

Mr Roderick & Mrs Rachel J Jackson  
Mellendeane Farmhouse  
Kelso  
Roxburghshire  
TD5 8HF

E [alastair.mckie@andersonstrathern.co.uk](mailto:alastair.mckie@andersonstrathern.co.uk)  
DD 0131 625 7257  
OUR REF **AJMC/JAC0156.0005/CC**  
YOUR REF  
23 October 2019

Dear Mr and Mrs Jackson,

**Planning Application (reference 19/00965/FUL) for demolition of existing dwellinghouse and erection of a replacement dwellinghouse at Folly Cottage Woodside Farm Kelso Scottish Borders**

I refer to your request for advice concerning the refusal of the above Application on 4 September 2019.

I note that you intend to make an application for a Review against the refusal of planning permission to Scottish Borders Councils' Local Review Body (LRB).

I can confirm that I have examined the Decision Notice and the Planning Officer's Report of Handling for this Application. It is my considered opinion that the Planning Officer has misinterpreted the development plan and carried this error into the reason for refusal. My reasoning for this and the correct approach for the LRB to adopt is set out below.

The reason for refusal given in the Decision Notice is as follows:-

*"The development would be contrary to policy HD2 (E) of the Local Development Plan 2016: Replacement Dwellings and Supplementary Planning Guidance: New Housing in the Borders Countryside 2008 in that the building is not a habitable dwellinghouse as it was last used for agricultural purposes and has been uninhabited for a significant period in time and its demolition would result in the loss of a building of local character to the detriment of the historic built environment"*

**Planning Officer's Assessment**

All applications must be decided in accordance with an adopted development plan (which in this case is Scottish Borders Council Local Development Plan 2016) unless material considerations indicate otherwise<sup>1</sup>. The relevant provisions of the development plan are Policy HD2 (E) and Housing in the Countryside and "New Housing in Borders Countryside Supplementary Guidance 2008".

The determining issue for an assessment of this Application should have been whether or not the existing building can be considered to be an "existing house" in terms of Policy HD2 (E). In my opinion it can.

<sup>1</sup> Sections 25 and 37(2) of the Town and Country Planning (Scotland) Act 1997

In my opinion, whether or not a building should for the purposes of Policy HD2 (E) be an "existing house" must involve examining both what is physically on the ground and the extent to which the building has any existing use rights for use as a house conferred either (1) over time (the "four year rule") or alternatively (2) through the implementation of a valid planning permission.

Firstly, as is evident from the photographs on the Application file there is a substantial existing building on the ground which clearly contains the elements and characteristics of a house. The Planning Officer focuses primarily on the habitability but in his assessment he fails to take fully into account the planning use rights conferred on the building through Permission 10/00655/ FUL which authorises its use as a house, and which has been lawfully implemented.

The Planning Officer in his Report, whilst accepting that existing house has planning permission in terms of Permission 10/0065/ FUL (in which development has commenced) places little or any weight on this important factor and focusses solely on habitability which is not the test required by Policy HD2 (E). The Planning Report states

*"In 2010, 10/00655/ FUL, a permission for reinstatement, alterations and extensions was approved for what was described as a "derelict farmhouse". This has commenced and now a live permission exists for reinstatement, alterations and extension, 17/00104/ FUL."*

The building became an "existing house" when the development authorised under permission 10/00655/ FUL (use as a house) was lawfully commenced.

In authorising development, Permission 10/00655/ FUL granted a change of use from the building to a house. It is not habitable in its present condition but that does not prevent it being an existing house for the purposes of Policy HD2(E) because there is a substantial building in existence which has use rights for residential purposes conferred by Permission 10/00655/ FUL. It is not necessary for all of the building operations (as opposed to the "use") authorised under Permission 10/00655/ FUL to have taken place all though some of these operations have been undertaken in implementation of the permission. The remaining operations could be undertaken at any future time as Permission 10/00655/ FUL, because it has lawfully commenced, will not expire.

The Planning Officer has mistakenly placed undue emphasis on his own view of the physical condition of the building rather than recognising the fact that the change of use of the building to use as a house has in fact taken place. The habitability of the building is irrelevant and so is its prior use. All that Policy HD2(E) requires is that there is an "existing house" and it should have been considered as such for the purposes of the planning assessment of Application 19/00965/ FUL.

#### **Reasons for Refusal**

The reason for refusal fundamentally misunderstands Policy HD2 (E) as it asserts "*that the building is not a habitable dwellinghouse*". Compliance with Policy HD2 (E) depends not on the habitability of a building but on the existence of a "house". Whether a building is habitable (as opposed to a building being an existing house) can be two very different things. An existing house may or not be habitable. The wrong policy test has been applied in the Planning Officer's determination.

**Conclusion**

The Planning Officer has misinterpreted the key provision of the development plan (Policy HD2 (E)) and carried this error into the reason for refusal. His reasoning is therefore fundamentally flawed. In my opinion the LRB should in its determination accept that the building on the site is an "existing house" and Policy HD2 (E) is therefore applicable, for all of the reasons set out above.



Partner  
Legal Associate of the RTPI  
Law Society Accredited Specialist in Planning Law  
Anderson Strathern LLP