



**Application under section 42 to vary planning condition 7 of
planning permission 19/00182/PPP (erection of residential apartments)
at Site in Grounds of Kingsmeadows House Kingsmeadows Road, Peebles
Scottish Borders Council
Application 24/00031/FUL**

SUPPORTING PLANNING STATEMENT

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1.0 INTRODUCTION

- 1.1 This is a supporting planning statement in respect of a planning application under section 42 to vary planning condition 7 of planning permission 19/00182/PPP (erection of residential apartments) to vary the wording of the condition to make it clearer and precise and to ensure that it passes the tests of conditions to comply with circular 4/1998 and Circular 3/2022. Planning application 24/00031/FUL refers.
- 1.2 This application is one of three applications lodged to vary conditions 2 and 7 of the consent with individual applications lodged to vary just condition 2 and just condition 7. This submission relates to the application to vary condition 7. This condition variation has not been considered by Scottish Borders Council to date. It was clear that multiple applications may be necessary to ensure that the consent complied with the government circulars on conditions and this has proven to be the case as despite being recommended for approval the application to just vary condition 2 was refused by councillors despite being recommended for approval by planning officers. That application sought variation to condition 2 (application 24/00030/FUL refers). Specifically, the application sought consent to vary the wording of the condition to read *'No development shall commence until all matters specified in conditions have, where required, been submitted to and approved in writing by the planning authority. Thereafter the development shall only take place in strict accordance with the details so approved'*. The application form included the ownership certificate confirming that the applicant is the owner of the application site.
- 1.3 The application to vary condition 2 was submitted with a location plan and covering letter. The original permission was for the erection of residential apartments as a renewal of previous consent 15/00822/PPP. The wording of condition 2 of this permission reads *'No development shall commence until all matters specified in conditions have, where required, been submitted to and approved in writing by the planning authority. Thereafter the development shall only take place except in strict accordance with the details so approved. Reason: To achieve a satisfactory form of development, and to comply with the requirements of section 59 of the Town and Country Planning (Scotland) Act 1997, as amended'*.
- 1.4 As an application for planning permission in principle matters specific in conditions require to be submitted. Other conditions relate to other technical matters to control the nature of development and to manage the impact of the development. Matters specified required to be lodged within
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- three years of the decision. The section 42 application was lodged prior to the expiration of the planning permission in principle and an acknowledgment letter was received on 5 March 2024.
- 1.5 The application was lodged as it was considered that the wording of condition 2 was not precise and open to misinterpretation with the insertion of the word 'except' causing confusing and imprecision. Clarification on this issue was required to prepare plans to comply with the other terms of the planning permission and to thereafter progress with the development as consented.
- 1.6 The application was recommended for approval by Scottish Borders Council planning officers. The officer report suggested a minor alteration to the proposed reworded condition which was suggested to read '*No development shall commence until all matters specified in conditions have, where required, been submitted to and approved in writing by the planning authority. Thereafter the development **shall take place only** in strict accordance with the details so approved. Reason: To achieve a satisfactory form of development, and to comply with the requirements of section 59 of the Town and Country Planning (Scotland) Act 1997, as amended.*' This rewording was accepted by the applicant.
- 1.7 The application was determined at committee on 9 December 2024 at which the applicant was represented was represented. The application was refused after a vote of committee members. The minute of the committee meeting was ratified by the subsequent planning committee held in February 2025. The refusal decision notice was issued and received by the applicant by email on 16 December 2024 which was the first date on which the applicant became aware of the wording of the reasons for refusal. The reasons for refusal are as follows:
- 1 The application is contrary to Policy EP11 of the Scottish Borders Council Local Development Plan 2024 in that the development would result in the loss of trees and green space. The need for development does not outweigh the need to protect or retain the existing mature trees and green space.*
- 2 The application is contrary to Policy EP13 of the Scottish Borders Local Development Plan 2024 in that the proposed development would result in loss of an existing woodland resource and the benefits of development do not outweigh the loss of landscape, or the ecological and historical value of the woodland resource.*
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3 The application is contrary to Policy 6 of National Planning Framework 4 in that the development would result in the loss of ancient woodland and cause ecological impact on trees of historical value.

- 1.8 It was therefore clear that councillors did not address the actual condition wording to which the application referred, but rather they were more concerned about tree protection which is considered in condition 7. The application to vary both conditions 2 and 7 is currently undetermined and sits with planning officers. However, as councillors have already considered condition 2, the applicant wishes to pursue the variation to condition 7 as this relates specifically to the issue which appears to be of concern to councillors. The following section provides an assessment of the councillor's decision on condition 2 and provides a way forward with this application which addresses the councillors' reasons for refusal through a variation to condition 7. Condition 7 refers specifically to tree management and reads as follows:

7 The first application for matters specified as conditions application should be supported by a management plan for the site and the remainder of the parkland/woodland, detailing maintenance, curtilage, access and boundary treatment proposals. That should include for an open plan area along the riverbank north of the development, free from individual gardens, fences, gates and other structures.

Reason: To maintain the character and open nature of the grounds within and surrounding the site and to protect the character and appearance of the conservation area.

- 1.9 It is considered that this condition fails the tests of circular 4/1998 as the condition is not relevant to the development proposed, is not necessary to make the development acceptable and is not reasonable in all other respects. It is therefore proposed that the wording be adjusted to:

7 The first application for matters specified as conditions application should be supported by a management plan for the woodland within application site.

Reason: To protect the character and appearance of the remainder of the woodland within the site.

- 1.10 The following section addresses the councillor's refusal of condition 2 and provides supporting reasoning why these reasons can allow approval of a variation to 7 which has not been considered by the council.
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2.0 RESPONSE TO COUNCILLOR REASONS FOR REFUSAL OF VARIATION TO CONDITION 2 APPLICATION

- 2.1 Firstly, it should be noted that the original planning permission 15/00822/PPP was granted permission on 30 March 2016 which required the submission of Matters Specified within three years i.e. before 29 March 2019. The renewal consent was issued on 5 March 2021 which is after the date on which the previous permission required Matters Specified in Conditions to be lodged.
- 2.2 The officer report on the variation to condition 2 application considers the policy and legal context in which a section 42 variation to condition application requires to be considered and reference is made to circular 4/1998 and Circular 3/2022. The committee report indicates that the development consented and subject to conditions has twice before been granted planning permission with the most recent approval being on 5 March 2021. In the consultation responses noted in the report, it is noted that the roads planning service responded stating that all other conditions laid out in the response to the original application, namely conditions 5 and 9 as well as the informatives should be included in any consent. Councillors were therefore aware that they were being asked to address the application as submitted which was a variation to a single condition.
- 2.3 The officer also notes that the key determining issues are whether there is justification to vary condition 2 and whether there are any other material changes since the original decision. The officer assessment states that the change of circumstance has been the adoption of a new Local Development Plan for Scottish Borders 2024 and NPF4. It also states that members can depart from the terms of the development plan if they consider there are material considerations for doing so.
- 2.4 The officer clearly explained in the report to committee that the application was in respect of a variation to condition to make condition 2 clearer and precise. The officer clearly indicated that all other conditions attached to the previous grant of planning permission would be imposed relating to tree surveys, arboricultural impact and method statements. The officer also stated that should members decide that planning permission should be granted subject to the same conditions as had previously been imposed then the application should be refused. As will be made clear in this submission councillors ignored this information. The application which the applicant is now seeking consent for provides councillors with an opportunity to address the issue of trees which appears to be the issue of concern.
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- 2.5 Despite the very clear reference to the terms of the application which was to vary the specific wording of a single condition relating to the implementation of the planning permission, councillors rejected the recommendation and refused planning permission. The permission therefore remains with condition 2 which is written in two parts. The first part controls the commencement of development which shall only take place after all matters specified have been submitted to and approved in writing by the planning authority. However, the second sentence of the condition then allows the development to take place but only except in strict accordance with the details approved. This leaves the applicant in a position whereby details have been approved but that the development cannot commence as the wording does not allow those details approved to be constructed. The condition is therefore imprecise and confusing to the applicant as there is no direction as to how or which development should proceed. The officer report therefore quite rightly agreed to reword the condition to make it clear that it is those matters specified that are approved that shall be implemented. Unfortunately, councillors did not address this very specific issue.
- 2.6 The officer recommendation was rejected by councillors at the committee. The minute of the meeting is very short and does not reference any debate that took place at the committee. It simply states that two councillors moved the recommendation but that councillor Douglas seconded by councillor Small moved as an amendment that the application be refused on three grounds. These reasons are those which are referred to in the refusal notice. The minute indicates that two ward councillors spoke on the application as did one objector as well as Mr Carruthers for the applicant.
- 2.7 The minute of the meeting does not suggest that councillors addressed the officer report at all and did not consider the application as submitted which was a variation to condition 2 and its specific wording. The reasons for refusal relate to the development which had previously been consented by Scottish Borders Council. The previous officer report on the application 19/00182/PPP recommended approval of the application and planning permission was issued. In the officer report it was made clear that the decision was based on the terms of the 2016 Scottish Borders Local Development Plan with the policies noted. The report made it clear that the development complied with the development plan and this was the decision taken by Scottish Borders Council with planning permission being issued.
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- 2.8 In the officer report on application 24/00030/FUL the officer notes the policies of the updated 2024 LDP, NPF4 and supplementary planning guidance. In assessing the change in circumstances from the previous grant of planning permission and the proposed rewording of condition 2, the report notes the following:

Those current SDP policies relevant to the proposed development are set out above. Whilst the SDP has changed, the terms and general tenor of the policies in the LDP element reflect broadly those of its previous iteration. For example: policy PMD2, quality standards, which introduces a need to be able to promote sustainable travel modes; HD3, protection of residential amenity, which has removed from the preamble text the reference to Scottish Planning Policy and; EP7, listed buildings, which refers in the preamble text to policy 7 of NPF4, the Historic Environment Policy for Scotland and Historic Environment Scotland's "Managing Change" documents, amongst others. Assessing the proposal against the LDP, there is no material consideration which would lead to a different conclusion than that previously reached. Assessing the proposal against the policies contained within NPF4, including amongst others those relating to the natural and historic environment, trees and biodiversity as with the LDP, there is no material consideration which would lead to a different conclusion than that previously reached.

- 2.9 In refusing the application against policies in the LDP which the officer noted had not changed materially since the previous approval it is unreasonable for councillors to reach a different conclusion on the same development which was granted planning permission assessing this against the same policy basis. The following paragraphs consider the reasons for refusal in further detail:

Reason 1

1 The application is contrary to Policy EP11 of the Scottish Borders Council Local Development Plan 2024 in that the development would result in the loss of trees and green space. The need for development does not outweigh the need to protect or retain the existing mature trees and green space.

- 2.10 Policy EP11 in the 2024 LDP is below:

POLICY EP11: PROTECTION OF GREENSPACE

(A) KEY GREENSPACES

Key Greenspaces as identified on Proposal Maps will be protected from development that will result in their loss. Development that protects and enhances the quality of Key Greenspaces will be supported.

(B) OTHER GREENSPACES

Greenspace within the Development Boundary of settlements will be protected from development where this can be justified by reference to any of the following:

- a) the environmental, social or economic value of the greenspace;
- b) the role that the greenspace plays in defining the landscape and townscape structure and identity of the settlement;
- c) the function that the greenspace serves.

In both cases development that would result in the loss of greenspace, including outdoor sports facilities, will only be permitted if it can be satisfactorily demonstrated that, based on consultation with user groups and advice from relevant agencies:

- d) there is social, economic and community justification for the loss of the open space; or
- e) the need for the development is judged to outweigh the need to retain the open space; and
- f) where appropriate, comparable open space or enhancement of existing open space may be provided and/or paid for by the developer at an alternative location within or immediately adjacent to the settlement where this will provide adequate and acceptable replacement for the open space lost as a result of the development. In some cases, recreational provision in the form of indoor sports facilities may be a suitable alternative provided it is equally accessible and is judged to compensate fully for the loss of the open space resource.

Development that would result in the loss of functional open space where a quantifiable demand can be demonstrated must in addition be justified by reference to:

- g) the levels of existing provision and predicted requirements for the settlement;
- h) the extent to which current or predicted future demand can be met on a reduced area.

Policy EP11, LDP 2024

2.11 The exact same policy was included in the 2016 LDP:

POLICY EP11: PROTECTION OF GREENSPACE

(A) KEY GREENSPACES

Key Greenspaces as identified on Proposal Maps will be protected from development that will result in their loss. Development that protects and enhances the quality of Key Greenspaces will be supported.

(B) OTHER GREENSPACES

Greenspace within the Development Boundary of settlements will be protected from development where this can be justified by reference to any of the following:

- a) the environmental, social or economic value of the greenspace;
- b) the role that the greenspace plays in defining the landscape and townscape structure and identity of the settlement;
- c) the function that the greenspace serves.

In both cases development that would result in the loss of greenspace, including outdoor sports facilities, will only be permitted if it can be satisfactorily demonstrated that, based on consultation with user groups and advice from relevant agencies:

- d) there is social, economic and community justification for the loss of the open space; or
- e) the need for the development is judged to outweigh the need to retain the open space; and
- f) where appropriate, comparable open space or enhancement of existing open space may be provided and/or paid for by the developer at an alternative location within or immediately adjacent to the settlement where this will provide adequate and acceptable replacement for the open space lost as a result of the development. In some cases, recreational provision in the form of indoor sports facilities may be a suitable alternative provided it is equally accessible and is judged to compensate fully for the loss of the open space resource.

Development that would result in the loss of functional open space where a quantifiable demand can be demonstrated must in addition be justified by reference to:

- g) the levels of existing provision and predicted requirements for the settlement;
- h) the extent to which current or predicted future demand can be met on a reduced area.

Policy EP11, LDP 2024

- 2.12 For the councillors to refer to the exact same policy against which the earlier consented application was considered and consented and to refuse planning permission is unreasonable as there has not been any change in circumstances. The development has been previously fully assessed against greenspace policies and considered to be acceptable. The application to vary condition 2 does not change the fundamental details of the proposal as the development would still be controlled by conditions relating to the protection and enhancement of the environment, greenspace and trees.
- 2.13 The reason for refusal was not therefore relevant to the application details submitted and refers to a policy which the council has already considered in granting planning permission in principle, the terms of which have not changed. It is unreasonable to refuse the application to vary condition 2 based on this policy. This application now refers specifically to the issue of trees and management in condition 7 and provides an opportunity for the council to correct the error that was made in refusing the variation to condition 2 application.

Reason 2

2 The application is contrary to Policy EP13 of the Scottish Borders Local Development Plan 2024 in that the proposed development would result in loss of an existing woodland resource and the benefits of development do not outweigh the loss of landscape, or the ecological and historical value of the woodland resource.

- 2.14 Policy EP13 of the 2024 LDP is replicated below:

POLICY EP13: TREES, WOODLANDS AND HEDGEROWS

The Council will refuse development that would cause the loss of or serious damage to the woodland resource unless the public benefits of the development clearly outweigh the loss of landscape, ecological, recreational, historical or shelter value.

Any development that may impact on the woodland resource should:

- a) aim to minimise adverse impacts on the biodiversity value of the woodland resource, including its environmental quality, ecological status and viability; and
- b) where there is an unavoidable loss of the woodland resource, ensure appropriate replacement planting, where possible, within the area of the Scottish Borders; and
- c) adhere to any planning agreement sought to enhance the woodland resource.

Policy EP13, LDP 2024

- 2.15 The exact same policy was included in the 2016 LDP:

POLICY EP13: TREES, WOODLANDS AND HEDGEROWS

The Council will refuse development that would cause the loss of or serious damage to the woodland resource unless the public benefits of the development clearly outweigh the loss of landscape, ecological, recreational, historical, or shelter value.

Any development that may impact on the woodland resource should:

- a) aim to minimise adverse impacts on the biodiversity value of the woodland resource, including its environmental quality, ecological status and viability; and
- b) where there is an unavoidable loss of the woodland resource, ensure appropriate replacement planting, where possible, within the area of the Scottish Borders; and
- c) adhere to any planning agreement sought to enhance the woodland resource.

Policy EP13, LDP 2016

- 2.16 The reason for refusal is not therefore relevant to the application details submitted and refers to a policy which the council has already considered in granting planning permission in principle, the terms of which have not changed. It was unreasonable to refuse the application to vary condition 2 based on this policy.

Reason 3

3 The application is contrary to Policy 6 of National Planning Framework 4 in that the development would result in the loss of ancient woodland and cause ecological impact on trees of historical value.

- 2.17 The pre-amble to policy 6 states that LDP's should identify and protect existing woodland and the potential for its enhancement or expansion. The 2024 LDP does not identify the application site for any form of specific woodland protection. As NPF4 was adopted as government policy before the SBC LDP 2024 was adopted the council could have adjusted the development plan proposals map to identify and protect any woodland the council considered required enhancement. The council chose not to identify the application site or its surroundings. NPF4 policy 6 does not therefore add any further policy protection to the site. The LDP policies have been assessed and have not changed because of NPF4 and these policies have been assessed by the council in determining the planning application on this site with planning permission being granted.
- 2.18 The trees on the site are not ancient woodland and the conditions of the planning permission address the impact of trees with arboricultural reports having been submitted and approved by Scottish Borders Council in granting planning permission. The use of this policy to refuse planning permission for a variation to condition which would retain all other conditions relating to the protection and enhancement of trees and the

environment on the application site is unreasonable. As will be noted below, this further application also addresses tree protection in further detail through the proposed variation to condition 7.

- 2.19 A comparison of the policies contained in the 2024 LDP and the previous 2016 LDP against which the original planning permission was granted indicates that there has not been any material change in circumstances. This being the case, it is inconsistent and unreasonable for Scottish Borders Council to reach a different conclusion on the planning application than that previously.

Way Forward

- 2.20 As the councillors were clearly concerned regarding the protection of trees in their assessment of the first variation to condition application which did not refer to tree protection, this application now provides councillors with a way to ensure that there is tree protection going forward through the proposed amendment to condition 7.

- 2.21 As noted above condition 7 reads *'The first application for matters specified as conditions application should be supported by a management plan for the site and the remainder of the parkland/woodland, detailing maintenance, curtilage, access and boundary treatment proposals. That should include for an open plan area along the riverbank north of the development, free from individual gardens, fences, gates and other structures.'*

Reason: To maintain the character and open nature of the grounds within and surrounding the site and to protect the character and appearance of the conservation area'.

- 2.22 The condition fails the tests of circular 4/1998 as the condition is not relevant to the development proposed, is not necessary to make the development acceptable and is not reasonable in all other respects. It is proposed that the wording be adjusted to:

7 The first application for matters specified as conditions application should be supported by a management plan for the woodland within application site.

Reason: To protect the character and appearance of the remainder of the woodland within the site.

- 2.23 The addition of this variation to condition provides councillors with the opportunity to address the error made in assessing the earlier application. It should be noted that the wider management of the site under the applicant's control is not an issue that arises from the granting of planning permission for this development which has been considered acceptable through an assessment against up-to-date planning policies. Condition 6 refers to a tree survey showing impact on trees within the application site and requiring a method statement which shows how any development would be carried out whilst minimising impact on retained trees. The reason given for condition 6 is reasonable in that it seeks to ensure that existing trees within the site are safeguarded and protected. Condition 7 goes further than is necessary to address the impact of the proposed development and is not therefore necessary. It also relates to an unspecified area which is unreasonable and not precise.
- 2.24 As the trees in the wider site lie within a conservation area there is a general protection on these trees through conservation area legislation. It is not necessary to seek to further protect existing trees out with the application site boundary that are not affected by the development consented.
- 2.25 The wording of the condition fails the test of being relevant to the development proposed. The development refers to the erection of residential apartments on a specific site where the proposed site plan has been approved. It is therefore clear where development has been consented. Condition 8 also refers to the general design principles shown in supporting plans and the design statement which also makes it clear where development has been consented. Any need for management of trees on the wider area (an area undefined in the condition) is not required because of this development.
- 2.26 In addition to the unnecessary and unrelated management plan for the unspecified area of parkland/woodland the condition also refers to restrictions on garden ground being formed along the riverbank north of the development. Such a restriction is unnecessary as garden ground would form part of the apartment's curtilage and as such change of use would be required to form garden ground from the open land that currently exists along the river bank out with the development site. This part of the condition is unnecessary as planning permission would be required for this form of use in this area and this is not within the consented area.
- 2.27 The applicant is therefore putting forward the case to vary condition 7 to ensure that the development as consented by Scottish Borders Council is
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properly and reasonably conditioned in a manner that conforms with planning policy and legal requirements relating to how condition wording requires to be framed. A positive decision will continue to control the development effectively in a legally sound manner. As policies have not changed since the initial grant of permission and the council has all the necessary controls over the development, the variation should be supported.

3.0 CONCLUSIONS

- 3.1 This supporting statement is lodged in respect of an application submitted under Section 42 for a variation to condition 7 of planning permission 19/00182/PPP such that it relates directly to the development as consented. At present the wording of the condition refers to land out with the application site which is not affected by the development.
- 3.2 At present the wording of this condition does not accord with circular 4/1998 as the wording is not clear or precise and is unreasonable. The condition therefore fails the tests of the circular and this application is seeking to rectify this.
- 3.3 A previous application only relating to condition 2 was refused by the council and the reasons for refusal have been addressed in this submission. It is unreasonable for a council to refuse an application for planning permission through reference to the exact same policy wording that has been previously used to grant planning permission. The officer recommendation of approval of the application clearly set out to councillors the matters before them and indicated that permission to vary the condition should be granted. The officer explained that there were no material changes in circumstances since the original approval in March 2021. Despite this clear guidance provided by the planning officer, councillors refused the section 42 application to vary the condition through reference to environmental policies in the LDP. The decision was unreasonable in that references were made to policies that had not changed since the original grant of planning permission. The reasons for refusal also did not refer to the application details at all, but rather considered the development as originally submitted. The councillors did not put forward any reasoning as to why they had reached their conclusion and what change of circumstances had arisen. It is considered that the councillors' decision was unreasonable and has not been justified.
- 3.4 This application allows the council to potentially revisit the previous decision making and to consider condition 7. The proposed revised wording of the condition does not change the consented development, but rather puts in place controls that comply with the law on conditions and allows full control over development to remain in place. Whilst condition 2 retains the same wording as the original consent, the council has the ability to revisit this wording once again should it wish to do so.
- 3.5 The proposed rewording would ensure that the consent and conditions accord with circular 4/1998 and there are no material changes to the
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development plan policy position which would suggest that any other conclusion should be reached.

June 2025