

APPENDIX III

SCOTTISH BORDERS COUNCIL LOCAL REVIEW BODY DECISION NOTICE

**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**

Local Review Reference: 20/00010/RREF

Planning Application Reference: 18/00749/FUL

Development Proposal: Variation of Condition 1 of planning permission 13/01082/FUL to allow the lifespan of the application to be extended by a further three years

Location: Plot 2 Land South East of Mounthooly House, Jedburgh

Applicant: Bentley Developments

DECISION

The Local Review Body upholds the decision of the appointed officer and refuses planning permission as explained in this decision notice and on the following grounds:

1. The development would be contrary to Policy IS8 of the Local Development Plan 2016 in that the site is at risk of flooding to the extent that there is no safe access/egress route resulting in risk to life and, in addition, development on the functional floodplain may displace the capacity to convey and store flood water, materially increasing the risk of flooding elsewhere and putting people and property at risk.

DEVELOPMENT PROPOSAL

The application relates to the variation of Condition 1 of planning permission 13/01082/FUL to allow the lifespan of the application to be extended by a further three years. The application drawings and documentation consisted of the following:

Plan Type	Plan Reference No.
Location/Site Plan	KB/98/11/BW4

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 1st June 2020.

After examining the review documentation at that meeting, which included a) Notice of Review; b) Decision Notice; c) Officer's Report; d) Papers referred to in Officer's Report; e) Consultations and f) List of Policies, the Review Body noted that the applicant had requested further procedure in the form of written submissions, but did not consider it necessary in this instance and proceeded to determine the case.

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: PMD2, HD1, HD2, HD3, EP1, EP2, EP3, IS2, IS7, IS8, IS9 and IS13

Other Material Considerations

- SBC Supplementary Planning Guidance on Placemaking & Design 2010
- SBC Supplementary Planning Guidance on Development Contributions 2011
- SBC Supplementary Planning Guidance on New Housing in the Borders Countryside 2008
- SBC Supplementary Planning Guidance on Privacy and Sunlight 2006
- Scottish Planning Policy 2014
- Circular 3/2013 "Development Management Procedures"

The Review Body noted that the application was made under Section 42 of the Act to vary Condition 1 of planning permission 13/01082/FUL to allow the lifespan of the application to be extended by a further three years, at Plot 2 Land South East of Mounthooly House, Jedburgh. Members understood that the application had been submitted before the expiry of the consent. They also noted that the consent had, however, now expired. They noted the differing views of both the applicant and the Appointed Officer on whether the Council were, in effect, able to re-examine the principle of the consent and the subsequent environmental effects.

They noted that the applicant had lodged several letters from a solicitor and Circular 3/2013 "Development Management Procedures", maintaining that when an application under Section 42 is made within the expiry date of the consent, the Planning Authority may only consider the issue of the conditions attached to the resulting permission. The Review Body also noted the views of the Appointed Officer who determined the application after taking advice from the Council's Legal Services Officer. In his opinion, the Circular explained that in certain circumstances, such as when the previous permission has lapsed, a Planning Authority could consider the overall effect of granting a new planning permission. The consent had not lapsed when the Section 42 application was submitted but, during the processing of the application, the original consent had then lapsed and, in the Appointed Officer's opinion, he was entitled

to follow the advice of the Circular and consider the overall effect of granting a new permission taking into account any changed material factors.

The Legal Adviser to the Local Review Body detailed both sides of that legal argument to Members. She advised that Members were by law required to consider “only the question of the conditions subject to which planning permission should be granted” and that in interpreting that provision they should have regard to the Circular. Members were advised that the approach taken by the Appointed Officer was lawful, but they should now determine whether it was the correct decision in all the circumstances.

After full consideration of the matter, the Review Body determined that there was a significant change in the detail of information and risk pertaining to flooding on the site. They noted that both the Council’s Flood Risk Officer and SEPA had objected to the application after considering the Flood Risk Assessment that had been supplied as part of the Section 42 application.

Members noted the level of inundation and flood risk was now considered to be significant on the site, following a more detailed examination of the risks using more accurate information and modelling. They also noted that neither the Flood Risk Officer nor SEPA considered there to be a safe access or egress from the site in the event of flooding and that the site was within the functional flood plain. After considering all matters, the Review Body agreed with the objections from SEPA and the Flood Risk Officer and determined that the application was contrary to Policy IS8 of the Local Development Plan.

Members then considered other issues relating to the proposal including building group addition in the countryside and the siting and design of the house, but concluded that the proposal was not appropriate for the aforementioned reasons relating to Policy IS8. They noted that had the application been supported, then development contributions for affordable housing would have been secured by a new legal agreement.

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 for the reasons stated above.

Notice Under Regulation 22 of the Town & Country Planning (Schemes of Delegation and Local Review procedure) (Scotland) Regulations 2013.

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.

Signed...Councillor T Miers
Chairman of the Local Review Body

Date.....8 June 2020