



APPEALS AND LOCAL REVIEW BODY DECISIONS

Report by Head of Communities and Economy

1 PURPOSE OF REPORT

- 1.1 This report informs the Committee of notices of reviews determined by the Local Review Body (LRB) at its meeting in February 2018; and two appeal decisions received from Scottish Ministers.

2 BACKGROUND

- 2.1 The Council's LRB considers reviews requested by applicants for planning permission, who wish to challenge the decision of planning officers acting under delegated powers to refuse the application or to impose conditions on a grant of planning permission.
- 2.2 The decision of the LRB on any review is final, and can only be challenged through the Courts on procedural grounds.
- 2.3 Decisions of the LRB are reported for information to this Committee.
- 2.4 In addition, this report includes two decisions on appeal which have been considered by Scottish Ministers.

3 PREVIOUS REVIEWS DETERMINED BY THE LRB

- 3.1 At its meeting on 27 February 2018 the LRB made the following decisions:

	Application Reference	Site Address	Proposed Development	LRB Decision
1	17/00630/DPP	153 The Loan, Loanhead	Change of use of office to two dwellinghouses and alterations to building	Permission granted at LRB meeting of 27.02.2018
2	17/00672/DPP	16 School Green, Lasswade	Erection of dwellinghouse	Permission granted at LRB meeting of 27.02.2018
3	17/00649/DPP	Airybank, Quarrybank, Cousland	Erection of four dwellinghouses	Permission refused at LRB meeting of 27.02.2018

4 APPEAL DECISIONS

- 4.1 An appeal against a refusal to issue a High Hedge Notice regarding a hedge at 41 Newmills Road, Dalkeith has been upheld and a High Hedge Notice has been issued requiring a reduction in the height of a section of hedge. The Reporter appointed by the Scottish Ministers concluded that the hedge adversely affects the reasonable enjoyment of a neighbouring residential property.
- 4.2 An appeal against non-determination of planning application for residential development on land north of Dalhousie Dairy, Bonnyrigg (allocated housing site Hs10) has been upheld subject to conditions. The Reporter appointed by the Scottish Ministers issued a decision advising the Council of the intention to grant planning permission subject to the conclusion of a legal agreement to secure developer contributions in October 2017. A copy of this decision was reported to the Committee at its meeting in October 2017. A decision has now been issued following the conclusion of the legal agreement securing developer contributions.

5 RECOMMENDATION

- 5.1 The Committee is recommended to note the decisions made by the Local Review Body at its meeting in February 2018 and the appeal decisions by Scottish Ministers.

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Head of Communities and Economy

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Background Papers: LRB procedures agreed on the 13 June 2017.



High Hedges (Scotland) Act 2013

Appeal under section 12(1)

Decision by Amanda Chisholm, a Reporter appointed by the Scottish Ministers

- High hedge appeal reference: HHA-290-4
- Location of the hedge: 41 Newmills Road, Dalkeith, EH22 2AQ
- Owner of the hedge: Baron Healthcare Ltd
- Appellant's address: 15 James Lean Avenue, Dalkeith, EH22 2AA
- Application for a high hedge notice 17/00612/HH dated 30 August 2017
- Appeal by Mr Bill McKay against the decision by Midlothian Council that there is no adverse effect from the high hedge and that no action should be taken
- Date of site visit by Reporter: 25 January 2018

Date of appeal decision: 20 February 2018

Decision

I quash the decision by Midlothian Council that there is no adverse effect from the high hedge and that no action should be taken, and I issue a high hedge notice, which is attached as an annex to this decision. The high hedge notice takes effect on the date specified therein.

Reasoning

1. The determining issues in this appeal are whether the hedge constitutes a high hedge within the meaning of the High Hedges (Scotland) Act 2013 ("the Act") and, if so, whether its height results in an adverse effect on the appellant's enjoyment of his property.

2. The hedge which is the subject of this appeal is formed by a row of 16 sitka spruce trees, interspersed with hawthorn, immediately adjacent to the northwestern boundary of the appellant's property and those of his neighbours (numbers 9 to 17 James Lean Avenue). Relying on the council's measurements, the hedge is approximately 39 metres long along its entire length. The section of hedge adjacent to the appellant's property is 8.9 metres long; at the hedge's highest point in this length the spruce trees are some 20 metres high. The trees adjacent to the appellant's property act as a barrier to light, as do the lengths on either side. I am therefore satisfied that the hedge at appeal comprises a high hedge within the meaning of the Act.



3. Based on the submissions and my observations during the site inspection, the key issues regarding the appellant's enjoyment of his property are the effect of the hedge on the light experienced in his garden; the resulting shade inhibiting plant growth; and the amount of needle and cone debris falling into the garden. Given that the site inspection was undertaken on a winter's day in January, I was unable to observe whether the hedge provides a windbreak, making it a haven for midges.

4. In coming to a view, I must consider whether the height of the hedge adversely affects the level of enjoyment that the appellant can reasonably expect to have. This may not reflect the level of amenity that would be ideal or desirable from the point of view of the appellant. I have taken cognisance of the council's calculations regarding the obstruction of light to the garden, including the course of the shadows cast by the hedge. However, in my view the spruce trees, at their current height, are out of scale with the rest of the garden, despite its length of 24.5 metres, and in consequence the hedge appears dominant and oppressive. At the site inspection it was difficult to ascertain if plant growth in this part of the garden was being affected, as much of the ground was covered by a tarpaulin. However, I observed that the garden is carpeted with pine needles and cones, particularly at the hedge end but also along its length as far as the house and, indeed, on the steps leading into the house. In my view the height of the hedge contributes to this, as there is simply more vegetation to give rise to debris, and I agree that this detritus (in the quantities observed) has an adverse effect on the appellant's enjoyment of the garden.

5. It is necessary to consider the effect of the hedge on the appellant's enjoyment of his property against the value of the privacy it provides to the hedge owner. In coming to a view, I must consider the level of privacy that the owner can reasonably expect to enjoy rather than that considered ideal or desirable. The hedge owner has not responded to the appeal. My understanding from the submissions is that the land on which the hedge is located is a vacant former mill/industrial site that has planning permission, granted in 2009, for the erection of a residential care home, and that a planning application for a similar use is currently under consideration by the council. I was unable to gain access to this site during the site inspection but observed that the hedge can be seen from both James Lean Avenue and Newmills Road. It is only part of the woodland vegetation on the site. In my view, reducing the hedge height to 12 metres will still screen the site from being overlooked by the appellant. I therefore conclude that the benefits of the hedge to the owner are not such that they would justify the current hedge height.

6. My understanding is that the trees on this site alongside the river are the subject of a Tree Preservation Order but that this protection does not extend to the hedge at appeal. I do not consider that the hedge is of cultural or historical significance and there is no evidence before me to indicate otherwise.

7. Finally, the appellant and his neighbours have voiced their concerns regarding overhanging branches. The appellant (through common law) already has the right to cut back branches that are hanging over his property as long as he offers the cuttings to the owner, and I have therefore not considered this matter further.

Conclusion

8. Drawing all of the above together, I conclude that the height of the hedge adversely affects the appellant's reasonable enjoyment of his property and that it should be lowered in line with the council's calculation of the "action hedge height" of 12 metres (in relation to the garden) using the method set out in *Hedge Height and Light Loss*. I consider that the hedge height should be reduced not only adjacent to the appellant's property but also along the length immediately adjacent to numbers 13 and 17, to reduce its oppressive appearance and the amount of needle and cone detritus shed into the appellant's garden. I shall issue a High Hedge Notice to that effect.

9. Under the Wildlife and Countryside Act 1981 it is an offence to carry out works that would disturb nesting birds. To be sure that no disturbance takes place I have taken the bird nesting season to be between the months of March and August. Given the date of this notice, I consider it reasonable to specify that the required works must be completed by 30 September 2018. It would be open to the hedge owner to carry out the works sooner, provided that they satisfied themselves that there would be no nesting birds that would be affected.

Amanda Chisholm

Reporter



High Hedge Notice

HIGH HEDGES (SCOTLAND) ACT 2013

This is a high hedge notice issued under section 16(1)(a)(i) of the High Hedges (Scotland) Act 2013 following the decision of the Scottish Ministers under section 14(1)(b) of the Act to quash the decision of Midlothian Council dated 24 October 2017 not to issue a high hedge notice.

1. Description of the high hedge which is the subject of this notice: the hedge comprising sitka spruce and hawthorn species extending along the common northwestern boundaries of 13, 15 and 17 James Lean Avenue, Dalkeith, EH22 2AA.
2. The land on which the high hedge is situated (this is the “neighbouring land” within the meaning of section 34 of the Act): 41 Newmills Road, Dalkeith, EH22 2AQ.
3. The domestic property adversely affected by the high hedge: 15 James Lean Avenue, Dalkeith, EH22 2AA.
4. Initial action to be taken by the owner of the neighbouring land: the hedge shall be reduced to a maximum height of 12 metres when measured from ground level on the hedge owner’s side of the property boundary.
5. Compliance period: the period by which the initial action must be taken is 30 September 2018.
6. Preventative action to be taken by the owner of the neighbouring land: the high hedge which is the subject of this notice shall be maintained so that it does not exceed a maximum height of 12 metres when measured from ground level on the hedge owner’s side of the property boundary.
7. Date on which this notice comes into effect: 21 March 2018.
8. In the event of a failure to comply with this notice Midlothian Council is entitled to authorise a person to take action under section 22 of the Act, and may recover the expenses of that action.
9. It is an offence under section 24 of the Act intentionally to prevent or obstruct a person authorised to take action from acting in accordance with this Act.

Amanda Chisholm

Reporter



Notes

1. This notice is binding on every person who is for the time being an owner of the neighbouring land specified in the notice.
2. This notice has been copied to Midlothian Council, every owner/occupier of the domestic property referred to in the notice, and every owner/occupier of the neighbouring land.



Decision by Stephen Hall, a Reporter appointed by the Scottish Ministers

- Planning appeal reference: PPA-290-2040
- Site address: Land North Of Dalhousie Dairy, Bonnyrigg, Midlothian, EH19 3NZ
- Appeal by Grange Estates (Newbattle) Ltd against the failure of Midlothian Council to give a decision
- Application for planning permission in principle 16/00712/PPP dated 14 October 2016
- The development proposed: Residential development
- Application drawings:
 - o *Design and Access Statement and Masterplan Report (January 2017, although dated October 2016 on front cover), as amended by:*
 - o *Site Layout 16039(PL)001L (as updated 13/03/17)*
- Date of site visit by Reporter: 31 May 2017

Date of appeal decision: 27 February 2018

Decision

I allow the appeal and grant planning permission in principle subject to the 14 conditions listed at the end of the decision notice. Attention is drawn to the two advisory notes at the end of the notice.

Reasoning

1. On 2 October 2017 I issued a notice of intention indicating that I was minded to allow the appeal and grant planning permission in principle subject to 14 proposed conditions, and following the signing and registering or recording of a planning obligation under section 75 of the Town and Country Planning (Scotland) Act 1997, or some suitable alternative arrangement, covering the topics of education provision, affordable housing, Borders Rail, A7 urbanisation and maintenance of open space. A copy of my notice of intention to allow the appeal is attached as an appendix to this decision notice.
2. Confirmation that a legal agreement addressing the topics described above has been concluded between the appellant and Midlothian Council was provided on 21 December 2017 and notification of its acceptance by the Keeper of the Registers of Scotland was received on 29 December 2017. Accordingly, I am now in a position to formally determine the appeal.
3. Following the issuing of the notice of intention there was a significant change in circumstances in the form of the adoption by Midlothian Council on 7 November 2017 of a



new local development plan. This replaces the Midlothian Local Plan, which formed part of the development plan at the time of issuing the notice of intention. I therefore requested a copy of the new adopted plan and gave parties an opportunity to comment on any changes in the plan relevant to the appeal.

4. The content of the adopted local development plan, insofar as it relates to this site, is largely unchanged from the expected content that I considered in my notice of intention. In particular, the application site now constitutes an allocated housing site in the adopted plan. At paragraph 47 of my notice of intention I stated that I had not identified any significant departures from the relevant provisions of the emerging plan. I am therefore of the view that the proposal continues to conform overall with the development plan following the adoption of the 2017 local development plan.

5. The appellant and the council have commented on the proposed conditions set out in the notice of intention.

- As regards condition 3x, I have removed the reference to a play area south of the Pittendreich Burn due to this area already being subject to a detailed planning consent.
- As regards condition 5v, I have removed the requirement for the widening of the footpath between the site entrance and Baird's Way because it appears that the appellant has no control over the land that would be required.
- As regards condition 6, I consider it remains necessary to restrict development until the approved design of the crossing over the Pittendreich Burn is known in order to ensure that development takes account of that design. Given that a detailed planning application for the crossing has now been submitted, I do not consider this should give rise to any significant delay.
- As regards condition 7, I agree that construction traffic should generally access the northern part of the site via the new burn crossing. However, it does appear from the evidence submitted that there are significant advantages in allowing some construction traffic associated with the construction of the burn crossing to access the site from the north for a limited period. I therefore consider that access relating to initial pre-construction enabling works related to the burn crossing should be allowed from the north. It seems to me that the council could control the management of traffic associated with this work (for instance the timing of deliveries) through conditions associated with the separate current planning application for the crossing itself.
- As regards condition 8, given that it now appears that the Scottish Environment Protection Agency is satisfied with the appellant's proposed box culvert design, I consider that the proposed requirement for the culvert to be a bridging structure is no longer necessary.
- As regards condition 14, the requirements in local development plan policies NRG3, NRG4 and NRG6 to incorporate low and/or zero carbon generating technology and to address community heating are clear. In the absence of adequate information in the application, a condition addressing these matters is necessary. The condition refers to policies in the development plan which provide greater detail on the approach that the council will expect. However I consider the proposed condition's reference to a feasibility study into these matters could be more precise and more closely reflect the wording of Policy NRG6 by referring to the technical feasibility and financial viability of the measures concerned. I consider that with this, and some

other small amendments, the condition is now adequately clear as to what is required of the appellant.

- Following the adoption of the new local development plan, references in the proposed conditions to the outgoing local plan are now redundant, and so have been removed or replaced.

Stephen Hall

Reporter

Conditions

1. Development shall not begin until an application for approval of matters specified in conditions regarding the phasing of the development has been submitted to and approved in writing by the planning authority. The phasing schedule shall include the construction of each residential phase of the development, the provision of affordable housing, the provision of open space, structural landscaping, SUDS provision and transportation infrastructure including the new road and pedestrian crossing over the Pittendreich Burn. Development shall thereafter be carried out in accordance with the approved phasing unless agreed in writing with the planning authority.

Reason: *To ensure the development is implemented in a manner which mitigates the impact of the development process on existing land users and the future occupants of the development.*

2. As soon as possible after each of the phases of the development approved under condition 1 above is completed (except for the last or final phase, in respect of which notice shall be given under section 27B(1) of the Town and Country Planning (Scotland) Act 1997), the person who has completed any phase shall give written notice of the completion of that phase to the planning authority.

Reason: *To accord with section 27B(2) of the Town and Country Planning (Scotland) Act 1997, as amended by the Planning etc (Scotland) Act 2006.*

3. Development shall not begin on an individual phase of development (identified in compliance with condition 1) until an application for approval of matters specified in conditions for a scheme of hard and soft landscaping works has been submitted to and approved in writing by the planning authority. Details of the scheme shall include:

- i. existing and finished ground levels and floor levels for all buildings, roads, footpaths and cycleways in relation to a fixed datum;
- ii. existing trees, landscaping features and vegetation to be retained, removed, protected during development and in the case of damage, restored;
- iii. proposed new planting in communal areas and open space, including trees, shrubs, hedging and grassed areas;
- iv. location and design of any proposed walls, fences and gates, including those surrounding bin stores or any other ancillary structures;
- v. schedule of plants to comprise species, plant sizes and proposed numbers/ density;

- vi. programme for completion and subsequent maintenance of all soft and hard landscaping. The landscaping in the open spaces shall be completed prior to the houses on adjoining plots being occupied;
- vii. drainage details and sustainable urban drainage systems to manage water runoff;
- viii. proposed car park configuration and surfacing;
- ix. proposed footpaths and cycle paths (designed to be unsuitable for motor bike use);
- x. proposed play areas and equipment, where this is included within the particular phase;
- xi. proposed cycle parking facilities; and
- xii. proposed area of improved quality (minimum of 20% of the proposed dwellings), where this is included within the particular phase.

All hard and soft landscaping shall be carried out in accordance with the scheme approved in writing by the planning authority as the programme for completion and subsequent maintenance. Thereafter any trees or shrubs removed, dying, becoming seriously diseased or damaged within five years of planting shall be replaced in the following planting season by trees/ shrubs of a similar species to those originally required.

Reason: *To ensure the quality of the development is enhanced by landscaping to reflect its setting in accordance with Policy DEV7 of the Midlothian Local Development Plan (LDP) and national planning guidance and advice.*

4. Development shall not begin on an individual phase of development (identified in compliance with condition 1) until an application for approval of matters specified in conditions for the siting, design and external appearance of all residential units and other structures has been submitted to and approved in writing by the planning authority. The application shall include samples of materials to be used on external surfaces of the buildings; hard ground cover surfaces; means of enclosure and ancillary structures. These samples will also include those proposed in the area of improved quality. Development shall thereafter be carried out using the approved materials or such alternatives as may be agreed in writing with the planning authority.

Reason: *To ensure the quality of the development is enhanced by the use of quality materials to reflect its setting in accordance with national planning guidance and advice.*

5. Development shall not begin on any individual phase of development (identified in compliance with condition 1) until an application for approval of matters specified in conditions for the site access, roads, footpaths, cycle ways and transportation movements has been submitted to and approved in writing by the planning authority. Details of the scheme shall include:

- i. existing and finished ground levels for all roads (including turning facilities), parking areas, footways and cycle ways including (unless otherwise agreed by the planning authority) a new link facilitating eastbound movement from the north-eastern corner of the site onto National Cycle Route 1, all in relation to a fixed datum;
- ii. the proposed upgrading of the existing vehicle access from the B6392, including details of associated localised road widening of the B6392 to form a dedicated right turn lane into the site entrance and the formation of a pedestrian crossing island on the access road;
- iii. proposed visibility splays, traffic calming measures, lighting and signage;

- iv. the upgrading of the current public transport infrastructure at the existing bus stops adjacent to the site entrance on the B6392 including the introduction of a signal controlled pedestrian crossing point linking the two bus stops, the relocation of stops to accommodate the crossing and the provision of a new bus shelter at the eastbound bus stop;
- v. except for over the short bridge section on the approach to the A7, the increasing in width to a minimum of 2.5m of the existing section of 2m wide public footway leading eastwards from the site entrance to the A7;
- vi. measures to close-off the vehicle/ pedestrian access to the proposed burn crossing to be put in place until the burn crossing is completed and the development on the northern part of burn is ready to commence;
- vii. a programme for completion for the construction of access, roads, footpaths and cycle paths;
- viii. proposed haulage routes for construction vehicles; and
- ix. proposed car parking arrangements.

Development shall thereafter be carried out in accordance with the approved details or such alternatives as may be agreed in writing with the planning authority.

Reason: *To ensure the future users of the buildings, existing neighbouring residents and those visiting the development site during the construction process have safe and convenient access to and from the site.*

6. Development shall not begin until an application for approval of matters specified in conditions for a road and pedestrian crossing over the Pittendreich Burn connecting the southern part of the application site with the northern part of the application site has been granted by the planning authority.

Reason: *In the interests of providing an effective road layout for the site and ensuring that the detailed design of houses to the south of the Pittendreich Burn takes proper account of the design of this crossing.*

7. Construction vehicle access to/ from the part of the site located to the north of the Pittendreich Burn shall only be via the new road crossing formed within the site over the Pittendreich Burn, except for such access as is required in connection with initial pre-construction enabling works related to the burn crossing and the early provision of structural landscaping. This crossing shall also be made available for residential access to houses built to the north of the Pittendreich Burn, from the date of first occupation of any of those houses.

Reason: *In the interests of road safety and the residential amenity of existing neighbouring residences.*

8. The crossing required by condition 7 shall incorporate either a dry otter tunnel or alternatively an otter ledge within the culvert and also fencing to guide otters towards the dry tunnel or culvert.

Reason: *In order to ensure that the new crossing is designed to facilitate the movement of otters up and down the river corridor in the interests of safeguarding otters.*

9. Development shall not begin until a scheme to deal with any contamination of the site and/ or previous mineral workings has been submitted to and approved by the planning authority. The scheme shall contain details of the proposals to deal with any contamination and/ or previous mineral workings and include:

- i. the nature, extent and types of contamination and/ or previous mineral workings on the site;
- ii. measures to treat or remove any contamination and/ or previous mineral workings to ensure that the site is fit for the uses hereby approved, and that there is no risk to the wider environment from contamination and/ or previous mineral workings originating within the site;
- iii. measures to deal with any contamination and/ or previous mineral workings encountered during construction work; and,
- iv. the condition of the site on completion of the specified decontamination measures.

Before any part of the site is occupied for residential purposes, any necessary measures to decontaminate the site, as described in the agreed scheme, shall be fully implemented as approved by the planning authority.

Reason: *To ensure that any contamination on the site is adequately identified and that appropriate decontamination measures are undertaken to mitigate the identified risk to site users and construction workers, built development on the site, landscaped areas, and the wider environment.*

10. Development shall not begin until details, including a timetable of implementation, of 'Percent for Art' have been submitted to and approved in writing by the planning authority. The 'Percent for Art' shall be implemented as per the approved details.

Reason: *To ensure the quality of the development is enhanced by the use of art to reflect its setting in accordance with policies IMP1 of the Midlothian LDP and national planning guidance and advice.*

11. Development shall not begin until a programme of archaeological works (metal detector survey and evaluation) and scheme of investigation has been submitted to and approved in writing in by the planning authority. The approved programme of works shall be carried out by a professional archaeologist prior to any construction works, demolition or pre-commencement ground works taking place unless otherwise agreed in writing by the planning authority.

Reason: *To ensure this development does not result in the unnecessary loss of buried archaeological material in accordance with Policy ENV25 of the Midlothian LDP.*

12. Prior to works commencing on site a report on an assessment of the likely effects of road traffic noise on the amenity of the future occupants of the houses shall be undertaken by an acoustic specialist to identify any noise mitigation measures necessary to ensure compliance with the following criteria:

- i. 50 dB LAeq(16hr) for daytime external garden amenity;
- ii. 35 dB LAeq(16hr) for daytime internal living apartment; and,

iii. 30 dB LAeq(8 hour) for night time internal living apartment.

The night time sleep disturbance criteria shall be that contained in the WHO Night Noise Guidelines for Europe, LAmax of 42 dB(A).

Any recommended noise mitigation measures shall be implemented prior to the occupation of the houses.

Reason: *In the interests of safeguarding the residential amenity of the future occupants of the houses.*

13. Prior to the commencement of the development a sustainability/ biodiversity scheme for the site, incorporating a programme of ecological works, action programme and timetable, shall be submitted to and approved in writing by the planning authority. The actions set out in the programme shall be undertaken in accordance with the agreed timetable.

Reason: *In the interests of safeguarding biodiversity.*

14. Prior to the commencement of development, the scope of a report, and a subsequent substantive report, on the technical feasibility and financial viability of the operation of a community heating scheme and the installation of low and zero carbon generating technology for the development hereby approved (linked if practicable with other neighbouring developments/ sites), in accordance with MLDP Policies NRG3, NRG4 and NRG6, shall be submitted for the prior written approval of the planning authority. Should the planning authority conclude, on the basis of this report, that a scheme is technically feasible and financially viable, no dwellinghouses on the site shall be occupied until a community heating scheme, and/ or low and zero carbon generating technology for the site, (linked if practicable with other neighbouring developments/ sites), is approved in writing by the planning authority. There shall be no variation therefrom unless with the prior written approval of the planning authority.

The approved scheme shall be implemented in accordance with a phasing scheme also to be agreed in writing in advance by the planning authority.

Reason: *To ensure opportunities for the provision of a community heating system and low and zero carbon generating technologies for the site are fully explored to accord with the requirements of Midlothian LDP Policies NRG3, NRG4 and NRG6, and in order to promote sustainable development.*

Advisory notes

- 1. Notice of the start of development:** The person carrying out the development must give advance notice in writing to the planning authority of the date when it is intended to start. Failure to do so is a breach of planning control. It could result in the planning authority taking enforcement action. (See sections 27A and 123(1) of the Town and Country Planning (Scotland) Act 1997 (as amended).)
- 2. Display of notice:** A notice must be displayed on or near the site while work is being carried out. The planning authority can provide more information about the form of

that notice and where to display it. (See section 27C of the Town and Country Planning (Scotland) Act 1997 Act (as amended) and Schedule 7 to the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013.)



Notice of Intention by Stephen Hall, a Reporter appointed by the Scottish Ministers

- Planning appeal reference: PPA-290-2040
- Site address: Land North Of Dalhousie Dairy, Bonnyrigg, Midlothian, EH19 3NZ
- Appeal by Grange Estates (Newbattle) Ltd against the failure of Midlothian Council to give a decision
- Application for planning permission in principle 16/00712/PPP dated 14 October 2016
- The development proposed: Residential development
- Application drawings:
 - *Design and Access Statement and Masterplan Report (January 2017, although dated October 2016 on front cover), as amended by:*
 - *Site Layout 16039(PL)001L (as updated 13/03/17)*
- Date of site visit by Reporter: 31 May 2017

Date of appeal decision: 2 October 2017

Notice of Intention

I am minded to allow the appeal and grant planning permission in principle subject to the 14 proposed conditions listed at the end of this notice, following the signing and registering or recording of a planning obligation under section 75 of the Town and Country Planning (Scotland) Act 1997, or some suitable alternative arrangement, covering the subject areas listed in paragraph 57 below.

Reasoning

1. I am required to determine this appeal in accordance with the development plan, unless material considerations indicate otherwise. Having regard to the provisions of the development plan, the main issues in this appeal are:

- The principle of development;
- Housing land supply;
- Education capacity;
- Prematurity with regard to the timing of the adoption of the Midlothian Local Development Plan;
- Access to the site; and
- The masterplanning of the site.

The Development Plan



2. The development plan for the site consists of the Edinburgh and South-East Scotland Strategic Development Plan (Sesplan) (and its associated supplementary guidance) and the Midlothian Local Plan. A large number of development plan policies have been mentioned by parties. I refer to those I consider to be of most relevance below.

Principle of development

3. The appeal site is located in the green belt as defined in the adopted local plan. As such, major housing development would not comply with Policy RP2 of the local plan, which resists such development in the green belt. However, there is common ground between the appellant and the council that a shortfall exists in the five years' effective housing land supply (at least in the period up to 2019). This brings Sesplan Policy 7 into play.

4. Sesplan contains a spatial strategy that identifies the A7/ A68/ Borders Rail corridor (which includes Bonnyrigg) as one of 13 strategic growth areas which are intended to be the main focus for future growth. Policy 5 sets a plan-wide housing land requirement for the 2009 – 2019 and 2009 – 2024 periods, but the distribution of that requirement between the Sesplan constituent authorities is delegated to supplementary guidance. I understand this guidance sets a housing land requirement for Midlothian of 8,080 homes for the 2009 – 2019 period, and a further 4,410 homes between 2019 and 2024. Policy 6 requires Midlothian Council to maintain a five years' effective land supply at all times. Policy 7 allows for the granting of planning permission on greenfield sites where necessary to maintain the five years' supply, so long as: the development is in keeping with the character of the settlement and local area; the development would not undermine green belt objectives; and any additional infrastructure required is either committed or to be funded by the developer.

5. Also of relevance here are local plan policies RP7, which resists development that would adversely affect local landscape quality, and seeks to maintain the local diversity and distinctiveness of landscape character; and RP21 which resists coalescence of communities without adequate mitigation.

6. I note the council's evidence that a surplus of housing land may be available post 2019. However, the council's response to the appeal accepts the possibility that houses on this development could be occupied as early as January 2018. Though this now seems unlikely, I am satisfied that the appeal site is capable of producing some completed units before the end of 2018 and therefore contributing, albeit in a small way, to a lessening of the current shortfall. Also, it is clear from the council's 2016 housing land audit that the surplus that is evident in the 2019 – 2024 period is in part accounted for by contributions from this and other sites allocated in the emerging local development plan. In fact the summary table in the housing land audit shows that at least 3,582 units out of the programmed completions for 2019 – 2024 did not benefit from planning consent at that time (the actual total will be larger but the figure for 2023/ 24 cannot be isolated from the audit). Many of these completions will be accounted for by emerging allocated sites such as the appeal site (termed Dalhousie Mains in the audit). Therefore it is not clear to me that a land supply surplus would exist post-2019 without the contribution from emerging allocations such as the appeal site.

7. However, even in these circumstances, Sesplan Policy 7 sets three tests for acceptable development. The first of these relates to the character of the settlement and local area. I note here that what is proposed is a development of mainly 2-storey houses at suburban densities, not dissimilar to the modern development adjoining the site to the west. The site is contained by built development to the north and west and would not be prominent from nearby countryside. I therefore consider the development would fit relatively well into the character of the Bonnyrigg area.

8. The second criterion relates to green belt objectives. Policy RP2 of the local plan sets out the overall objectives of the green belt, these being to: maintain the identity of Edinburgh and the Midlothian towns by clearly establishing their physical boundaries and preventing coalescence; provide countryside for recreation and institutional purposes; and maintain the landscape setting of Edinburgh and the Midlothian towns.

9. In this context I note that the existing green belt boundary to the west of the site is not currently well-defined, though a landscaping belt is maturing in this area. The existing green belt boundary to the north of the site is much stronger consisting of an elevated former railway embankment. The eastern edge of the proposed development follows the line of an overhead power line and associated pylons. While this is a prominent landscape feature, it is visually permeable and would not, in itself, form a strong and defensible green belt boundary. The application proposes new structural landscaping to create such a boundary. While this approach may be effective in time, it is less satisfactory than using and strengthening existing landscape features. However the approach proposed appears no different from that taken with the existing green belt boundary to the west of the site. Overall I do not consider the proposal would represent any significant weakening of the green belt boundary in this area.

10. The proposed development would occupy land within the current landscape gap between Bonnyrigg and Eskbank, reducing the gap to less than 400 metres at the closest point. However, due to the intervening topography and vegetation I consider it unlikely that any intervisibility between the two settlements would result from the development. Nor do I believe the site and any other settlement would be seen simultaneously from any nearby viewpoints. The intervening presence of the A7 would maintain a clear functional separation between Bonnyrigg and Eskbank. Overall I do not consider the development would create an additional sense of coalescence between Bonnyrigg and any other settlement.

11. It was clear from the informal footpaths and dog-walkers that I encountered during my site visit that the site is currently used for recreation on an informal basis. As a large area of accessible open land adjacent to a housing estate this is not surprising. However in mitigation I note that the appeal proposals include a linear open space adjacent to the valley of the Pittendreich Burn and linking into the residual undeveloped land to the east of the site.

12. The site is not visible from the main A7 road and only fleetingly so from the B6392. (Both roads are in cuttings close to the site.) The site does provide a rural foreground to views of the recent developments east of Bonnyrigg from the Penicuik-Musselburgh railway walkway/ cycleway to the north of the site. However this is in the context of existing urban development to the north of the former railway. The development would be seen from the

high land of the Pentland and Moorfoot Hills, but at a distance of over eight kilometres. In the context of the existing urban development of the A7 corridor, I consider there would be little appreciable impact from these viewpoints. Overall I do not consider the site plays a large role in the landscape setting of Bonnyrigg. More widely, for this and the other reasons set out above, I conclude that the proposal would not significantly undermine green belt objectives.

13. The third criterion of Sesplan Policy 7 requires necessary infrastructure to be committed or funded. The main concern here relates to education provision. I discuss this matter in more depth at paragraphs 15 to 29 below. However I note here that while it appears that the new school buildings the council considers to be required are not yet committed, the appellant is willing to make a substantial financial contribution in line with the council's requirements on other similar nearby sites.

14. For these reasons I conclude that, subject to my conclusions on education provision below, the proposal satisfies the criteria set out in Sesplan Policy 7, which I consider to be the policy of most relevance to the principle of this development, and that therefore the principle of the development is in conformity overall with the development plan.

Education

15. Policy IMP2 of the local plan resists development where provision has not been made for essential infrastructure, and requires developers to fund such infrastructure including schools. Policy 7c of the strategic development plan requires any additional infrastructure required as a result of greenfield housing developments to be either committed or funded by the developer.

16. The council raises significant concerns regarding the availability of schools capacity to cater for the children arising from this development, and the uncertain prospects of providing additional capacity. It is clear from its evidence that the council is aware of the need to provide additional school capacity in the wider Bonnyrigg area and is actively pursuing a number of options.

17. One option the council has identified for building a new primary school is within the wider Hs10 site that is the subject of this appeal. Regarding this suggestion I note below that the site has been proposed by the council as a housing allocation in the emerging local development plan, and that there is now a high degree of certainty that this proposal will shortly form part of the statutory development plan. The emerging plan contains no mention of a primary school on this site. The council's housing land audit also assumes that the site will deliver 300 housing units in future years. The site therefore makes a substantial contribution to securing the maintenance of an adequate housing land supply going forward. There is no evidence before me that the landowner supports the development of a primary school on the appeal site rather than housing. For these reasons I do not place any significant weight on the suggestion that a primary school could be built on the appeal site.

18. I recognise that there may be occasions where infrastructure shortfalls may be so severe as to render developments unacceptable. However I do not consider this to be the case in this appeal for a number of reasons. Firstly it is clear that the council recognises a

need to provide additional school capacity, and is actively pursuing a number of options. There is therefore a high degree of likelihood that a solution will be identified in due course. The consultation response regarding this application from the council's Education Department dated 20 April 2017 stated that "a council decision on the long term education strategy for Bonnyrigg to accommodate the children arising from the strategic housing allocations ... [would] be made at the end of the summer/ the beginning of autumn 2017".

19. In the meantime, the development of this site is projected, in the housing land audit, to proceed to beyond 2023. While it is suggested that the site may ultimately give rise to up to 141 primary pupils and 99 secondary pupils (noting that this level is based on the development of 300 houses, not the 263 houses proposed in the application masterplan), a much lower number of pupils would arise during the early years of the development, giving more time for the authority to arrive at an ultimate solution for meeting schooling pressures in Bonnyrigg.

20. Secondly, this is a site which will almost certainly shortly become a housing allocation in the statutory development plan, and on which the council itself is relying (in part) to meet its housing land supply obligations. The council has been planning for the development of this land for housing for some years, and so has had time to prepare its wider corporate plans to provide the necessary infrastructure (insofar as such infrastructure is the responsibility of the council, as schooling is) to support this development. I consider this to be a materially different situation from a speculative and unexpected application for housing development on a site not identified in any planning document. Furthermore I note that in its evidence to the recent examination of the local development plan, the council stated that "the scale of development can be accommodated with appropriate [education] solutions identified".

21. Thirdly, the need and demand for the housing on the appeal site ultimately derives from demographic pressures which have been fed into the planning system through the housing need and demand assessment, the strategic development plan, the emerging local development plan and ultimately this application. Hence the current proposal will not create the children that require to be schooled, but is rather a response to wider demographic change. While individual applications may affect the local distribution of school age children, the council has chosen to respond to the demographic situation by allocating land for housing development at this site. It would not be reasonable to now resist development on the basis that it has not provided the school places that are equally required to respond the same demographic change. Ultimately it is the council's responsibility, as education authority, to provide the school places required to serve an ever-changing population, securing, if necessary and justifiable, developer contributions to help them do so.

22. Fourthly I am not clear that some capacity does not exist in short term to accommodate children from this development. The council's main concern relates to primary schooling, and yet the roll projection for Bonnyrigg Primary School, secured by the applicant through a Freedom of Information request appears to forecast the roll being below the current operating capacity of 413, and the Primary 1 intake being below 2015 levels, until 2024. I appreciate that some further capacity may need to be provided in the longer term, but there appears to be some time in which the council may plan and deliver this.

23. The council argues (in an email dated 4 August 2016) that while capacity may exist at Bonnyrigg Primary School, there is no capacity across the wider local group of four non-denominational primary schools serving the wider area. The available capacity at Bonnyrigg Primary School is therefore wholly required to accommodate overspill from these other local schools, particularly Burnbrae Primary School, which is over-capacity. The council also highlights a lower-than expected proportion of pupils attending roman catholic schools, and a higher-than-expected 'pupil product' from recent developments in Bonnyrigg. According to the council, the overall picture is a forecast excess of pupils over existing primary school places across these four schools of up to 510 places in 2026 (spreadsheet accompanying email from Sandra Banks, dated 4 August 2016).

24. There is some discrepancy regarding the total design capacity of the four existing local non-denominational primary schools. The council report of 17 May 2016 regarding the educational use of the former Hopefield Primary School site gives this joint capacity as 1,600, which is projected to be exceeded in 2020. Whereas an email from the council's education resource manager dated 4 August 2016 states the joint capacity of the four schools is 1,540, and will be exceeded in 2019.

25. As part of its response to this situation the council has agreed to the construction of a new primary school at Hopefield in Bonnyrigg. According to the 17 May 2016 report, this two-stream school will be completed by August 2018. I note that the council's intention is now for this building to be a joint campus with only one element catering for non-denominational pupils. This change appears to have arisen from a decision to close the existing St Mary's Roman Catholic Primary School, in part so as to gain a capital receipt from the sale of the land. Nevertheless, this school will provide additional non-denominational capacity and thereby push back the date by which any additional primary school places will need to be provided in the Bonnyrigg area.

26. In the medium term, the emerging local development plan contains a proposal for a new 2-stream primary school within site Hs12 to the south-west of Bonnyrigg (with land reserved for a 3rd stream should this be required), which will relieve pressure on school places in the town as well as catering for new development. (Paragraph 8.2.18 of the proposed plan states that this school could serve part of the current Hopefield development.) Site Hs12 is expected to provide homes in the period up to 2024, and the relevant settlement statement notes that this school may need to be provided early in this site's development programme. There is now a high degree of certainty that the Hs12 proposal will be included in the adopted plan.

27. There is dispute between the council and the applicant regarding the feasibility of extending Lasswade Primary School, and the need to identify a site for a replacement for this school. However, even without such an extension at Lasswade Primary School, it appears that no capacity shortfall will emerge in existing schools before 2019, and that there are good prospects of additional capacity becoming available from 2018 at Hopefield, and well before 2024 at site Hs12. Any additional or larger replacement accommodation for Lasswade Primary School will only further relieve the forecast pressures.

28. For these reasons I am not persuaded that an over-riding school capacity constraint exists, sufficient to warrant the dismissal of this appeal. Some capacity exists in the short

term, and the council is working, as it should, on options for delivering more capacity in the medium and longer term. The appellant is prepared to make a reasonable financial contribution towards funding this additional capacity. On this basis, I conclude that the proposal is in compliance with local plan Policy IMP2 and the third criterion of Sesplan Policy 7.

29. The council is also of the view that consent cannot be granted because the amount of any developer contribution that may be required towards education provision cannot at this time be calculated, because the ultimate education solution is not yet known. However, I agree with the appellant that it would be possible to identify an initial contribution based on a 'worst case scenario' with a provision for reimbursement should the ultimate solution prove to be less expensive. This is the approach that appears to have been taken with other applications in the area.

Masterplanning of the site

30. Although this is an application for planning permission in principle, the appellant has submitted a masterplan report and drawing, which are not intended to be indicative, and therefore fall to be agreed through this application. Policy DP2 of the local plan sets out a range of detailed development guidelines relating to matters including design, sustainability, landscaping, open space, housing, and accessibility and parking.

31. Broadly, the masterplan proposes a suburban layout of predominantly 2-storey houses across 263 house plots, of a similar density and character to neighbouring recently-developed housing areas. It incorporates a pattern of open space provision that would extend the existing linear park network that has been put in place as part of the development of the recent suburban development to the west. This includes a wide strip of open space extending from the end of the existing linear park at Gladstone's Gait, alongside the valley of the Pittendreich Burn, and linking through to the residual undeveloped area to the east. A narrow central spine of open space is also proposed linking north from the linear park through to the regional footway/ cycleway to the north. Buildings are generally orientated so as to face the main spine roads and the linear park. The wildlife corridor of the Pittendreich Burn is maintained, and new woodland planting proposed along the eastern boundary, which would form the new green belt edge.

32. The council, the community council and local residents raise various criticisms of elements of the masterplan. Some of these concerns relate to missing or incomplete information, which I consider can be addressed at the 'approval of matters specified in conditions' stage. Such matters include the location and phasing of the affordable housing, the specification of materials in the 'area of improved quality', the timing of the pedestrian and cycling connections, low and zero carbon generating technology, community heating, and the 'percent for art'.

33. Regarding the phasing of the eastern woodland buffer, I agree that it is desirable for structural landscaping to be put in place as early as possible. I take the phasing plan shown in the masterplan to relate to the timing of the construction of houses, and not to preclude the planting of trees along the eastern side of the northern part of the development at an earlier stage. I accept that such planting may require some limited use

by the developer of the access point via Baird's Way, which could be provided for in the relevant condition.

34. The absence of a children's play area in the first phase southern part of the site would result in a temporary deficiency until the bridge over the Pittendreich Burn was built and play provision made in the northern part of the site. However I note that the most recent amended version of the masterplan drawing (16039(PL)001L) incorporates a small area of open space in the southern area that would appear suitable for accommodating some play equipment. I therefore consider that the provision of such equipment could easily and reasonably be secured by a condition.

35. Regarding the suitability of parts of the southern area for two-storey houses, I note that section 6.6 of the masterplan report only states that development will be predominantly two-storey. It is normal to apply a condition to a grant of planning permission in principle requiring the subsequent approval of the design of individual houses. In the event that final ground levels mean that single storey dwellings would be most appropriate close to the southern side of the Pittendreich Burn, I therefore consider that the council could secure this at this subsequent approval stage.

36. While the density of the development appears to be relatively uniform across the site, it appears to be in line with other nearby areas of Bonnyrigg. The council also criticizes a lack of differentiation of character areas. I find that a somewhat uniform suburban character is evident throughout the site, and there is an unfortunate dominance of hard landscaping, in the form of driveways, particularly in some of the secondary streets. That said, the proposed layout does go some way towards providing an interesting and varied physical form, including the grouping of terraced houses around the central open space spine, and the contrast between the treatment of the primary and secondary streets. The latest version of the masterplan drawing has been amended to show most of the houses adjoining the southern access road being orientated to face it.

37. In conclusion, while I agree that some shortcomings are evident in the proposed masterplan, overall I consider that the masterplan does broadly achieve the headline requirements of Policy DP2, and that the proposal is therefore compliant with this element of the development plan.

Traffic and Access

38. Policy DP2 of the local plan seeks for housing layouts to incorporate direct footpath/cycleway links to facilities, and to meet the council's road and parking standards. Other policies of the plan provide general support for measures that provide alternatives to the use of private cars and promote the use of non-car modes. Policy DP3 resists the construction of culverts unless there are no alternatives.

39. The proposal before me incorporates a link across the Pittendreich Burn allowing the principal access to the entire site to be from the B6392 to the south, although the appellant argues this link is not strictly required. I consider that the provision of such a link is preferable to the main access to the northern part of the site being from Baird's Way/Harmony Crescent. The use of the latter roads would involve a highly circuitous access route to the development. While not encouraging through traffic, the provision of both the

link to the B6392 and the access to Harmony Crescent produces a connected permeable network in line with the aspirations of the Scottish Government policy statement 'Designing Streets'. I therefore agree with the council that, should the appeal be allowed, a suspensive condition should be applied to require the provision of this link.

40. Consultees have identified a number of technical requirements relating to the proposed road link across the Pittendreich Burn. These include the replacement of the originally proposed pipe culvert with a an arched structure. These matters could be addressed in conditions.

41. Regarding access onto the cycle/ footpath to the north of the site, I note that the latest version of masterplan drawing shows a potential new ramped access from north-eastern corner of site to facilitate east-bound movement. This access would be outside the application area, but can nevertheless be secured in due course, subject to ownership and technical considerations, at the approval of matters specified in conditions stage. I do not consider there is a need for an access to the cyclepath at the north-western corner of the site, as west-bound movement from the site onto the cyclepath can be easily achieved via Gladstone's Gait.

42. Subject to the inclusion of the conditions referred to above, I conclude that the proposal conforms with the local plan policies relating to traffic and access.

Overall Conclusion re Compliance with the Development Plan

43. I have identified above that the proposal is contrary to local plan green belt policy, but that housing land supply issues, in particular the application of the provisions of Sesplan Policy 7, render the principle of the application in conformity overall with the development plan. Regarding education capacity and the detail of the proposal, I have not identified any significant conflicts with the policies of the development plan. I therefore conclude that overall the proposal is in conformity with the development plan.

Other Material Considerations

The emerging replacement local development plan

44. The local plan is shortly to be replaced by the new Midlothian Local Development Plan. This plan has been subject to examination, and the examination report was published on 10 July 2017. The law requires the authority to inform Scottish Ministers of its intention to adopt the plan with 3 months of the publication of the report, i.e. by 10 October 2017. Given the limited legal scope for authorities to depart from the recommendations set out in examination reports, there is therefore now a high degree of certainty as to the what the contents of the adopted plan will be. For these reasons I give a great deal of weight to the contents of the emerging local development plan.

45. The emerging plan proposes the allocation of the appeal site for housing development as Site Hs10 Dalhousie Mains with a notional capacity of 300 homes. (The north-eastern boundary of the appeal site follows a slightly different alignment from that shown in the emerging plan, but I do not consider this difference significant.) The report of the examination of the proposed plan recommends no change to this allocation. There is

therefore a high degree of certainty that the allocation of this site for housing development will shortly be included in the statutory development plan. I consider this fact only adds strength to the conclusion I reached at paragraph 14 above that the development of the site for housing is acceptable in principle.

46. Detailed development considerations for site Hs10 are included in Table 8.10. These include references to: protecting and enhancing the woodland of the Pittrendreich Burn and incorporating it within the green network; footpath links from the existing open space to the west, and from the southern part of the site, onto the Penicuik-Musselburgh railway walkway/ cycleway; and to the need for additional primary and secondary school capacity, for which developer contributions will be sought. Table 8.11 sets out implementation requirements applying to Site Hs10, including for a secondary school extension, additional capacity at a denominational secondary school, and an extension to Lasswade Primary School. The examination report recommended no relevant changes to these provisions of the plan.

47. I discuss education matters and the masterplanning of the site above, but overall I have not identified any significant departures from these provisions of the emerging plan in the appeal proposal.

Prematurity and Presumption in Favour of Development that contributes to Sustainable Development

48. Given the high degree of certainty that now exists regarding the final content of the emerging local development plan, I do not believe that granting this appeal would in any way prejudice the emerging plan.

49. According to paragraph 125 of Scottish Planning Policy, development plan policies for the supply of housing will not be considered up-to-date where a shortfall in the 5-year effective housing land supply emerges. In this case, there is no dispute that such a shortfall in the housing land supply currently exists. Scottish Planning Policy contains a presumption in favour of development that contributes to sustainable development. Paragraph 33 states that where the relevant policies in a plan are out-of-date, the presumption in favour of development that contributes to sustainable development will be a significant material consideration.

50. Further explanation of the principles contributing to sustainable development are set out in paragraph 29 of Scottish Planning Policy. The proposed development would contribute to a number of these principles, including supporting the delivery of accessible housing development. I have no reason to doubt that it would also provide a net economic benefit, both at the construction stage and through the provision of housing for which a need and demand has been identified. I have not identified any significant conflicts with any of the other principles set out in paragraph 29. Therefore, on balance, I conclude that the development contributes overall to sustainable development.

Other Matters

51. The Midlothian Health and Social Care Partnership, the community council and some local residents raise concerns regarding the availability of local health facilities to

serve the occupants of the development. However, I consider that broadly it is the responsibility of health providers to ensure that services are in place to meet the needs arising from demographic changes in the area. I would not rule out the possibility of seeking developer contributions to help achieve this, but I am not aware that any mechanism is in place at the moment in Midlothian to provide for this. Given that the council has actively promoted the development of this site for housing in its emerging local development plan, and that there is no dispute that a shortfall exists in the housing land supply that requires to be addressed, I do not consider that health considerations provide an adequate basis for dismissing the appeal.

52. I have considered all the other matters raised, including the impact on the nearby scheduled ancient monument, and conclude that, subject where necessary to adequate mitigation to be secured through conditions and through the detailed design of the scheme, there are none that warrant the dismissal of this appeal.

Overall Conclusion

53. I therefore conclude, for the reasons set out above, that the proposed development accords overall with the relevant provisions of the development plan and that there are no material considerations which would still justify refusing to grant planning permission.

Conditions and Legal Agreement

54. Given that the council will be responsible for their monitoring, I have based the proposed conditions set out below on those suggested by the council, amended where necessary in the light of the appellant's comments, the avoidance of unnecessary repetition and the provisions of Circular 4/1998: The Use of Conditions in Planning Permissions.

- I have retained the council's suggested condition 1 relating to phasing because, despite the inclusion of a basic phasing plan in the masterplan, there are more detailed phasing issues relating to such matters such as the provision of landscaping, sustainable drainage systems and affordable housing that it would be useful for the planning authority to agree in advance. I have removed references to the number of houses, as the number and location of the individual house plots are specified on the masterplan drawing 16039(PL)001L, which is agreed as part of this permission.
- At condition 4, I have removed the references to underbuilding, which can be adequately addressed when the design of the individual houses is considered, and to the houses falling within the 'Area of Improved Quality', as this has been agreed through the masterplan.
- At condition 5, I have removed the references to a green travel plan because measures to encourage walking, cycling and public transport use are separately required by other parts of the condition.
- I have concluded above that the new crossing of the Pittendreich Burn is required, and therefore conditions 6, 7 and 8 are necessary. However I consider that residential access from Harmony Crescent/ Gladstone's Gait should be unrestricted post-construction, in the interests of creating a permeable development with a connected road system.
- I have amended condition 13 to remove the reference to the ecological assessment report, the recommendations of which are not sufficiently specific.

- As regards community heating, condition 14 requires a feasibility study to be prepared, which I consider to be a reasonable approach, given the support in both Scottish Planning Policy and the emerging local development plan for this technology, but also the apparent absence currently of comprehensive information locally regarding opportunities for district heating. I have also included references to low and zero carbon generating technology in this condition in acknowledgement of Policy NRG3 of the local plan and Policies NRG3 and NRG4 of the emerging local development plan.
- I have removed the references to bats and swifts from condition 15, as this appears to go beyond anything suggested in either the ecology report or Policy Dev5 of the emerging local development plan.

55. I have not included the council's proposed conditions relating to the erection of a primary school on the site because I do not consider this can be justified for the reasons set out in paragraph 28 above.

56. There is consensus between the appellant and the council that the Heads of Terms for an agreement under Section 75 of the Town and Country Planning (Scotland) Act 1997 should include education provision, affordable housing, Borders Rail and A7 urbanisation. In addition, the council seeks for the maintenance of open space to be included in any agreement. I agree that, while the provision of open space and landscaping can be secured by condition, provision for its ongoing maintenance is a suitable matter for inclusion in a planning obligation, and would comply with the tests set out in Circular 3/2012: Planning Obligations and Good Neighbour Agreements.

57. Before granting planning permission I therefore consider that a planning obligation covering the topics of education provision, affordable housing, Borders Rail, A7 urbanisation and maintenance of open space should be completed. Accordingly, I will defer determination of this appeal for a period of 12 weeks to enable the relevant planning obligation (either an agreement with the planning authority or a unilateral obligation by the appellant under section 75 of the Town and Country Planning (Scotland) Act 1997 (as amended) or some suitable alternative arrangement as may be agreed by the parties) to be completed and registered or recorded, as the case may be. If, by the end of the 12 week period, a copy of the relevant obligation with evidence of registration or recording has not been submitted to this office, I will review the situation.

58. The conditions and advisory notes which I am minded to attach to the planning permission in principle, should it be granted, are shown below.

Stephen Hall
Reporter

Proposed Conditions

1. Development shall not begin until an application for approval of matters specified in conditions regarding the phasing of the development has been submitted to and approved in writing by the planning authority. The phasing schedule shall include the construction of each residential phase of the development, the provision of affordable housing, the

provision of open space, structural landscaping, SUDS provision and transportation infrastructure including the new road and pedestrian crossing over the Pittendreich Burn. Development shall thereafter be carried out in accordance with the approved phasing unless agreed in writing with the planning authority.

Reason: *To ensure the development is implemented in a manner which mitigates the impact of the development process on existing land users and the future occupants of the development.*

2. As soon as possible after each of the phases of the development approved under condition 1 above is completed (except for the last or final phase, in respect of which notice shall be given under section 27B(1) of the Town and Country Planning (Scotland) Act 1997), the person who has completed any phase shall give written notice of the completion of that phase to the planning authority.

Reason: *To accord with section 27B(2) of the Town and Country Planning (Scotland) Act 1997, as amended by the Planning etc (Scotland) Act 2006.*

3. Development shall not begin on an individual phase of development (identified in compliance with condition 1) until an application for approval of matters specified in conditions for a scheme of hard and soft landscaping works has been submitted to and approved in writing by the planning authority. Details of the scheme shall include:

- i. existing and finished ground levels and floor levels for all buildings, roads, footpaths and cycleways in relation to a fixed datum;
- ii. existing trees, landscaping features and vegetation to be retained, removed, protected during development and in the case of damage, restored;
- iii. proposed new planting in communal areas and open space, including trees, shrubs, hedging and grassed areas;
- iv. location and design of any proposed walls, fences and gates, including those surrounding bin stores or any other ancillary structures;
- v. schedule of plants to comprise species, plant sizes and proposed numbers/ density;
- vi. programme for completion and subsequent maintenance of all soft and hard landscaping. The landscaping in the open spaces shall be completed prior to the houses on adjoining plots being occupied;
- vii. drainage details and sustainable urban drainage systems to manage water runoff;
- viii. proposed car park configuration and surfacing;
- ix. proposed footpaths and cycle paths (designed to be unsuitable for motor bike use);
- x. proposed play areas and equipment, where this is included within the particular phase, but including within the area south of the Pittendreich Burn;
- xi. proposed cycle parking facilities; and
- xii. proposed area of improved quality (minimum of 20% of the proposed dwellings), where this is included within the particular phase.

All hard and soft landscaping shall be carried out in accordance with the scheme approved in writing by the planning authority as the programme for completion and subsequent maintenance. Thereafter any trees or shrubs removed, dying, becoming seriously diseased or damaged within five years of planting shall be replaced in the following planting season by trees/ shrubs of a similar species to those originally required.

Reason: To ensure the quality of the development is enhanced by landscaping to reflect its setting in accordance with Policy DP2 of the Midlothian Local Plan and national planning guidance and advice.

4. Development shall not begin on an individual phase of development (identified in compliance with condition 1) until an application for approval of matters specified in conditions for the siting, design and external appearance of all residential units and other structures has been submitted to and approved in writing by the planning authority. The application shall include samples of materials to be used on external surfaces of the buildings; hard ground cover surfaces; means of enclosure and ancillary structures. These samples will also include those proposed in the area of improved quality. Development shall thereafter be carried out using the approved materials or such alternatives as may be agreed in writing with the planning authority.

Reason: To ensure the quality of the development is enhanced by the use of quality materials to reflect its setting in accordance with national planning guidance and advice.

5. Development shall not begin on any individual phase of development (identified in compliance with condition 1) until an application for approval of matters specified in conditions for the site access, roads, footpaths, cycle ways and transportation movements has been submitted to and approved in writing by the planning authority. Details of the scheme shall include:

- i. existing and finished ground levels for all roads (including turning facilities), parking areas, footways and cycle ways including (unless otherwise agreed by the planning authority) a new link facilitating eastbound movement from the north-eastern corner of the site onto National Cycle Route 1, all in relation to a fixed datum;
- ii. the proposed upgrading of the existing vehicle access from the B6392, including details of associated localised road widening of the B6392 to form a dedicated right turn lane into the site entrance and the formation of a pedestrian crossing island on the access road;
- iii. proposed visibility splays, traffic calming measures, lighting and signage;
- iv. the upgrading of the current public transport infrastructure at the existing bus stops adjacent to the site entrance on the B6392 including the introduction of a signal controlled pedestrian crossing point linking the two bus stops, the relocation of stops to accommodate the crossing and the provision of a new bus shelter at the eastbound bus stop;
- v. except for over the short bridge section on the approach to the A7, the increasing in width to a minimum of 2.5m of the existing section of 2m wide public footway leading eastwards from the site entrance to the A7 and leading westwards from the site entrance to the public footway at the entrance to Baird's Way;
- vi. measures to close-off the vehicle/ pedestrian access to the proposed burn crossing to be put in place until the burn crossing is completed and the development on the northern part of burn is ready to commence;
- vii. a programme for completion for the construction of access, roads, footpaths and cycle paths;
- viii. proposed haulage routes for construction vehicles; and
- ix. proposed car parking arrangements.

Development shall thereafter be carried out in accordance with the approved details or such alternatives as may be agreed in writing with the planning authority.

Reason: *To ensure the future users of the buildings, existing neighbouring residents and those visiting the development site during the construction process have safe and convenient access to and from the site.*

6. Development shall not begin until an application for approval of matters specified in conditions for a road and pedestrian crossing over the Pittendreich Burn connecting the southern part of the application site with the northern part of the application site has been granted by the planning authority.

Reason: *In the interests of providing an effective road layout for the site and ensuring that the detailed design of houses to the south of the Pittendreich Burn takes proper account of the design of this crossing.*

7. Construction vehicle access to/ from the part of the site located to the north of the Pittendreich Burn shall only be via the new road crossing formed within the site over the Pittendreich Burn, except for such access as is required in connection with the early provision of structural landscaping. This crossing shall also be made available for residential access to houses built to the north of the Pittendreich Burn, from the date of first occupation of any of those houses.

Reason: *In the interests of road safety and the residential amenity of existing neighbouring residences.*

8. The crossing required by condition 7 shall not incorporate an enclosed pipe culvert, but instead shall be a bridging structure and shall incorporate either a dry otter tunnel or alternatively an otter ledge within the culvert and also fencing to guide otters towards the dry tunnel or culvert.

Reason: *In order to accord with the guidance within SEPA's "Construction of River Crossings Good Practice Guide" in the interest of avoiding negative impacts of poorly designed river crossings, and to ensure that the new crossing is designed to facilitate the movement of otters up and down the river corridor in the interests of safeguarding otters.*

9. Development shall not begin until a scheme to deal with any contamination of the site and/ or previous mineral workings has been submitted to and approved by the planning authority. The scheme shall contain details of the proposals to deal with any contamination and/ or previous mineral workings and include:

- i. the nature, extent and types of contamination and/ or previous mineral workings on the site;
- ii. measures to treat or remove any contamination and/ or previous mineral workings to ensure that the site is fit for the uses hereby approved, and that there is no risk to the wider environment from contamination and/ or previous mineral workings originating within the site;
- iii. measures to deal with any contamination and/ or previous mineral workings encountered during construction work; and,

iv. the condition of the site on completion of the specified decontamination measures.

Before any part of the site is occupied for residential purposes, any necessary measures to decontaminate the site, as described in the agreed scheme, shall be fully implemented as approved by the planning authority.

Reason: *To ensure that any contamination on the site is adequately identified and that appropriate decontamination measures are undertaken to mitigate the identified risk to site users and construction workers, built development on the site, landscaped areas, and the wider environment.*

10. Development shall not begin until details, including a timetable of implementation, of 'Percent for Art' have been submitted to and approved in writing by the planning authority. The 'Percent for Art' shall be implemented as per the approved details.

Reason: *To ensure the quality of the development is enhanced by the use of art to reflect its setting in accordance with policies IMP1 and DP2 of the Midlothian Local Plan and national planning guidance and advice.*

11. Development shall not begin until a programme of archaeological works (metal detector survey and evaluation) and scheme of investigation has been submitted to and approved in writing in by the planning authority. The approved programme of works shall be carried out by a professional archaeologist prior to any construction works, demolition or pre-commencement ground works taking place unless otherwise agreed in writing by the planning authority.

Reason: *To ensure this development does not result in the unnecessary loss of buried archaeological material in accordance with Policy RP28 of the Midlothian Local Plan.*

12. Prior to works commencing on site a report on an assessment of the likely effects of road traffic noise on the amenity of the future occupants of the houses shall be undertaken by an acoustic specialist to identify any noise mitigation measures necessary to ensure compliance with the following criteria:

- i. 50 dB LAeq(16hr) for daytime external garden amenity;
- ii. 35 dB LAeq(16hr) for daytime internal living apartment; and,
- iii. 30 dB LAeq(8 hour) for night time internal living apartment.

The night time sleep disturbance criteria shall be that contained in the WHO Night Noise Guidelines for Europe, LAmax of 42 dB(A).

Any recommended noise mitigation measures shall be implemented prior to the occupation of the houses.

Reason: *In the interests of safeguarding the residential amenity of the future occupants of the houses.*

13. Prior to the commencement of the development a sustainability/ biodiversity scheme for the site, incorporating a programme of ecological works, action programme and timetable,

shall be submitted to and approved in writing by the planning authority. The actions set out in the programme shall be undertaken in accordance with the agreed timetable.

Reason: *In the interests of safeguarding biodiversity.*

14. Prior to the commencement of development, the scope of, and a subsequent report on, a feasibility study of the operation of a community heating scheme, and the installation of low and zero carbon generating technology, for the development hereby approved, and if practicable other neighbouring developments/ sites, in accordance with MLDP Policies NRG3, NRG4 and NRG6, shall be submitted for the prior written approval of the planning authority. Should the planning authority conclude, on the basis of this study, that a scheme is viable, no dwellinghouses on the site shall be occupied until a community heating scheme, and/ or low and zero carbon generating technology for the site, and, if practicable, other neighbouring developments/ sites, is approved in writing by the planning authority. There shall be no variation therefrom unless with the prior written approval of the planning authority.

The approved scheme shall be implemented in accordance with a phasing scheme also to be agreed in writing in advance by the planning authority.

Reason: *To ensure opportunities for the provision of a community heating system and low and zero carbon generating technologies for the site are fully explored to accord with the requirements of Midlothian Local Plan Policy NRG3 and MLDP Policies NRG3, NRG4 and NRG6, and in order to promote sustainable development.*

Advisory notes

1. Notice of the start of development: The person carrying out the development must give advance notice in writing to the planning authority of the date when it is intended to start. Failure to do so is a breach of planning control. It could result in the planning authority taking enforcement action. (See sections 27A and 123(1) of the Town and Country Planning (Scotland) Act 1997 (as amended).)

2. Display of notice: A notice must be displayed on or near the site while work is being carried out. The planning authority can provide more information about the form of that notice and where to display it. (See section 27C of the Town and Country Planning (Scotland) Act 1997 Act (as amended) and Schedule 7 to the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013.)