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## SCOTTISH BORDERS COUNCIL LOCAL REVIEW BODY

MINUTE of Meeting of the LOCAL REVIEW BODY held in the Council Chamber, Council Headquarters, Newtown St Boswells, TD6 0SA on Monday, 22 January 2018 at 10.00 am

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Present:- Councillors S. Hamilton (Chairman), S. Aitchison, A. Anderson, J. A. Fullarton, H. Laing, S. Mountford, C. Ramage and E. Small (from paragraph 2)

Apologies:- Councillor T. Miers

In Attendance:- Principal Planning Officer (C. Miller), Solicitor (E. Moir), Democratic Services Officers (F. Henderson and F. Walling).

### **CHAIRMAN**

In the absence of the Chairman the meeting was chaired by Vice Chairman Councillor Scott Hamilton.

### **MEMBER**

Councillor Small had not been present at the initial consideration in respect of the undernoted application and was therefore unable to participate in the further consideration. The Member withdrew from the Chamber for this part of the meeting.

### **1. CONTINUATION OF REVIEW OF 17/00479/FUL**

- 1.1 With reference to paragraph 1 of the Minute of 16 October 2017, the Local Review Body continued their consideration of the request to review the refusal of planning permission in respect of erection of a dwellinghouse on land North East of and incorporating J. Rutherford Workshop, Rhymers Mill, Mill Road, Earlston. The Chairman referred to Members' concern relating to the identified flood risk to the site when the application was first considered and the decision that the application could not be determined without further procedure in the form of a hearing session. The purpose of the hearing would be to provide clarification on: the discrepancies between the assessments of flood risk to the site; and the finished floor level required in the proposed dwellinghouse to mitigate against a 1 in 200 year flood event and blockage of the Clatteringford Bridge. Following the hearing session Members of the Local Review Body would consider all aspects of the review with no further input from the hearing attendees.

### **HEARING SESSION**

- 1.2 Speaking at the Hearing on behalf of the appellant were Mr Barry Austin, and Mr Willie Hume of consultants Terrenus Land & Water Ltd. Scottish Borders Council was represented by Ms Lauren Addis, Flood Risk Officer and Mr Stuart Herkes, appointed Planning Officer. SEPA was not represented. Hearing statements on behalf of the appellant and by both Council officers had been circulated.

- 1.3 In her opening statement Ms Addis drew attention to recent survey information, in the form of the Earlston Flood Study, carried out by JBA Group, which had become available since the application was first considered. This provided detailed information which was an update from her original hearing statement and was of relevance to the application.

Following advice from the Solicitor, Members determined that this did constitute new evidence under the terms of Section 43B of the Town and Country Planning (Scotland) Act 1997, but that they would want to include this information as part of their consideration. Members applied the test set by Section 43B and concluded that the information could not have been available at the time of the appointed officer's determination and that the information was material to their deliberations. The Chairman therefore adjourned the meeting to allow the appellant's representatives to make an outline appraisal of the survey information and to decide if they wished to either continue with the hearing or to request deferral to a future date to facilitate a more detailed examination. After a 15 minute adjournment the appellant and his representatives advised that they were happy to proceed.

- 1.4 Ms Addis provided a short summary of the information contained in the Earlston Flood Study which had been commissioned by the Council's Flood Risk and Coastal Management Team. The full topographic study using the most up-to-date modelling techniques had resulted in the development of new flood maps. According to the new study, if the floor level of the dwellinghouse was raised to a level of 103.03m above sea level inclusive of the required freeboard of 600mm this would be sufficient to mitigate the flood risk. However further work was required on proposals for compensatory storage and consideration of any effect on neighbouring amenity of the updated floor level. The team had offered to share the new survey information with the applicant in order to undergo a further site-specific investigation. Ms Addis answered Members' questions. With regard to options for compensatory storage and potential impact on neighbouring properties Ms Addis advised that she could not comment until detailed proposals were available. She confirmed that her team's objection on the grounds of flood risk remained but that the matter would be reconsidered once the results of the site-specific work were available.
- 1.5 On being invited to speak the applicant, Mr Barry Austin, gave a short account of the background of his company Austin Coach Travel and of his family's roots in Earlston. With regard to concerns over flood risk raised in response to the application, Mr Austin advised that from his own experience, at 59 years of age, he had never seen the site flood. According to information from other local residents, some being over 80 years of age, the only time any flooding was noted was 1947/48. It was believed that this would not have been a problem had the old railway bridge parapet not been choked with falling trees. Since the old bridge structure was totally removed, Mr Austin had not come across one Earlstonian who could remember flooding of the proposed site at Mill Road.
- 1.6 Mr Willie Hume, Director of the appellant's consultants Terrenus Land & Water Ltd. addressed the Review Body. Mr Hume referred to the new data provided by the Earlston Flood Study believing this to be useful and robust. Whilst details were still to be established regarding updated floor levels he supported the position of the Council's Flood Risk Officer with regard to the requirement for final floor levels to be placed at least 600 mm above any potential overland flow water in the event of significant blockage of the Clatteringford Bridge, as happened in the 2016 flood. He added that during the 1 in 200 year event with no blockage of the bridge the site was not at risk of inundation. He referred Members to the site plan and the site levels based on a temporary benchmark and advised that this would be updated with the new information. With regard to mitigating potential impact on surrounding areas, he believed that enhanced transference of water was an alternative to compensatory storage and that safe ingress and egress of water over the site could be controlled by condition. However he was happy to agree the detail of these measures with Council officers on the basis of the new data.
- 1.7 The Council's appointed Planning Officer highlighted the main points of his written statement. He emphasised that any assessment of how the flood risk impacts might be appropriately mitigated, should take full account of the implications of any such mitigation requirements for the layout and design of the proposal and its accommodation within the surrounding streetscape. Any excessive under-build and/or any make up of ground levels

required to accommodate a particular finished floor level, had potential to impact unacceptably, both upon the visual amenities of the site and surrounding area, and upon the residential amenity of surrounding properties. This would be a particular concern were the levels of the windows, eaves and roof ridge height raised to a level obviously out-of-alignment with the same features on neighbouring properties. The Planning Officer recommended that it was not made a simple requirement by planning condition that a particular finished floor level should be achieved; at least not without the applicant first having been required to account for the full implications of this achievement within a revised design, describing in appropriate detail, all proposed revisions required to the design of the house and/or any proposed make up of levels on the site. Given both the degree of uncertainty and wider concerns with the proposed design and layout it was strongly recommended that these design considerations would in fact be most appropriately addressed within a new planning application - even if it was ultimately concluded by the Local Review Body that a raised finished floor level would suffice to address the flood risk impacts.

- 1.8 After the Chairman had closed the Hearing session the Local Review Body reconvened to continue consideration of the review. Members agreed that the Hearing had been useful in providing further information about the degree of potential flood risk and proposed mitigation measures in the event of flooding. However, despite the technical detail supplied, they remained unclear about the actual floor level required to mitigate against flood risk in the light of the new data within the Earlston Flood Study and, if this resulted in a change in the ridge height of the house, any impact this may have on the neighbourhood amenity. They also required further information about proposals for compensatory storage or alternative method of mitigation for any water flow over the site. After further discussion Members concluded that they could not make a determination without further clarification on these matters from the applicant.

## **DECISION**

### **AGREED that:-**

- (a) in accordance with Section 43B of the Town and Country Planning (Scotland) Act 1997 the review be determined with reference to the new evidence submitted;**
- (b) the review could not be determined without further procedure in the form of written submissions from the applicant;**
- (c) the applicant provide written submissions on the following, taking into account information provided by the recent Earlston Flood Risk Study:**
  - (i) an updated finished floor level to preserve the necessary freeboard to mitigate against a 1 in 200 flood risk and the impact on ridge height as a result of the updated floor level; and**
  - (ii) safe access and methods of mitigating potential impact on surrounding properties;**
- (d) the review be continued on a date to be arranged.**

## **2. REVIEW OF 17/01007/FUL**

There had been circulated copies of the request from Mr David Lee, per Ericht Planning & Property Consultants, Gifford House, Bonnington Road, Peebles, to review the decision to refuse the planning application to vary planning condition 9 of planning consent 10/00172/FUL relating to occupancy of building at The Pavilion, Coldingham. The supporting papers included the Notice of Review (including the Decision Notice and Officer's Report); papers referred to in the report; and a list of relevant policies. Members were sympathetic with the reasons put forward by the appellant to vary condition 9 which limited occupancy of the building approved for holidaying purposes, for individual periods

of no more than 4 weeks in any 13 week period. They considered the interpretation of the wording of the condition and took into account Circular 4/1998 which referred to the use of conditions in planning permission. They also paid particular attention to the variation in wording proposed by the appellant to limit occupancy to genuine holiday makers only and not to be used as a sole or main residence. Members understood the reasons why the restrictions had been put in place and, after a lengthy debate concluded that the current wording of condition 9 did enable year round occupation but that the restrictions were necessary to control the continued operation of the property for tourism purposes. They noted that there was an option open to the applicant to apply for planning permission for change of use to a dwellinghouse.

## **DECISION**

### **AGREED that:-**

- (a) the request for a review had been competently made in terms of Section 43A of the Town and Country Planning (Scotland) Act 1997;**
- (b) the review could be considered without the need for any further procedure on the basis of the papers submitted;**
- (c) the proposal would be contrary to the Development Plan and that there were no other material considerations that would justify departure from the Development Plan; and**
- (d) the officer's decision to refuse the application be upheld for the reasons detailed in the Appendix to this Minute.**

*The meeting concluded at 12.15 pm*



**APPENDIX**

**SCOTTISH BORDERS COUNCIL  
LOCAL REVIEW BODY DECISION NOTICE**

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**APPEAL UNDER SECTION 43A (8) OF THE TOWN AND COUNTRY PLANNING  
(SCOTLAND) ACT 1997**

**THE TOWN AND COUNTRY PLANNING (SCHEMES OF DELEGATION AND LOCAL  
REVIEW PROCEDURE) (SCOTLAND) REGULATIONS 2013**

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**Local Review Reference:** 17/00052/RREF

**Planning Application Reference:** 17/01007/FUL

**Development Proposal:** Variation of Condition No. 9 of planning consent 10/00172/FUL relating to occupancy of building

**Location:** The Pavilion, Coldingham

**Applicant:** David Lee

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**DECISION**

The Local Review Body (LRB) upholds the decision of the appointed officer and refuses planning permission for the reasons set out in this decision notice and on the following grounds:

1. The proposed variation of Condition 9 of planning permission 10/00172/FUL would be contrary to Policy ED7 of the Scottish Borders Local Development Plan 2016 in that it would enable the use of the building for purposes which would not constitute direct tourism purposes, which would result in the loss of a tourism development that has the potential to generate year-round economic benefit to the surrounding area. Other material considerations do not justify a departure from the Development Plan in this case.

**DEVELOPMENT PROPOSAL**

The application relates to a proposed variation of Condition No. 9 of planning consent 10/00172/FUL relating to occupancy of building. The application drawings and documentation consisted of the following:

**Plan Type**

**Plan Reference No.**

Location Plan

## **PRELIMINARY MATTERS**

The Local Review Body considered the review, which had been competently made, under section 43A (8) of the Town & Country Planning (Scotland) Act 1997 at its meeting on 22<sup>nd</sup> January 2018.

After examining the review documentation at that meeting, which included: a) Notice of Review (including the Decision Notice and Officer's Report); b) Papers referred to in Officer's Report; and c) List of Policies, the LRB concluded that it had sufficient information to determine the review and proceeded to consider the case. In coming to this decision Members considered the applicant's request for further procedure in the form of a site visit but concluded this was not necessary.

## **REASONING**

The determining issues in this Review were:

- (1) whether the proposal would be in keeping with the Development Plan, and
- (2) whether there were any material considerations which would justify departure from the Development Plan.

The Development Plan comprises: SESplan Strategic Development Plan 2013 and the Scottish Borders Local Development Plan 2016. The LRB considered that the relevant listed policies were:

- Local Development Plan policies: PMD1, ED7, HD2, HD3 and IS2

Other Material Considerations

- Scottish Planning Policy
- Circular 4/1998 "The Use of Conditions in Planning Permission"

The Local Review Body noted that the proposal was to replace Condition 9 of planning consent 10/00172/FUL which limited occupancy of the building known as The Pavilion for holidaying purposes for individual periods of no more than 4 weeks in any 13 week period. It was noted that the variation sought to replace the time limits of occupation with wording that limited occupancy to genuine holiday makers only and not to be a person's sole or main residence.

The Review Body noted that there had already been a successful application to vary a previous condition to allow year-round occupation at the premises and, whilst appreciating that the time limit restrictions may cause issues as identified in the applicant's submissions, they understood and accepted the reasons why the restrictions had initially been imposed to seek genuine holiday usage of the property and not permanent residential occupation.

The Review Body discussed the question of how to define tourism and holiday use and how the existing and proposed conditions would ensure such occupation. They considered the actual restrictions imposed by the existing condition. They then considered the submissions made by the applicant and what approach had been taken to conditions attached to other consents. They attached weight to the enforceability of the conditions, noting that this was one of the tests applied by Circular 4/1998, together with the other tests including precision and relevance. They also discussed the operation and veracity of the mutual element of both

the existing and proposed conditions which seeks a register of holidaymakers to be available to the Council.

The Review Body concluded that, whilst an option open to the applicant was also to apply for planning permission for change of use to a dwellinghouse, the restrictions currently in place under Condition 9 were both necessary and sufficiently flexible to allow tourism and holiday use, no matter what the circumstances of the ownership or occupation. They understood that year-round occupation of the premises was possible and full occupation within each 13 week period, albeit only for total periods of 4 weeks by an individual person or group of persons.

They did not accept that the proposed variation of condition would achieve the same precision or degree of control to ensure continued operation of the property for genuine holiday or tourism purposes and agreed that the existing condition must be maintained, with its time limit restrictions.

## **CONCLUSION**

After considering all relevant information, the Local Review Body concluded that the development was contrary to the Development Plan and that there were no other material considerations that would justify departure from the Development Plan. Consequently, the application was refused.

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### **Notice Under Section 21 of the Town & Country Planning (Schemes of Delegation and Local Review procedure) (Scotland) Regulations 2008.**

1. If the applicant is aggrieved by the decision of the planning authority to refuse permission for or approval required by a condition in respect of the proposed development, or to grant permission or approval subject to conditions, the applicant may question the validity of that decision by making an application to the Court of Session. An application to the Court of Session must be made within 6 weeks of the date of the decision.
2. If permission to develop land is refused or granted subject to conditions and the owner of the land claims that the land has become incapable of reasonably beneficial use in its existing state and cannot be rendered capable of reasonably beneficial use by the carrying out of any development which has been or would be permitted, the owner of the land may serve on the planning authority a purchase notice requiring the purchase of the owner of the land's interest in the land in accordance with Part V of the Town and Country Planning (Scotland) Act 1997.

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**Signed.....**Councillor S. Hamilton  
Chairman of the Local Review Body

**Date.....**23 January 2018

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