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Our ref: 079913-000004

Scottish Borders Council
Planning and Building
Council Headquarters
Newtown St. Boswells
Melrose
TD6 0SA

26/03/2024

Dear Sir or Madam,

OBJECTION TO PLANNING APPLICATIONS 24/00030/FUL, 24/00031/FUL AND 24/00247/FUL APPLICATIONS UNDER SECTION 42 TO VARY PLANNING CONDITIONS 2 AND 7 DR CATRIONA MCKAY AND DR MICHAEL MARSHALL

We have been instructed by Dr Catriona McKay and Dr Michael Marshall in respect of the above referenced application made under S.42 of the Town and Country Planning (Scotland) Act 1997.

As you will be aware, applications 24/00030/FUL (to vary condition 2, dated 5/1/24), application 24/00031/FUL (to vary condition 7, dated 5/1/24) relate to planning permission in principle 19/00182/PPP, which itself was a renewal of 15/00822/PPP, granted on the 30/3/16. Our clients lodged an objection to both applications on the 17/1/24.

Our clients understand from discussions with the relevant planning officer that these applications were materially defective and did not meet the requirements for planning applications as set out in the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013 (The Regulations). This has led to the re-submission of these applications, as well as a third application, 24/00247/FUL (to vary conditions 2 and 7, dated 4/3/24), which again was made in respect of 19/00182/PPP. As of today's date, the applicant has had a period of 8 years to satisfy the various matters specified in the conditions of these permissions in principle.

The applicant had until the 4/3/2024 to submit a further application for approval of the matters specified as set out in the decision notice. Instead of seeking to do so, they have sought to misuse the planning system by submitting three separate S.42 applications under applications 24/00030/FUL, 24/00031/FUL and 24/00247/FUL.

It is worth stating that under S.59(2A) of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act), the grant of these applications would, by default, allow the applicant a further 5 years to comply with the relevant conditions. The granting of this would therefore result in an overall period of 13 years for the applicant to satisfy the matters specified in the conditions, over a time span where the local development plan has materially changed from the granting of the original application 15/00822/PPP.

Considering this background, we make the following objections:

The validity of the S.42 applications:

These applications are materially defective and cannot be validated at this point.

Regulation 10(3)(b) states that the application **must** be accompanied, where any neighbouring land is owned by the applicant, by a plan identifying that land. The applicant has submitted a plan which displays the red line of the development site, alongside an area outlined in blue. However, the applicant continues to enjoy a right of proprietorship over sections of Kingsmeadows house outlined in title sheet PBL 6298. They also continue to own a section of the access road (which has not been adopted by the Borders Council) leading to Kingsmeadows House. Neither of these areas have been included within the areas outlined in red or blue within the layout plan. Our clients position therefore, is that the applicant has failed to comply with regulation 10(3)(b), and that an amended plan showing the full and correct extent of their ownership should be re-submitted, as is required by regulation 10(3)(b).

Furthermore, Regulation 11(3) the Regulations, a S.42 application **must** contain a statement that it is be made under S.42 of the TCPSA. However, within the application form, the applicant has failed to identify which Act the applications are being submitted under. The Applicant should therefore be required to re-submit a corrected application form to abide by the statutory regulations.

Lastly, under Regulation 9(2)(c), an application form completed by an agent acting on behalf of the applicant **must contain** the name and address of the agent acting on behalf of the applicant. We note that on all three application forms, the agent has failed to submit a relevant address and has instead provided a PO box. This submission is not consistent with the requirements contained in the Regulations and it is submitted that the applicant should again be required to re-submit an amended application to satisfy the requirements under the Regulations.

Given these failings, these applications are materially defective. The Planning Authority should require the applicant to amend the application forms and the proper validation of these applications cannot be carried out until this has been completed by the applicant.

S.42(4) of the 1997 Act:

Without prejudice to the above argument, that the application requires amendments before validation, we make the following comments in regard to the legal position of S.42(4) of the 1997 Act.

The decision notice granted in respect of 19/00182/PPP contained the requirement that an application for approval of matters specified in the conditions set out in this decision shall be made to the Planning Authority before whichever is the latest of the following (with the relevant one being) the expiration of three years from the date of this permission (5/3/2021).

This reflected the statutory position in place at that time in that under S.59(2)(a)(i) of the 1997 Act, an application for the approval mentioned in S.59(1)(b), must be made before the expiration of 3 years from the date of the grant of the permission. The applicant made an application to discharge the relevant conditions under application 22/00422/AMC, which was refused by the Borders Council.

It is clear then, that the applicant has failed to discharge the relevant conditions specified in 19/00182/PPP prior to the 3-year deadline imposed as a requirement in the decision notice and the version of S.59 of the 1997 Act, which was in place at that time. Given this fact, permission 19/00182/PPP cannot now be implemented.

S.42(4) of the TCP(S)A states that S.42 does not apply if the previous permission was granted subject to a condition as to the time within which the development to which it related was to be begun, and that time has expired without the development having been begun.

Given these facts, S.42(4) has now been triggered by the applicant failing to commence development within the period specified in the decision notice. The Planning Authority cannot now consider these S.42 applications submitted by the applicant, given the time condition on which application 19/00182/PP was granted has now expired without the development having been begun.

We are aware from correspondence with our clients that the relevant planning officer considers that there is case law which limits the applicability of S.42(4). However, having reviewed relevant Scottish case law on which S.42 applications were the subject of judicial discussion, we are firmly of the view that there is no precedent which limits the scope and timing of S.42(4), and our interpretation of S.42(4) is therefore correct.

As a result of this, even if the applications satisfied the conditions of validation, these applications cannot be considered as the requirements in S.42(4) are applicable, and this fact renders the applications invalid.

Considering the Principle of the Development:

Again, notwithstanding the applicability of the above argument in relation to S.42(4), the principle of the development itself must now be considered as a result of these applications, under the following explanation.

As the applicant has stated in their application, S.42(2) of the 1997 Act states that on such a S.42 application, the 'Planning Authority shall consider only the question of the conditions subject to which planning permission should be granted…'.

What the applicant has failed to point out, is that this is not the full position available to the Local Authority when determining a Section 42 Application. I have set out the full position available to the Local Authority under the 2022 Development Management Procedures as set out by Scottish Government, (the "DMR") at Annex H (Application for Planning Permission under S42):

> *"In determining a Section 42 application, authorities may consider only the issue of the conditions to be attached to any resulting permission.* ***However, in some cases this does not preclude the consideration of the overall effect of granting a new planning permission, primarily where the previous permission has since lapsed or is incapable of being implemented."***

As set out in my arguments above, planning permission 19/00182/PPP has lapsed and is incapable of being implemented. Under the DMR, the Planning Authority must now consider the overall effect of granting a new permission.

This position has been further cemented in relevant case law, particularly in City of Edinburgh Council v Scottish Ministers (2020 CSIH 13), which in brief, was a S.42 application relating to an outline planning permission. This decision is directly relevant to the applications at hand, and I have included the relevant excerpts from the judgment below:

> *"[37] It is not disputed that a successful application under sec 42 of the 1997 Act to allow a person to proceed with a development, which is permitted under an earlier permission, without complying with a condition of that permission, amounts to the grant of a new permission.* ***It follows that any decision on whether to grant the application must be in accordance with the current development plan 'unless material considerations indicate otherwise'*** *(1997 Act, sec 25(1)).*
>
> *[38]* ***In a case where the development has not yet commenced and the effect of a refusal would mean that the original permission cannot be implemented, this may involve a reconsideration of the principle of development in light of any material change in the***

development plan policies *(eg Pye v Secretary of State for the Environment , Transport and the Regions and North Cornwall District Council , not following Allied London Property Investment Ltd v Secretary of State for the Environment , p 338; R v Leicester City Council, ex p Powergen UK plc).* ***That is so even if sec 42(2) stipulates that it is only the question of the condition, from which compliance is sought to be avoided, that is to be considered."***

Under the Court's interpretation of Section 42, as well as the accompanying 2022 circular, it is clear that where the original permission cannot now be implemented, a S.42 application must result in the 'reconsideration of the principle of development in light of any material change in the development plan policies'.

Since the original PPP was granted in 2016 there has been a material change in the development plan which new applications are considered against, with the introduction of NPF4. Given that the development plan is now materially different from the point at which 19/00182/PPP was granted, and the fact that the existing permission has now lapsed, the Planning Authority must now consider the overall effect of granting a new planning permission, rather than solely considering the relevant conditions. This is in compliance with the Scottish Government 2022 DMR and has been reinforced by relevant case law. Given the considerations outlined above, the Borders Council must now reconsider the principle of development in light of the material change in development plan policies.

Consideration of the application on its merits:

Again, notwithstanding the above arguments, the Planning Authority must reject these applications on their merits, for the following reasons:

It seems clear to us that the applicant submitting three separate applications in such a manner is an obvious attempt to manipulate the planning system by the unnecessary use of S.42 applications to benefit from a fresh planning permission being granted. This is not the intended purpose of S.42 of the TCPSA.

In respect of Condition 2, the inclusion of the word 'except' within the condition does not result in any confusion to the condition as a whole, and the condition is therefore sufficiently precise. The wording of condition 2 as it stands, does not therefore fail the tests as set out in Circular 4/1998 and application 24/00030/FUL must therefore be rejected on this basis. Without prejudice to the previous argument, we submit that if the relevant Planning Officer deems that the condition 2 wording should be altered, that this could be done by the Council confirming the change as a non-material application under S.64 of the TCPSA.

In respect of Condition 7, our client's position is that the condition as currently set out is a vital protection of the woodland against the proposed development and is therefore an entirely reasonable condition. This condition does not therefore fail the tests of Circular 4/1998 and should remain as it currently reads. If the relevant planning officer is in agreement with this, then under S.42(2(b)) of the TCPSA, the application must be refused.

Furthermore, any watering down to this condition could result in the loss of trees over and above what was accepted in the planning permission in principle. As stated within the decision notice issued under 22/00422/AMC, this would be to the detriment of the character and appearance of the conservation area and the locally designated landscape.

Should the relevant Planning Officer choose not to treat the application to vary conditions 2 and 7 as non-material variations, we would urge that they use the discretion available to them under S.59(2A)(b) of the TCPSA. This allows the Planning Authority to determine a different timeline to the 5-year default period that the applicant would otherwise be granted on receipt of a new planning permission. We would suggest, given the extensive history of the planning site as outlined above, that the applicant has

had more than sufficient time to comply with and discharge the relevant conditions. Any fresh planning permission arising from a S.42 application should therefore include, under S.59(2A(b)) of the TCPSA, a condition specifying a period ending 6 months from the 5/3/2024 for satisfaction of any conditions. In this way, the applicant would achieve the change they have requested. If the applicants aim had been to secure additional time to achieve a further period for making submission for satisfaction of conditions, then they could and should have been upfront about this and made the application on that basis.

To conclude, it is obvious given the variety of points raised that these applications are inappropriate at best. Given that the applicant has failed to comply with the relevant regulations that apply to any planning application, the applications themselves cannot be validated at this stage. Furthermore, S.42(4) of the 1997 Act has been triggered and the applications cannot now be considered. Without prejudice to these arguments, the Borders Council must now consider the wider effect of granting permission and by extension the principle of development under the Scottish Government's guidance and in accordance with relevant case law. Lastly, without prejudice to all the above, we submit that the relevant planning officer must reject each application based on their failure on their own merits.

I would be happy to further discuss any of the points which I've raised in this letter. I look forward to hearing from you.

Yours faithfully,

[redacted]

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