

SCOTTISH BORDERS COUNCIL

**APPLICATION TO BE DETERMINED UNDER POWERS DELEGATED TO
CHIEF PLANNING OFFICER**

PART III REPORT (INCORPORATING REPORT OF HANDLING)

REF : 16/00041/FUL

APPLICANT : Eileen Cockburn

AGENT : Alistair MacDonald

DEVELOPMENT : Removal of Condition 3 of planning permission 04/02011/FUL pertaining to occupancy of the dwellinghouse

LOCATION: Craigie Knowe Blainslie Road
Earlston
Scottish Borders
TD4 6DJ

TYPE : FUL Application

REASON FOR DELAY:

DRAWING NUMBERS:

Plan Ref	Plan Type	Plan Status
	Location Plan	Refused

NUMBER OF REPRESENTATIONS: 0
SUMMARY OF REPRESENTATIONS:

No representations and no statutory consultees.

PLANNING CONSIDERATIONS AND POLICIES:

Scottish Borders Council Consolidated Local Plan 2011:

Policy G1: Quality Standards for New Development
Policy H2: Protection of Residential Amenity
Policy D2: Housing in the Countryside

Scottish Borders Council Proposed Local Development Plan 2016

Policy HD2: Housing in the Countryside

SPG - New Housing in the Borders Countryside

SPP (2014)
Circular 4/1998
Circular 3/2012

Recommendation by - Stuart Herkes (Planning Officer) on 21st March 2016

This is a joint report on Planning Application 16/00041/FUL and Application for Modification or Discharge of a Planning Obligation 16/00049/MOD75. It should be read with reference to the Report of Handling which informed the Eildon Area Committee's approval of Planning Application 04/02011/FUL on 20 December 2004.

BACKGROUND

Planning Consent 04/02011/FUL gave permission for the erection of a dwellinghouse and the change of use of an existing shed to business use, at a site in the countryside to the southwest of Earlston.

Planning consent was granted subject to planning conditions and the conclusion of a legal agreement. The property concerned is today known as 'Craigie Knowe'. It remains out with the Development Boundary and in isolation from any building group, albeit that it lies in close proximity both to Earlston, and to some other isolated rural properties to the south and east.

The planning conditions attached to Planning Consent 04/02011/FUL include Condition 3, which specifically requires that:

"The occupation of the dwellinghouse hereby approved shall be limited to a person solely or mainly employed in the operation of the adjoining land and building as a Horse Breeder, Potato Merchant, Horse Feed Merchant or Farrier or other business approved by the planning authority.

Reason: The erection of a dwellinghouse for normal residential occupation would be contrary to the Council's policy on housing in the countryside."

Planning Application 16/00041/FUL now proposes that the above condition be removed. The Applicant's case in support of this proposal is set out in two documents and is considered below.

In addition to the imposition of conditions, a legal agreement was also required in relation to Planning Consent 04/02011/FUL, in order to achieve the following objectives: (i) to secure a development contribution towards the Waverley Rail reinstatement; (ii) to ensure that no further dwellinghouses are built on adjoining land within the Applicants' ownership; and (iii) to ensure that the subject house and business premises are not sold separately. Ultimately the first point was addressed within a Section 69 legal agreement shortly after the Eildon Area Committee's approval of the application in December 2004. A Section 75 agreement to achieve the latter two objectives was ultimately concluded in 2010, and registered in 2011.

Application for Modification or Discharge of a Planning Obligation 16/00049/MOD75 now proposes that the planning obligation secured by the Section 75, be modified. However, no specific details are given with respect to the proposed modification, beyond advice within the supporting statement that the Applicant wishes the occupancy restriction set out in Planning Condition No 3 to be removed from the Section 75 legal agreement. The occupancy restriction referred to though, is only required by Planning Condition No 3 attached to Planning Consent 04/02011/FUL. It does not feature (either directly or indirectly) as a burden within the Section 75 legal agreement. Moreover, the Applicant has explicitly advised that she is content that the existing burdens imposed by the Section 75 legal agreement should be maintained; specifically the prevention of further housing on the land and the requirement that the business premises and house should be retained in perpetuity as a single planning unit. In light of this, it is concluded that the MOD75 application has been predicated upon a misinformed understanding that there is a burden on the occupancy of the property contained within the legal agreement itself, when in fact no such legal burden exists.

Ultimately, the reason for, and purpose of, the proposed modification of the legal agreement are not clear. The application appears to be irrelevant even to the achievement of the Applicant's explicitly stated purpose for making it. Given that it is self-evidently redundant - unable to advance anything regardless of the outcome of the determination of Planning Application 16/00041/FUL - it is concluded that it is neither necessarily nor productively considered beyond this point, and is only reasonably refused in the circumstances.

Henceforth this report relates only to the proposal of Planning Application 16/00041/FUL.

PLANNING CONSENT 04/02011/FUL

Planning Application 04/02011/FUL proposed a new house and change of use of an existing shed to accommodate: (1) the operation of Mr Cockburn's established Potato Merchant, Horse Feed Merchant and

Farrier business activities, and (2) a proposed new Horse Breeding business. The applicants at this time were Mr and Mrs Cockburn. Until his death last year, Mr Cockburn was the sole operator of the above noted businesses. Mrs Cockburn, his widow, is the current Applicant (16/00041/FUL).

The Report of Handling which informed the Eildon Area Committee's decision of 20 December 2004, identifies the site as being in an isolated rural location.

In line with the Council's Housing in the Countryside Policies of the time, the Report of Handling recognises a strict requirement for the Applicant to demonstrate that the proposed residential property is justified on economic grounds as being essential to service the operational needs of a business with a demonstrable requirement to operate from this rural location. However, the Report also considers that significant weight is reasonably given within Members' consideration, to the prevalence of what is identified as a more relaxed approach to supporting new isolated houses in the countryside associated with business ventures.

Firstly, it is observed that this approach is reflected in (what was then) the most up-to-date review of the housing in the countryside policy.

Secondly, Members' attention is drawn to specific examples of other (then recent) planning decisions, where it is advised that the Council has accepted proposals for dwellinghouses in association with businesses which in their nature did not necessarily require to be located within a rural location. Two specific examples of such decisions are referenced. These are both for new single houses in association with new business premises in isolated rural locations. The first, the subject of Planning Consent 01/01789/FUL, was originally recommended for refusal but was ultimately approved by the Tweeddale Area Committee subject to a planning condition relating to access arrangements. The other, the subject of Planning Consent 03/02061/OUT, was also recommended for refusal but then ultimately approved by the Berwickshire Area Committee, this time subject to three conditions. These were imposed to regulate matters at the detailed application stage, but also specifically sought further details with respect to services and access. Legal agreements were concluded in both cases.

The Eildon Area Committee's determination of 20 December 2004 was that approval of Planning Application 04/02011/FUL was consistent with the Planning Authority's support for these other recent decisions of the Council in respect of similar proposals. Approval was however subject, firstly, to the conclusion of a Section 75 legal agreement (i) to ensure that no further dwellinghouses should be built on the adjoining land within the Applicant's ownership, and (ii) to ensure that the house and business unit should not be sold separately from one another; and secondly, to requirements that: (a) the businesses should be in operation prior to, or in tandem with, the occupation of the dwellinghouse, and (b) the dwellinghouse should be occupied by a person employed in the business.

The latter concern is addressed within Planning Condition No.3 attached to the Planning Consent which was ultimately issued on 13 August 2010.

PLANNING CONDITION NO. 3

The Reason For Decision given on the Decision Notice for Planning Consent 04/02011/FUL, explicitly notes the requirement for a suitably worded planning condition to be attached to ensure that "the dwellinghouse is occupied by a person employed in the business". Along with the other explicitly identified matter to be addressed by condition (Condition No 4) and the legal agreement, the regulation of the new property's occupancy is reasonably understood as being integral to the Planning Authority's support for the subject development.

According to the Reason attached to the Planning Condition itself, this is because: "The erection of a dwellinghouse for normal residential occupation would be contrary to the Council's policy on housing in the countryside".

Excepting only the explicit recognition within the Reason For Decision that the development "do(es) not necessarily require to be located within a rural location", it is reasonably understood that the Planning Authority's determination of 20 December 2004 is that the siting and operation of the dwellinghouse would otherwise have no unacceptable impacts upon the environment and amenity of this rural location so long as it is occupied by the operator of the subject business and is not available for normal residential occupation.

It is however the Applicant's current proposal that Planning Condition No 3 should now be removed entirely. If supported, this would result in the dwellinghouse being capable of residential occupation by someone other than an operator or a worker of the subject business (or an appropriate successor in operation to the latter). The only restrictions on the use and disposal of the site that would remain in force then, would be those secured by the legal agreement. However, since these require only that the site be retained as a single planning unit and not be subject to any further housing development, neither serve to tie the occupancy of the dwellinghouse to the business use it was approved to service.

Accordingly, the direct effect of the removal of Planning Condition No. 3 would be the establishment of a new residential property in an isolated rural location in the absence of any restrictions upon its occupancy. This would allow the existing house, within less than six years of its consent, to be occupied by a party with no operational requirement to be resident at the site for the purposes of overseeing the operations of the business that the house was explicitly approved to serve.

Given that the imposition of the occupancy restriction was explicitly identified as being integral to the Planning Authority's support for the dwellinghouse in 2004, it is axiomatic that the removal of Condition No. 3 would be contrary to the terms of the Planning Authority's support and approval of Planning Application 04/02011/FUL. However, the proposal of Planning Application 16/00041/FUL requires to be assessed within the planning policy context of the present, and not that which prevailed within 2004. More specifically, the principle requires to be assessed in terms of the policies and proposals of the current statutory development plan, and beyond this, regard is necessarily had to any other material considerations. The latter include the Applicant's own supporting case and national planning policy and guidance with respect to the operation of planning conditions.

PLANNING PRINCIPLE

Despite some subsequent development in closer proximity in the intervening years, the site still prevails within essentially the same planning policy context as it did at the time of the Eildon Area Committee's determination of Planning Application 04/02011/FUL in 2004. As such, it remains in planning policy terms, an isolated site in the countryside and therefore is only appropriately assessed accordingly.

The Applicants seeks the removal of the occupancy restriction, such that there should be no requirement for the occupants of the dwellinghouse to be actively engaged in the operation of a potato merchant, horse breeder, horse feed merchant and farrier business. This would have the effect of allowing the residential property to become available for onward sale, or disposal, to a third party unrelated or unconnected to the operation of the subject business. It would then be capable of being traded within the wider housing market and ultimately sold on to any party interested in the residential property per se, rather than retained for use by the subject business, or any appropriate successor in operation, to allow it to meet its operational needs for both a rural location and on-site residential accommodation.

The establishment of a new residential property in an isolated rural location in the absence of any restrictions upon its occupancy for the purposes of ensuring that it would only ever be used to serve a specific business' demonstrated operational requirements, would be directly contrary to the Council's rural housing policy; and specifically, Policy D2 of the Adopted Scottish Borders Consolidated Local Plan 2011 and the guidance of the approved Supplementary Guidance Note on New Housing in the Borders Countryside.

The above noted requirements of Policy D2 are essentially retained within Policy HD2 of the emerging Local Development Plan. The latter does expand the circumstances in which a new isolated dwellinghouse might be supported. However in all cases, these circumstances relate only to the operational requirements of a business with a demonstrated need for either a countryside location and/or for an isolated location. There is no support for a new isolated dwellinghouse unrelated to the operations of such a business.

Besides resulting in a proliferation of isolated dwellings which do not support a business' operation, the removal of the planning condition would also be liable to result in the loss of a potential opportunity for the appropriate accommodation of a business with an operational requirement for a rural location and on-site accommodation. Were it to be traded in the open housing market, and therein acquired by a private household, this opportunity would be lost to the rural economy.

Accordingly, and unless any other material considerations indicate otherwise, the proposed removal of Planning Condition No 3 would only be appropriately refused on the grounds that:

The establishment of a new residential property in an isolated rural location in the absence of any restriction that it only be occupied to serve the operational requirements of a business that has both a need for this countryside location and a need for on-site residential accommodation, would be directly contrary to the Council's rural housing policy; and specifically, Policy D2 of the Adopted Scottish Borders Consolidated Local Plan 2011 and the guidance of the approved Supplementary Guidance Note on New Housing in the Borders Countryside.

APPLICANT'S SUPPORTING CASE

In support of the proposed removal of Planning Condition No 3 and the proposed modification of the Section 75 legal agreement, the Applicant has provided supporting details which advise that the proposed deletion and modification that the applications have been prompted by her concern for personal reasons, to sell the property in its entirety, following the death of her husband and the cessation of the potato merchant, horse breeder, horse feed merchant, and farrier business activities which he had up until that time, operated from the property at 'Craigie Knowe'.

A supporting statement advises that there is no concern on the Applicant's part that the property should be divided and broken up, or that there should be any lifting of the legal burden prohibiting any further new dwellings on the subject land.

Her concern is only that Planning Condition No 3 attached to Planning Consent 04/02011/FUL should now be removed. The latter, it is advised, is causing a significant problem within the sale of the property upon the open housing market.

In support of the proposed deletion of the condition, it is advised that the house should now be re-considered as being well-related to an established rural building group, which it advises encompasses thirteen other existing houses, including two new properties on the opposite side of the road from 'Craigie Knowe'.

It is further advised that since the cessation of the specific business activities required to be in operation by Planning Condition No 3, the Applicant, as the widow of the late operator, is now by default occupying the property in direct contravention of the strict requirement of the same planning condition.

In direct response to the Planning Officer's concern to establish if any efforts had been made to sell the business and house on to a third party as an existing and operational business unit (04 February 2016), the Applicant has advised that no one else worked within the business other than her late husband, and that no one else within the family has been in a position to take over the running of the business in the period since.

With respect to onward sale to a third party, it is advised that the disposition of a potato merchant, horse breeder, horse feed merchant and farrier business, would have been difficult to achieve in the present climate in light of the general downturn in market trends and competition from larger national companies. The business it is advised, was latterly surviving solely on the basis of its farrier activities. It is also advised that the planning condition's restrictions would have made access to borrowing from financial institutions difficult, if not impossible.

ASSESSMENT OF APPLICANT'S SUPPORTING CASE

There are understandable personal reasons why the Applicant and her family have no concern to maintain the potato merchant, horse breeder, horse feed merchant and farrier business; and why the Applicant should now wish to be accommodated elsewhere. However, the principle of the proposals is only reasonably considered on the basis of its planning merits.

Given that the proposed removal of Condition No 3 would be liable to result directly in both an isolated dwelling which does not support a business' operational requirement, and the loss of a potential opportunity for the accommodation of another business with an operational requirement for a rural location and on-site accommodation, it need to be demonstrated to the Planning Authority's satisfaction that there is no realistic prospect of the site being retained in operation as a business premises.

The Applicant has however not reasonably demonstrated any effort to market the property as a business premises. Instead the advice given appears to indicate that the property has to this point, only ever been presented for sale on the open housing market as a private dwelling, without account or acknowledgement of the business occupancy restriction.

Ultimately, there is nothing within the supporting case itself which provides any tangible evidence of the statements that the Applicant has given with respect to the difficulties associated with the marketing of the property for onward sale as a business premises, or indeed with respect to securing any financial assistance required to facilitate any such transaction.

On the contrary, the statements about the difficulties that it is anticipated that the Applicant would have experienced had she sought to market the property as a business premises, appear to be entirely uncorroborated. There is no documentary evidence that any such difficulties have in fact been encountered, let alone during any reasonable period of time in which there has been a reasonable expenditure of effort to promote awareness of the property as a business premises available for uptake by a potato merchant, horse breeder, horse feed merchant and/or farrier business.

The supporting statement does not represent, or otherwise evidence, a genuine and credible attempt to promote awareness of the site amongst parties who would be liable to be both interested in, and qualified to operate, such a specialist business premises. It is therefore unclear at this point, whether or not there is actually any realistic prospect of the premises being capable of uptake and operation by a successor potato merchant, horse breeder, horse feed merchant and/or farrier business. Without an evidence-based account of any actual difficulties that have been experienced by the Applicant during the marketing of the site as a business premises over a reasonable period of time, and within a strategy that might reasonably have been expected to have yielded results had there been any serious and genuine interest in the property as a potato merchant, horse breeder, horse feed merchant and/or farrier business premises, it is not considered that it would be reasonable or necessary to accept that the occupancy restriction is having any unacceptable impacts.

There is further, a risk that any acceptance of the proposal on the basis of no or minimal evidence of any reasonable and concerted effort to market the site as a business premises, would be liable to promote other unsubstantiated proposals being made in relation to isolated dwellings elsewhere, for the purpose of removing restrictions or other ties affecting occupancy or operation. On this basis alone, it is reasonable for the Planning Authority to insist that evidence is provided to corroborate the advice that there is no prospect of the property being sold on to an equivalent business operation to that which the dwellinghouse was approved to serve.

Although the Planning Authority was content within its determination of Planning Application 04/02011/FUL that the house and business premises would have no adverse impacts upon the landscape setting at the site or within the surrounding area, the Applicant's assertion that the property has subsequently been absorbed into a building group is not found to be the case. Notwithstanding that there has been development within the surrounding area, the property remains an isolated, single property at distance from neighbouring development, which does not integrate with, or contribute to any sense of a wider building group within the surrounding area. Accordingly, there are no grounds to consider that the circumstances at the site have now changed so substantially that it is appropriate to redefine or reassess its relationship to its surroundings in any fundamental way. The property is, and is only appropriately considered, as an isolated rural dwelling.

In addition to the Applicant's own supporting case however, consideration needs to be given to national planning policy and guidance which are material to the operation of planning conditions in relation to the regulation of the occupancy of rural dwellings.

SCOTTISH PLANNING POLICY

Scottish Planning Policy (2014) Paragraph 83 allows that where appropriate, the construction of single houses out with settlements should be allowed provided these are well-sited and designed to fit with local landscape character, taking account of landscape protection and other plan policies. It also explicitly advises that occupancy restrictions on housing should not be imposed.

While the advice of the SPP is a consideration, and one which post-dates both the issue of Planning Consent 04/02011/FUL and the adoption of the Consolidated Scottish Borders Local Plan, it is not considered that it is sufficient in isolation to outweigh the need for the proposal to be determined in accordance with the statutory development plan.

The advice is general, and consideration needs to be given to the specific circumstances of a proposal, and whether, and (if relevant) how, its operation would be appropriately accommodated. Accordingly, and notwithstanding the relatively favourable context the SPP promotes relative to new development which has a demonstrated operational need for accommodation in an isolated rural location, there is no basis to accept the SPP as an overriding material consideration in this specific case.

CIRCULAR 4/1998

Circular 4/1998 sets out six tests to be applied with respect to the imposition of planning conditions. These are specifically whether the condition is: (i) necessary; (ii) reasonable; (iii) relevant to the development to be permitted; (iv) enforceable; (v) precise; and (vi) reasonable in all other respects.

It is acknowledged that the Applicant does find herself in very different circumstances to those that were then prevalent at the time of the determination of Planning Application 04/02011/FUL, and that the condition might have been written to allow greater flexibility in response to foreseeable events or circumstances. (Although not all circumstances are reasonably anticipated, the condition might nonetheless reasonably have included the potential for the property to be occupied by a spouse and any dependents of the operator of the business; the potential for the property to be occupied by the operator beyond their retirement from the business; and the potential for any widow or widower, and dependents, of the operator to occupy the property after the operator's death). While it would have been appropriate to consider (and, I would readily anticipate, support) any proposal to vary the planning condition to accommodate such provisions had such an application been made (or were it to subsequently be made) this is not the proposal before the Planning Authority. The application must be determined on the basis of the proposed removal - and not variation - of the planning condition.

Notwithstanding its shortcomings with respect to its regulation of the operation of the occupancy of the dwellinghouse, Planning Condition No 3 is, and remains, necessary, reasonable, relevant and enforceable in its requirement that the operation of the development consented by Planning Consent 04/02011/FUL, should be compliant with the Council's Housing in the Countryside Policy.

There is moreover, no reason to accept that the condition has now served its purpose since the property essentially still inhabits the same planning policy context as it did in 2004. The removal of Planning Condition No 3 would be liable to have more adverse and unacceptable impacts upon the environment and amenity of the site and its rural location than its maintenance. This would be through a dwellinghouse being made newly available for normal residential occupancy in a situation where this would not otherwise have been permitted in 2004, and which would not otherwise be permitted in 2016, and where no justification for doing so has otherwise been accepted, let alone provided.

CONCLUSION

As noted above, Application for Modification or Discharge of a Planning Obligation 16/00049/MOD75 appears to have been predicated upon the misunderstanding that there is a burden on the occupancy of the property contained within the legal agreement itself, when in fact no such legal burden exists. The application appears to be irrelevant even to the achievement of the Applicant's explicitly stated purpose for making it. Given that it is unclear in its proposal and redundant in its purpose, the application is only reasonably refused.

It is not considered that there are any material considerations that outweigh the need to determine Planning Application 16/00041/FUL in accordance with the Council's adopted Housing in the Countryside Policy. Accordingly it is considered that the application should be refused.

As noted above, there are provisions within Planning Condition No 3 which are considered to be overly restrictive in their specific terms (not least in the lack of provision for the Applicant to remain within her existing home as the widow of the business' operator) but these matters appear readily capable of being addressed through variations to the planning condition, which, if these were now sought, it is anticipated

could be considered sympathetically. However, since the application seeks the removal of the condition, it is not possible to address these points within a refusal of the current application. These matters would now only be appropriately progressed by the Applicant through a new application, specifically proposing these variations.

REASON FOR DECISION :

The establishment of a new residential property in an isolated rural location in the absence of any restrictions upon its occupancy for the purposes of ensuring that it would only ever be used to serve a specific business' identified operational requirements, would be directly contrary to the Council's rural housing policy; and specifically, Policy D2 of the Adopted Scottish Borders Consolidated Local Plan 2011 and the guidance of the approved Supplementary Guidance Note on New Housing in the Borders Countryside. Further, it is not considered that there are any material considerations - including the Applicant's supporting case and the advice and guidance of the SPP and Circular 4/1998 - that outweigh the need to determine this application in accordance with the Council's adopted Housing in the Countryside Policy. Accordingly the application is only reasonably refused.

Recommendation: Refused

- 1 The establishment of a new residential property in an isolated rural location in the absence of any restrictions upon its occupancy for the purposes of ensuring that it would only ever be used to serve a specific business' identified operational requirements, would be directly contrary to the Council's rural housing policy; and specifically, Policy D2 of the Adopted Scottish Borders Consolidated Local Plan 2011 and the guidance of the approved Supplementary Guidance Note on New Housing in the Borders Countryside. Further, it is not considered that there are any material considerations - including the Applicant's supporting case and the advice and guidance of the SPP and Circular 4/1998 - that outweigh the need to determine this application in accordance with the Council's adopted Housing in the Countryside Policy. Accordingly the application is only reasonably refused.

“Photographs taken in connection with the determination of the application and any other associated documentation form part of the Report of Handling”.