

SCOTTISH BORDERS COUNCIL

PLANNING AND BUILDING STANDARDS COMMITTEE

15 JUNE 2023

APPLICATION FOR PLANNING PERMISSION

ITEM: **REFERENCE NUMBER:** 23/00382/FUL

OFFICER: Cameron Kirk
WARD: Mid Berwickshire
PROPOSAL: Removal of condition 5 of planning permission 21/00794/FUL pertaining to visibility splay
SITE: Land East of Thistle Brae, The Hardens, Duns
APPLICANT: Mr Richard Wood
AGENT: N/A

PLANNING PROCESSING AGREEMENT: A planning processing agreement has been agreed until 22 June 2023.

SITE DESCRIPTION

The application site relates to Plot 3, The Hardens, which is located approximately 2 miles north west of the centre of Duns. Plot 3 is the second last plot to be developed within the building group. The dwellinghouse granted under planning permission 21/00794/FUL is nearing completion. The application site is rectangular in shape and slopes towards the south. There is a row of listed cottages to the east and two modern dwellinghouses are to the north west and west. The site is served by an existing private access road from the C98 public road.

PROPOSED DEVELOPMENT

Permission is sought to remove condition 5 from planning permission 21/00794/FUL (approved 27 January 2022).

Condition 5 of planning permission 21/00794/FUL states:

No development shall commence until a detailed drawing showing visibility improvements to the north east at the junction onto the public road (a splay of 2.4m by 100m) has been submitted to and approved in writing by the Planning Authority. The visibility splay shall be provided before occupation of the dwellinghouse and shall be maintained in perpetuity thereafter.

Reason: To enable safe vehicle access on to the public road.

PLANNING HISTORY

Application site:

06/01486/OUT Erection of four dwellinghouses and formation of new access road. Granted 27 August 2007.

07/00397/FUL Formation of site access and service layby. Granted 08 June 2007.

09/01327/AMC Erection of dwellinghouse with integral garage (Plot 3). Granted 04 December 2009.

13/00045/FUL Erection of dwellinghouse with integral garage (change of house design previously approved 09/01327/AMC) (Plot 3). Granted 14 March 2013.

17/00645/FUL Erection of dwellinghouse and garage (Plot 3). Granted 26 June 2017.

18/00214/PREAPP – Pre-application enquiry.

18/00872/FUL Erection of dwellinghouse (Plot 3). Granted 09 November 2018.

21/00794/FUL Erection of dwellinghouse with detached garage. Granted 27 January 2022.

Neighbouring plots:

08/00263/REM Erection of dwellinghouse and detached garage (Plot 1). Granted 13 May 2008.

08/01727/REM Erection of dwellinghouse and detached garage (Plot 2). Granted 17 December 2008.

REPRESENTATION SUMMARY

A total of nine letters of representation, eight objections and one general comment, have been received by the Planning Authority. This does not include multiple representations from the same household which equates to ten letters in total. All issues raised have been considered. The key material planning considerations raised in objections relate to impacts on road safety

APPLICANTS' SUPPORTING INFORMATION

- Supporting letter

DEVELOPMENT PLAN POLICIES:

National Planning Framework 4

Policy 18 – Infrastructure first

Scottish Borders Council Local Development Plan 2016

PMD2: Quality Standards

OTHER PLANNING CONSIDERATIONS:

Planning Circular 4/1998: The Use of Conditions in Planning Permissions

CONSULTATION RESPONSES:

Scottish Borders Council Consultees

Roads Planning Service: No objection. RPS has discussed the original condition with colleagues from both the Council's Legal and Planning Enforcement teams, and it

would appear that the relevant condition cannot be enforced from a Planning perspective. This is due to the land relating to the condition being outwith both the ownership of the applicant and the red-line boundary for the site. However, the visibility splays were conditioned, and provided, in the interests of road safety via a previous application for the site which included the formation of the access. This application was 07/00397/FUL and related to the formation of a site access and a service lay-by. The visibility splays provided as part of that application are the same ones as were requested under application 21/00794/FUL. As they had already been provided, it would now appear following on from further discussions that there was no need to require that they be provided again and there was no need for the condition to have been included in the approval of the 2021 application. As the previously provided splays are deemed to be within the public road boundary, the Council have powers under the Roads (Scotland) Act 1984 to ensure the splays are retained, therefore there is no further requirement for them to be requested under the 2021 application.

They appreciate, that by supporting the removal of this condition, this may give the objectors the impression that there will therefore be no control over the visibility at the access, however, as intimated above, this is not the case. The Council, as Roads Authority, have the powers to ensure the previously provided visibility is maintained through serving notice on the appropriate land owner to remove any obstructions to visibility. If no action is forthcoming through discussions with the land owner, or any notice should it be served, the Council can remove any obstructions and reclaim any reasonable expenses from the landowner if needs be.

KEY PLANNING ISSUES:

- Whether the principle of removing the condition would be acceptable, having particular regard to the six tests of planning conditions set out in Policy 18 of National Planning Framework 4 and in Planning Circular 4/1998: The Use of Conditions in Planning Permissions;
- Whether there would be any adverse impacts arising from the proposal in respect of road safety.

ASSESSMENT OF APPLICATION:

Permission is sought to remove condition 5 from planning permission 21/00794/FUL. The pre-commencement element of this condition requires a detailed drawing showing visibility improvements to the north east at the junction onto the public road (a splay of 2.4m by 100m) to be submitted to and approved in writing by the Planning Authority prior to any works commencing on site.

The applicant's agent submitted a drawing (drawing no. 9632.PL5 A) to satisfy the pre-commencement element of condition 5. Roads Planning Service considered the drawing and they confirmed that it was acceptable to demonstrate that the visibility splay could be physically achieved to the north east at the junction onto the public road. The pre-commencement element of condition 5 has therefore been satisfied.

The second part of condition 5 however, requires the visibility splay to be provided before occupation of the dwellinghouse and for that to be maintained in perpetuity thereafter.

The applicant wrote to the Planning Authority to advise that they would be unable to implement the visibility splay required by condition 5 as they have no legal control over the land to which it would be formed. They advise that the owner of the land will not permit them to form the visibility splay, as required by condition 5. In light of this, they

have submitted the current application to remove condition 5 from planning permission 21/00794/FUL.

In determining this application the Planning Authority must have regard to Policy 18 of National Planning Framework 4 and Planning Circular 4/1998: The Use of Conditions in Planning Permissions. The removal of condition 5 from planning permission 21/00794/FUL must be considered against the six tests below:

1. **necessary** – the condition would not be necessary to grant planning permission. It would however improve the existing visibility at the access on to the public road which would be to the benefit of road safety;
2. **relevant to planning** – the condition is relevant to planning as it aims to provide a safe means of access to the development from the public road;
3. **relevant to the development to be permitted** – the condition is relevant to the development that was granted permission as the use of the access onto the public road would intensify as a result of the development as an additional dwellinghouse would use this access. The condition aims to improve the visibility at the access on to the public road;
4. **enforceable** – the condition is unenforceable as the applicant has no control over the land in which the visibility splay must be formed. They would be unable to from the visibility splay unless the sought permission from the landowner;
5. **precise** – the condition is precise and it make it clear to the applicant and others what information is required to be submitted to satisfy the condition and at what stage the visibility splay must be formed;
6. **reasonable in all other respects** - the condition is not reasonable as the land is located outwith the application site and the applicant does not have sufficient control over the land to enable those works to be carried out.

Condition 5 of permission 21/00794/FUL fails to meet two of the six tests. As the applicant has no control over the land in which the visibility splay would be formed, the condition is unenforceable and it is not reasonable. It therefore fails to meet the tests of enforceability as set out in Circular 4/1998.

A number of representations have been received by the Planning Authority that raise concerns regarding the impact the removal of condition 5 from planning permission 21/00794/FUL would have on road safety.

It should also be noted that five properties already use this junction for access and egress onto the public road from the private road. Whilst the development granted under planning application 21/00794/FUL will intensify the use of the existing access, it will not result in additional traffic movements to the detriment of road safety, given the visibility splays have already been provided under an earlier consent.

Roads Planning Service has been consulted as part of the assessment of this application. They do not raise any concerns regarding the removal of condition 5 as they acknowledge that the applicant has no control over the land to which the visibility splay would be formed. In their consultation response, they refer to the original planning permission 07/00397/FUL that was granted to from the site access and associated service layby. Condition 2 of this permission required a visibility splay of 2.4x100m to the north east and 2.4x160m to the south west to be provided before the development becomes operational. It is understood that the visibility splays were provided at the time the site access and service layby were constructed.

In Roads Planning Service's previous consultation responses to planning applications 17/00645/FUL, 18/00872/FUL and 21/00794/FUL they requested that a condition be attached that required improvements to the visibility splay to the north east. Although the visibility splay had previously been provided to the north-east it had not been maintained. The Planning Authority has, however, consistently attached the condition recommended by Roads Planning Service to earlier consents requiring improvements to the visibility splay to the north east.

Roads Planning Service acknowledge in their consultation response to this application that the visibility splays have already been provided at the new access, and there is no longer a requirement for the improvements to be provided again or for the condition to be included in the planning permission granted under 21/00794/FUL. As the visibility splays are deemed to be within the public road boundary, the RPS has confirmed that Council have powers under the Roads (Scotland) Act 1984 to ensure the splays are maintained in perpetuity. This may necessitate the serving of a notice under the relevant act if visibility splays are not maintained. The Council also has powers under this act to remove any obstructions and reclaim any reasonable expenses from the landowner.

An unauthorised fence was erected in the north east visibility splay in 2022. The Roads Planning Service is currently pursuing the removal of this fence as it impedes visibility and it poses a risk to road safety. The Roads Planning Service has written to the landowner and requested the fence be removed. However, (at the time of writing) it would appear the fence remains in-situ. Roads Planning has advised that they will continue to pursue the matter under the Roads (Scotland) Act. Whilst not being pursued under planning legislation, it is important to note that the removal of the unauthorised fence will continue to be pursued by the Council, and the overall outcome (to remove the fence and improve visibility) will be the same.

As the removal of a condition effectively grants a new planning consent, it would be appropriate to attach any conditions or applicant informatives to the new permission that remain outstanding.

CONCLUSION:

In consideration of the above, the removal of condition 5 from planning permission 21/00794/FUL would not unduly impact upon road safety. The visibility splay has already been provided under an earlier grant of planning consent, and powers available under the Roads Planning (Scotland) Act 1984 will allow the Council to ensure visibility is maintained. The Condition fails to meet the six tests of enforceability as set out in Circular 4/1998 and cannot be enforced. The proposal accords with the relevant provisions of the National Planning Framework 4 and Scottish Borders Local Development Plan 2016 and there are no material considerations that would justify a departure from these provisions.

RECOMMENDATION BY CHIEF PLANNING AND HOUSING OFFICER:

It is recommended that the application be granted, subject to the following condition:

1. The development shall be implemented in accordance with the approved plans and drawings pursuant to planning permission 21/00794/FUL. The schedule of conditions attached to planning permission 21/00794/FUL, excluding condition 5 of 21/00794/FUL which is removed by this permission, still apply to this

development, together with the drawings/information approved by the Planning Authority to discharge those conditions.

Reason: To secure control over matters agreed and already controlled by and under conditions attached to the original planning permission.

DRAWING NUMBERS

Plan Ref

Plan Type

9362.PL5

Location 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.

Author(s)

Name	Designation
Cameron Kirk	Assistant Planning Officer



23/00382/FUL

Land East of Thistle Brae,
The Hardens, Duns

