 2002. It was given reference 42/2002/2763 and permission was granted subject to 12 conditions on the 10 February 2003 ("the 2003 consent")[1]. This consent does not explicitly approve any plans, and I do not have those which formed part of the application. I have assumed that the approved plan for 5/42/149C illustrates the development approved by the 2003 consent. It is labelled 'car park' in the north west corner, with an hotel on the opposite side of the access road. The Gallaber Flash is situated within an area marked with green hatching, and I have assumed that this was the nature conservation area (see condition 5 copied at para 14 below).

12. The Reserved Matters were 'details of the design and external appearance of the buildings, the landscaping of the site and the siting of the manager's house' for which application for approval had to be made before the expiration of three years from the date of the 2003 consent [condition 3, and condition 5 on landscaping requirements].

13. Development permitted by the 2003 consent had to begin either before the expiration of five years from that consent, or 2 years from the approval of the last of the reserved matters to be approved, whichever was later [condition 4].

[1] Item 1 in Folder for counsel.

14. Condition 5 required that details of landscaping

> 'shall include details of a scheme for the preservation or enhancement of that part of the application site shown on the approved plan as a nature conservation area. The scheme shall include a nature conservation area management plan, including long term conservation objectives, management responsibilities and a programme of implementation and maintenance.'

15. ML Evans of Tower Farm applied for approval of reserved matters in 2005, reference 42/2005/5082.

16. On 25 July 2005, the Planning Committee considered the application. Mr Scott-Smith is recorded as speaking for objectors, and Mr R Beck for the applicant.

17. The minute[2] states that the Head of Planning and Building Control was authorised to approve the application

> 'subject to the conditions summarised below, and subject also to prior discussions and agreement with the Environment Agency, English Nature and the applicants regarding retention of the wetland area (either through a condition or as part of the management plan) as opposed to the creation of a lake. In the event of agreement not being reached the Head of Planning and Building Control to report back to the Committee.'

18. An email from the Environment Agency dated 25 August 2005[3] notes that the valued characteristics of the lake (they use this term) are that it should be "full and wet" in winter and "practically empty and dry" in the summer. The officer's visit on 23 August 2005 showed it to be dry and it was this "ephemeral" characteristic of the "lake" they advised the LPA should be retained. The email also notes that the writer had been invited to a meeting on 25 August but had been unable to attend.

19. A letter from English Nature dated 26 August 2005[4] analyses the position of the lake in some detail on 25 August. The key points for present purposes are

    a. The importance of the site for breeding and wintering birds is noted and 'will be retained if management of the site aims to have high winter water levels to provide feeding areas for wintering birds and relatively lower levels during early spring and summer to provide breeding and feeding areas for wading birds.'

    b. English Nature states that after advising the applicant's agents throughout the life of the application 'We believe that we now have a plan which sets out sound principles to achieve [a suitable outline management plan].'

20. The application for approval of reserved matters was granted on 20 September 2005, subject to 16 conditions ("the RM approval")[5].

[2] Received by email 9 July 2020.

[3] Copy received by email 9 July 2020.

[4] Copy received by email 9 July 2020.

[5] Item 5(1) in Folder for counsel.

21. Condition 1 requires compliance with the approved plans comprising GP25/011B, GP25/001a, GP25/002a, GP25/003a, GP25/004a, GP25/005a, GP25/006a, GP25/007a, GP25/008, GP/25/009, 4103/01, 4103/02, 4103/03, 4103/04, 4103/05 and 4103/06.

22. The layout plan 011B shows an hotel adjacent to the access from the A65T but there is no further detail of its design, and the area of "Car Parking" on the other side of that access road lies outside the red line. The RM approval requires that prior to commencement of construction of the hotel building, full detailed design drawings shall be approved and the development must be implemented in accordance with them [condition 2]. I have seen the details submitted to discharge this condition and the Council's letter of 21 November 2007 confirming satisfactory discharge[6].

23. The other conditions imposed on the RM approval concern the following :-

    a. The submission of samples before commencement of certain works to the buildings [conditions 3 and 4];

    b. The location of soil stacks to the hotel building [condition 5];

    c. Details of surfacing materials to be approved before use [conditions 6 and 7];

    d. Details of boundary structures of enclosures before their erection [condition 8];

    e. Control of surface water drainage – requirement for an oil interceptor and a settlement scheme to be approved by the LPA [conditions 9 and 10 – discharged by the Council's letter dated 1 February 2008][7];

    f. Existing and approved levels over the site – the development to be carried out in accordance with details approved [condition 11 – discharged by the Council's letter of 9 January 2008][8];

    g. Environmental impact and mitigation – development not to begin until a full environmental management plan is submitted and approved in consultation with English Nature and the Environment Agency. The development must be carried out in accordance with that approved plan [Condition 12 – discharged by the Council's letter of 9 January 2008][9];

    h. Landscaping – the submission and approval of a scheme before development commenced and compliance with it [condition 13 – discharged by the Council's letter of 9 January 2008][10];

[6] Item 5(3) in Folder for counsel.

[7] Items 5(4) and (5) in Folder for counsel. I note that the Environment Agency were consulted on the submitted Flood Risk Assessment and confirmed satisfactory discharge of both conditions on 31 January 2008.

[8] Item 5(6) in Folder for counsel.

[9] Item 5(7) in Folder for counsel.

[10] Item 5(8) in Folder for counsel. I note discussions had been held with Natural England, as referred to in the submission letter.

i. The pedestrian environment – details to be provided before commencement of development, and implementation in accordance with the approved details [conditions 14 – discharged by the Council's letter of 21 November 2007].

j. Development south of the A65 and the provision of external lighting [conditions 15 and 16 respectively].

24. The following conditions imposed on the 2003 consent prevent development commencing before approval of details:-

a. Condition 6 – the implementation of a programme of archaeological work in accordance with a written scheme approved by the LPA. I have seen the details submitted to discharge this condition in 2007 and the Council's letter of 9 January 2008 to D Hill confirming satisfactory discharge[11];

b. Condition 8 – details of pedestrian, wheelchair and vehicular links within the site and the adjacent Hellifield station site approved by the LPA. I have seen the details submitted to discharge this condition in 2007 and the Council's letter of 21 November 2007 to D Hill confirming satisfactory discharge[12];

c. Condition 9 – details of foul and surface water drainage works approved by the LPA. I have seen the details submitted to discharge this condition in 2008 and the Council's letter of 1 February 2008 confirming satisfactory discharge. This letter also states that all the pre-commencement conditions had been met[13].

25. Condition 12 provides that, before commencement, visibility splays should be provided at the junction of the access road with the A65(T). However, this is not a pre-commencement condition of the kind that would render ineffective works undertaken by way of implementation of the consent[14]. I do not know whether or not these visibility splays were provided before implementation but, for the avoidance of doubt, I consider the implications of not complying with this condition later within this Advice.

26. On 1 February 2008 the Council confirmed to David Hill, agent for the applicant, that all pre-commencement conditions imposed on the 2003 consent and the RM approval had been met. By letter dated 6 February David Hill wrote

> "My client started work on the approved new access road directly south off Waters Side Lane and directly west of Kell Well Beck at Hellifield on Monday 4 February 2008. A watching brief was undertaken during the initial top soil strip of the site by Archaeological Services WYAS or Morley, Leeds. No archaeological remains were found."

David Hill sought confirmation that the development permitted by the 2003 consent had been implemented, and this was given in writing by the Council in a letter dated 7 February 2008.

[11] Item 2 in Folder for counsel

[12] Item 3 in Folder for counsel

[13] Item 4 in Folder for counsel

[14] See *Howell v Waveney DC* [2018] EWHC 3388 (Admin).

27. The following year, on 16 July 2009, the Council issued a scoping opinion to JO Steel Consulting, relating to development of land for a hotel and conference centre, 30 holiday apartments, 60 bed care home, 9 hole golf course and club house, garden centre, holiday village comprising 185 cottages and business park at land adjoining Hellifield Station. I have not seen the letter of 1 June 2009 requesting the scoping opinion, nor any plans or illustrations of the proposed development. No application for planning permission followed – perhaps not surprising given the onset of a deep recession following the 2008-9 financial crash. The scoping opinion advised that the EIA should cover (amongst other matters) ecology/biodiversity, landscape, and traffic.

28. In September 2010 there was correspondence about what had been permitted and whether the 2003 consent had been implemented. The Local Planning Authority advised that it was satisfied that the works to construct the access successfully implemented the 2003 consent.

29. There must have been some concern expressed about Kell Well Beck in 2011, as later correspondence refers to an email addressing alleged diversion of the beck[15].

30. On 20 June 2011 a meeting was held between Officers about the proposed development[16] and I have seen a letter from David Hill to a land agent which appears to be part of an exercise in land assembly[17].

31. In February 2013 the Council investigated complaints received about the dumping of possible waste and soil/earth from other sites that the Developer was working on. Those corresponding by email over the response to these complaints include

    a. An Officer, who contacted the Biodiversity Officer for the Ribble who was involved in the original consultation on the 2009 Scoping Opinion;

    b. The Environment Agency who was investigating complaints about other waste said to be spread on adjacent fields.

32. Amongst other things the Officer asked the Environment Agency for assistance with her investigation of alleged breaches of planning conditions, saying

> "The condition requires a settlement facility to be in place throughout the construction period to remove suspended solids from surface water run-off. From your visit to the site or discussions with [the Developer] are you aware as to whether or not there is a settlement facility on site? I presumed that this is something you may have looked for in order to ensure the water (in the nearby kell well beck) is not polluted in any way."

33. The Environment Agency's reply was as follows

> From my initial site inspection, it would appear that there is no such settlement facility. This would be in the form of a pond, swale, soakaway or device such as a 'silt buster' designed to

[15] The letter from an Officer to a complainant of 21 May 2013. I note that correspondence in 2005 also referred to diversion of the Beck – both the Environment Agency and English Nature referred to it in correspondence with the LPA. However, the EA's visit in August 2005 was at least partially reassuring on the question whether it had caused any harm to the ephemeral characteristics of the lake.

[16] 2.4.2 of the Environmental Statement, 2016, Wardell Armstrong.

[17] Email dated 10 May 2020 from Councillor Moorby to Legal Services Manager.

> settle out or filter suspended solids from any run-off from the site in order to prevent silt from entering the watercourse. …
>
> My immediate concern with the building of the road was its proximity to the Kell Well Beck and whether this constituted a flood risk. I also expressed some concern about potential for impact on water quality from the stripping of the topsoil and stockpiling of the earth close to the beck – there did not appear to be any measures to protect the beck from run-off generated by the construction works. This would previously have been considered as part of an application for land drainage consent, when the EA would have issued pollution prevention advice on the back of any method statement for dealing with the silty water run-off.

34. Also in February 2013, the Local Planning Authority prepared a statement on "Recent Development at Hellifield Flash" which is introduced as follows: "The comments below are not legally binding and comprise an informal officer view only to help give a better understanding of the current position." The statement was sent to the CPRE and to "other interested parties"[18]. It was that officer's view that

    a. After implementation in 2008, no further works of construction were undertaken until "very recently".

    b. The reserved matters application could not have been subject to EIA[19].

    c. There was no legal requirement to undertake a screening opinion of the 2000 consent, since that application was governed by the 1988 EIA Regulations and not those introduced in 1999. This was said to be the subject of a legal opinion[20].

    d. A screening opinion should have been undertaken for the 2003 consent. However, the authority could not do so retrospectively 10 years after the application was granted. The statutory consultees were involved in the decision making process, and conditions (such as that requiring an Environmental Management Plan under condition 12 of the reserved matters approval) ensured no harm was caused.

    e. In conclusion Gordon Halton Homes was permitted to work on site in accordance with plans, conditions and the environmental management plan – something being monitored by the planning enforcement team.

35. On 11 March 2013 an Officer wrote to Councillor Moorby as follows (in reply to his letter dated 5 March 2013).

> "Unfortunately the Council are yet to receive a retrospective application for the pond. I met with [a representative of] David Hill on 7th March 2013 and discussed the options available to him in order to try and regularise the situation, unfortunately other unrelated matters have delayed the submission of an application. As you are aware the Council try to resolve enforcement issues by way of negotiation and persuasion in the first instance, taking formal enforcement action as a last resort. [The agent] has been responsive to our suggestions and it is hoped that the matter will be resolved in due course once he has made a submission to the

[18] Officer's letter of 12 March 2013 to CPRE.

[19] A point I return to later. He was mistaken on this point.

[20] I have not seen the opinion. In March he said the Opinion had been recently obtained. I am informed by the Legal Services Manager that the Council has been unable to located this Opinion.

> Council, I have been advised by him that this will be within the next month. Once we receive something I will update you again."

36. The Councillor had also raised concerns about the alleged diversion of a watercourse – in response to which an Officer advised that such matters must be dealt with by North Yorkshire County Council. She provided contact details for the purpose of alerting them to the concerns.

37. Also on 11 March 2013 an Officer wrote to "Save Our Craven Countryside" and advised him that

    a. The access road[21] appears to be in the approved position in relation to the beck – but that she would check when next visiting the site;

    b. That evidence of diversion of a watercourse is needed before the NYCC will investigate a complaint; and

    c. How to make arrangements for inspecting documents held by the Council.

38. NS also wrote to Mr Halton by letter dated 8 March 2013 about the implementation of the settlement facility (but I do not have a copy of this letter) and followed it up with a telephone call on 9 April 2013[22].

39. On 12 March 2013 an Officer wrote to CPRE Craven, in reply to the letter of 28 February 2013. It seems the RSPB had lodged a holding objection to an application on the site in 1998 – saying that EIA was required. The Officer's response was that "the requirement to carry out EIA's to accompany certain types of planning application wasn't in place until 1999 and yet the later [sic] was dated 1998." I think the Officer must have misunderstood the legal opinion – since it was the specific requirement to carry out a screening opinion that was introduced in 1999; EIA had been a requirement of certain applications for several years by then. I will return to this point in due course when considering EIA issues. The letter continues to point out that the holding objection had been withdrawn after the case officer had consulted the RSPB with revised information.

40. On 8 April 2013 SOCC wrote asking the Council to serve a breach of condition notice on Gordon Halton Homes.

41. On 9 April 2013 an Officer wrote to CPRE as follows

> "I have negotiated with the developer and he is due to install the settlement facility (this should have been done prior to commencement) on Wednesday 10th April 2013. The details of the settlement facility were agreed back in January 2008, a report was submitted to the Council who then consulted with the EA. At the time it was considered by the EA that sufficient information had been provided to recommend that the condition be discharged. I have attached the relevant document that was originally submitted for your information.

[21] I have 23 photographs of the site taken on 14 February 2013 [001.JPG – 023.JPG] which suggest the construction of an access track running in a straight line towards the flash, and some stored soil covered in grass alongside.

[22] The letter is referred to in NS's later letter of 2 May 2013.

> Once the settlement facility is in place, I would like to know if anyone in your department would normally check the work that has been done to ensure it has been carried out to a certain standard? I am aware that the complainants believe that despite the installation of the settlement facility it may have been done too late and there is a danger that harm may have already occurred. I am also concerned about the possible harm that may have already been caused to wildlife and aquatic life. Obviously I will be visiting the site to ensure that the developer is no longer in breach of the planning approval and that the work has been carried out however I do not have the expert knowledge to suggest whether or not the settlement facility has been implemented successfully. In addition I would also be grateful for your opinion as to whether or not there has been any possible harm to aquatic life since development began in January 2013 as a result of the lack of settlement facility."

42. The Environment Agency's reply on 9 April 2013 was

> "Many thanks for this, having had a quick scan, it appears that the settlement facility would seem to be straw bales placed in Gallaber pond and Kell Well Beck – with the pond being suggested as a 'settlement facility' and solids discharged to Kell Well Beck being allowed to settle out in the slack water. I'm not sure who approved this back in 2008 or whether the biodiversity officers at the time had any input but it doesn't seem a very robust management plan! I certainly don't think that allowing solids to settle on the bed of the beck can be justified – the consultant claims that this is ok because flows are sluggish downstream of the pond. What happens when the flows increase after rain? Potentially all those solids will be picked up and carried downstream.
>
> I am not really qualified to say whether wildlife has sustained any damage due to works already having started – we'd need to take samples and in the absence of any sample data from prior to commencement of the work, it would be difficult to assess whether in fact there has been any damage. I will forward on to [another Environment Agency Officer] to see what she thinks. It might also be worth running it past the NYCC Ecologist for their comments.
>
> From my perspective, I am looking at pollution prevention measures and whether straw bales are going to be enough in themselves.
>
> However, as we have obviously approved their proposals we will presumably have to work with what we have got."

43. On 10 April 2013, SOCC wrote to the Local Planning Authority and others asking how "this" would fulfil condition 10 and how will it prevent pollution draining into the ground and contaminating Kell Well Beck? He attached four photographs (showing straw bales within fields).

44. On 2 May 2013 an Officer wrote to the Developer (and copied this letter to all complainants) reminding him of the JBA Flood Risk Final Report which was approved by the Council on 1 February 2008, and the requirements of paragraph 5.14 (details of measures to be followed when carrying out works at the site). She warned the Developer the Council would continue to monitor the situation.

45. On 6 May 2013 SOCC wrote to the Council[23].

[23] I do not have a copy of this letter. It is referred to in later correspondence.

46. An Officer wrote to SOCC on 21 May 2013 by way of a short but comprehensive response to his stated concerns, stating

    a. The Hellifield and Long Preston bypass and the railway heritage project would not be going ahead.

    b. That the planning enforcement team had been in regular contact with the EA and the North Yorkshire County Council's Biodiversity Officer because they have the expertise to assess whether there is or has been potential for harm to wildlife; they have continued to stress the importance of wildlife in letters to the developer.

    c. On the access and the detail of its construction, the County Council's highways engineer had advised that "the road was being laid correctly and was in accordance with the plans submitted to and approved by Craven District Council. The developer did obtain a use of waste in construction exemption certificate from the Environment Agency …."

    d. On the settlement facility that "it is acknowledged that in order to comply with condition 10 a settlement facility should have been provided before the commencement of any works at the site. Unfortunately this did not happen, however the Planning Enforcement Team did make the developer aware of the importance of the situation …. Following the letter, as far as I am aware no further work was undertaken at the site." She confirmed that the placing of straw bales in this particular location was considered sufficient.

    e. On condition 5 and the Environmental Management Plan, that there had been no breach of the condition.

    f. On the diversion of Kell Well Beck, that an explanation had been given in 2011 that this is a matter for North Yorkshire County Council as Lead Local Flood Authority, and that their approach to alleged diversions had been set out in an email of 11 March 2011[24].

    g. On pedestrian access to the station, and compliance with details submitted for conditions 8 and 14 of the reserved matters approval, approved on 21 November 2011, that this would be monitored. Advised that when the development reaches the stage that pedestrian and disabled routes are needed then it is the responsibility of the developer to ensure they are provided.

47. The Officer ended the letter confirming that no formal action was being considered but the concerns of SOCC were fully acknowledged by the Council.

48. SOCC replied to this letter on 12 June 2013, saying

    a. Surely cancellation of the bypass means the designation of the site as a tourism development opportunity should be cancelled.

    b. An officer of the Local Planning Authority has acknowledged that the failure to undertake EIA before planning consent was granted was an error.

[24] I do not have a copy of this email.

c. There is evidence of great crested newts on site. Had EIA taken place these would have been confirmed and stricter conditions applied.

d. The developer remains in breach of conditions 5 of the 2003 consent and 12 of the reserved matters approval since development has commenced and therefore the management plan should be in place.

e. There has been a diversion of Kell Well beck – it is acknowledged in the JBA report within the reserved matters file.

f. The lack of a right to secure access to the station was known before discharge of the planning conditions which raises questions about why the condition was discharged and on what evidence.

49. On 24 June 2013, Julian Smith MP wrote to the Chief Executive of the Council asking him to consider the request for a meeting.

50. He wrote again on 22 September 2013 (a letter I have not seen), to which an Officer replied on 10 October 2013. She wrote the following about the Environmental Management Plan:-

> "My letter of 3rd July 2013[25] still stands in this respect. In addition, we have written to the Developer (copying in [NYCC]), to enquire about the implementation of the Environmental Management Plan and who is responsible for the monitoring and reviewing of the plan. [NYCC] has not yet made any response. [The Developer] has responded to advise that he is discussing the matter with his agent and he will be in touch again soon. We will update you again when we can provide more information."

I have not seen any sign of that additional information.

51. I have 20 photographs taken on 16 September 2014 showing views of the site and the point at which the beck is culverted.

52. Ballan Ltd became interested in development of the site and, on 30 November 2016, applied for outline planning permission for

> development of a leisure centre, including swimming pool, hotel and visitor accommodation, including up to 300 lodges, a park and ride facility, pedestrian access to Hellifield Station, parking areas, bus and coach drop off point. Landscaping including ground modelling and water features.

53. The site is 31.75ha (some 20 ha less than the 2003 consent). It excludes the Gallaber Flash and surrounding land. It includes the access part-constructed by way of implementation of the 2003 consent. The Applicant stated the proposal fell within Schedule 2 Part 12(c) of the EIA Regulations 2011, and that it had decided to undertake EIA voluntarily (not having requested a screening opinion).

54. The cumulative assessment claimed "there are no similar developments nearby"[26], and it seems clear the proposal was promoted as a replacement for the 2003 consent.

[25] I do not have a copy of this letter.

[26] 6.3.3 of the Planning Statement, 2016, prepared by Wardell Armstrong.

55. Of some note, environmental impacts on overwintering birds and flashes were to be the subject of more detailed assessments at reserved matters stage; and the re-alignment of Kell Well Beck was described as a beneficial impact[27].

56. The main issues identified in the officer's report of 29 March 2019 (OR) were landscape and visual impact, ecology, amenity, heritage assets, flooding and drainage, highway safety, and the principle of development. It noted as follows

    a. The proposal conflicts with saved and draft policies of the development plan. Notably, draft policy EC4B "Tourism Development Commitment at Hellifield" is not supportive of the application.

    b. There are extant planning permissions for a hotel and a rural environment centre on part of the site.

    c. The RSPB (and several others) objected, but later withdrew their objections in the light of significant amendments to the scheme proposed. There does appear to have been significant movement on issues such as the management of Gallaber Pond, the creation of additional wetlands, and the acquisition of land to provide compensatory habitat.

57. In early June 2019, when works were being carried out on the car park area to the north west of the site, an Officer and the Developer corresponded by email over the drainage plan to which the developers were working. The Officer informed the developer that residents were alleging contaminated materials were being imported and that he had passed those allegations to the Environmental Health team. The developer's perspective was that they had bought the site with the benefit of planning permission, were building the 40 bedroom hotel and had an operator in place to run it.

58. At about this time the Environment Agency Regulatory Enforcement Officer for the Cumbria and Lancashire area, visited the site

59. On 6 June 2019 an Officer wrote to a complainant and others, seeking to clarify the view that a lawful start was made to secure the 2003 consent.

60. On 4 July 2019 the Environment Agency visited the site and made a number of recommendations to the contractor, later preparing a report. He noted the ground works taking place, the bunds complained of, and the straw bales. He expressed his opinion thus:-

> "In my opinion [the bund of topsoil adjacent to the ground works area] looked a good example of a pollution prevention measure. The key being to prevent water containing suspended solids leaving the ground works area, and allowing it to soakaway and settle out the solids. The straw bales should act as secondary emergency containment but should not alone be relied upon."

61. On 20 July 2019 a complainant asked for proof that an Archaeological Survey was done within the car parking area. An Officer replied on 7 August 2019 that archaeological

[27] 8.5.1 of the Planning Statement.

conditions were satisfied by the watching brief undertaken when work commenced in 2008. He advised her that no further action was required.

62. On 6 August a complainant raised a number of questions about the works undertaken around the Gallaber Flash. It seems from the Officer's reply of 12 August 2019 that

    a. the complainant was working from an incomplete copy of the Flood Risk Assessment (and LH uploaded a complete copy to the website);

    b. The excavation taking place accorded with the proposed remodelling of the lake as proposed by approved plan P(0)07 Rev B. This shows a large lake controlled at 140 AOD, with a perimeter slope rising by just over a metre.

63. In September/October 2019 an Environmental Crime Officer with the Environment Agency investigated the importation of material to the site adjacent to Waterside Lane. He responded to a concerned local resident that the U1 exemption which had been relied upon in June 2019 was not appropriate and that activities had to cease – and did. He went on to explain that by September the site was active again but with a CL:AIRE Definition of Waste Code of Practice in place. This, the Environment Agency explained

> "provides a clear, consistent and efficient process which enables the reuse of excavated materials either on a site or their movement between sites, without it being classed as a waste. This is a way of reducing the amount of material going to landfill. I have had the CL:AIRE checked by a Waste Specialist colleague who has advised that it is all above board and in order. Part of the CL:AIRE is a Materials Management Plan which confirms that all materials to be used will not harm human health or pollute the environment."

64. At about the same time, an Officer of the North Yorkshire police visited the site and introduced himself to a representative of the developer on site, serving a report on him (I think this was the EA report).

65. In November 2019 the Council adopted the Craven Local Plan. This includes policy EC4B which is supportive of "alternative sustainable tourism development on land at Hellifield identified as grey hatching on Diagram EC4B" subject to the satisfaction of a number of requirements. The land identified as grey hatching corresponds to that approved under the 2003 consent (including the car parking area, the hotel adjacent to the access, and the Rural Environment Centre, all as marked on plan 011B).

66. On 10 January 2020 an Officer visited the site and saw no activity.

67. On 15 January 2020 an Officer contacted North Yorkshire (LLFA) to see if they had told the developer to stop. They said that they were in the process of contacting the developer.

68. On 24 January 2020 an Officer wrote to the Council's Chief Executive addressing a range of matters which were then being considered by a number of different public authorities including the police (great crested newts), the Environment Agency (the importation of waste), and North Yorkshire (LLFA on lack of drainage consent).

69. In February 2020 a complainant wrote warning of tipping at Waterside Lane and then another complainant wrote to the Local Planning Authority and others alerting them with photographs to the presence of "wagons" which "are queuing up to tip waste all day every day on the so-called "car park" at Waterside Lane?" This is the area at the north west of the site where the hotel car parking was approved in 2008. She also notes

that "a new lake has been formed in the area scooped out for more waste to be buried"[28]. Another complainant stated

> "I am sure this has nothing to do with the hotel development as the rubbish is piling up so high it would be a mountain chalet if built. I suspect the developer is selling the site as land fill to other developers. If this looks like the case they should have a license and if they do not, they should be prosecuted and made to clear the site."

70. In March 2020 an application for outline planning permission was made for

> up to 99 lodges, reception cabin with parking, and landscaping including ground modelling and water features (resubmission of previous application 42/2016/17496 refused 28 March 2019)

71. This application has yet to be determined.

Environmental Impact Assessment

72. I am asked whether the 2003 consent and/or the 2005 reserved matters approval should have been subject to EIA.

73. As is well known, the legislative source of the requirement to carry out an environmental impact assessment is the European EIA Directive, transposed into English law by Regulations. The European Directive has been amended and replaced several times, as have the domestic Regulations required to transpose it into UK law.

The 2003 consent

74. The legislation applying to the 2003 consent was as follows

    a. The EIA Directive of 1985 (85/337/EEC) as amended in 1997 (97/11/EC); and

    b. The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999/293, which came into force on 14 March 1999[29].

75. The 1999 Regulations prohibit a local planning authority from granting planning permission for "EIA development" without taking the environmental information into consideration [Regulation 3]. The environmental information is, in short, an Environmental Statement within the meaning of the Regulations and the fruits of consultation on that Statement as required by the Regulations. As is now widely understood, EIA is a process and not an outcome or a document – it is the process of (a) submission of an ES; (b) informed consultation upon it with statutory consultees and the public; and (c) the consideration of the environmental information by the planning authority when taking decision on the application.

76. The first step for any planning authority, therefore, is to decide whether an application should be required to follow to that process, i.e. whether the development is EIA development.

[28] I am not quite sure where this is.

[29] As amended by the EIA Regulations 2000/2867, which came into force on 15 November 2000.

77. The Regulations define EIA development as development of a description either falling within Schedule 1, or "Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location." This definition of EIA development has remained consistent and there is a wealth of case law assisting with its interpretation[30].

78. The question whether any particular development project falls within Schedule 1 or Schedule 2 is a question of law, turning on the interpretation of that Schedule. If, as a matter of law, the development does not fall into either Schedule it is not EIA development (unless the Secretary of State makes a direction under Regulation 4(8) of the EIA Regulations 1999, which did not happen in this case).

79. So, for present purposes, the crucial question is whether the development proposed in 2002 was Schedule 2 development (it did not fall within Schedule 1). If so, the Council should have adopted a screening opinion – should have made a reasoned decision taking into account the selection criteria in Schedule 3, whether or not the development was likely to have significant effects on the environment by virtue of the factors mentioned. The adoption of a screening opinion to the effect that the development is EIA development determines the issue[31].

80. Paragraph 2 of the Schedule "sets out the descriptions of development and applicable thresholds and criteria for the purpose of classifying development as Schedule 2 development". These are taken directly from those in Annex 2 of the Directive itself. There are 13 paragraphs, of which the twelfth is headed "Tourism and Leisure". Within that category are ski runs and ski lifts etc; marinas, golf courses and associated development; camp sites and caravan sites; theme parks; and the only candidate for the development in question is category 12(c) "*Holiday villages and hotel complexes outside urban areas and associated development*."

81. The European Commission has published Guidance on the interpretation of project categories but only gives guidance on specific categories where there have been Court rulings on the issue or there is other relevant information available. For this category there is no specific guidance, so I turn to the general principles within Chapter 2. As is often said

> The wording of the EIA directive indicates that it has a wide scope and broad purpose. This has been consistently held by the Court. In case C-72/95 *Kraaijeveld and others*, paragraph 31, the Court stated that 'The wording of the Directive indicates that it has a wide scope and a broad purpose. That observation alone should suffice to interpret point 10(e) of Annex II[32] to the Directive as encompassing all works for retaining water and preventing floods — and therefore dyke works — even if not all the linguistic versions are so precise.' The Court emphasised again the wide scope and broad purpose of the Directive in Case C-227/01, *Commission v Spain*, paragraph 46.

82. It follows that it is necessary to bear in mind this wide scope and broad purpose when interpreting paragraph 12 and the phrase "hotel complex". The NPPG makes the same

[30] See for example *Loader v SSCLG* [2012] EWCA Civ 869.

[31] Regulation 4 of the EIA Regulations 1999.

[32] Construction of roads, harbours and port installations, including fishing harbours.

point (and provides a link to the above guidance) at ID: 4-031-20170728. Notably, it states

> The fact that a particular development is not specifically identified in one of the Schedules does not necessarily mean that it falls outside the scope of the Regulations. For example, the Schedule 2.10(b) category, "urban development" (which accounts for by far the largest proportion of Environmental Impact Assessment development in England), includes residential and other development of an urban nature.

83. But neither does it mean that it necessarily does fall into the scope of the category which includes "hotel complexes". If it were necessary to reach a formal decision on this issue, I would look at the different linguistic versions of category 12(c) in order to reach a view of its scope (the exercise referred to in the above extract from *Kraaifeveld*). Clearly not all hotels are hotel complexes – or the second word is meaningless. But what is it that makes the difference?

84. I have found no case law or planning decision[33] which purports to define "hotel complex" or to distinguish it from "hotel".

85. I note, however, that the adjective "complex" connotes something having a lot of different but related parts: see, for example, complex eye, complex argument, complex procedure.

86. I have also noted the widespread use of the term "hotel complex" within appeal decisions when referring to the site of a hotel together with related, ancillary, uses (eg marquee, car park, gardens, leisure facilities, restaurant, and function rooms) whether these are separate or within a single building.

87. Retuning to the case in point, the Council had an application in front of it with more information than I have now, (I have only the development as it was described in the 2003 consent, and as is illustrated in the plan which I understand illustrates the development approved)[34]. However, it seems doubtful (given the lack of information about the hotel available in 2005) that there was much more detail on the proposed hotel.

88. I am also influenced by the fact that an officer of the Local Planning Authority prepared a statement in February 2013[35] which states that "Advice has been taken on this issue and it appears that a screening opinion, and therefore potentially an EIA, should have been undertaken." That officer went on to say why, in their view "whilst a procedural error may have occurred in 2003, the relevant issues were considered and no harm was caused." Perhaps the person providing legal advice in 2013 had more information than I have about what was proposed in 2002.

89. For all these reasons taken together I think it quite possible that the hotel part of the development fell within the description "hotel complex", consisting as it does a substantial L shaped hotel building, a separate house for a manager, and a separate car park. I cannot rule out that the Council erred in failing to carry out a screening opinion

[33] I have used the database Compass as my source in this respect.

[34] This is drawing ENG 154 entitled Proposed Layout and stamped received 24 March 1998.

[35] Referred to above at paragraph 29.

in 2002 (or before granting consent in 2003). If the Council did not have enough information (as I do not) to determine definitively whether or not they needed to screen the development, they should have asked for more information from the applicant [Regulation 7].

90. I turn to the area of the site, which at 51 hectares is well over the threshold of 0.5ha in Schedule 2. There may have been questions as to whether the site of the hotel complex should be the whole site for the purposes of the screening opinion, particularly bearing in mind the fact that the proposal was expected to deliver a distinct enterprise to that of the Rural Environment Centre, but I see no possible basis on which it could be under the threshold. I also think it quite likely that the "project" for screening (and potentially EIA) purposes would have extended to the entire development for which application was made.

91. In conclusion, and bearing in mind the wide scope and broad purpose of the Directive, in my view any uncertainty on the definition question (whether the development proposed included an hotel complex) should have been resolved in favour of undertaking a screening opinion to see whether significant effects on the environment could be ruled out.

92. Significant effects may be positive or negative, and a precautionary approach must be taken to the question whether or not they are likely. This means that wherever there is a "serious possibility" of significant effects they are likely[36].

93. As has been well established, there are limits on the assumptions as to mitigation that a planning authority can make when carrying out a screening opinion, and the state of the law is summarised within the NPPG at ID: 4-023-20170728.

94. The English guidance available at the time on screening (Circular 2/99) stated this about the category of Tourism related development

> A33. In assessing the significance of tourism development, visual impacts, impacts on ecosystems and traffic generation will be key considerations. The effects of new theme parks are more likely to be significant if it is expected that they will generate more than 250,000 visitors per year. EIA is likely to be required for major new tourism and leisure developments which require a site of more than 10 hectares. In particular, EIA is more likely to be required for holiday villages or hotel complexes with more than 300 bed spaces, or for permanent camp sites or caravan sites with more than 200 pitches.

95. For all these reasons, it seems to me quite possible (albeit far from certain) that the Council erred in failing to subject the 2003 consent application to EIA. In 2013, an officer expressed the view that a screening opinion should have been adopted, and it is impossible to second guess its result, or the outcome of the more rigorous assessment that (if appropriate) EIA would have required.

96. I am conscious that I am referring to some caselaw and guidance which was not available in 2002, but it sheds light on issues which were live in 2002 and (albeit with hindsight) helps us to understand the process which should ideally have been undertaken.

[36] *R (Bateman) v South Cambridgeshire DC* [2011] EWCA Civ 157 at para 17.

97. Turning to the important question of its status, the 2003 consent has been treated as the baseline of committed development for so long that it underpins the recently adopted policy EC4B within the Craven Local Plan, and many other decisions have been taken in reliance on its having been lawfully granted. It is lawful on its face and lawful unless and until it is quashed by the Planning Court. A quashing order is always a discretionary remedy, even where legal error is admitted, so the possibility of procedural error on the part of the Council in 2003 does not in and of itself undermine its validity.

98. The fact that we're looking back over more than 17 years, and that the Local Planning Authority acknowledged in 2013 (over 7 years ago) that a legal error was made, also mean that there is very little (close to zero) prospect of a judicial review of the 2003 consent being successful. Any challenge would face the immediate (and in my view insuperable) hurdle of delay.

99. So, while I do think it likely that an error or errors were made in 2002, I do not think the 2003 consent is at any material risk of a successful challenge.

100. With that in mind I turn to the 2005 Reserved Matters approval.

The RM Approval

101. The legislation applying to the RM Approval, dated 20 September 2005 was as follows

    a. The EIA Directive (85/337/EEC) as amended in 1997 (97/11/EC) and 2003 (2003/35/EC)[37]; and

    b. The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999/293, which came into force on 14 March 1999[38].

102. At the time of the application and approval of reserved matters, the general legal consensus in the UK was that EIA could not be required at reserved matters stage.

103. That changed following a ruling of the ECJ and the subsequent judgment of the House of Lords in *Barker v Bromley LBC* [2006] UKHL 52. In 2008 the Regulations were amended with effect from 1 September 2008 to allow for screening and EIA of applications for reserved matters ("subsequent applications") for certain projects, e.g. where Schedule 2 development has not previously been screened. The Regulations are not retrospective (see eg Regulation 3 of the 2008 Regulations /2093). They apply only to applications not determined before 1 September 2008.

104. However, it is worth recognising that the change in the Regulations was made to correct a failure by the UK properly to transpose the EIA Directive – as *Barker v Bromley LBC* made clear. This means that it was never strictly correct to say that "reserved matters cannot be subject to EIA" as Circular 2/99 did, and the Officer's statement in February 2013 to that effect was wrong.

[37] The 2003 Directive expanded provisions relating to public participation and access to information in line with the Aarhus Convention.

[38] As amended by the EIA Regulations 2000/2867, which came into force on 15 November 2000.

105. So, there is no simple answer to whether the RM Application should have been screened – certainly there was no UK law providing for it, since the EIA Directive (as the European Court confirmed in 2006) required that EIA of "subsequent applications" should be possible. Of course, the point wasn't taken. The question now is whether there are any grounds for criticising / challenging the RM Approval for the failure to undertake a screening opinion.

106. The amendments made to the EIA Regulations in 2008 give a framework for considering this as they put right the deficiencies of the 1999 Regulations in this respect in the light of the ECJ's ruling.

107. If, as I have advised may have been the case, the development approved by the 2003 consent was Schedule 2 development, the application for reserved matters should have been screened [as was later required by the amended Regulation 7].

108. It is not possible to predict the outcome of that screening process but, had an application for judicial review been made at the time, it would have stood a reasonable chance of success. This is, however, far from certain: the law in 2005 was as held by the Court of Appeal in the *Barker v Bromley* case, namely that EIA could not be required at reserved matters stage. However, in 2003 the House of Lords had referred the question of EIA for reserved matters applications to the ECJ, and its judgment was awaited. An application for judicial review made in 2005 would have had to seek a stay pending the outcome of that reference. It would have taken skill and determination.

109. I would like to emphasise, too, that the error I've identified was made many times over the years in the belief that EIA could not be required at reserved matters stage (after all this was the advice in Government Circular 2/99), and there is effectively no chance of success for an application for judicial review were one to be brought now, some 15 years after the decision in question. For the same or similar reasons to those set out for the 2003 consent, in my opinion the reserved matters approval remains a valid decision and the long delay since any grounds for judicial review arose protects it from legal challenge.

The reserved matters approval

110. As already mentioned, the Council approved reserved matters on 20 September 2005, subject to 16 conditions.

111. I am asked to consider whether the terms of the approval fell outside the scope of the authority delegated to the Head of Planning and Building Control on 25 July 2005. If approval was granted without lawful authority, it would have been vulnerable to judicial review if an application had been brought promptly. As for the other questions regarding decisions taken over ten years ago, the passage of time would in this case, in my opinion, be fatal to any application for judicial review.

112. Nevertheless, the Council has asked me to look at this question, and accordingly my opinion follows.

113. Authority to approve the application was given to the Head of Planning subject to prior discussions and agreement with the EA, EN, and applicant regarding retention of the

wetland area as opposed to the creation of a lake. Thus a process, not an outcome, was mandated.

114. It is worth pausing for a moment to consider what the committee meant when it distinguished wetland from "the creation of a lake". After all, Gallaber Flash was already a lake (the word used for it by the EA) or a pond (used by others including EN).

115. I understand that there was some suspicion at the time that the applicant wished to turn the Gallaber Flash into a mere fishing lake with limited environmental interest – full all year round.

116. In that context, the committee's objective (bearing in mind its statutory function) was to ensure that the Gallaber Flash would function in a way which fosters the environmental interest of the site, referred to by the EA as its "ephemeral characteristics". It should, generally speaking, be full in winter and dry in summer. This objective can be seen to have been shared fully by both the EA and EN in their letters (referred to briefly above at paras 18-19). While I haven't seen correspondence from the applicant, its agreement can be inferred by the fact both the EA and EN explicitly give their agreement to the course proposed by the applicant at that time, as set out in the outline environmental management plan.

117. In short, I see no possible basis for concluding that the officers (and therefore the Head of Planning) acted in excess of the authority given to them on 25 July 2005: they met with the EN and tried to meet with the EA. While we do not have a minute of the meeting on 25 August 2005, it is reasonable to conclude that the letters which followed are sufficient evidence that the applicant, the EA, and EN, agreed that the proposed outline management plan would meet the objective pursued by the planning committee, retaining the wetland "as opposed to the creation of a lake".

Implementation of the 2003 consent

118. The third issue I am asked to address is whether the 2003 consent was implemented.

119. I have set out the facts in some detail above. All the evidence I have seen points to the following conclusions:-

    a. Works falling within the scope of s56 of the Town and Country Planning Act 1990 were carried out before the date on which the 2003 consent would otherwise have expired; and

    b. all 'conditions precedent' on the 2003 consent and on the RM approval were discharged before any works were undertaken. In other words, any breaches of planning control which may have taken place on the site did not render those works ineffective in implementing the consent.

120. Further, the Council does not have to rely on views reached over 10 years later, since officers considered the matter and confirmed lawful implementation on 7 February 2008 [see paragraph 26 above].

121. That letter does not itself answer the more involved question whether the 2003 consent, construed together with the RM approval, permits the construction of a car park in the NW corner of the site.

122. In my opinion it does permit a car park in that location. There was no legal requirement for the site of the reserved matters application to extend to the site identified in the 2003 consent for car parking.

123. The 2003 consent required that details of pedestrian, wheelchair and vehicular links within the site be approved before development commenced (condition 8). The RM approval required that "levels of paths roads and parking areas" across the site be approved before development commenced (condition 11). 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.

124. Although the area of car parking lies outside the application for approval of reserved matters, the condition was, in my view, effective to control levels in that area since it lay within the site of the 2003 consent and on land controlled by the applicant. This appears also to have been the view of the developer.

125. On this question the Officer's email of 6 June19 said this

> "The car parking area (already approved at outline stage) was shown on the submitted drawings but was excluded from the final approved red outline plan (Drawing GP25/011B, attached.)
>
> "I believe that this was because no details for the car parking areas were submitted at the time and the appearance and layout of the car parking areas would be assessed at a later date. To that end, Condition 11 was included in the Decision Notice.
>
> "Drawings 6252/P(0)06 rev C and 6252/P(0)07 rev B (copies attached) were submitted to the Council in December 2007 to discharge Conditions 11 and 13 of 42/2005/5082. The details were deemed to be acceptable to discharge the conditions and the attached letter dated 9th January 2008 was sent to the agent confirming this."

126. In my view the Officer's email provides a reasonable explanation of the issue, and discloses no error of law by the authority.

Enforcement issues

127. I am asked specifically whether there appear to be any breaches of planning control and, if so, to advise on the Council's powers in relation to them.

128. I will start with a very brief summary of the statutory framework. A breach of planning control occurs when development takes place without the requisite planning permission and/or when a breach of planning condition occurs. If a breach continues for four years (operational development) or ten years (use or breach of condition) without enforcement action being taken it becomes lawful (questions of concealment aside). Enforcement action is taken when an enforcement notice is issued under s172, or a breach of condition notice is issued under s187 of the Town and Country Planning Act 1990.

129. The planning authority has a range of powers to obtain information about activities taking place on land, and a broad discretion over whether or not to take enforcement

action, depending on its judgment whether or not enforcement action is expedient in the circumstances.

130. The factual and legal context to my advice in this section is as I have set out in this Advice above, and may be summarised as follows

a. The 51 ha site benefits from the right to carry out development in accordance with the 2003 consent/RM approval.

b. Unless a condition were to require otherwise, a developer can pick and choose which parts of a major consent of this kind to carry out. It is lawful for a developer to build, for example, the hotel alone.

c. The developer should, of course, comply with all relevant regulatory regimes (eg as to transportation of waste, pollution of the water environment etc) but the only proviso to (b) above, in terms of planning control, is that any development carried out on the site must comply with the conditions imposed on the 2003 consent and RM approval.

131. I have seen it said that the details approved in 2008 were inadequate to control the development taking place, bearing in mind information only available after that date, for example that great crested newts have been seen on site [paragraph 43c) above]. However undesirable this is, it provides no grounds for planning enforcement as it is not a breach of planning control.

132. The Local Planning Authority informed me on 12 February 2020 that they are not aware of any breaches of the 2003 consent. That is the date at which I fix this advice. It is a developing situation, and my advice does not cover activities since that date.

133. 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 (see correspondence at paragraphs 24, 31, 32(b), and 43(e) above).

b. Whether the breach of condition governing the settlement facility (straw bales) was handled lawfully in 2013 (see paragraphs 27, 33, 36, and 41(d) above).

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.

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 (see paragraph 20 above).

e. Whether the provision of the access road constructed in 2013 was a breach of planning control (see paragraph 32 and 41(c) above).

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 (see paragraphs 18(g), 41(e), 43(d), and 45 above).

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 (see paragraphs 19(b), 41(g) and 43(f) above).

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 (see paragraphs 26, 58, and 64 above).

134. I will deal with each of these in turn in the following paragraphs.

Diversion of Kell Well Beck

135. The question is whether the diversion of Kell Well Beck in 2011 was handled correctly by the Council as planning authority (see correspondence at paragraphs 24, 31, 32(b) and 43(e) above).

136. The Kell Well Beck is/was an ordinary watercourse within the meaning of the Land Drainage Act 1991. Section 23 of that Act, as it applied before 2012, required the written consent of the drainage board before carrying out works causing an obstruction to the flow of the Beck. The drainage board at the time was the Environment Agency, although, by 2013, when the matter was discussed in the correspondence I have seen, responsibility had moved to the "lead local flood authority", namely North Yorkshire County Council.

137. From what I can tell, the Beck was diverted away from its original course into the Flash in about 1998-2003[39].

138. I am not clear exactly what was done to divert the Beck in 2011, or how its course changed, but I have seen no indication that the works involved development. Was it a breach of the conditions imposed on the 2003 consent and RM approval? Possible candidates are condition 9 on the 2003 consent which concerns surface water drainage, and requires that development is carried out in accordance with the approved details; and condition 12 on the RM approval which required that development be carried out in accordance with the approved environmental management plan.

139. The details submitted and approved under condition 9 are enclosed with my instructions. I note the Environment Agency's statement [1-2-2008] that "There must not be any increase in flows into Kell Well Beck, other than reverting the watercourse back to its original route away from the pond." The EA was not happy with the Flood Risk Assessment, and expected to work informally with the developers over levels and flood risk. It seems that some alteration to the watercourse was envisaged and encouraged by the Environment Agency.

140. The Environmental Management Plan did not propose diversion of the Beck, but neither would a diversion necessarily conflict with it (which would be a breach of condition 12).

[39] See the Environmental Management Plan of 2007 submitted under condition 12 of the RM approval.

141. The correspondence on the subject in 2013 appears to involve no error of law or on the part of any of the public authorities involved. The officers involved appear to have tried to help concerned residents navigate the complex intersection of statutory responsibilities.

Straw bales

142. The question is whether the breach of condition governing the settlement facility (straw bales) was handled lawfully in 2013 (see paragraphs 27, 33, 36, and 41(d) above).

143. The Council identified a breach of condition and arranged informally with the developer that the settlement facility approved in 2008 was put in place. There is some evidence that work stopped pending the introduction of the straw bales.

144. The matter was discussed in depth at the time with representatives of concerned local residents. An Officer set out the Council's position fully and fairly. There appears to have been no error of law, and it is very common for enforcement of planning control to be successful without the need to take formal action.

Archaeology

145. The question is 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.

146. The condition required (a) the submission and approval of a written scheme of investigation; and (b) the implementation of a programme of archaeological work; and that both (a) and (b) are carried out before development took place.

147. What in fact happened was the submission of a Geophysical Survey which concluded that there were no anomalies (within the hotel site, the access road, and the rural environment centre site) considered "definitely archaeological in nature". That Survey had been drawn up in association with the County Council. As a result David Hill's suggested the condition had been complied with, and the County Council's advice was that "an archaeological watching brief is carried out over the area of the proposed environmental centre. I would suggest that a phased approach be taken to this work, to comprise monitoring of the initial topsoil strip for the access road and services, or the building, whichever is carried out first. On the basis of the results of this first stage, we can review whether additional monitoring of further stages of work is necessary or not." [email 11 October 2007[40]]

148. From these facts, it appears to me that

    a. The basis of the condition was the judgment that the site had archaeological interest, whereas the material submitted by the developer sought to show that it did not.

[40] Item 2 in Folder for Counsel.

b. The NW portion of the site was never surveyed for archaeological interest.

c. The County expected a review of the question whether additional monitoring of further stages of work was necessary following the initial topsoil strip.

d. The Geophysical Survey was not a programme of work – indeed, no programme of work was ever submitted.

e. Because condition 6 had been discharged without securing a programme of work reflecting the expectations of the County, the Council had no basis for requiring any monitoring of further work.

149. In these circumstances the two Councils, District and County, might be criticised for failing to insist on the details required by condition 6 with any rigour, 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.

Visibility splays

150. The question is whether a failure to provide the requisite visibility splays at the junction with the A65, remains an enforceable breach of condition 12 of the 2003 consent (see paragraph 25 above).

151. As I say at paragraph 25, condition 12 required the necessary visibility splays to be provided before commencement of development. If this was not done at that time it was a breach of condition. The condition requires they be maintained clear of any obstructions. It is in my view arguable that this latter part of the condition impliedly imposes on the developer a continuing duty to provide the visibility splays – such that if they were not provided at the correct time, it would be possible to enforce the condition today. I only mention this in passing as I have seen no sign of any concern by others about the visibility splays.

2013 access road

152. The question is whether the provision of the access road constructed in 2013 was a breach of planning control (see paragraph 32 and 41(c) above).

153. I have seen no evidence capable of contradicting the judgment of officers reached in 2013 and communicated to those who had expressed concern on this issue.

The Environmental Management Plan

154. The question is 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 (see paragraphs 18(g), 41(e), 43(d), and 45 above).

155. Condition 12 of the RM approval required, of course, the submission and approval of "the full environmental management plan for the site" which had been required by condition 5 of the 2003 consent. In September 2007 the Nature Conservation Area

Management Plan was submitted on behalf of Gordon Halton Homes. It is thin by modern standards, but was judged good enough and approved in January 2008.

156. The condition also required that "the provisions of the approved management plan shall be carried out and no building occupied unless the provisions within the management plan are still undertaken." 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.

157. If that were to happen, it would be an enforceable breach of condition to occupy a building without also undertaking and continuing the provisions of the plan. This states that its long term objectives would be met through control of water levels, grazing management and pest control. The measures envisaged within these three categories are described in the most general terms:-

    a. The first envisages the use of a drop board sluice, the responsibility of a suitable post holder. The water level calendar should be reviewed after two years of operation.

    b. The second, grazing, envisages a grazing licence specifying particular terms and for its review in March 2009 and refined.

    c. The third, pest control, describes in general terms the ways predatory birds should be controlled.

158. For completeness I should add that, if the hotel were to be constructed and occupied, a wholesale failure to carry out the measures approved within the EMP would be a clear breach of condition, but the detailed requirements are so vague that it would not be easy to assess and identify a clear set of enforceable requirements.

159. Although it is clear from the condition that the EMP was expected to provide ongoing protection of the nature conservation interest on site; and although the importance of doing so during the construction period might appear to us obvious – particularly given that it has been so long and so potentially harmful to that interest – I have not identified a clear breach of the EMP in the various incidents to which my attention has been drawn in the correspondence.

160. The correspondence at paragraph 50 above illustrates one of the problems caused by such light touch regulation of development at an environmentally sensitive site, precisely because the planning system offers no solution.

Access to Hellifield Station

161. The question is 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 (see paragraphs 19(b), 41(g) and 43(f) above).

162. Condition 8 on the 2003 consent required details of pedestrian, wheelchair and vehicular links between the site and Hellifield station to be approved by the Council and for the development to be carried out in accordance with the approved details.

163. It would therefore be a breach of condition to develop the site without providing the approved details. However, there was no obligation on the developer to demonstrate that the condition would be capable of being met when the time came. Indeed, much can change during the course of construction on a site like this: the developer could reach a deal with the relevant landowner over provision of access, and/or the developer could have sought a variation of the condition to accommodate a different solution. The advice given by the Officer in 2013 was correct and there is no breach of planning control.

Importation of Waste

164. The question is 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 (see paragraphs 26, 58, and 64 above)[41].

165. The answer depends on whether the scale of importation and the manner of its deposit are such as to lead the Council (or those officers who inspected the site) to the judgment that the activity amounted not to the implementation of the 2003 consent and RM approval, but to a waste disposal operation. That would be a material change of use of the site used for waste disposal and would require planning permission.

166. 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.

167. I am also conscious that the developer has recently applied for planning permission.

168. Enforcement officers should bear in mind that activity on site may be designed to deliver the proposed development (as yet unauthorised) rather than that approved. It is worth checking how consistent are the two sets of proposals in the areas where development is taking place.

<u>Summary and Conclusions</u>

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;

[41] I am not concerned with the detailed regulation of transportation of waste and whether the appropriate documentation was obtained, although it would seem likely that the 2019 and 2020 works (at least) have indeed been properly regulated.

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. <u>If</u> 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