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Mr. James Wood, Director  
Petrian Construction Ltd.

**By email only**

27<sup>th</sup> February 2023

Dear James

**Land at Lancaster Lane, Brockholes, Holmfirth HD9 7BP**  
**Discharge of Condition Application Reference: 2021/90493 to discharge Condition 15 of Outline**  
**Planning Permission Reference: 2016/90138**  
**Kirklees Council**

You have asked me to investigate, provide a legal opinion and advice in relation to the above application to discharge a planning condition, which has been ongoing for some considerable.

I am going to try and be as non-technical as I can in the following and my apologies in advance for the length of this letter. This reflects an application that has been going on for a considerable and seemingly unnecessary amount of time.

I am sensitive to the fact that your instinct is to appeal for non-determination, claim costs for unreasonable behaviour leading to wasted expense and even issue a complaint against the Highways Engineers in the 'Structures Section' of the Highways Department, specifically Mr. Farhad Khatibi. However, from my investigation, I find that this might be unfair on Mr. Khatibi; at least at this stage.

This is principally because Mr. Khatibi appears to have been operating without oversight or guidance from a planning officer with stewardship of the application to discharge this condition.

Mr. Khatibi, clearly an experienced engineer, or more properly the Structures Section of the Council as Highway Authority, is a professional technical consultee acting upon instructions from his planning officer colleague. The situation is compounded when it transpires that the original said instructing planning officer with stewardship of this Discharge of Condition Application, Adam Walker, left the Council approximately 12 to 18 months ago.

In basic terms, the legal process of discharging a planning condition is a matter for the Council as Local Planning Authority ('LPA') not the Highway Authority ('HA'). It appears from what is before me that Mr. Khatibi has been operating without instruction or oversight from the LPA.

Possibly as a result, it appears to be the case that Mr. Khatibi has strayed beyond the parameters of what the condition requires. More specifically, Mr. Khatibi appears to think that the condition relates to the large highway retaining wall structure between the A616 New Mill Road and your site. To assist in my explanation, I am going to try and break this down in simple terms in the following. Condition 15 of Outline Permission 2016/90138, that you are trying to discharge under this Discharge of Condition Application reference 2021/90493, states (**NB.** my emphasis):

15. No development shall take place until the design and construction details of all temporary and permanent highway retaining structures within the site have been approved in writing by, the Local Planning Authority. The details shall include a design statement, all necessary ground investigations on which design assumptions are based on, method statements for both temporary and permanent works and removal of any bulk excavations, a full slope stability analysis together with structural calculations and all associated safety measures for the protection of adjacent public highway, footpath and retaining wall. All highway retaining structures shall be designed and constructed in accordance with the approved details and shall be so retained thereafter.

*Reason: In the interests of highway safety and in accordance with Kirklees Unitary Development Plan Policy T10. This is a pre-commencement condition so that such matters are investigated and addressed at an appropriate stage of the development process.*

I note that the relevant condition in the Appeal Decision Letter from last year (Ref: APP/Z4718/W/21/3284361; appealing LPA ref: 2021/91578), to which you are going to be working in due course, is almost identical. Therefore, discharge of this present Condition 15 will undoubtedly be helpful in streamlining that application when you eventually make it.

The obvious point here is that the condition is talking about highway retaining structures **within the site**; i.e. **within the red line of the application site**. Importantly the large retaining wall which fronts the A616 New Mill Road is a highway retaining wall, in the ownership and control of the Council as HA. The highway retaining wall is very clearly **not** "...within the site..." and importantly is not within the control of the applicant and landowner.

On considering the reporting and submissions described above, it has become clear that the retaining walls of concern are in fact those proposed within the site itself, as well as possibly those on the far side of Lancaster Lane, which retains Lancaster Lane from the houses below them. The only possible connection to the existing large retaining wall that fronts and retains the A616 from Petrian's and Kingsman's respective lands is the "...associated safety measures for the protection of adjacent public highway, footpath and retaining wall".

However, even if this is referring to the said wall, all that is required is to show that what is or shall be taking place in due course on your site will not compromise the existing highway retaining wall and its underpinnings.

That really is the extent of the requirements of the condition and nothing more. This information was in fact provided almost two years ago when you engaged Messrs Groundsolve Ltd (Geotechnical Engineers) and others to carry out this work.

Nevertheless, that is also generously interpreting the condition in the Council's favour. I use the words: "even if", above, because on considering the extrinsic information submitted with and otherwise associated with the original application (e.g. the consultation responses, the associated Committee reporting, etc.), it is increasingly clear that the large New Mill Road retaining wall is not and never has been at issue here.

I cannot see how the Council could reasonably argue this position now.

Remember again that a discharge of a planning condition is a matter for the Council as LPA, not the HA. Of course, where appropriate, as it is in this case, the LPA shall engage and take advice from the relevant technical consultee. However, the consultee and indeed the administering LPA, must adhere only to the parameters of the relevant planning condition. Where it may be professionally desirable to stray beyond those parameters, that is entirely irrelevant and more importantly such an approach would be unlawful.

Viewing this correctly, through the prism of planning and local government law, then **if** your Condition 15 on the original Outline Planning Permission had meant to include what effectively amounts to direct

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improvement works and mechanisms for the Council's highways retaining wall on the A616, then it would have specified this in what is known as a *Grampian*-type planning condition. In very basic terms, a *Grampian*-type condition is one which restricts works on a development pending works and conditions associated with land outside of the development that the applicant may not own or control.

In the alternative, the Council could have insisted on entry into a planning obligation under s.106 of the Town and Country Planning Act 1990, or more properly an agreement pursuant to s.278 or similar of the Highways Act 1980. There are also more general legal powers that the Council could have engaged and deployed.

It has not done any of these things in what has ultimately led to the imposition of Condition 15.

The Decision Notice granting outline application 2016/90138 is clear on its face, as are the associated conditions, as is legally required. Reinforcement of this arises when one considers the relevant extrinsic information submitted and associated with 2016/90138; not least the technical consultation responses and indeed the Council's reporting to its relevant Planning Committee. For the avoidance of any doubt, there is nothing of substance in this respect within the associated Approval of Reserved Matters.

The highways retaining wall clearly never was or is at issue. This becomes clear following reference to the said extrinsic information and ultimately in the framing of Condition 15.

What Mr. Khatibi and the Council's Structures Section may perhaps think or believe, does not mean that is what the condition is in fact saying and thereby controlling.

The inclusion of the Council-owned and Council-controlled highways retaining wall on the A616 is, or can only be, either: (i) not a part of this condition; or (ii) at very best and generously interpreting in the Council's favour, is only indirectly linked, insofar as you should not do anything within your development which would compromise the Council's highways retaining wall. However, it follows that even if (ii) was the case, then the condition would likely fail several of the relevant 'tests' for planning conditions to be considered valid.

Perhaps more simply, in stark and simple terms, Condition 15 is specifically concerned about what is going on your side of the wall, not what is going on with the A616 side of the wall, nor the wall itself directly.

**Accordingly, the Council can now discharge this condition immediately, from everything that is before me.** It has all but done so prior to the point that it requested further information in the form of that eventually commissioned and submitted previously by Paragon Highways on your behalf. Whilst the information from Paragon Highways is useful, it was not actually required to discharge this condition. The Council had strayed beyond the parameters of the condition in requesting this information from Paragon Highways.

It is beyond the scope of this letter and probably in the circumstances unhelpful to comment on what recourse you may have against the Council in that respect. My advice is at this stage to remain focussed on the discharge of this Condition 15 pursuant to the present Discharge of Condition Application 2021/90493.

### **Parallels on the 'Kingsman Land'**

Nevertheless, as a related aside, I did discover some further interesting information during my investigations and compiling this letter.

It is/was the case at the site further south on Lancaster Lane, which is now owned and being developed separately by Kingsman Homes Ltd. (the 'Kingsman Land'), that Condition 19 on application reference: 2019/90085 is almost identical to Condition 15 in your permission 2016/90138.

In headline terms and without going into detail, Kingsman Homes did not have to provide anything like the information that you have had to provide to discharge its relevant parallel Condition 19 on permission reference: 2019/90085. This is curious when considering that the volume and expanse of the highway retaining wall adjacent to the Kingsman Land is greater than is the position against your site, as well as the fact that your section is also largely covered by a 30mph speed camera on this immediate point on the A616, just above your development site.

The history of discharging that Condition 19 on the said Kingsman Land, is noteworthy. The discharge of that Condition 19 was initially declined, by way of split decision letter 3<sup>rd</sup> June 2021 following application: 2021/94219. The text in that letter stated:

*Condition 19*

*The Council's Highways Structures department have advised that condition 19 pertaining to the slope stability at this site cannot be discharged for the following reasons:*

- 1) Inaccurate description of the site and the existing highway retaining wall, which does not reflect the site layout, thus invalidating the report in the main.*
- 2) Absence of a suitable ground model to accurately map out the ground conditions including the presence of any bedrock for the full height of the slope, based on the interpolation/extrapolation of ground investigation.*
- 3) Omission of cross-sectional details for sections AA, B-B and C-C and the absence of any analysis for these sections.*
- 4) Groundwater levels do not appear to have been taken into account and no consideration is given to any impact on slope drainage post development.*
- 5) Absence of an objective assessment of a potential slope/wall failure due to large bulk excavations.*

*Further information is therefore required before details can be approved under this condition.*

In a later submission of updated information by Kingsman to discharge that Condition 19 on permission 2021/94219, a decision letter issued by the Council on 29<sup>th</sup> June 2022, over a year later, approves the discharge of that application. The text in that letter states:

*Condition 19 (Work to highway retaining wall)*

*You have submitted the following:*

- *Approval in Principle for design of proposed private reinforced concrete cantilevered retaining wall adjacent to A616 New Mill Road off Lancaster Lane, Brockholes by Kirklees Highways Structures, reference K61107 revision 2 dated 22nd April 2022.*

*This is acceptable for the purposes of the planning condition only and subject to the agreed work being completed in full*

**(NB. underline emphasis is not added and appears in this form in the LPA's decision letter).**

Why do I say that this is interesting and noteworthy?

It is clear from this that the Council's Structures Section may have an unfortunate *history* with investigation and control beyond the parameters of the relevant condition on land on Lancaster Lane where it meets the Council's highways retaining wall, which was and is like your site, not within the ownership and control of Kingsman. I note that in discharging the relevant Condition 19 on permission 2019/90085, that the information "...acceptable for the purposes of the planning condition only...".

As part of my investigation, I have spoken with Mr. Chris Bright, the agent that submitted the application to discharge the said Condition 19 for Kingsman Homes Ltd. in discharging that Condition 19 on the Kingsman Land. Unsurprisingly, nothing like the information that you have been asked to provide (particularly that information supplied at not inconsiderable expense on your part by Paragon Highways) was required to discharge the said Condition 19.

Mr. Bright could not directly recall any direct correspondence challenging the relevant Highways Engineer (which by coincidence was in fact Mr. Khatibi again), but that it was possible that Mr. Walker as the then overseeing planning officer may have intervened. The LPA's reference to an underlined reinforced "planning condition only" was and is arguably an acknowledgement that it was letting the applicant know that the Structures Section was not entirely happy about that situation, for whatever reason.

We can only speculate that similar events could be reasonably observed to be taking place in relation to your attempt to discharge your Condition 15 on Outline Planning Permission 2016/90138.

#### **Mr. Khatibi and the HA Structures Section**

This is where, more cynically, one might speculate (and I stress that it could be nothing more at this stage) that the Structures Section may in fact know that it is acting beyond the parameters of the condition. However, I do think that there must be reasonable doubt in this situation, from what is before me.

First, Mr. Khatibi and his colleagues will deal with many applications of this nature each year. This application will be one of many. Second, I return to the overriding point that Mr. Khatibi cannot be criticised if he has not been provided with the relevant parameters and guidance by an overseeing planning officer for around 12-18 months now. Where Mr. Khatibi may have erred in taking his investigations beyond the parameters of the condition, it could be reasonably argued that it is nothing more than an honest mistake by a person acting in his usual capacity as an experienced and, I do not doubt, diligent engineer; there is certainly no evidence before me to suggest that Mr. Khatibi is anything but that.

Therefore, Mr. Khatibi should in my view be given the benefit of the doubt here. Moreover, it would not be fair to criticise Mr. Khatibi where he may have been *left to his own devices* for what looks like the past 12 to 18 months, since Mr. Walker's departure.

One might say that with the great benefit of hindsight, you should perhaps have been engaging Mr. Walker's replacement as overseeing planning officer when approaching Mr. Khatibi. However, I understand that it is presently not known which officer that is. Also, unhelpfully, I see that Mr. Walker's name, all these months later, still appears on the Council's website as the planning officer with stewardship of your present Discharge of Condition Application (ref: 2021/90493). That is an administrative shortcoming of the Council as LPA, not Mr. Khatibi and his Structures Section as a technical consultee.

Of course, where all the above is brought to Mr. Khatibi's attention and, when you locate them, the relevant planning officer's attention, and the Council will still not discharge the application, then that is a different matter.

I shall advise separately if required on appealing for non-determination and submitting an associated claim for costs, because it must follow that resistance to discharging this application now is likely to amount to unreasonable behaviour on the part of the Council. A complaint could also follow, but hopefully that will not be necessary. There are also potential other legal approaches, but I stop myself writing further on that at this point.

Of course, the Council should be allowed to explain the position. However, from what is before me, I am now unable to identify any reason to delay discharging Condition 15 immediately. All the relevant information has seemingly been provided and accepted by Mr. Khatibi already. The most recent information from Paragon Highways was not required to discharge Condition 15; the Council has for

whatever reason, strayed beyond the parameters of the relevant condition in requiring that unnecessary information.

### **Summary**

It is evident that the Council's (as HA) Structures Section may have misunderstood the parameters of Condition 15 of Outline Planning Permission 2016/90138 which you are presently looking to discharge and have been doing so for a long time.

The Council's highways retaining wall clearly does not form a part of the condition. All that is required (if indeed it is required) is to ensure that the wall is not compromised as a result of the development.

This work was done some considerable time ago by your technical consultant(s).

My advice is that you should at least bring this letter to the Council's attention. There is nothing of sensitivity that in my view means that you should not show this letter to the presiding planning officer, whomsoever that might be.

In any event, it is now clear that the Council's Highways Structures Section:

- 1) has misunderstood the extent of Condition 15 on Outline Planning Permission 2016/90138
- 2) did not actually require the more recent information from Paragon Highways (though in fairness more generally and outside of planning conditions this will more widely do no harm for both parties); and
- 3) has for some considerable time had all the information that it needed to discharge the said Condition 15 immediately and without delay.

Where the Council will not discharge the condition following receipt of this information, then it should be pressed to explain as a matter of priority, with direct reference, deference, and relevance to Condition 15, why it is maintaining such a position.

Although there may be other reasons, the Council's error does seem to be borne out of lack of oversight and stewardship of this Discharge of Condition Application by the LPA. For that reason, my advice is that appealing for non-determination and complaint against the Council's Structures Section, etc., would not be as useful as bringing this to the immediate attention of officers, to avoid recourse to such an appeal, etc.

However, from a thorough investigation and from everything before me, I cannot see how the Council as LPA could now sustainably resist your Discharge of Condition Application ref: 2021/90493.

I look forward to receiving news that the Council acknowledges its unfortunate error and now accepts that this condition can now be discharged immediately and without delay.

However, please do let me know if I can assist further or provide any clarification on anything.

Yours sincerely

*Noel Scanlon*

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