

SCOTTISH BORDERS COUNCIL

PLANNING AND BUILDING STANDARDS COMMITTEE

2 SEPTEMBER 2019

APPLICATION FOR PLANNING PERMISSION

ITEM: **REFERENCE NUMBER:** 19/00593/FUL

OFFICER: Euan Calvert
WARD: Jedburgh and District
PROPOSAL: Removal of Condition No 3 from planning consent
16/00160/FUL
SITE: Land East Of Plot 7 Ladyrig Farm Heiton
Kelso
APPLICANT: Robert Ian Jones And Lynda Jones
AGENT: Brodies LLP

PLANNING PROCESSING AGREEMENT: 5th August 2019

SITE DESCRIPTION

Ladyrig is located half a mile to the east of Heiton on an unclassified road (leading to Bowmont forest). Ladyrig is a group of traditional agricultural buildings which have been converted to four dwellinghouses. Ladyrig Farmhouse and Lodge are situated south of this former steading. On the opposite side of the public road are 3 houses (one conversion and 2 new build hoses) which were developed following the grant of planning permission in 2002.

The application site (Middlemarch) is set back from the road and east of the property known as Seven Oaks. It is situated to the rear of Ladyrig Farm Cottages, which comprises of 3 small terraces each consisting of 3 houses. Westfield (a converted agricultural building) is located on the south west side of the public road and accessed by a farm track. This farm track is opposite the entrance to Middlemarch and the Claimed right of way BR20. The track forms the southern edge of the designed gardens of Ladyrig Farmhouse and the southern edge of the group.

The application site area extends to 0.33 ha, being the western portion of a paddock which extends to 0.57ha. Sevenoaks, Middlemarch and all 9 Cottages are served by the same minor access road which is sealed blacktop.

PROPOSED DEVELOPMENT

This application seeks consent remove condition 3 from planning permission 16/00160/FUL which was granted in April 2016. The house (Middlemarch) has been constructed and is occupied.

Condition 3 reads; "The path indicated as a Public Right of way 16-001/SD/006 must be maintained open and free from obstruction in the course of development and in perpetuity and shall not form part of the curtilage of the property. No stiles, gates, steps or barriers to access may be erected that would deter or hinder future pedestrian, horse rider or cyclist use.

Reason: To protect public access rights during and after development."

PLANNING HISTORY

There is a lengthy planning history associated with this site and the wider building group and this can be summarised as follows:

The former Ladyrig Farm steading was changed from agriculture to residential use following the submission of 8 planning applications in 2002. Middlemarch (the current application site) was constructed on land which previously formed part of the land associated with Plot 7 (Seven Oaks), immediately to the west of this site. Applications 02/01844/OUT and 04/00120/REM are relevant.

In 2002 the Council's Rights of Way Officer responded to planning consultations for the development of Plots 7 and 8, (02/01844/OUT & 02/01845/COU) highlighting the presence of a Claimed Right of Way, BR20, on this area of land.

An application for a house was first submitted on the current application site in 2005 (05/01493/FUL) and was approved by Committee in February 2006. Approval was subject to a Section 75 Agreement which would "...preclude erection of any future housing within the curtilage of the site....." Planning condition 7 of that consent states that "The public pedestrian right of way along the north west boundary of the site to be maintained by the owner to the satisfaction of the Planning Authority.
Reason: To retain public access in the interests of amenity."

A further planning application was submitted in 2006 (06/01475/FUL) seeking permission to erect an identical house but also to develop a garage on the line of the claimed right of way.

Elected Members considered both applications at the same Cheviot Area Committee on 23 May 2007 and resolved to approve the 2005 application but refuse the application lodged in 2006.

05/01493/FUL - This application was considered for a second time as it remained live. The applicant challenged Condition 7 (protecting the right of way) and sought Committee to rescind the Section 75. The Committee approved the application with an identical schedule of conditions to that previously approved and subject to a Section 75 Agreement with the same requirement as previously proposed. The agreement was eventually signed and the permission issued in May 2008.

06/01475/FUL was refused by Committee on the basis that it would obstruct the claimed right of way.

The Council confirmed in writing that the development approved under planning permission 05/01493/FUL was lawfully implemented prior to the permission expiring. A further application was submitted and approved under reference 16/00160/FUL for a change of house type. This permission has been implemented and the house is now built and occupied.

REPRESENTATION SUMMARY

25 representations were received from 19 separate households objecting to the application as originally submitted. Two petitions and one anonymous representation have also been submitted in objection. These can be viewed in full on Public Access and raise the following issues:

- The applicants want the path closed.

- Contrary to Local Plan.
- Detrimental to Residential Amenity.
- Path has been used for 12 years regularly and peacefully.
- The path provides for a walk which avoids the road. Removal will diminish local residents' ability to walk off the public road and along field edges.
- A gate has been erected giving the impression that the path is not for public use.
- Obstructions (gate/ stile) ensure path is impossible to use for horse riders, cyclists and less abled.
- The path is historic, in existence for over 200 years.
- The path contributes to active lifestyle choices for public health.
- Harassment of users is now feared and has been witnessed.
- There are legal issues.
- There is overlooking from inadequate Boundary/Fencing.
- There are cameras trained on the path which is intimidation.
- This is a Core Path.
- This would be a loss to community and visitors.
- The waymarkers on the path have been removed.
- No alternative option has been provided.
- Planting trees or a hedge along the fence line or buying curtains for the windows would mitigate privacy issues.
- This sets a precedent for altering other rights of way and lays open challenge of other ROW by landowners.
- The applicant is trying to make financial gain from re-routing the right of way.
- The applicant had clear knowledge of the existence before purchasing and building the property.
- SLC vs SSS – The case considered a footpath that was unproven in existence: a condition attaching to an unproven path becomes legally questionable. This is different: BR20 is recorded and a well-documented Right of way, capable of having a condition attached.
- There is considerable public reaction to this application demonstrating strong feelings for retention of the condition.
- The footpath has been there for 300 years as shown on the historic OS map dated 1855. A historic mounting block and watering facility exists on the right of way.

16 individual letters of support have also been received. The principal grounds of support can be summarised as follows:

- It is wrong that the council requires a path, with public access rights, to traverse a private garden.
- Paths and access need to be managed by the Land Reform (Scotland) Act only.
- There are no signs anywhere else on this 3 mile route.
- The path is blocked (in other places) and doesn't join two public places.
- Privacy of the private garden should be maintained by removing the condition.
- The condition is unreasonable, inconsistent, lacks clarity and is open to misinterpretation.
- Access rights are not given to gardens under the Land Reform (Scotland) Act and the Scottish Outdoor Access Code.
- The site of the current path was formerly farm buildings, old cottage, pig stiles and not a path.
- The majority of people living in Ladyrig Cottages weren't there 15 years ago therefore their opinions or comments are invalid.
- The house has been placed too close to the ROW therefore it is unreasonable and invades privacy.
- Alternative routes have been provided by the applicants to resolve this matter.

One Local Member supports the application and highlights the following points:

- The path is close to windows and intrusive to occupants.
- Alternative routes have been demonstrated to Heiton and Roxburgh CC.
- It is acceptable to close the pathway and divert walkers 200 yards down the lane to access the very same field.

APPLICANTS' SUPPORTING INFORMATION

The applicants have submitted a Supporting Statement. This raises the following matters:

- Condition 3 is not relevant to planning control and ought not to be retained. This position is supported by the decision of the Court of Session in the case of South Lanarkshire Council -v- Secretary of State for Scotland 1997 SLT 961.
- Condition 3 comprises two elements. The first is no longer relevant because it relates to the development phase and the second relates to a post development phase.
- Rights of way are protected in terms of legislation: Section 1 of the Land Reform (Scotland) Act 2003. Any legal right of passage which exists, or existed at the time that planning permission was granted, was protected by statutory and common law provisions.
- Condition 3 is unnecessary, inappropriate and not reasonably related to the now developed residential unit. There is no sound or clear-cut reason for the retention of the condition and it should be removed.

A second supporting statement was submitted in June 2019 by the applicant highlighting the following:

- The PROW was not mentioned in 2005.
- Planning decisions have been imprecise and confused.
- There is evidence to prove the path is not in the garden.
- Path usage has been low but now high and there is now harassment and intimidation.
- BR20 is blocked in other places but there is a SBC stile in this section.
- Historic maps show the route in a different location.
- A review of title deeds show no path, diversion order or creation order. Decision notice (05/01493/FUL), condition 7, was the first to stipulate the location of the right of way.
- Condition 3 had an enhanced remit which is unreasonable.
- Brodies LLP had made the application based on planning condition 7 from 05/01493/FUL as this is on the title deeds and only a design change took place in 16/00106/FUL.
- The overall basis of the total path and its history is weak. It is blocked in numerous places and signs only in this section. This location was a working farm which was impassable at this point in 2002. No historical map evidence exists.
- 16 support comments demonstrate a body of support.
- The objections are rebutted.
- BR20 does not meet current SBC paths criteria. It does not join two public places together and is blocked in various places. This section is being treated completely differently to the rest of the path (BR20).
- Legislation has been ignored and access to our plot managed by condition. The legislation which should be used is the Countryside Act Scotland 1967 and the Land Reform Act Scotland 2003.

DEVELOPMENT PLAN POLICIES:

Scottish Borders Council Local Development Plan 2016

Policy PMD2: Quality Standards
Policy IS5: Protection of Access Routes.

OTHER PLANNING CONSIDERATIONS:

Supplementary Planning Guidance

Placemaking and Design 2010
Householder Development (Privacy and Sunlight) 2006

Planning Circular 4/1998 - The use of Conditions in Planning Permissions

CONSULTATION RESPONSES:

Scottish Borders Council Consultees

Access Officer: Further information required. The applicant will need to provide evidence that a suitable alternative route for the right of way has the agreement of the local community and local landowners and that due process has been followed before we can support this application.

Legal Services: No response

Statutory Consultees

Heiton and Roxburgh Community Council: Object. No suitable alternative footpath has been proposed.

Other Consultees

Scotways (The Rights of Way and Access Society): Object and raise the following matters:

- The applicant was aware of the existence of a right of way when planning permission was granted.
- The Council recognised the right of way and gave a clear and precise reason for imposing a condition.
- Applicant's supporting documentation refers to a case that may not be relevant to this situation - whether that route was a public or a private access.
- The Society is concerned that, by seeking to remove this condition, the applicant intends to block access along the right of way. No planning documentation suggests that the applicant intends to close or divert the route. It would be reasonable to expect an alternative proposal but none has been put forward.
- There is confusion between statutory access rights under the LRA and rights of way at common law. All public rights of way will continue to exist and are unaffected by the Land Reform (Scotland) Act 2003. (Scottish Outdoor Access Code, S.2.16)
- It is the duty of a planning authority to assert, protect and keep open any public right of way so the condition that seeks to protect the public right of way is both relevant and necessary.

KEY PLANNING ISSUES:

- Whether there remains a planning purpose for the condition.

ASSESSMENT OF APPLICATION:

Background and Scope of Application

The existence of a right of way at Ladyrig has been recognised throughout the planning history of the site. At the time of the most recent grant of planning permission in 2016 the officer's report noted that "The Right of way BR20 has previously been a material consideration. Its location is identified on the site plan being a 2m wide strip of land bounding the north western panel fence with Seven Oaks."

The path exists and is separated from garden ground by a post and wire fence which has been erected to delineate the path from the garden boundary. There is a steel gate on the route of the path which is located adjacent to the entrance gates leading to Middlemarch. At the opposite end of this 60m grass corridor there is a two-step stile. This stile marks the fenced boundary with the agricultural field beyond. The field margins are currently laid to grass and it is accepted that the continuing line of the claimed right of way BR20 is not visible beyond this point.

Whilst much of the commentary made in relation to this proposal by consultees and third parties has centred on the value, location, condition, history and status of the path, including its connection to the wider path network, these are not determining matters in the consideration of this particular application. This report will purposely not consider these questions for reasons that will be explained below. The key issue in this case rests on a point of planning law and guidance.

Planning Circular 4/1998 (The Use of Conditions in Planning Permissions) sets out 6 tests which planning conditions should be judged against which are: necessity; relevance to planning; relevance to the development; enforceability; precision; and reasonableness in all other respects. In the context of the test of relevance to planning, it is an established planning principle, also set out in this Circular, that conditions should not be used to duplicate controls set out in other legislation. Such conditions are likely to be considered unnecessary and unreasonable.

Two other pieces of access legislation are in force which place duties on the Council to uphold public access;

1. *Countryside (Scotland) Act 1967 s.46* 'It shall be the duty of a planning authority to; assert, protect, and keep open and free from obstruction or encroachment any public right of way which is wholly or partly within their area.'
2. *Land Reform (Scotland) Act 2003 (LRA) s.13(1)* "It is the duty of the local authority to assert, protect and keep open and free from obstruction or encroachment any route, waterway or other means by which access rights may reasonably be exercised."

Matters of countryside access are dealt with by the Transport and Access team, within the wider planning service, using this legislation.

Effect of Removal of Condition

The imposition and phraseology of the condition at the grant of permission needs to be reviewed in the determination of this application to remove it. As noted above, the condition is worded as follows:

“The path indicated as Public Right of Way 16-001/SD/006 must be maintained open and free from obstruction in the course of development and in perpetuity and shall not form part of the curtilage of the property. No stiles, gates steps or barriers to access may be erected that would deter or hinder future pedestrian, horse-rider or cyclist use. Reason: To protect public access rights during and after development.”

In effect, the condition needs to be assessed in two parts; the first, which requires the right of way to be maintained open during construction and that it should not form part of the curtilage of the property, and the second that it should be retained in perpetuity.

The first part is considered to have been entirely reasonable and appropriate at the time permission was granted as a mechanism – related to the planning decision – to ensure that the development being permitted did not interfere with the claimed right of way. It served a planning purpose and met the tests for conditions. However, once the development was completed and the path provided, the requirements of that part of the condition had been met. In terms of the first part of the condition, therefore, the condition had then served its purpose.

The second part of the condition is really at the heart of this decision; the requirement to maintain the path in perpetuity. This arguably still gives the condition a purpose, but the question is rather whether it is still necessary and reasonable.

The protection of rights of way is conferred by the Countryside (Scotland) Act and the Land Reform Act, which means that this part of the condition results in a duplication of control and, in turn, that the overall condition no longer adds value and therefore fails to meet the tests for conditions.

In practical terms, the removal of the condition does not alter the position as regards the status of the right of way: The protection afforded by legislation to the right of passage along the route (including any obstruction to it) is the same whether the condition is in place or not. Even if removed, the procedure required to extinguish or divert the right of way would still need to be followed. Therefore, regardless of any view on the retention and significance of the right of way, the removal of the condition would make no difference to this process and, that being so, it is difficult to defend its retention on planning grounds.

If it were to be removed, it is important to be clear that the removal of the condition does not confer any wider Council support for extinguishing or diverting of the route, merely that other processes would need to be followed if that aspiration is to be achieved. An informative note to that effect is therefore proposed. A case would then need to be presented separately to satisfy the requirements of access legislation, which is likely to be more focussed on the practical matters raised in representations.

Objection comments and consultation responses

Responses from the Outdoor Access Officer and the Community Council both suggest that the removal of this condition is premature. No alternative route has been agreed by the Community Council. That said, BR20 has never been asserted or vindicated

by the Council under the Countryside (Scotland) Act 1967 but it is also the case that that the Council has not agreed any diversion.

Scotways (formerly The Rights of Way and Access Society) place an objection to this application. Scotways have highlighted a significant point of law in that there is public confusion between statutory access rights conferred under the LRA and Rights of Way at common law. In response to several of the support comments received, Scotways note that all public rights of way will continue to exist and are unaffected by the Land Reform (Scotland) Act 2003. (Scottish Outdoor Access Code, S.2.16). The Planning Authority can therefore conclude that removing this condition does not remove public access rights to this path.

The applicant and their agent are quite correct that the condition has achieved what was set out during the development phase. The Council already has a duty as Access Authority to uphold this Claimed right of way regardless of where it is or over whose land it passes. This Claimed right of way, BR20, is recognised. Public access over this 60m cannot be closed or diverted without a formal legal process with the Council as Access Authority.

Any suggestion by Objectors that by removing this condition increases the risk of public access being closed or lost is incorrect. It is simply not the case that by removing this condition there will no longer be a path. Similarly, several of the Support Comments have also drawn this conclusion erroneously.

Support comments

Several comments arising throughout the course of this application have questioned the validity to this Claimed right of way. Several comments stress that other parts of BR20 are un-usable or obstructed. Arguments have also been raised by third parties concerning the intensity of use; potential harassment from users; and issues concerning privacy arising from the position of the house.

Because this case hinges on a point of planning law and practice, it is not necessary or appropriate for the Council, in its capacity as Planning Authority, to consider these arguments. Neither is it appropriate for the Planning Authority to consider whether BR20 is navigable beyond the 60m affected by this permission. The applicants' further supporting information researches the history of this site and BR20, but while helpful in establishing the background, this detail is more likely to be of significance in relation to any application to divert or extinguish the right of way through access legislation and is largely immaterial to this application.

Summary

Since 1997, the Council has upheld public access across this land on the route shown as BR20 in its capacity as countryside access authority. Right of public access will continue on this route and will be upheld by the Council in this capacity, regardless of the existence of condition 3, unless and until a request to extinguish or divert it has been agreed. In effect, this renders the condition superfluous, and it therefore fails to meet the tests of necessity and relevance to planning.

The removal of condition 3 does not alter the status of the claimed right of way, BR20, and should not be regarded as support for any proposal to divert the route, assert it or extinguish it under the Land Reform Act. To that end, an informative note is proposed to convey that message in the context of this specific planning decision.

CONCLUSION

Development has been completed in accordance with the approved planning permission reference 16/00160/FUL. In planning terms, the condition has now served its purpose of securing the route of the footpath and the Council accepts that it is unnecessary to bind the applicant to maintain Right of Way (BR20) open and free from obstruction in perpetuity when other legislation exists to uphold access rights to this footpath. The condition therefore fails to meet the tests of necessity and relevance to planning and should therefore be removed.

RECOMMENDATION BY CHIEF PLANNING AND HOUSING OFFICER:

I recommend this application is approved subject to the following applicant informative:

Note to Applicant:

1. The proposal to remove condition 3 on planning permission 16/00160/FUL is considered to be acceptable as it has served its planning purpose in that public access has been maintained open and free from obstruction in the course of development in accordance with the approved plan. Other rights of way legislation exist to uphold public access rights in this post development phase and there is no longer a planning purpose for the condition. Accordingly, the removal of condition 3 does not alter the status of the Claimed right of way, BR20, and should not be regarded as support or otherwise for any proposal to divert the route, assert it or extinguish it under the Land Reform Act, for which a separate request would need to be made under that legislation.

DRAWING NUMBERS

16-001/SD/006 SITE PLAN

Approved by

Name	Designation	Signature
Ian Aikman	Chief Planning and Housing Officer	

The original version of this report has been signed by the Chief Planning and Housing Officer and the signed copy has been retained by the Council.

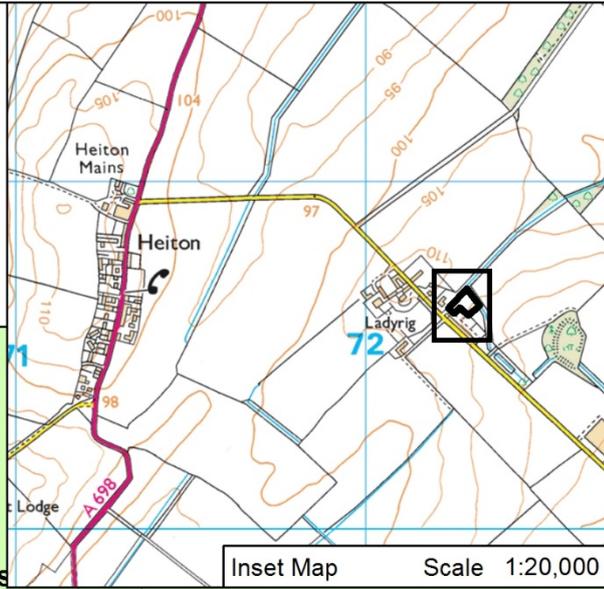
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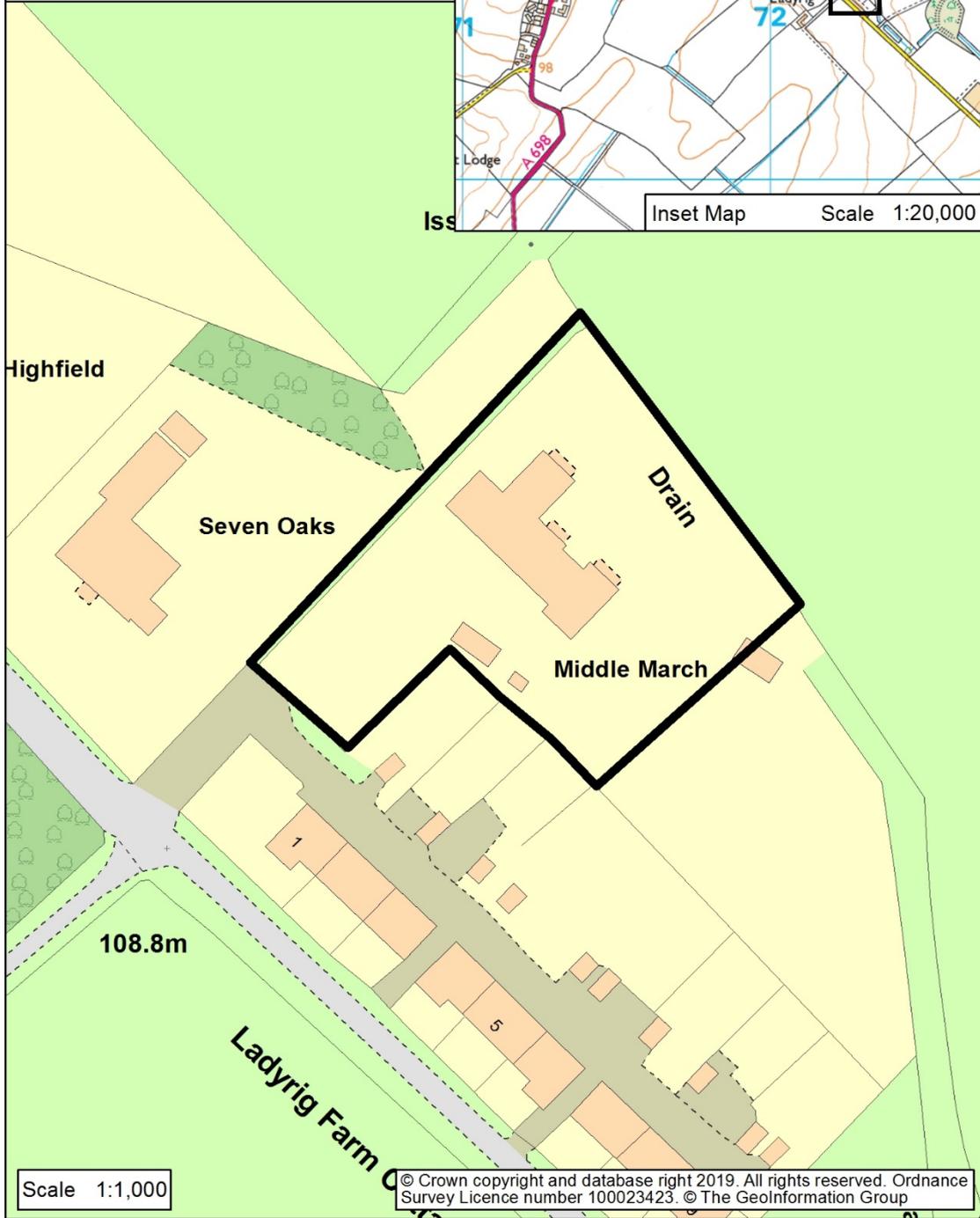


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Land East Of Plot 7
Ladyrig Farm Heiton
Kelso



Inset Map Scale 1:20,000



Scale 1:1,000