

**SCOTTISH BORDERS COUNCIL**

**PLANNING AND BUILDING STANDARDS COMMITTEE**

**25 MARCH 2024**

**APPLICATION FOR PLANNING PERMISSION**

**ITEM:** **REFERENCE NUMBER:** 23/01782/FUL

**OFFICER:** Julie Hayward  
**WARD:** Leaderdale And Melrose  
**PROPOSAL:** Removal Condition no. 24 of planning permission 18/01385/FUL pertaining to a scheme of woodland management

**SITE:** Land At The Croft Dingleton Road Melrose  
**APPLICANT:** Rural Renaissance Ltd  
**AGENT:** Hypostyle Architects

**PLANNING PROCESSING AGREEMENT:**

A Planning Processing Agreement is in place until 25<sup>th</sup> March 2024.

**SITE DESCRIPTION:**

The site is located on the southeastern edge of Melrose adjoining the lower slopes of the Eildon Hills and consists of 2.56 hectares of grazing land (the top soil has been stripped) with the Croft at its centre, accommodating the Cherrytrees Children's Nursery.

The site includes part of Dingleton Road, which borders the northwestern edge of the site, partly delineated with stone walling. An existing access road and bridge cross the Malthouse Burn and currently connects the nursery with Dingleton Road. Existing housing lies along Dingleton Road to the northwest/west and to the southern boundary of the site along Dingleton Loan.

The Malthouse Burn with associated riparian vegetation lies between Dingleton Road and the main part of the site, being part of the River Tweed Special Area of Conservation. The site is bordered to the northeast and south west by rights of way, tree belts and agricultural land. The site is within the Eildon and Leaderfoot National Scenic Area.

**PROPOSED DEVELOPMENT**

Planning permission (18/01385/FUL) for the erection of 28 dwellinghouses with associated parking, roads and landscaping was granted by the Planning and Building Standards Committee on 1<sup>st</sup> July 2019 and the decision was issued on 4<sup>th</sup> May 2023 following completion of a Section 75 legal agreement. This was a major application under the Hierarchy of Developments (Scotland) Regulations 2009.

Condition 24 states:

No development shall be commenced until a Scheme of Woodland Management is submitted to, and approved in writing by, the Planning Authority. The Scheme shall identify an area of woodland outwith the site to its southeastern edge and proposals for the retention, maintenance, regeneration and management of the woodland. Once approved, the Scheme then to be operated in perpetuity in accordance with the agreed details.

Reason: To safeguard the visual amenity of the area.

This current application is submitted under Section 42 of the Town and Country Planning (Scotland) Act 1997 As Amended seeking removal of the above condition.

### **PLANNING HISTORY:**

18/00016/PAN: Residential development with associated roads, car parking, landscaping and new access.

18/01385/FUL: Erection of 28 dwellinghouses with associated parking, roads and landscaping. Approved 4<sup>th</sup> May 2023.

### **REPRESENTATION SUMMARY:**

Eight representations (from 6 households) have been received objecting to the application and are available to view in full on Public Access, raising the following planning issues:

- The Council has stipulated that the development cannot go ahead without a scheme of woodland management being submitted. The woodland is critical to the mitigation of the development's visual impact on an area of local importance and natural beauty. The Planning Committee assured objectors that the development would only proceed with appropriate screening provided by the existing woodland.
- The removal of the condition can only be agreed by the Planning Committee.
- The owner of the land must comply with the condition. It cannot be removed or un-required as to do so would negate the right to planning permission.
- The condition ensures that the loss of habitat and environmental assets within the Croft is balanced by well-managed woodland, habitat and environment outwith the boundaries, particularly during construction to ensure it is not damaged.
- The applicant could enter into an agreement with JS Farming, owners of the land in question, to develop a management plan.
- Residents and visitors who use the paths surrounding the Croft and access to the Eildons, including the General's Walk, to the south, would benefit from this condition, which guarantees that the development does not detract from the character, accessibility and environmental richness of the locality.
- Development on this site has been strongly contested by the public from the start for over 18 years, since before the Croft Planning Brief was approved. The application (18/01385/FUL) was contentious, and the condition was considered essential to lessen the visual impact of the development and to ensure this

visual screen would endure. Without the trees the development would be intrusive.

- The site is sensitive on the lower slopes of the Eildons within the National Scenic Area, and visible from the higher parts of the Eildons, though currently the trees obscure most of the site. Condition 24 seeks to protect the trees to safeguard visual amenities. Without the woodland, the visual impact would be significant, exposing the development to open views from the Eildons, impairing views. The condition must be enforced. The public and Council are stewards of vulnerable and precious landscapes and must seek to protect it.
- The approved location plan for 18/01385/FUL shows the entire block of land, including the development site, the belt of trees and the fields above it, labelled as being owned by JS Farming Partnership. Both Rural Renaissance Ltd and JS Farming Partnership are understood to be part of the greater "Crawford's" business empire. If ownership of the development site has been transferred internally to Rural Renaissance from JS Farming Partnership, both "Crawford's" businesses, then presumably the conditions for site development were inherited along with it.
- There is no justification for the removal of trees around the site, other than road access, and this may result in an application to increase the site.
- The condition provided some mitigation to the effect on the landscape of a sizable building development at the foot of the Eildons within the National Scenic Area. If the condition cannot be met, then the permission should fall and no building or tree removal should be allowed or a new screening belt of trees should be planted along the south eastern edge of the site on land in the control of the applicant.
- No evidence has been provided that the developer does not have sufficient control over ownership of the land. To remove this condition the Committee would be required to establish that the developer is not able to work with JS Farming Partnership to achieve the requirements of the condition. The Planning Authority judged in 2019 when the decision was made, that the relationship between the applicant Rural Renaissance Ltd and the landowner JS Farming Partnership, was sufficient to impose condition 24 and to approve planning permission on land not owned by the applicant. JS Farming Partnership has been involved in applications for the Croft and surrounding land since proposals were first brought forward in 2006. While no longer owning the land, JS Farming Partnership retains a material stake in the success of the development at the Croft.
- When considering previous applications in 2006, the Scottish Government's Reporter concluded that the site at the Croft was acceptable for development (but surrounding land was not) because of the site's unique setting and woodland screening. Development on the Croft has only been approved by the Council and the Reporter on the condition that the site is adequately screened. Condition 24 is material to maintaining and developing that screening.
- While Rural Renaissance Ltd may be the legal owners of the site, there seems to be an almost indiscernible difference between that business and "Crawfords", and an obvious historic (and presumably ongoing) connection between the owners of the Croft site and the owners of the land that the tree screen is on.

Using ownership transfer to sidestep a condition previously considered vital has the air of underhand behaviour and should not be used as a reason to remove the condition.

- JS Crawford Farming Partnership does not seem to exist on the public website for Companies House, even though all partnerships need to be registered. There may be a question as to whether JS Crawford Farming Partnership has ever legally existed so presumably cannot own or transfer property.
- The land ownership may have changed but the nature of the site has not, it continues to have visual and environmental sensitivities relating to the National Scenic Area. The established framework of mature trees and woodland within the site and around its perimeter is still an important landscape resource to be conserved and positively managed; the conditions attached to any development of this site should not change either. If the change in land ownership means that the '6 tests for conditions' can no longer be met, then it follows that the planning permission must be suspended.
- The removal of this condition could result in other critically important conditions being removed.
- No formal notice was given of the removal of this condition or statutory consultations carried out.
- Developments elsewhere in Melrose and partially built sites meet the demand for housing without damaging this sensitive landscape.
- Without enforcement of condition 24, there would be areas of conflict with National Planning Framework 4 policies regarding biodiversity, historic assets and residential amenity.
- Trees have already been removed from the site (including a thriving orchard that was chopped down by the applicant following their acquisition of the site). Once built on the damage cannot be undone.
- The Planning Brief under Landscape/Ecology states that 'there is an established framework of mature trees and woodland within the site and around its perimeter and that this woodland is an important landscape resource to be conserved and positively managed' (to safeguard the visual amenity of the area).
- Irrespective of who owned what land and when, no development on this site should commence without condition 24 being met. The Council's Landscape Architect confirmed the requirement for a management scheme to be agreed with the developer for the surrounding woodland to safeguard the visual amenity of the area. Condition 24 was considered to be the most appropriate way to secure the long-term protection and management of the woodland.
- The real key planning issue is whether or not the development would be acceptable without the particular protection afforded by condition 24 and the potential impact, and spread, of the development without such a scheme. Retaining Condition 24 might in fact "assist" the applicant in finding a way to fulfil it.

- The very narrow focus on the six tests listed in Planning Circular 4/1998: The Use of Conditions in Planning Permissions without referring to the five preceding tests represents a major flaw as it fails to indicate planning policy which, when considering the removal of a condition, is far more useful and relevant than the six tests.

#### **APPLICANTS' SUPPORTING INFORMATION:**

Supporting Statement

#### **DEVELOPMENT PLAN POLICIES:**

##### **National Planning Framework 4**

Policy 1: Tackling the Climate and Nature Crises  
 Policy 2: Climate Mitigation and Adaptation  
 Policy 3: Biodiversity  
 Policy 4: Natural Places  
 Policy 6: Forestry, Woodland and Trees  
 Policy 7: Historic Assets and Places  
 Policy 14: Design, Quality and Place  
 Policy 15: Local Living and 20 Minute Neighbourhoods  
 Policy 16: Quality Homes  
 Policy 18: Infrastructure First  
 Policy 22: Flood Risk and Water Management

##### **Scottish Borders Council Local Development Plan 2016**

Policy PMD1: Sustainability  
 Policy PMD2: Quality Standards  
 Policy PMD3: Land Use Allocations  
 Policy HD1: Affordable and Special Needs Housing  
 Policy HD3: Protection of Residential Amenity  
 Policy EP1: International Nature Conservation Sites and Protected Species  
 Policy EP2: National Nature Conservation Sites and Protected Species  
 Policy EP3: Local Biodiversity  
 Policy EP4: National Scenic Areas  
 Policy EP5: Special Landscape Areas  
 Policy EP8: Archaeology  
 Policy EP9: Conservation Areas  
 Policy EP13: Trees, Woodlands and Hedgerows  
 Policy EP15: Development Affecting the Water Environment  
 Policy IS2: Developer Contributions  
 Policy IS3: Developer Contributions Related to the Borders Railway  
 Policy IS4: Transport Development and Infrastructure  
 Policy IS6: Road Adoption Standards  
 Policy IS7: Parking Provision and Standards  
 Policy IS8: Flooding  
 Policy IS9: Wastewater Treatment Standards and Sustainable Urban Drainage  
 Policy IS13: Contaminated Land

#### **OTHER PLANNING CONSIDERATIONS:**

- Town and Country Planning (Scotland) Act 1997 As Amended

- Circular 4/1998: The Use of Conditions in Planning Permissions
- Designing Streets 2010

#### Supplementary Planning Guidance

- Affordable Housing 2015
- Developer Contributions 2016 (Amended 2023)
- Trees and Development Updated 2020
- Landscape and Development 2008
- Green Space 2009
- Placemaking and Design 2010
- Guidance on Householder Development 2006
- Waste Management 2015
- Biodiversity 2005

"The Croft" Planning Brief 2006

#### **CONSULTATION RESPONSES:**

##### **Scottish Borders Council Consultees**

**Landscape Architect:** No response.

##### **Statutory Consultees**

None

##### **Other Consultees**

None

#### **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.
- The impact of the development at the Croft on the trees and woodland, the visual amenities of the area and special landscape qualities of the National Scenic Area should the condition be removed.

#### **ASSESSMENT OF APPLICATION:**

##### Planning Policy

Policy 18 of National Planning Framework 4 lists the six tests all planning conditions should meet. These are set out in greater detail within Planning Circular 4/1998: The Use of Conditions in Planning Permissions. The existing condition must be considered against the six tests below:

1) necessary, 2) relevant to planning, 3) relevance to the proposed development, 4) enforceable, 5) precise, 6) reasonable in all other respects.

Should a condition not meet one of the six tests it would not be appropriate to impose the requirement or obligation sought by the condition.

### Existing Consent

Planning application 18/01385/FUL was submitted for the site in October 2018 for the erection of 28 dwellinghouses with associated parking, roads and landscaping. Planning permission was granted in May 2023. Condition 24 sought to secure a Scheme of Woodland Management for the area of woodland outwith the site to its southeastern edge and proposals for the retention, maintenance, regeneration and management of the woodland.

This current application seeks the removal of this condition. The applicant's Supporting Statement advises that the area referred to in the condition is outside the original application site boundary and outwith the ownership of the applicant, therefore, Rural Renaissance Ltd (the applicant) has no control over the land to which the condition relates.

In respect of policy 18 of National Planning Framework 4 and Circular 4/1998: The Use of Conditions in Planning Permissions, the first test in respect of conditions is that there is a need for the condition. The Circular states that in considering whether a particular condition is necessary, authorities should ask themselves whether planning permission would have to be refused if that condition were not to be imposed. If it would not, then the condition needs special and precise justification. The same principles must be applied in dealing with applications for the removal of a condition under Section 42 of the Act; a condition should not be retained unless there are sound and clear-cut reasons for doing so.

The site is allocated for housing development in the Local Development Plan as EM4B with an indicative site capacity of 25 units.

There is also an approved Planning Brief for the site (adopted in July 2006). This sets out the main opportunities and constraints for the site to create a framework for its future development. The Development Vision included the retention and enhancement of the landscape framework surrounding the site. There is an established framework of mature trees and woodland within the site and around its perimeter, which is an important landscape resource that should be conserved and positively managed. An appropriate management scheme for the woodland is recommended in the Planning Brief between SBC and the developer.

Significant concern was expressed by objectors over the felling of trees along the southeastern boundary of the site before application 18/01385/FUL was submitted. However, the trees are not protected in any way, either by designation or planning condition, and could be replaced with new planting to comply with the terms of any felling licence.

During the consideration of planning application 18/01385/FUL, the Council's Landscape Architect provided extensive comments, including the requirement for a management scheme to be agreed with the developer for the surrounding woodland.

The committee report (18/01385/FUL) stated that the site retains strong landscape and topographical containment despite recent felling. This would be replaced and there is sufficient strong woodland cover behind the site to continue to screen the development from the rear and provide a backdrop from Dingleton Road. Continuation of this screen can be controlled within a Woodland Management Scheme, which is a requirement of

the Planning Brief. As the applicant owns this woodland, securing a Scheme can be achieved through a planning condition. At that time, when the 2018 application was assessed and determined by members, it was considered that the application complied with the Planning Brief, Local Development Plan Policies and Supplementary Planning Guidance.

Circular 4/1998 advises that landscape quality and the appearance of a proposed development and its relationship to its surroundings can be important material considerations in determining many planning applications; the visual impact of a development will often need to be assessed as a whole. Planning Authorities should not refuse permission if development can be permitted subject to conditions that will prevent damaging impacts on important physical features; Planning Authorities should also bear in mind that a number of areas valued for their landscape quality or nature conservation interest are afforded statutory protection; National Scenic Areas provide the national designation for landscape. Section 159 of the Planning Act places an express duty on the Planning Authority, when granting planning permission, to ensure whenever appropriate that adequate conditions are imposed to secure the preservation or planting of trees.

The protection and augmentation of the landscape framework surrounding the site is identified in the Planning Brief as being of fundamental importance to the design and success of a development on the site, respecting the rural edge of Melrose and the setting and qualities of the Eildon and Leaderfoot National Scenic Area. The requirements of the Brief are reinforced by Local Development Plan Policies PMD2: Quality Standards, EP4: National Scenic Areas and EP13: Trees, Woodlands and Hedgerows, together with Supplementary Planning Guidance on Trees and Development and Landscape and Development. There should also be consideration of the proximity of the site to the Tweed, Ettrick and Yarrow Confluences Special Landscape Area (policy EP5) and Melrose Conservation Area (policy EP9).

Since the original application was determined National Planning Framework 4 has been adopted and forms part of the development plan and so is a material consideration in assessing the removal of condition 24. In particular, policy 4: Natural Places states that development proposals that will affect a National Scenic Area will only be supported where the objectives of designation and the overall integrity of areas will not be compromised or any significant effects on the qualities for which the area has been designated are clearly outweighed by social, environmental or economic benefits of national importance.

Policy 6: Forestry, Woodland and Trees states that proposals that enhance, expand and improve woodland and tree cover will be supported. Development proposals will not be supported where they will result in adverse impacts on native woodlands; development proposals on sites which include an area of existing woodland will only be supported where the enhancement and improvement of woodlands and the planting of new trees on the site are integrated into the design.

Therefore, the condition is necessary to ensure the retention, maintenance, regeneration and management of the woodland and the justification for it was clearly set out in the original committee report, this accords with current development plan policies. In this respect, the condition meets the first 3 tests outlined in Circular 4/98 in that condition 24 is justified by the nature of the development permitted and its effect on the surrounding landscape, is relevant to planning and relevant to the development that has been approved at the Croft.



Circular 4/1998 also requires conditions to be enforceable; it must be possible to detect an infringement, prove a breach has occurred and monitor compliance.

The Circular advises that a condition may raise doubt about whether the person carrying out the development to which it relates can reasonably be expected to comply with it. If not, subsequent enforcement action is likely to fail on the ground that what is required cannot reasonably be enforced. In relation to this, conditions should be precise and clear to ensure a condition is enforceable. A condition must also be reasonable and avoid onerous requirements.

The Circular advises that particular care needs to be taken over conditions which require works to be carried out on land in which the applicant has no interest at the time when planning permission is granted. If the land is outside the site, a condition requiring the carrying out of works on the land cannot be imposed unless the authority is satisfied that the applicant has sufficient control over the land to enable those works to be carried out. Therefore, it is unreasonable to impose a condition worded in a positive form which developers would be unable to comply with themselves, or which they could comply with only with the consent or authorisation of a third party.

Although it would be ultra vires (acting or done beyond one's legal power or authority) to require works which the developer has no powers to carry out, or which would need the consent or authorisation of a third party, it may be possible to achieve a similar result by a condition worded in a negative form, prohibiting development until a specified action has been taken. A House of Lords ruling (in the British Railways Board v the Secretary of State for the Environment and Hounslow LBC [1994]) established that the mere fact that a desirable condition, worded in a negative form, appears to have no reasonable prospects of fulfilment does not mean that planning permission need necessarily be refused as a matter of law. Thus, while an authority will continue to have regard to all relevant factors affecting a planning application and whether it should be granted with or without conditions, there is no longer a legal requirement to satisfy a reasonable prospects test in respect of any negative condition they may decide to impose.

In this particular case, application 18/01385/FUL was submitted by Rural Renaissance Ltd in October 2018. The location plan (AL\_0\_100 B) states that both the site (within the red line boundary) and the surrounding land, including the woodland, (land identified by a blue line) is owned by JS Farming Partnership. The Land Ownership Certificate on the application form also states the land belongs to JS Crawford Farming Partnership (Cert B).

Therefore, at the time the application was determined, the application site and adjoining woodland were within the same ownership and condition 24 met the 6 tests for conditions; the condition was considered to be the most appropriate way to secure the long-term protection and management of the woodland.

The current application has also been submitted by Rural Renaissance Ltd. The revised location plan (AL\_0\_100 C) shows that the site within the red line is owned by Rural Renaissance Ltd and the surrounding land, including the woodland, (land identified by a blue line) is still owned by JS Farming Partnership. The Land Ownership Certificate on the application form states that Rural Renaissance Ltd now own the application site (Certificate A).

The justification from the agent for the removal of the condition is that the applicant, Rural Renaissance Ltd, does not own the woodland and has no control over it.

However, the condition has been worded in such a way that it is a negative suspensive condition (or Grampian condition), as explained above, which means that that it remains both reasonable and enforceable, notwithstanding the change of ownership. Taking into account the landownership of this site and the woodland, there is a reasonable prospect that this condition can be complied with. The onus is, therefore, on the developer to comply with the condition before the development can commence on-site. The condition is considered to meet the reasonable test and has been worded in such a way as to be clear and precise about what is required and when, and so is enforceable.

### Material Changes Since Decision

National Planning Framework 4 has replaced both NPF3 and Scottish Planning Policy and now forms part of the Councils statutory development plan and directly influences planning decisions. The proposed removal of condition 24 is therefore required to be considered against the relevant policies contained within NPF4.

Key to establishing whether the principle of the development is suitable against National Planning Framework 4 is its compatibility with policy 16: Quality Homes, which seeks to encourage, promote and facilitate the delivery of more high quality, affordable and sustainable homes in the right locations, providing choice across tenures that meet the diverse housing needs of people and communities across Scotland. The proposed development would see the development of a site allocated in the Local Development Plan 2016 for housing.

The merits of the proposals have also been considered against other relevant NPF4 policies, including those covering design quality, biodiversity, historic assets and residential amenity, and there are no areas of conflict that cannot reasonably be covered by the remaining conditions, where relevant.

The proposal was also considered against the Local Development Plan 2016, which remains the Council's prevailing Local Development Plan. There has not been any change to this document and there is no requirement under the current proposals to re-examine the earlier decision to approve the residential development.

### **CONCLUSION:**

It is considered that condition 24 of planning permission 18/01385/FUL meets the tests contained within policy 18 of National Planning Framework 4 and Planning Circular 4/1998: The Use of Conditions in Planning Permissions.

The trees and woodland are an important landscape resource that is vital in screening and providing a backdrop to the approved development, to protect the visual amenities of the area and the special qualities of the National Scenic Area.

The retention, protection and long-term management of the woodland is therefore important to the design, setting and success of the development and can be achieved through the Woodland Management Scheme, to be secured by condition 24. This is a requirement of the Planning Brief and reinforced by National Planning Framework 4 policies 4 and 6 and Local Development Plan 2016 policies PMD2, EP4 and EP13. The removal of this condition has not been adequately justified and so the application cannot be supported.

**RECOMMENDATION BY CHIEF PLANNING AND HOUSING OFFICER:**

I recommend the application is refused for the following reason:

The proposed removal of condition 24 of planning permission 18/01385/FUL would be contrary to National Planning Framework 4 policies 4 and 6 and Local Development Plan 2016 policies PMD2, EP4 and EP13 and The Croft Melrose Planning Brief in that the case has not been adequately made for the removal of the condition, without which the long-term future of the woodland cannot be secured, to the detriment of the design, setting and success of the approved development and therefore the visual amenities of the area and special qualities of the National Scenic Area.

DRAWING NUMBERS

AL\_0\_100 C                      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
Julie Hayward	Team Leader Development Management



23/01782/FUL  
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Melrose

