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Our ref FUL001-1/LF

16 April 2013

Dear Sirs

**Land at Germany Beck, Fulford  
Reserved Matters Consent 12/00384/REMM**

1. We are instructed by Fulford Parish Council (FPC) in relation to the above Reserved Matters Application (RSM) to the outline consent 01/0315/OUT for development of the Germany Beck land. For the avoidance of doubt this letter also applies to any decision to proceed to determine the pending extension of time application (12/01802/OUTM) (ETA) and the second RSM application (lodged under ref 12/01749/REMM). We understand that the City of York Council (CYC) has today published the committee report recommending approval of the RSM. This decision reinforces the points we make in this letter but we do not deal in this letter specifically with any concerns FPC may have with the committee report.
2. CYC has consistently refused to deal with our client's concerns set out in our correspondence with CYC including, *inter alia* the need to determine the RSM in light of current environmental information (our letter of 3 February 2012), the need to revoke the outline consent (our letters of 10 April 2012 and 5 July 2012) and to consider current information concerning the development site as the site of the Battle of Fulford of 1066 in FPC's letter to CYC dated 26 March 2013 and R(oao Charles Jones) v English Heritage and City of York (interested party) CO/1932/2013.
3. Further, in November 2012 and again in March 2013 FPC identified to CYC areas where the RSM is not consistent with the approved outline Masterplan.
4. Further FPC has continued to press CYC about serious deficiencies in the applicant's environmental information.
5. Overall there has been a catalogue of serious failings in relation to the RSM application, which individually and collectively form the basis for FPC to bring judicial review proceedings if CYC proceeds to determine the application without grappling with FPC's concerns.

6. You are reminded that this development consent process is subject to the Aarhus Convention and CYC's failure to grapple with FPC's concerns breaches the Convention's obligations of effective public participation in environmental decision-making.
7. For these reasons, CYC is requested to defer determination of the RSM until CYC fully deals with the issues raised in this letter or for the reasons fully advanced by the FPC and ourselves to refuse the RSM application.
8. Following is a summary of the major shortcomings but this letter cannot be taken to deal in full with all potential grounds for judicial review. If matters proceed to that stage in the event CYC approves the RSM application, subject to instructions, we will write to CYC setting out judicial review grounds in a formal letter before action which may well go beyond the issues identified to CYC now.

#### Revocation

9. CYC's 23 May 2012 response to our request that CYC revoke the outline consent indicated that CYC considered it necessary to review the further environmental information submitted by the applicant before deciding whether to revoke. The information has been with CYC for several months and CYC has failed to advise its position on revocation in light of the environmental changes since the grant of outline consent.
10. It is common ground there have been material changes. Where there are material changes since the grant of outline consent in 2007 the failure to consider revocation in the first instance is an error of public law for the reasons set out in our letters referred to above.

#### Green Belt and Very Special Circumstances

11. On a related matter, on 3 July 2012 FPC wrote to CYC identifying that the Germany Beck site has not made a contribution to the housing supply and has not fulfilled the urgent need that justified its release from the Green Belt by the outline consent. FPC further observed that the extant ETA is "an attempt by the applicant to delay the site further as they are not in a position to move forward with it. It casts serious doubts over the deliverability and viability of the site."

#### Battlefield Registration

12. English Heritage (EH) is currently reconsidering whether to register the Germany Beck site as the site of the Fulford Battle of 1066. Further, we have commenced judicial review proceedings on behalf of Charles Jones under ref CO/1932/2013 in relation to EH's decision not to register the battlefield site on grounds, inter alia that EH applied the wrong test and considered immaterial information in relation to the extant outline consent in deciding not to register the site. CYC is an interested party to those proceedings.
13. The status of the registration of the battlefield site is a material consideration in the determination of the reserved matters details for reasons that the RSM details will necessarily be influenced by a positive registration decision and the consequential

need to consider if there is effective mitigation available or not, in light of the requirements for development imposed by the outline consent and Masterplan to preserve the historical significance of the battlefield. Therefore the outcome of the EH review and a final decision in the legal proceedings must occur before CYC decides the RSM. See eg R v Royal Borough of Kensington and Chelsea ex p Kassam (1994) 26 HLR 455, 465.

14. This conclusion is supported by EH's Battlefields Panel view expressed in its report dated 2 February 2012 that if the Germany Beck site is developed "the site would be very unlikely to merit inclusion in the Register." Further support comes from statements in the applicant's Environmental Statement Update Non-Technical Summary (NTS) as follows:

"14.9....The construction and operational; phases of the development without appropriate mitigation would have a major effect on the overall historical integrity of the landscape.

14.10 The categories of development which will affect the archaeological resources are the construction of roads service trenches, house foundations and landscaping."

#### Environmental Information

15. As a consequence of the intervening years since the outline decision in 2007, and the fact that the most up-to-date environmental information is at least seven years old (from 2006 or earlier) (eg the Flood Risk Assessment (FRA) is dated 2004), following our letter of February 2012 in March 2012 CYC concluded that certain chapters of the Environmental Statement need to be updated:

"Cultural Heritage:

The Environmental Statement should be revised to take account of the changes to the archaeological work carried out in the area since the original Environmental Statement was written...[including] (a) the published report on the working carried out by Chas Jones (Finding Fulford, the search for the first battle of 1066, C Jones, 2011)...."

16. The applicant's further environmental information does not deal with Mr Jones research as CYC directed, and this information is not reported in the full ES or the NTS, which makes only this observation:

"14.8 The Battle of Fulford took place on the 20th September 1066 and in 2002 the Battle of Fulford Society was formed by Charles Jones to establish the location of the Battle. Whilst much work has been undertaken there has been no archaeological evidence to support this hypothesis."

17. In relation to Landscape and Visual Amenity CYC advised that "the view points referred to be checked to ensure that there are no material changes that may have significantly altered the views with the original [ES].

18. In response the NTS reports:

“10:4 The landscape treatments of the completed road junction with the A19 (now approved) and alongside the road access into the site will ensure that the new road fits comfortably into its setting. It will have no detrimental effect on the Fulford Conservation Area or the landscape beyond the Conservation Area. Despite the increase in highway infrastructure, the proposal will result in a negligible impact on the landscape character of this area.”

19. As is apparent the ES/NTS fails to deal with the new Conservation Area boundaries, which is a material change that significantly alters the assessment of the landscape and visual impact. This concern has been made by CYC officer for Design and Conservation and Sustainable Development:

“In addition we notice that the access road appears to be highly damaging to the existing environment. Although the principle of the new road was agreed before the conservation area boundary was extended we do expect to have a degree of control over this detailed layout and design to reduce its impact as far as possible on important characteristics of the entrance to the village.”

20. In relation to ecology and the presence of European Protected Species, (several species of bats) FPC has consistently identified serious shortcomings with the applicant's environmental information in relation to ecology. CYC requested further environmental information through a Reg 22 request but the response in the ERAP Bat Survey Reports is insufficient to inform any reliable assessment of bat usage of the site or the impact of the development on bats. (See FPC to CYC 26 March 2013 and MAB Ecology Reports of 2012 and 2013).

21. These statements are but some of the examples where the ES/NTS has failed to grapple with new information. We appreciate that any court review of the adequacy of environmental information requires a high threshold of failure. However that general principle will not preclude a court from finding an ES is inadequate in circumstances where the local planning makes a request for further information through the EIA regime (Reg 8; now Reg 22) and this is not then acted on or complied with fully. It would be perverse and irrational and Wednesbury unreasonable to identify material inadequacies in the environmental information and for CYC to seek further environmental information through the EIA regime in the first instance and then exercise discretion to proceed to determine the application without the fully updated information.

### Flooding

22. Despite well-documented changes in flooding in the Fulford area CYC did not require an update to the 2004 FRA. FPC observed in its letter to CYC that the Environment Agency has published revised flood maps that indicate an increase to areas of the site now included within areas of high flood risk (zones 2&3). In these circumstances, it would be unlawful to determine a RSM application in the absence of an up-to-date FRA to inform the detailed housing layout.

23. Two related concerns are firstly, CYC has agreed to leave the drainage details to be addressed by condition. FPC objected to this: "For a site of this size, sited partly within the functional flood plan and with little natural gradient, drainage solutions should be detailed in the [RSM] application." Secondly, the surface water pumping station was omitted from the scheme in June 2006, after the publication of the 2006 ES Supplement, yet no assessment is provided in the 2012 ES regarding the impact of this omission on the effectiveness of the proposed flood mitigation measures.

#### Aarhus Convention

24. Finally we remind you that this development is subject to the Aarhus Convention. This gives high-level protection to individuals and organisations like FPC the right to insist on full participation and fairness in the environmental decision-making, procedures. The Aarhus principles are backed up by Article 47 of the Charter of Fundamental Rights of the European Union, see Case C-260/11, Edwards v Environment Agency [2013] CJEU.

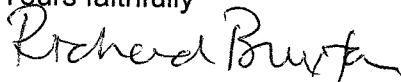
25. As explained in the Aarhus Implementation Guide (2000, revised draft 2011) (*Implementation Guide*) explains:

"The Aarhus Convention is a new kind of environmental agreement. It links environmental rights and human rights. It acknowledges that we owe an obligation to future generations. It establishes that sustainable development can be achieved only through the involvement of all stakeholders. It links government accountability and environmental protection. It focuses on interactions between the public and public authorities in a democratic context and it is forging a new process for public participation in the negotiation and implementation of international agreements."

26. Access to information stands as the first of the convention pillars. It is the first in time, since effective public participation in decision-making depends on full, accurate, up-to-date information. For the reasons set out above, the lack of full accurate and up-to-date information has eroded effective public participation.

27. CYC will appreciate that Aarhus Convention provides that review procedures should not be prohibitively expensive. If judicial proceedings are lodged by FPC, or a member of the local community acting as the claimant, it will be proper for the claimant to apply for a statutory Protective Costs Order (PCO) under CPR 45.43. The reason for pointing this out now is that in light of the serious failings identified the CYC has open to it the decision to refuse the application as a means to avoid costly legal proceedings with our clients.

Yours faithfully



Richard Buxton

cc Persimmon Homes (Attn A Hopwood)