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1st April 2021

The Planning Inspectorate
Major Applications and Plans
Temple Quay House
Temple Quay
Bristol
BS1 6PN

Dear Sir/Madam

Millhouse Developments Ltd
Land Adjacent to A1 north of Longdike Burn near Burgham
Registration identification number: 20026914.

We are writing on behalf of our client 'Millhouse Developments', with regards their land interests at Burgham as cited in the Examining Authority's Further Written Questions (EXQ2) GEN 2.8 which specifically addresses our clients land interests. Regards has also been had to REP3024, REP3-029 and REP4-024 as cited GEN 2.8.

Northumberland County Council and the Highways Agency's responses to REP2-024, REP3-029 and REP4-024 respectively have been reviewed. The Examining Authority should be aware that discussions are continuing with the Local Planning Authority with regards the planning status of the site supported by advice from Clyde and Co.

A copy of the most recent correspondence prepared by Clyde and Co, on behalf of Millhouse Developments Ltd, in support of the case that planning applications CM/00/D/D337 and CM/04/D.550 have been lawfully implemented is attached for information.

On this basis it is considered that the proposals put forward by the Highways Agency should make suitable provision for access to the land that is owned by our client but not required for the dualling works to the A1. A contrived access arrangement is currently proposed through neighbouring land which is to be restricted for agricultural use only. As previously stated this is inadequate for our clients purposes, particularly in view of the currently unrestricted access to their site from the A1 and the historic planning consent for 'Roadside service incorporating petrol filling station and shop' (reference CM/00/D/337 and CM/04/D.550)

We request that the Inspector gives due consideration to requisite access arrangements for our client's land in view of the advanced stage of the design development.

Yours sincerely,



 MRTPI
For YoungsRPS

Cc . Mike Clark- Milhouse Developments Ltd

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Our Ref
IG/RU/10127207

Your Ref

Date
31 March 2021

Dear Sirs

**DYSART DEVELOPMENTS LIMITED
LAND ADJACENT TO THE A1 NORTH OF LONGDIKE BURN, NEAR BURGHAM PARK,
NORTHUMBERLAND
APPLICATION FOR A CERTIFICATE OF LAWFULNESS OF EXISTING USE OR
DEVELOPMENT
SECTION 191(1)(c) OF THE TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED)**

1 INTRODUCTION

- 1.1 We act for Dysart Developments Limited ("the Applicant").
- 1.2 This letter is submitted, on behalf of the Applicant, in support of a possible application ("the Application") for a Certificate of Lawfulness.
- 1.3 We understand it has been suggested that the Application be sought for a Certificate of Lawfulness of Existing Use or Development ("CLEUD") pursuant to section 191(1)(c) of the Town and Country Planning Act 1990 (as amended) ("the Act"). Our letter is predicated accordingly. However, we reserve the Applicant's right instead to submit the Application pursuant to section 191(1)(b) of the Act i.e. to seek a Certificate of Lawfulness of Proposed Use or Development ("CLOPUD"). The key issue remains the same i.e. whether the relevant planning consent has lawfully been implemented.
- 1.4 In our view, the evidence clearly indicates this is the position, as to which please see further below.

2 BACKGROUND

- 2.1 The Application relates to premises known as Burgham Park ("the Site"), which is vested in the Applicant.

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- 2.2 The Application is submitted to Northumberland County Council ("NCC"), which is the local planning authority within the meaning of the Act.
- 2.3 A CLEUD would be sought for:
'Roadside services incorporating petrol filling station and shop, restaurant/café, shop and toilet facilities, play area hotel and associated access, parking and service areas.' ("the Development")
- 2.4 The Development is authorised by the following consents:
- (a) outline planning permission dated 3 July 2001 (ref 00/D/337) ("the Outline Permission"); and
 - (b) reserved matters approval dated 17 September 2004 (ref 04/D/550) ("the RM Approval"),
 (together "the Permission").
- 2.5 The Outline Permission and the RM Approval were granted by Castle Morpeth Borough Council ("the Council"), then being the relevant local planning authority. However, the Council was abolished in 2009 as a consequence of local government re-organisation and has since been replaced by NCC.
- 2.6 The Outline Permission reserved all matters, except access, for subsequent approval by the Council. At that time, the relevant reserved matters were siting, design, external appearance and landscaping ("the Reserved Matters").
- 2.7 The RM Approval granted approval for the Reserved Matters.
- 2.8 Both the Outline Permission and the RM Approval were subject to pre-commencement conditions, which were required to be discharged prior to commencement of the Development.

3 LEGAL AND POLICY FRAMEWORK

- 3.1 The relevant statutory provisions will be well-known to NCC so we need only summarise them here.
- 3.2 Section 55 of the Act deals with the meaning of development, and provides as follows (insofar as is material):

'55 Meaning of "development" and "new development"

(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land ...

(1A) For the purposes of this Act "building operations" includes—

- (a) demolition of buildings;*
- (b) rebuilding;*
- (c) structural alterations of or additions to buildings; and*
- (d) other operations normally undertaken by a person carrying on business as a builder.*

3.3 Section 56 of the Act deals with the time when development is begun, and provides as follows (insofar as is material):

'56 Time when development begun

(1) *Subject to the following provisions of this section, for the purposes of this Act development of land shall be taken to be initiated—*

(a) *if the development consists of the carrying out of operations, at the time when those operations are begun;*

[...]

(2) *For the purposes of the provisions of this Part mentioned in subsection (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.*

[...]

(4) *In subsection (2) "material operation" means—*

(a) *any work of construction in the course of the erection of a building;*

(aa) *any work of demolition of a building;*

(b) *the digging of a trench which is to contain the foundations, or part of the foundations, of a building;*

(c) *the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b);*

(d) *any operation in the course of laying out or constructing a road or part of a road;*

(e) *any change in the use of any land which constitutes material development...'*

3.4 Section 73 of the Act provides as follows (insofar as is material):

'(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.

(2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

...

(4) This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun.

(5) Planning permission must not be granted under this section for the development of land in England to the extent that it has effect to change a condition subject to which a previous planning permission was granted by extending the time within which—

(a) a development must be started;

(b) an application for approval of reserved matters (within the meaning of section 92) must be made.'

3.5 Section 191 of the Act provides as follows (insofar as is material):

'(1) If any person wishes to ascertain whether—

....

(b) any operations which have been carried out in, on, over or under land are lawful

he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

(2) For the purposes of this Act uses and operations are lawful at any time if—

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

....

(4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

(5) A certificate under this section shall—

(a) specify the land to which it relates;

(b) describe the use, operations or other matter in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);

(c) give the reasons for determining the use, operations or other matter to be lawful; and

(d) specify the date of the application for the certificate.

(6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.'

3.6 Section 171A(1) of the Act provides that, for the purposes of the Act:

'failing to comply with any condition or limitation subject to which planning permission has been granted... constitutes a breach of planning control.'

3.7 Section 171B(1)(3) of the Act provides as follows:

'In the case of any other breach of a planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.'

3.8 The Planning Practice Guidance ("the PPG") provides as follows (insofar as is material):

'How is a lawful development certificate obtained and what does it mean?

...If the local planning authority is satisfied that the appropriate legal tests have been met, it will grant a lawful development certificate. Where an application has been made under section 191,

the statement in a lawful development certificate of what is lawful relates only to the state of affairs on the land at the date of the certificate application' (paragraph: 002 Reference ID: 17c-002-20140306)'

'How is lawfulness defined in relation to lawful development certificates?

...lawful development is development against which no enforcement action may be taken and where no enforcement notice is in force, or, for which planning permission is not required.' (paragraph:003 Reference ID: 17c-003-20140306)'

'Who is responsible for providing sufficient information to support an application?

The applicant is responsible for providing sufficient information to support an application, although a local planning authority always needs to co-operate with an applicant who is seeking information that the authority may hold about the planning status of the land. A local planning authority is entitled to canvass evidence if it so wishes before determining an application. If a local planning authority obtains evidence, this needs to be shared with the applicant who needs to have the opportunity to comment on it and possibly produce counter-evidence.

...in the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability'. (paragraph:006 Reference ID 17c 006-20140306)'

'How is an Application for a Lawful Development Certificate Determined?

A local planning authority needs to consider whether, on the facts of the case and relevant planning law, the specific matter is or would be lawful. Planning merits are not relevant at any stage in this particular application or appeal process.

A local planning authority may choose to issue a lawful development certificate for a different description from that applied for, as an alternative to refusing a certificate altogether. It is, however, advisable to seek the applicant's agreement to any amendment before issuing the certificate. A refusal is not necessarily conclusive that something is not lawful, it may mean that to date insufficient evidence has been presented.' (paragraph:009 Reference ID: 17c-009-20140306)' [our emphasis]

4 RELEVANT CASE-LAW

Material Operations

- 4.1 It is generally acknowledged that the threshold for implementing a planning permission (pursuant to section 56(4) of the Act) is relatively low: by way of example only, the laying out of pegs to mark the route of a proposed access road has been held to be sufficient.
- 4.2 As to what constitutes a material operation, it is trite law that the list set out in section 56(4) of the Act is not exhaustive (per Barry Field v First Secretary of State and Crawley Borough Council [2004] EWHC 147 (Admin)).

Conditions Precedent

- 4.3 In Whitley & Sons v Secretary of State for Wales and Clywd County Council [1992] 64 P & CR 296 the Court held that:
 - (a) a planning permission must be read together with the conditions attached to it; and

- (b) all true conditions precedent must be complied with for implementation to occur i.e. a development begun in breach of a condition precedent would not be lawful for planning purposes.
- 4.4 However, the Court also held (as an exception to this 'rule') that lawful implementation is maintained even if there has been such a breach provided that: (i) the relevant submission was made to the local planning authority, pursuant to the condition, before the 'implementation date'; and (ii) that submission is subsequently approved by the authority (even if after the 'implementation date').
- 4.5 Therefore, the general starting-point is that development in breach of planning control is normally ineffective to commence development because it is unlawful (see, for example, R (Hammerton) v London Underground Ltd [2003] J.P.L 984) but there exist some established exceptions to this general rule.
- 4.6 The position was summarised by Sullivan J (as he then was) in R (Hart Aggregates Ltd) v Hartlepool Borough Council [2005] EWHC 840 (Admin) and subsequently endorsed by the Court of Appeal in Greyfort Properties Ltd v Secretary of State for Communities and Local Government and Torbay Council [2011] EWCA Civ 908.
- 4.7 In short, the following principles arise:
- (a) first, it is necessary to consider whether the condition which is alleged to have been breached is a condition precedent to the lawful commencement of development (i.e. a pre-commencement condition). If it is not a condition precedent, then the development may lawfully be commenced notwithstanding a breach of that condition;
 - (b) second, if it is a condition precedent to the lawful commencement of development and it has not been complied with, then it is necessary to consider whether any of the recognised exceptions may apply. These exceptions are:
 - (i) where a condition requires the local planning authority's approval before a particular date, and the developer has applied by that date for the approval, which is subsequently given such that no enforcement action can be taken, work done before the deadline and in accordance with the permission can amount to the lawful commencement of the development for the purposes of implementing that permission;
 - (ii) where a local planning authority has agreed that development can commence without full compliance with all relevant conditions; and
 - (iii) where a condition has been complied with in substance, but the formalities of such compliance have not yet been observed before work starts on the site;
 - (c) third, even if none of the exceptions apply, it is necessary to consider whether a decision to initiate enforcement action would be susceptible to a claim for judicial review (e.g. whether such action would be irrational or an abuse of power).
- 4.8 Even if a condition is (properly construed) a pre-commencement condition it is still necessary to consider whether it goes to the heart of the relevant planning permission. A pre-commencement condition might not be a 'true condition precedent' if it does not go to the heart of the planning permission, such that failure to comply with that condition will not prevent lawful implementation (see, for example, Bedford Borough Council v Secretary of State for Communities and Local Government [2008] EWHC 2304 (Admin))

and R (Howell) v Waveney District Council [2018] EWHC 3388 (Admin)). The question of whether a pre-commencement condition goes to the heart of the planning permission is a matter of fact and degree.

Variation of Reserved Matters Approvals

4.9 In R (Pressland) v Hammersmith and Fulham London Borough Council [2016] EWHC 1763, the Court held that an application may be made under section 73 of the Act to develop land without compliance with conditions attached to a permission granted by a development order i.e. to vary conditions attached to a prior approval granted by a local planning authority pursuant to the Town and Country Planning (General Permitted Development) (England) Order 2015.

4.10 In reaching this conclusion, John Howell QC (sitting as a Deputy District Judge) stated that planning permissions are granted subject to such conditions as may be imposed when either the permission or any subsequent approval is granted. Notably, he stated that:

‘ ...

34. A local planning authority may grant an application for any consent, agreement or approval required by a condition imposed on a grant of planning permission (referred to in paragraph (b) of section 78(1)) subject to conditions. It is no doubt the case that such a condition may serve merely to define what the development permitted is in greater detail or to preclude the carrying out of development until something occurs: carrying out the development otherwise than in accordance with such a condition may mean that the whole development is carried out without the planning permission required for it. But other conditions may be imposed which, without unlawfully modifying the permission that has been granted without compensation, may provide for things to be done or not done which, if breached, would not cause the development to be carried out without permission. If such conditions were not ones “subject to which planning permission has been granted”, however, they would be unenforceable under Part VII of the 1990 Act.

...

36. Mr Buley’s submissions assume that the only conditions subject to which planning permission has been granted are those imposed at the same time as the grant of that permission. The fact that a condition subject to which a subsequent required approval was given was not imposed when the permission was granted does not mean in my judgment, however, that the permission has not been granted subject to it as a result of that conditional approval. Thus, for example, in the case of an outline planning permission granted subject to the approval of reserved matters, the permission is granted subject to compliance with what is approved (which may serve to define what the permission is for), and given that any approval may be conditional, subject to any conditions that may be imposed on that approval. That is what the legislation entails. Once imposed such a condition is one subject to which planning permission has been granted. Planning permissions are granted subject to such conditions as may be imposed when either the permission or any subsequent required approval is granted...

42. ... Just as a conditional approval of reserved matters on an outline permission means that the permission is granted subject to the conditions thus imposed, so equally in my judgment the permission granted by Class O which is defined by the details that are approved by the authority is subject to the conditions subject to which that approval was granted. In my judgment Mr Buley’s submissions on this point are flawed by the assumption that the only conditions subject to which planning permission may be granted are those imposed when that permission is granted.’ [our emphasis]

4.11 Pressland was endorsed by the Court in R. (on the application of Fulford Parish Council) v York City Council [2019] EWCA Civ 1359, which confirms that non-material

amendments pursuant to section 96A of the Act may be made to reserved matters approvals.

4.12 In endorsing Pressland, Lewison LJ stated that:

‘...’

35. In my judgment, the “planning permission” to which section 96A refers is the package consisting of the grant of planning permission itself together with any conditions to which the grant is subjected, whether the conditions are imposed at the time of or subsequent to the grant of permission. An application for an amendment to an approval (or conditional approval) of reserved matters is, in my judgment, an application for the alteration of an existing condition; which is expressly permitted by section 96A(2)(B)...’

CLEUDs

4.13 The onus of proving the lawfulness of an existing use rests with the Applicant. The Courts have held that the relevant evidential test is 'the balance of probability' (see, for example, Gabbitas v Secretary of State for the Environment [1985] JPL 630). This is the legal basis upon which an application for a CLEUD should be determined by the Council.

4.14 If the Council has no evidence of its own, or from others, to contradict or otherwise make the Applicant's versions of events less than probable, there is no good reason to refuse a CLEUD, provided that the Applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a CLEUD 'on the balance of probability'.

5 THE OUTLINE PERMISSION

5.1 The Outline Permission authorised the Development.

5.2 Condition 2 of the Outline Permission is cast in fairly standard terms and required:

- (a) application for approval of the Reserved Matters to be submitted for approval by the Council within 3 years i.e. no later than 3 July 2004; and
- (b) the Development to be begun no later than whichever is the later of:
 - (i) the expiration of 5 years from the date of the Outline Permission (i.e. by 3 July 2006); or
 - (ii) the expiration of 2 years from the final approval of the Reserved Matters (i.e. by 17 September 2006 as below).

5.3 As such, it was necessary to begin the Development by no later than 17 September 2006 (“the Expiry Date”) in order lawfully to implement the Permission.

5.4 The Outline Permission imposed the following conditions (amongst others):

- (a) approval of a landscaping scheme *before any development commences*, including a 10m wide landscaping buffer incorporating species of local provenance along south west part of the Site and hedge reinstatement behind the site lines on the frontage area onto the A1(T) (condition 7);
- (b) approval of full structural details of the installation, including the means of excavation, details of excavation, details of the tank, its surround, associated pipework and monitoring system *prior to commencement of work on the site* (condition 8);

- (c) approval of details of protective measures *prior to the commencement of the development*, which should include a heavy membrane to be incorporated in the Development, or site evaluation and analysis assessing the likelihood of the production of stythe so as to demonstrate that the incorporation of a membrane is unnecessary (condition 11); and
- (d) *no development shall commence until* approval of a detailed wildlife survey of the Property carried out by a qualified ecologist (to include protective and preservation measures) (condition 12).

6 THE RM APPROVAL

6.1 On 24 June 2004 (i.e. within the time permitted by the Outline Permission), an application for approval of the Reserved Matters was submitted to the Council.

6.2 On 17 September 2004 the RM Approval was granted pursuant to that application.

6.3 The RM Approval imposed the following conditions:

- (a) *no development shall be commenced until* approval of details of a fenced buffer area minimum width of 10 metres, adjacent to Longdyke Burn (with no tree planting, landscaping, mulching or vegetation management that would devalue the site as a habitat for water vole) (condition 5);
- (b) *no development shall commence until* approval of a detailed surface water attenuation scheme utilising sustainable drainage systems (SUDS) (condition 15); and
- (c) approval of a foul drainage system *prior to the commencement of the development* (condition 17).

6.4 In addition (and unnecessarily):

- (a) condition 8 repeated condition 8 of the Outline Permission;
- (b) condition 11 repeated condition 11 of the Outline Permission; and
- (c) condition 12 repeated condition 12 of the Outline Permission.

6.5 Condition 13 of the RM Approval states that:

'Prior to their opening to the public, all new facilities on the site shall be provided with an internal notice board (to be available solely for the display of advertisements from any local business, Borough, County or Parish Council), details of the size and siting of which shall be submitted to and approved in writing by the local planning authority prior to the commencement of development.' [our emphasis]

7 DISCHARGE OF PRE-COMMENCEMENT CONDITIONS

7.1 We have seen evidence that the following conditions imposed on the Outline Permission have been discharged:

- (a) by a letter dated 18 January 2007, the Council confirmed that (following the receipt of additional information on 16 January) condition 7 was formally discharged;

- (b) by a letter dated 21 December 2006, the Council confirmed that (following receipt of details additional details on 18 August 2006) condition 11 was formally discharged; and
 - (c) by a letter dated 21 December 2006, the Council confirmed that (following receipt of additional details on 18 August 2006) condition 12 was formally discharged.
- 7.2 Please see below for discussions on discharge of condition 8 to the Outline Permission.
- 7.3 We have seen evidence that the following conditions imposed on the RM Approval have been discharged:
- (a) by a letter dated 18 January 2007, the Council confirmed that (following the receipt of additional information on 16 January), condition 5 (and 7) were formally discharged;
 - (b) by a letter dated 8 September 2006, the Council confirmed that (following the receipt of additional details on 18 August 2006) condition 11 was formally discharged;
 - (c) by a letter dated 6 October 2006, the Council confirmed that (following the receipt of additional details on 18 August 2006) condition 12 was formally discharged;
 - (d) by a letter dated 17 January 2007, the Council confirmed that (following receipt of a response to formal consultation with the Environment Agency on 16 January 2007) condition 15 was formally discharged;
 - (e) by a letter dated 12 January 2007, the Council confirmed that (following receipt of a letter from the Environment Agency on 17 September 2006) condition 17 was formally discharged.
- 7.4 We are advised that details to discharge conditions 5, 7, 8, 11, 12, 15 and 17 to the RM Approval were submitted by hand to the Council on 15 September 2006 i.e. before the Expiry Date.
- 7.5 In any event, on 14 November 2006, the Council varied condition 8 to the RM Approval (ref CM/20060785) such that approval of full structural details of the installation, including the means of excavation, details of excavation, details of the tank, its surround, associated pipework and monitoring system was required '*prior to commencement of works on the fuel tanks*' as opposed to '*prior to commencement of work on the site.*' ("the s73 Approval").
- 7.6 Condition 13 to the RM Approval, requires details of the size and siting of internal notice boards to be approved by the Council *prior to commencement of development* (as to which see below).

8 PREVIOUS PRE-APPLICATION DISCUSSIONS WITH NCC

- 8.1 We understand that:
- (a) an application for a CLEUD was submitted to NCC in December 2019; and
 - (b) at the request of NCC, a pre-application enquiry was submitted to NCC on 6 February 2020 ("the Pre-App Enquiry").
- 8.2 A response to the Pre-App Inquiry was received from NCC on 29 April 2020 ("the Pre-App Response").

8.3 In summary, the Pre-App Response states that:

- (a) having taken legal advice, NCC is satisfied from the evidence supplied with the Pre-App Enquiry that material operations under section 56 of the Act relating to the Development, and as permitted by the Permission, were undertaken on or before the Expiry Date;
- (b) correspondence from the Council in January 2006 (this is a typo and should be 2007 (see below)) states that following a site visit in December 2006, the Council was satisfied that material operations in respect of the Development had taken place albeit in breach of pre-commencement conditions;
- (c) there are four pre-commencement conditions attached to the Outline Permission - namely conditions 7, 8, 11 and 12 - and that the Council has:
 - (i) paperwork confirming that conditions 7, 11 and 12 were discharged *after* the Expiry Date; and
 - (ii) no evidence that condition 8 was discharged;
- (d) accordingly, it has not been demonstrated, on the balance of probabilities, that application(s) to discharge conditions 7, 11 and 12 to the Outline Permission were made prior to the Expiry Date;
- (e) there are seven pre-commencement conditions attached to the RM Approval - namely conditions 5, 8, 11, 12, 13, 15 and 17 - and that NCC has no evidence that any of them were discharged;
- (f) the effect of the s73 Approval is that condition 8 of the RM Approval is no longer a pre-commencement condition;
- (g) however, legal advice was sought as to whether Fulford and Pressland would support a grant of planning permission under section 73 of the Act in respect of a reserved matters approval and that NCC's solicitor considers that such a scenario has not been determined as lawful in those cases or by the Courts generally;
- (h) accordingly, NCC's solicitor considers that the s73 Approval is '*not a valid document*' as in light of Fulford and Pressland, '*it would be considered an ultra vires decision*';
- (i) the s73 Approval in its *proposal section* only refers to a condition not any actual development, and only refers to condition 8 rather than the others on the RM Approval and, therefore, the s73 Approval is not a 'standalone' planning permission in itself and cannot be relied upon in any way;
- (j) in light of the above, a CLEUD application seeking confirmation that the Development was lawfully commenced pursuant to the Permission would not be supported due to the absence of evidence to demonstrate on the balance of probabilities that:
 - (i) all the pre-commencement conditions attached to the RM Approval have been discharged; and
 - (ii) applications to discharge all of the pre-commencement conditions on both the Outline Permission and RM Approval were submitted to the Council prior to the Expiry Date;

- (k) a CLEUD application referencing the s73 Approval would likewise not be supported as NCC considers that this permission cannot be relied upon for the reasons stated above; and
 - (l) therefore, a CLEUD application based upon the evidence submitted in support of the Pre-App Enquiry '**would not be likely to be looked upon favourably**' (original emphasis).
- 8.4 On 18 September 2020, youngsRPS submitted further evidence, on behalf of the Applicant, demonstrating the discharge of conditions attached to the RM Approval (as summarised above).
- 8.5 On 12 October 2020, NCC's planning officer responded in the following terms:

'Helen

... I have now had an opportunity to discuss your latest submissions further with Liz Sinnamon. Having done this I remain of the view, as per my previous letter of the 29 April 2020, that insufficient information has been provided to justify a Certificate of Lawfulness in respect of lawful commencement for either outline planning permission CM/00/D/337 or reserved matters approval CM/04/D/550. My detailed comments are as follows:

1. *For CM/00/D/337 information has not been provided to demonstrate on the balance of probabilities that the details to discharge condition 7 were submitted prior to the permission expiry date of the 17 September 2006.*
2. *Likewise for CM/04/D/550 information has not been provided to demonstrate on the balance of probabilities that the details to discharge conditions 5, 15 and 17 were submitted prior to the permission expiry date of the 17 September 2006. Details in this regard have also not been provided re condition 13 nor has information been provided to demonstrate that this condition was discharged.*
3. *Re 1 and 2 above your latest submission does refer to correspondence dated 18/08/2006 regarding submission of details to discharge conditions but this correspondence has not been provided.*
4. *The condition 8 issue remains re both permissions, in that the view of our solicitor, as outlined in my previous letter of the 29 April 2020, is that the Section 73 permission CM/20060785 cannot be relied upon as they do not consider that such a permission can be legally granted in respect of a reserved matters approval.*

Given that we have now provided this further input in addition to the written advice previously provided in April 2020, I am advised that should you require any further advice on this matter relating to the issues highlighted above or other matters then a further formal pre-application enquiry with the relevant fee would need to be submitted.

Kind Regards

Geoff [our emphasis]

9 THE CASE FOR A CLEUD

- 9.1 At the outset, we would emphasise that if NCC has no evidence to contradict or otherwise make the Applicant's version of events less than probable, there is no reason to refuse a CLEUD application (per the PPG).
- 9.2 We respond as follows to the principal issues arising out of the Pre-App Response.

Material Operation

- 9.3 The Pre-App Response confirms that NCC accepts that works undertaken in advance of the Expiry Date were sufficient to be a '*material operation*'.

- 9.4 As referenced above, by letter dated 18 January 2007, the Council's Legal and Democratic Services Manager wrote to Dickinson Dees (being the Applicant's retained planning consultants at that time) in the following terms:

'Further to our meeting of 21 December 2006 and the evidence provided by Jennifer Asquith of your firm, the Local Planning Authority is of the firm belief that development had lawfully started on the site before 17 September 2006 albeit in technical breach of condition. The Local Planning Authority therefore has written to Local Government Office North East (copy letter attached) explaining its position and stating that it would be writing to yourselves inviting you to withdraw your application to vary condition 2.'

- 9.5 The Council wrote in the same terms to the then Government Office for the North East.
- 9.6 Therefore, it is common ground that material operations were carried out in advance of the Expiry Date.

Discharge of pre-commencement conditions

Outline Permission

- 9.7 In the Pre-App Response, NCC states that it has not been demonstrated that, on the balance of probabilities, application(s) to discharge conditions 7, 11 and 12 of the Outline Permission were made prior to the Expiry Date. This is not accepted by the Applicant and, if necessary, statutory declarations sworn on oath would be produced to support the case for a CLEUD.
- 9.8 However, even if (which is not accepted) NCC is correct that the applications were submitted after the Expiry Date, it does not follow that the Permission was not later lawfully implemented. In particular, the above-cited case law provides that where:

- (a) a local planning authority has agreed that development can commence without full compliance with all relevant conditions; and
- (b) a condition has been complied with in substance, but the formalities of such compliance have not been complied with,

non-compliance with a pre-commencement condition will not mean that the relevant permission was not implemented.

- 9.9 Point (a) is clearly engaged here as the Council subsequently discharged the relevant conditions and (in its letter dated 18 January 2007) confirmed that the Permission was lawfully implemented (albeit in technical breach of condition). In addition, if necessary, we reserve the Applicant's right to argue that it is irrational and/or an abuse of power for NCC now to pursue this argument in circumstances where these conditions were approved some time ago (we deal with condition 8 of the Outline Permission separately below).

RM Approval

- 9.10 As to the RM Approval, the Pre-App Response (and subsequent correspondence) states that:
- (a) NCC has not been provided with sufficient evidence that details to discharge conditions 5, 15 and 17 were submitted prior to the Expiry Date; and
 - (b) there is no evidence that condition 13 has been discharged.

- 9.11 Turning to (a) above, and as we have already summarised, we are advised that details to discharge conditions 5, 7, 8, 11, 12, 15 and 17 to the RM Approval were submitted by hand to the Council on 15 September 2006 i.e. before the Expiry Date. It is, therefore, unclear why this point is being taken by NCC. If necessary, sworn evidence can be produced to support the Applicant's case.
- 9.12 Where a condition requires the local planning authority's approval before a particular date, and the developer has applied by that date for the approval, which is subsequently given such that no enforcement action can be taken, work done before the deadline and in accordance with the permission can amount to the lawful commencement of the development for the purposes of implementing that permission. As above, this is a well-established legal position. Accordingly, NCC's concerns regarding conditions imposed on the RM Approval largely fall away. We need only further address conditions 8 and 13.
- 9.13 Regarding condition 13 of the RM Approval, in accordance with the above cited case law, it cannot be said that this is a 'true' condition precedent. It is not expressed to the effect that '*no development may take place*' (by contrast with, for example, condition 12 of the RM Approval) until the condition is complied with. Further, the subject-matter of condition 13 – approval of the size and siting of internal notice boards – does not go to the '*heart of the permission*' (per Hart). Therefore, even if this condition has not been discharged, it would not follow that the RM Approval was not lawfully implemented.

Condition 8

- 9.14 Condition 8 of the RM Approval is identical to condition 8 to the Outline Permission and, therefore, these may be dealt with together.
- 9.15 As with condition 13 of the RM Approval, condition 8 is not a 'true' condition precedent such that non-compliance would not mean that the Permission has not been lawfully implemented.
- 9.16 For completeness, even if NCC considers condition 8 of the Permission to be a pre-commencement condition, condition 8 of the RM Approval was varied by the s73 Approval such that it is no longer a pre-commencement condition.
- 9.17 Respectfully, we do not agree with NCC's assessment of Pressland and Fulford as summarised in the Pre-App Response for the following principal reasons:
- (a) Fulford (which endorses Pressland) supports the proposition that an outline planning permission and any reserved matters approval granted pursuant to it together constitute the *planning permission* for the purposes of s96A of the Act. We consider this can (and should logically) be applied to the definition of *planning permission* in section 73 of the Act; and
 - (b) contrary to the views of NCC's solicitor, the absence of consideration by the courts as to whether a reserved matters approval may be varied by section 73 of the Act does not of itself mean that such a consent would be unlawful or '*ultra vires*'.
- 9.18 Accordingly, the s73 Approval is valid and condition 8 of the RM Approval is no longer a pre-commencement condition.
- 9.19 In light of the case law that the outline permission and reserved matters approval together constitute the planning permission, where (as here) mirror conditions are imposed on an outline permission and a related reserved matters approval, any

application to discharge or vary such a condition must reasonably be considered to relate to each of them even if the application does not expressly state so.

9.20 Thus, in the legal context of:

- (a) the Outline Permission and the RM Approval together comprising the *planning permission* (per Fulford); and
- (b) mirror conditions being imposed on each of the Outline Permission and the RM Approval,

it would be a nonsense for NCC to argue that one of the mirror conditions has been varied but the other one has not. Accordingly, we consider that condition 8 of the Outline Permission can reasonably be said to have been varied – to the same extent as the mirror condition imposed on the RM Approval – such that it is no longer a pre-commencement condition.

9.21 For completeness, even if NCC is correct that the S73 Approval is invalid, it is plainly relevant that the Council was willing to vary condition 8 such that it was no longer a pre-commencement condition. In particular, this supports a contention that it is not a true condition precedent which can be said to go to the *'heart of the permission'*. For NCC now seemingly to argue that condition 8 is a condition precedent going to the 'heart of the permission', with which non-compliance renders the implementation of the Development unlawful, would (in our view) be challengeable by reference to the legal principles we have identified above.

10 CONCLUSION

10.1 In light of the above, it is clear that the points raised by NCC in its Pre-App Response can easily be addressed. The Applicant's case for a CLEUD is compelling and, for the reasons, set out in this letter, it cannot be said that the Permission was not lawfully implemented.

10.2 Indeed, NCC accepts that material operations sufficient to implement the Permission were undertaken prior to the Expiry Date.

10.3 As to condition 8, we do not agree with NCC's view that the s73 Approval was/is unlawful. Accordingly, for the reasons set out above, we consider that condition 8 of the Outline Permission and the RM Approval is no longer a pre-commencement condition. Further, condition 13 to the RM Approval is not a pre-commencement condition.

10.4 Accordingly, there is sufficient evidence to satisfy NCC that, on the balance of probabilities, the Permission was lawfully implemented. Accordingly, we would respectfully invite NCC to agree this proposition pursuant to the Application and subsequently to grant a CLEUD at the earliest opportunity.

Yours faithfully

Clyde & Co LLP