

**Item: 3**

**Local Review Body: 3 July 2024.**

**Proposed Siting of Two Houses and Create Access on Land near Thorne Villa, Harray (22/179/PIP).**

**Report by Corporate Director for Strategy, Performance and Business Solutions.**

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## **1. Overview**

- 1.1. Planning application 22/179/PIP in respect of the proposed siting of two houses and creation of an access on land near Thorne Villa, Harray, was refused by the Appointed Officer on 30 November 2023.
- 1.2. Under the Town and Country Planning (Scotland) Act 1997 and the Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2013, where an application for planning permission for local development has been determined by the Appointed Officer in accordance with the Council's Planning Scheme of Delegation, the applicant is entitled to seek a review of that decision by the Local Review Body.
- 1.3. The applicant's agent has submitted a Notice of Review (see Appendix 1) requesting that the decision of the Appointed Officer be reviewed.
- 1.4. Since the Appointed Officer's refusal and the submission of the Notice of Review a new Development Management Guidance – Housing in the Countryside (DMG) (see Appendix 7) was ratified by the Council on 30 April 2024. This has potential legal implications in terms of procedural fairness to the applicant which are described in more detail in sections 5.5 and 5.6 below.
- 1.5. A letter from the Chief Planner, Scottish Government, issued in July 2011, confirmed that a review by a Local Review Body should be conducted by means of a full consideration of the application afresh.
- 1.6. In accordance with the Council's policy to undertake site inspections of all planning applications subject to a review, prior to the meeting to consider the review, a site inspection to land near Thorne Villa, Harray, is due to be undertaken at 10:30 on 3 July 2024.
- 1.7. The review procedure is set out in section 4 below.

## 2. Recommendations

- 2.1. It is recommended that members of the Local Review Body:
- i. Use the written submissions procedure under Regulation 15 of the Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2013 to ensure the applicant is afforded the opportunity to provide updated submissions on their Notice of Review now that a new Development Management Guidance is in force.
  - ii. Ensure that, if the Local Review Body is minded to follow the recommendation at 2.1(i) above, Development Management is included in the procedure notice that will be required in order that Development Management is afforded the opportunity to make comments on the applicant's updated submissions.

## 3. Planning Authority Decision

- 3.1. On 30 November 2023, the Appointed Officer refused planning application 22/179/PIP on the following grounds:
- Policy 5E (vi) of the Orkney Local Development Plan 2017 provides for "...the creation of one housing plot within an existing housing group during the lifetime of the Orkney Local Development Plan..." The planning application is submitted in principle for two housing plots, therefore exceeding and contrary to the provision of Policy 5E (vi) of the Orkney Local Development Plan 2017.
  - The application site is not within an 'existing housing group' as defined in paragraph 3.19 of Supplementary Guidance 'Housing in the Countryside' (2021). The proposed development therefore fails to meet the requirement of point 1, of paragraph 3.20 of Supplementary Guidance 'Housing in the Countryside' (2021), and is therefore contrary to Policy 5E (vi) of the Orkney Local Development Plan 2017.
  - The application site does not 'share boundaries with two existing independent dwelling houses'. The proposed development therefore fails to meet the requirement of point 2, of paragraph 3.20 of Supplementary Guidance 'Housing in the Countryside' (2021), and is therefore contrary to Policy 5E (vi) of the Orkney Local Development Plan 2017.
  - On the basis the application site is not within a 'housing group' as defined for the purposes of new housing in the countryside, the development cannot accord with and enhance a housing group. The plot shape and development density are not similar to houses nearby. The proposed development therefore fails to meet the requirement of point 3, of paragraph 3.20 of Supplementary Guidance 'Housing in the Countryside' (2021), and is

therefore contrary to Policy 5E (vi) of the Orkney Local Development Plan 2017.

- No provision exists within Policy 17 'Rural homes' of National Planning Framework 4 for infill housing development in the countryside. The proposed development is therefore contrary to Policy 17 of National Planning Framework 4.

3.2. The Planning Handling Report, Planning Services file and the Decision Notice are attached as Appendices 2, 3 and 4 to this report.

## **4. Local Review Procedure**

4.1. In response to a Notice of Review, "interested parties" are permitted to make a representation to the Local Review Body. "Interested parties" include any party who has made, and not withdrawn, a representation in connection with the application. A representation was received from Development Management and is attached as Appendix 5 to this report.

4.2. In instances where a representation is received from an "interested party", the applicant is afforded the opportunity to make comments on any representation received. Comments received from the applicant's agent on the further representations received are attached as Appendix 6 to this report.

4.3. If the Local Review Body decides that further procedure is required, it may decide to hold a pre-examination meeting to consider what procedures to following the review, or to obtain further information by one or more of the following methods:

- By means of written submissions under the procedure set out in Regulation 15 of the Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2013; and/or.
- By the holding of one or more hearing under the Hearing Session Rules set out in Schedule 1 of the Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2013.

4.4. For the reasons outlined in section 1 above, it is recommended that the Local Review Body instigates the written submissions procedure. Further information is provided at section 5.5 below.

4.5. However, the Local Review Body may determine that it has sufficient information to proceed and thereafter determine whether to uphold, reverse or vary the decision of the Appointed Officer. In the event that the decision is reversed, an indication of relevant matters, in respect of potential planning conditions, are as follows:

- Approval of matters specified:
  - Siting and design

- Site layout
  - Boundaries
  - Landscaping
  - Surface water drainage
  - Foul drainage
  - Refuse bin storage
  - External lighting
  - Access
  - Hours of construction
  - Biodiversity enhancement.
- 4.6. All conditions should be in accordance with [Planning Circular 4/1998](#) regarding the use of conditions in planning permissions.
- 4.7. If the decision is reversed and the development is approved, it is proposed that powers are delegated to the Corporate Director for Strategy, Performance and Business Solutions, in consultation with the Planning Advisor and the Legal Advisor, to determine the necessary conditions, based on the relevant matters, agreed in terms of section 4.3 above.

## **5. Relevant Planning Policy and Guidance**

- 5.1. Section 25 of the Town and Country Planning (Scotland) Act 1997 as amended states, “Where, in making any determination under the Planning Acts, regard is to be had to the development plan, the determination is, unless material considerations indicate otherwise ... to be made in accordance with that plan...”
- 5.2. The full text of the Orkney Local Development Plan 2017 (OLDP 2017) and other supplementary planning advice and guidance can be read on the Council website [here](#). Although the Orkney Local Development Plan is “out-of-date” and has been since April 2022, it is still a significant material consideration when considering planning applications. The primacy of the plan should be maintained until a new plan is adopted. However, the weight to be attached to the Plan will be diminished where policies within the plan are subsequently superseded.
- 5.3. National Planning Framework 4 was approved by Parliament on 11 January 2023 and formally adopted by Scottish Ministers on 13 February 2023. The statutory development plan for Orkney consists of the National Planning Framework and the Orkney Local Development Plan 2017 and its supplementary guidance. In the event of any incompatibility between a provision of National Planning Framework 4 and a provision of the Orkney Local Development Plan 2017, National Planning Framework 4 is to prevail as it was adopted later. It is important to note that National Planning Framework 4 must be read and applied as a whole, and that the intent of each of the 33 policies is set out in National Planning Framework 4 and can be used to guide decision-making.

5.4. It is for the Local Review Body to determine which policies are relevant to this application; however the policies listed below were referred to by the Appointed Officer in the Planning Handling Report:

- Orkney Local Development Plan 2017:
  - Policy 1 – Criteria for All Development.
  - Policy 5E – Housing, Single Houses and new Housing Clusters in the Countryside.
  - Policy 8B - Historic Environment and Cultural Heritage.
  - Policy 9 – Natural Heritage and Landscape.
  - Policy 13 – Flood Risk, Sustainable Drainage Systems (SuDS) and Waste Water Drainage.
  - Policy 14 – Transport, Travel and Road Network Infrastructure.
- Supplementary Guidance:
  - Housing in the Countryside (2021).
- National Planning Framework 4:
  - Policy 17 – Rural Homes.

5.5. The decision of the Appointed Officer was issued on 30 November 2023. The Notice of Review was submitted on 13 February 2024. The Local Review Body was arranged to hear the Review on 2 May 2024. On 30 April 2024, new Development Management Guidance – Housing in the Countryside (DMG) (see Appendix 7) was approved by the Council. Although it is for the Local Review Body to determine which policies or guidance are relevant to this application, it is important to note that the applicant has not had an opportunity to make submissions on their Notice of Review since the new DMG came into force . The adjournment of this Review on 2 May 2024 was to consider any implications for the Local Review Body and the applicant arising from approval of the new DMG. In order to ensure procedural fairness and, in turn, adhere to the principles of natural justice, it is recommended that the Local Review Body use the written submissions procedure outlined in section 4.4 above, so that the applicant can provide updated submissions on their Notice of Review now that a new DMG is in force.

5.6. If the Local Review Body is minded to follow the recommendation outlined in section 5.5, it is further recommended that Development Management is named on the procedure notice so that they are afforded the opportunity to make comments on the applicant’s updated submissions.

**For Further Information please contact:**

Susan Shearer, Planning Advisor to the Local Review Body, extension 2433, Email: [susan.shearer@orkney.gov.uk](mailto:susan.shearer@orkney.gov.uk).

Stuart Bevan, Legal Advisor to the Local Review Body, extension 2220, Email: [stuart.bevan@orkney.gov.uk](mailto:stuart.bevan@orkney.gov.uk)

**Implications of Report**

- 1. Financial:** All resources associated with supporting the review procedure, mainly in the form of staff time, are contained within existing revenue budgets.
- 2. Legal:** The legal implications are set out in the body of the report.
- 3. Corporate Governance:** In accordance with the Scheme of Administration, determination of Notices of Review is delegated to the Local Review Body.
- 4. Human Resources:** None.
- 5. Equalities:** None.
- 6. Island Communities Impact:** None.
- 7. Links to Council Plan:** Not applicable.
- 8. Links to Local Outcomes Improvement Plan:** Not applicable.
- 9. Environmental and Climate Risk:** None.
- 10. Risk:** None.
- 11. Procurement:** None.
- 12. Health and Safety:** None.
- 13. Property and Assets:** None.
- 14. Information Technology:** None.
- 15. Cost of Living:** None.

**List of Background Papers**

Orkney Local Development Plan 2017.

National Planning Framework 4.

Supplementary Guidance for Housing in the Countryside.

**Appendices**

Appendix 1 – Notice of Review (pages 1 - 20)

Appendix 2 – Planning Handling Report (pages 21- 29)

Appendix 3 – Planning Services File (pages 30 - 57)

Appendix 4 – Decision Notice and Reasons for Refusal (pages 58 - 61)

Appendix 5 – Representation from Development Management (pages 62 - 63)

Appendix 6 – Comments from Agent on further representation received (pages 64 - 65)

Appendix 7 - Development Management Guidance – Housing in the Countryside (pages 66 – 68)

Pages 1 to 61 can be viewed [here](#), clicking on “Accept and Search” and inserting the planning reference "22/179/PIP".

Pages 66 to 68 can be viewed [here](#).

**22/179/PIP****Proposed formation of Two House Plots at Land Near Thorne Villa, Stoneyhill Road, Harray****Regulation 10(b)****Representation by Interested Party – Development Management**

The Notice of Review (“the Notice”) relies heavily on the Chief Planner letter dated 8 February 2023 which advises that ‘in the event of any incompatibility between a provision of NPF4 and a provision of an LDP, whichever of them is the later in date is to prevail’.

The Notice states that the Local Development Plan has been superseded by NPF4 and that “the policies of NPF4 should be the determining factor in the assessment of any planning application”. This is correct to a point, but whilst NPF4 has primacy in instances of incompatibility between the Local Development Plan and NPF4, that is not the case here, and the Local Development Plan remains a material consideration and cannot be set aside.

The Notice states that reasons for refusal which rely on policies of the Local Development Plan are “not relevant” and “cannot be cited as justification”. Development Management does not agree with this conclusion, which implies that the Local Development Plan currently has no role in decision-making; that is not the case.

Irrespective of the above, references in the Notice to relevant policies of NPF4 can also be scrutinised.

The Notice notes that the relevant policy of NPF4 is Policy 17 ‘Rural homes’.

However, the Notice states that the planning handling report has “wrongly referred to Policy 17 (a) and (b)” and contends that the application should be assessed in relation to “Policy 17c alone”, on the basis the application site is in a ‘remote rural’ area.

The statement that Orkney is designated as ‘remote rural’ area is correct. However, the interpretation of Policy 17 (c) is not correct.

Policy 17 (c) as follows:

*c) Development proposals for new homes in remote rural areas will be supported where the proposal:*

- i. supports and sustains existing fragile communities;*
- ii. supports identified local housing outcomes; and*
- iii. is suitable in terms of location, access, and environmental impact.*



The 'and' is critical; i.e. any proposed development must meet i, ii and iii to be compliant with Policy 3 (c).

Whilst the Policy 17 text confirms that "The Scottish Government's 6 fold Urban Rural Classification 2020 should be used to identify remote rural areas" which identifies all Orkney as remote rural, it also confirms that "Plans should reflect locally appropriate delivery approaches."

In that context, 'fragile communities' identified in point i of Policy 17 (c) are the unconnected isles of Orkney, where an open approach to housing in the countryside operates, not applicable in the Mainland. That is further supported by the confirmation in point ii that proposals must 'support identified local housing outcomes' which is the open approach in the unconnected isles, and the multiple limited provisions of housing in the countryside in the Mainland.

Therefore, relying on Policy 17 (c) alone as stated in the Notice results in a conclusion that the proposal does not comply with Policy 17.

Indeed, taking the logic of the Notice to its conclusion would result in an open policy of housing development in all Orkney countryside, with the Local Development Plan and Supplementary Guidance abandoned, which is clearly not the case.

## **Summary**

The Local Development Plan is not incompatible with NPF4, in relation to housing in the countryside/rural homes.

The proposed development meets none of the policy provisions in 17 (a).

17 (c) is not relevant, other than to confirm that the site is 'remote rural' but not fragile and that local housing outcomes should be used as the basis of decision-making, as set out in the Local Development Plan.

In terms of Policy 5E of the Local Development Plan, and Supplementary Guidance 'Housing in the Countryside', the proposed development meets none of the policy provisions.

This includes assessment in relation to the infill policy provision. Fundamentally, the provision "allows for the creation of one housing plot within an existing housing group" and the application is for two housing plots, not one. Further, the site is not in a housing group as defined, and does not share boundaries with two occupied and independent dwelling houses.

The proposed development, for two plots in previously undeveloped countryside in the Mainland, simply meets none of the relevant policy provisions of NPF4, or any of the relevant provisions of the Local Development Plan.

## **Development Management**

**10 March 2024**

**22/179/PIP****Proposed formation of Two House Plots at Land Near Thorne Villa, Stoneyhill**

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The following comments are submitted in response to the Development Management submission.

**NPF4**

Section 24(3) of the Town and Country Planning (Scotland) Act 1997, states that in the event of any incompatibility between a provision of NPF and a provision of an LDP, whichever of them is the later in date is to prevail.

There is no ambiguity in the terms of the legislation. Where there is a change in policy, it is the later adopted policy that will apply.

The Orkney Islands Local Development Plan dates to 2017. The Council's website advises that *'where policies in NPF4 contradict those in the Orkney Local Development Plan 2017 and its associated Supplementary Guidance then NPF4, as the most recent plan, will take precedence.'*

In this instance, NPF4 defines the area as Remote Rural as is acknowledged by the planning authority. This means that the relevant NPF4 policy for assessing this application is Policy 17 part (c). As stated in the main appeal submission, Part c requires a proposal for new homes in the remote rural areas to meet three criteria.

The first relates to the defined fragile areas and is not relevant as the proposed site is not within a defined fragile area.

The second criteria relates to identified housing outcomes and, where established, that the proposal meets the third criteria which relates to location, access and environmental impact.

The Local Development Plan identifies that a significant number of individual houses will be secured through development of 'windfall' sites. This makes a valuable contribution to the local housing requirements and outcomes. There is therefore no conflict with criteria (ii).

Criteria (iii) relates to location, access and environmental impact. None of these three criteria were raised as reasons for refusal. The site is situated between existing houses, will continue the established linear pattern that is a characteristic of Orkney housing on the Mainland areas and will have no adverse environmental impact on the site or surrounding area – all matters that were assessed in the original determination of the application.

**Summary**

The correct policy for determination of applications within the defined Remote Rural areas as set out in the recently adopted NPF4 policy framework is Policy 17 – Rural Homes, Part c.

While the Policy set out in NPF4 represents a departure from the established policies and guidance that existed prior to the adoption and introduction of NPF4, these older policies cannot now be used to assess a planning application where the terms set out in NPF4 differ. The Review Body is respectfully reminded

that legislation as set out in Section 24(3) of the Town and Country Planning (Scotland) Act 1997 stipulates that the more recent policy will take precedence.

It is acknowledged that Policy 17 (c) introduces a change to the previous policy governing individual houses within the countryside. But the terms of NPF4 quite evidently allow for the development of the two houses as proposed.