

Item: 6

Planning Committee: 8 May 2024.

Remove Condition 07 (Provision of Footway) of Planning Permission 22/060/PP at Plots 1A and 1B Eastbrae, Wardhill Road, Stromness.

Report by Corporate Director for Neighbourhood Services and Infrastructure.

1. Summary

1.1.

An application is submitted under Section 42 of the Town and Country Planning (Scotland) Act 1997, as amended, to carry out development without complying with conditions subject to which a previous planning permission was approved. In this case, it is proposed to vary planning condition 07 attached to planning permission 22/060/PP to erect two houses with air source heat pumps and create an access (resubmission of 21/095/PP). Condition 07 requires details of a footway to be provided and specifies that those details include the extent of the footway, and details including street lighting, drainage, and property accesses. Planning application 22/060/PP was approved by the Planning Committee on 1 June 2022; given the previous Committee decision for the development, the Corporate Director for Neighbourhood Services and Infrastructure has opted not to exercise delegated powers. The effect of approval of the Section 42 application as submitted, would be to allow the approved housing development with a reduced footway provision along the stretch of Wardhill Road, and a reduced specification. A similar proposal, to remove condition 07, was considered under planning application 22/456/VR, which was refused by Planning Committee on 8 March 2023.

1.2.

Consideration of this application does not affect the principle of development as accepted by approval of application 22/060/PP, and that approval remains the fallback position should the current application to vary condition 07 be refused. The key consideration of this application is therefore whether the development would be acceptable if planning condition 07 for the installation of a footway and associated services and works was varied as proposed, i.e. the development as approved but with reduced footway and services, and the extent to which the subsequent development would comply with the Orkney Local Development Plan 2017 ("Local Development Plan") and National Planning Framework 4 (NPF4) policies and other material considerations. Taking full consideration of supporting information and relevant policies, it is considered that the footpath specification required in terms of condition 07 attached to planning permission 22/060/PP is necessary for the proposed development.

1.3.

In short, a planning condition 07 was attached to planning permission 22/060/PP by Planning Committee in June 2022, and is considered necessary. Committee refused an application to remove condition 07 in March 2023, as it remained the case that the condition as originally attached was necessary. The current application is a further test of the necessity of condition 07. The requirements remain as they were on the two previous occasions this development has been considered by Committee and it is therefore considered that the application to vary condition 07 fails to accord with relevant principles and policies within the Local Development Plan and NPF4 in respect of sustainable transport/travel and road network infrastructure, and the development would not address the road safety objections raised by Roads Services. Accordingly, the application is recommended for refusal.

Application Number:	23/428/VR.
Application Type:	Vary Condition(s) of Planning Consent.
Proposal:	Vary condition 07 (provision of footway) of planning permission 22/060/PP.
Applicant:	Miss L Foulis, Innovation Centre - Orkney, Hatston Pier Road, Kirkwall, KW15 1ZL.

1.4.

All application documents (including plans, consultation responses and representations) are available for members to view [here](#) (click on “Accept and Search” to confirm the Disclaimer and Copyright document has been read and understood, and then enter the application number given above).

2. Consultations

2.1. Roads Services

Roads Services objects to the variation of condition 07 of planning permission 22/060/PP, as the condition applied is already a compromise that was agreed by the Planning Committee on 1 June 2022. The proposed variation could have a negative impact on road safety as well as the potential to create an unacceptable burden on the Council as roads authority.

2.2. Development and Marine Planning

As with the previous application 22/456/VR, to carry out the development without complying with condition 07, Development and Marine Planning objects to this application. It is highlighted that Local Development Plan Policy 14 ‘Transport’, part B Sustainable Travel, paragraph ii) requires that “Within settlements, all development must demonstrate how it will access and facilitate sustainable travel to minimise the need for independent car journeys. This requirement will be proportionate to the nature of the proposal and the size of the settlement; and may require sustainable travel infrastructure improvements within or outwith the site. Further detail and specific requirements for individual allocations will be provided in the settlement

statements, masterplan and development briefs". It is noted that the development is not in an allocation of the Local Development Plan.

In the context of Stromness being Orkney's second largest settlement, it is noted that although the original planning application of 22/060/PP is for two houses, within the housing group the developer has had planning permission approved for 10 houses and other residential holiday accommodation. Therefore, requiring a footpath to allow existing and proposed residents as well as visitors in the location to walk safely to other parts of Stromness is considered proportionate and appropriate.

In addition to the Local Development Plan policy on sustainable travel, NPF4 policy 13 on sustainable transport aims to encourage, promote and facilitate developments that prioritise walking, wheeling, cycling and public transport for everyday travel and reduce the need to travel unsustainably.

3. Representations

None.

4. Relevant Planning History

Reference	Proposal	Location	Decision	Date
22/456/VR	Remove condition 07 (provision of footway) of planning permission 22/060/P	Plots 1A & 1B Eastbrae, Wardhill, Stromness, Orkney	Application Refused	09.03.2023
22/060/PP	Erect two houses with air source heat pumps and create an access (resubmission of 21/095/PP)	Plots 1A and 1B, Eastbrae, Wardhill Road, Stromness.	Grant Subject to Conditions	29.06.2022.
21/095/PP	Erect three houses with air source heat pumps and create an access.	Plots 1A, 1B and 1C, Eastbrae, Wardhill Road, Stromness.	Withdrawn	
15/554/PP	Erect a house and install an air source heat pump.	Eastbrae Plot 1 (formerly Plot 1d), Stromness.	Grant Subject to Conditions	28.01.2016

12/546/PP	Create 4 serviced house sites and associated works, including road widening (amendment to 11/299/PIP).	Eastbrae (Land Near), Stromness.	Grant Subject to Conditions	20.11.2012
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5. Relevant Planning Policy and Guidance

5.1.

The full text of the Orkney Local Development Plan 2017 and supplementary guidance can be read on the Council website [here](#).

5.2.

The key policies, supplementary guidance and planning policy advice listed below are relevant to this application:

- Orkney Local Development Plan 2017:
 - Policy 1 – Criteria for All Development.
 - Policy 2 – Design.
 - Policy 5 – Housing in Settlements.
 - Policy 9 – Landscape.
 - Policy 13B – Sustainable Drainage Systems (SuDS).
 - Policy 13C – Waste Water Drainage.
 - Policy 14C – Road Network Infrastructure.
- Supplementary Guidance and Planning Policy Advice:
 - Planning Policy Advice ‘Planning Policy Advice: Amenity and Minimising Obtrusive Lighting.
 - Eastbrae, Stromness, Housing Development Brief, Supplementary Guidance, (July 2012).
- National Planning Framework 4
 - Policy 13 – Sustainable Transport

6. Legal Aspects

6.1.

Section 25 of the Town and Country Planning (Scotland) Act 1997 as amended (the Act) 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...”

6.2.

Annex A of Planning Circular 3/2013: 'development management procedures' provides advice on defining a material consideration, and following a House of Lords' judgement with regards the legislative requirement for decisions on planning applications to be made in accordance with the development plan, confirms the following interpretation: "If a proposal accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the proposal does not accord with the development plan, it should be refused unless there are material considerations indicating that it should be granted."

6.3.

Annex A continues as follows:

- The House of Lords' judgement also set out the following approach to deciding an application:
 - Identify any provisions of the development plan which are relevant to the decision.
 - Interpret them carefully, looking at the aims and objectives of the plan as well as detailed wording of policies.
 - Consider whether or not the proposal accords with the development plan.
 - Identify and consider relevant material considerations for and against the proposal.
 - Assess whether these considerations warrant a departure from the development plan.
- There are two main tests in deciding whether a consideration is material and relevant:
 - It should serve or be related to the purpose of planning. It should therefore relate to the development and use of land.
 - It should relate to the particular application.
- The decision maker will have to decide what considerations it considers are material to the determination of the application. However, the question of whether or not a consideration is a material consideration is a question of law and so something which is ultimately for the courts to determine. It is for the decision maker to assess both the weight to be attached to each material consideration and whether individually or together they are sufficient to outweigh the development plan. Where development plan policies are not directly relevant to the development proposal, material considerations will be of particular importance.
- The range of considerations which might be considered material in planning terms is very wide and can only be determined in the context of each case. Examples of possible material considerations include:
 - Scottish Government policy and UK Government policy on reserved matters.
 - The National Planning Framework.

- Designing Streets.
- Scottish Government planning advice and circulars.
- EU policy.
- A proposed local development plan or proposed supplementary guidance.
- Community plans.
- The environmental impact of the proposal.
- The design of the proposed development and its relationship to its surroundings.
- Access, provision of infrastructure and planning history of the site.
- Views of statutory and other consultees.
- Legitimate public concern or support expressed on relevant planning matters.
- The planning system operates in the long term public interest. It does not exist to protect the interests of one person or business against the activities of another. In distinguishing between public and private interests, the basic question is whether the proposal would unacceptably affect the amenity and existing use of land and buildings which ought to be protected in the public interest, not whether owners or occupiers of neighbouring or other existing properties would experience financial or other loss from a particular development.

6.4.

Where a decision to refuse an application is made, the applicant may appeal under section 47 of the Act. Scottish Ministers are empowered to make an award of expenses on appeal where one party's conduct is deemed to be unreasonable. Examples of such unreasonable conduct are given in Circular 6/1990 and include:

- Failing to give complete, precise and relevant reasons for refusal of an application.
- Reaching a decision without reasonable planning grounds for doing so.
- Not taking into account material considerations.
- Refusing an application because of local opposition, where that opposition is not founded upon valid planning grounds.

6.5.

An award of expenses may be substantial where an appeal is conducted either by way of written submissions or a local inquiry.

6.6. Status of the Local Development Plan

Although the Orkney Local Development Plan 2017 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.

6.7. Status of National Planning Framework 4

6.7.1.

National Planning Framework 4 (NPF4) was adopted by Scottish Ministers on 13 February 2023, following approval by the Scottish Parliament in January 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 NPF4 and a provision of the Orkney Local Development Plan 2017, NPF4 is to prevail as it was adopted later. It is important to note that NPF4 must be read and applied as a whole, and that the intent of each of the 33 policies is set out in NPF4 and can be used to guide decision-making.

6.7.2.

In the current case, there is not considered to be any incompatibility between the provisions of NPF4 and the provisions of the Orkney Local Development Plan 2017, to merit any detailed assessment in relation to individual NPF4 policies.

7. Assessment

7.1. Background

7.1.1.

Planning application 22/060/PP to 'Erect two houses with air source heat pumps and create an access (resubmission of 21/095/PP)' at Plots 1A and 1B Eastbrae, Wardhill Road, Stromness, was approved by the Planning Committee on 1 June 2022. The location plan is attached as Appendix 1 to this report. The Eastbrae, Stromness, Housing Development Brief, Supplementary Guidance (July 2012), indicated a figure of seven additional houses in the development brief area; although the relevance of the development brief has been diminished by the passage of time and the adoption of subsequent Local Development Plans, the consultation response from Development and Marine Planning notes that the developer has received planning permission for 10 houses and other residential holiday accommodation in the immediate locality.

7.1.2.

In consultation for application 22/060/PP, Roads Services raised concerns regarding the number of properties constructed or proposed within the original development brief area, given that no footway exists along the stretch of Wardhill Road from Syradale to the application site, which is approximately 470 metres. On the recommendation of Roads Services therefore, it was recommended to Planning Committee that the application be subject to the following planning condition, requiring a footway, associated works and services at the developer's expense:

"07. Full details of a new 1.8 metre-wide footway, extending from the north-western boundary of the application site hereby approved with the public road to the current extent of public footway outside the property Syradale, Wardhill Road, shall be submitted to, and approved in writing by, the Planning Authority in conjunction with

Roads Services. These details shall include associated streetlighting, drainage and property accesses.

No other development shall commence until these details are submitted and approved as specified, and thereafter until this footway is installed in its entirety, and wholly in accordance with all details as approved by the Planning Authority.

Reason: In the interests of road safety, and to ensure connectivity between the proposed development and the existing public footpath network.”

7.1.3.

It was included in the committee report, and contrary to the current position, that, “Following the consultation response from Roads Services regarding the requirement for the footway, the developer has confirmed a willingness to install a footpath from the application site to the junction of Wardhill Road with Downies Lane”.

7.1.4.

On 1 June 2022, the Planning Committee resolved to amend the planning condition, as follows, to reduce the distance of footway required:

“07. No development shall commence until full details of a new footway, not less than 1.5 metres in width, and extending from the north-west boundary of the application site hereby approved with the public road, along Wardhill Road, to its junction with Downies Lane, are submitted to, and approved in writing by, the Planning Authority in conjunction with Roads Services. Including both plan form and specifications, these details shall include:

- A street lighting duct, the entirety of the length of the footway, and extending 1 metre to the north-east beyond the end of the section of footway, into Downies Lane.
- Drainage, including surface water drainage measures to manage the loss of roadside ditches (due to the footway).
- Property accesses crossing the footway along the entirety of the length of the footway.

No other development shall commence until the footway is installed in its entirety, wholly in accordance with all details as approved in writing by the Planning Authority.

Reason: In the interests of road safety, and to improve connectivity between the proposed development and the existing public footpath network.”

7.1.5.

The amended planning condition reduced the length of footway required, to a stretch of Wardhill Road from Downies Lane to the furthest edge of the application site. It is this planning condition that is the subject of the current application, and which the applicant is requesting to vary.

7.2. Proposal

7.2.1.

Following clarification being sought from the agent, it is confirmed that the current application is a proposed variation to condition 07 as follows:

- “No development shall commence until full details of a new footway, not less than 1.5 metres in width, and extending from the north-west boundary of the application site hereby approved with the public road, along Wardhill Road, to its junction with Downies Lane, are submitted to, and approved in writing by, the Planning Authority in conjunction with Roads Services.

We would request a variation on this point that the proposed footpath be installed from the junction at Downies Lane and extend past the entrance of the local garage as shown on the attached plan. This is a revision of the length of the footpath as per condition 7.

A minimum road carriageway of 5.5m will be maintained and 1.5m footpath installed where existing garden walls and foundations will allow. No existing foundations to be moved within this proposal.

Proposed footpath will stop either side of driveways and be finished with drop kerbs. Edge kerbs to be included where there are no existing garden walls which would naturally form the back edge of the footpath.

This is in the interest of minimising disruption to the neighbours and their properties.

- Condition 7 stipulates that a street lighting duct be installed, the entirety of the length of the footway, and extending 1 metre to the north-east beyond the end of the section of footway, into Downies Lane.

We would request a variation on this point that no street duct be installed in the interests of the neighbouring properties, who do not want to see street lighting in the area.

- Drainage, including surface water drainage measures to manage the loss of roadside ditches (due to the footway).

We propose a new drainage system be installed opposite plot 3 and connected into the existing drainage system. This represents more drainage capacity than is currently in place onsite”.

7.2.2.

The extent of footway required by condition 07 would be reduced, the footway would not cross existing private accesses, street lighting ducting would not be installed, and the drainage system required by Roads Services would not be installed. In short, the footpath would be significantly reduced in both length and specification, and not to the standard required by the roads authority.

7.2.3.

The agent provided the following further information in support of the variation:

- “The proposed footpath would directly service most of the residential properties in the area and the local commercial car garage.
- The proposed footpath would extend from the junction at Downies Lane to past the entrance to the local car garage (the proposed two new houses can be connected to the proposed footpath over private land).
- A minimum road carriageway of 5.5m will be maintained and 1.5m footpath installed where existing garden walls/foundations etc allow. No existing garden walls or foundations will be moved in this proposal.
- The bounding neighbours do not want streetlights in the area. They want to keep the rural feel to the area. No cable duct under the footpath has been allowed for. The OIC are welcome to install this duct at their cost prior to tarmac being installed.
- The bounding neighbours also do not want their existing driveways dug up. The proposed footpath will stop either side of their existing driveways and will be finished with drop kerbs etc.
- Edge kerbs are only included where there are no existing garden walls which will naturally form the back edge of the footpath.
- A new drainage gully will be installed opposite plot 3 and will be connected into the existing drainage system. This represents more drainage capacity than is currently in place onsite.
- The above works represents a very significant investment in public infrastructure for only two relatively small dwelling houses. Many other developers could not afford to justify this investment.
- There is also an additional significant development cost associated with these two new houses due to having to move overhead power lines and other existing underground electricity service cables. The developer must also factor this into the viability assessment.
- After an updated assessment, proposed length and specification of public footpath is maximum justifiable position of the Developer to allow the two dwelling houses to be built”.

7.2.4.

The location is an infill site adjacent to the road. The area is developed to such a level that it is no longer detached from the town, and instead is seen as an extension to the settlement. However, there is no formal footway to the housing, and presently the public footway network concludes at Syradale at the end of Wardhill Road. Wardhill Road is largely single track with passing places with grass verges. A section of the road has previously been widened by the developer across the frontage of the site from just beyond the junction of Wardhill Road with Downies Lane to the west of Eastbrae Lodge, as required in conjunction with previous development.

7.2.5.

In requesting that the footway required by condition be varied as requested above, within the supporting statement it is stated that this variation would still service most of the residential properties in the area including the vehicle repair garage, and that the two proposed houses covered by 22/060/PP could be connected to the proposed footpath across private land.

7.2.6.

The financial viability of developing the approved sites is not a planning consideration. As noted in the Development and Marine Planning consultation response, the same developer has developed multiple residential and commercial properties in the immediate vicinity, which is the development that has led to the requirement for the additional infrastructure. The footpath requirements included in the planning condition would allow all existing and future residents as well as visitors to walk safely to other parts of Stromness, in line with NPF4 Policy 13 which aims to encourage, promote and facilitate developments that prioritise walking, wheeling, cycling and public transport for everyday travel and reduce the need to travel unsustainably.

7.2.7.

The key planning issue in this case is whether the proposed variation to condition 07 of 22/060/PP, and the resulting changes proposed to the extent of the footway and access crossings, removal of a street lighting duct and proposed drainage system changes, are appropriate, i.e. whether the development is acceptable with the proposed variation included. On the basis the approved planning condition secures the infrastructure requirements considered as the minimum necessary by the roads authority to deliver a development that is safe and accessible, the variation to the condition as proposed could have a negative impact on road safety.

7.3. Connectivity

7.3.1.

Policy 14 'Transport, Travel and Road Network Infrastructure' of the Local Development Plan confirms that, "Any developments within settlements will be required to provide safe and convenient opportunities for walking and cycling, for both active travel and recreation, in order to encourage options for healthy living and positive aging". Policy 14B 'Sustainable Travel' and 14C 'Road Network Infrastructure', are particularly relevant in this case.

7.3.2.

Paragraph ii of Policy 14B 'Sustainable Travel' states: "ii. Within settlements, all development must demonstrate how it will access and facilitate sustainable travel to minimise the need for independent car journeys. This requirement will be proportionate to the nature of the proposal and the size of the settlement; and may require sustainable travel infrastructure improvements within or outwith site. Further detail and specific requirements for individual allocations will be provided in the settlement statements, masterplans and development briefs."

7.3.3.

Policy 14C 'Road Network Infrastructure' lists five requirements that the proposed development must demonstrate; criterion i. is particularly relevant to this application and confirms that development should demonstrate that:

"i. It is well connected to the existing network of roads, paths and cycleways and will not create a barrier to future development."

A key aim of the policy is to facilitate sustainable travel and improve the network of footways (and cycleways), which was a consideration in the determination of application 22/060/PP.

7.3.4.

Under the 'Sustainable transport' heading, NPF4 sets out the policy intent, which is:

"To encourage, promote and facilitate developments that prioritise walking, wheeling, cycling and public transport for everyday travel and reduce the need to travel unsustainably."

Policy 13(b) of the Local Development Plan notes that development will be supported where it is demonstrated that it would provide direct, easy, segregated, and safe links to local facilities via walking, wheeling and cycling networks before occupation of the development.

7.3.5.

The sustainability and travel policies in both the Local Development Plan and NPF4 are clear, with an aim to provide appropriate connection from development to existing footpaths to local facilities, and to facilitate walking etc.

7.3.6.

Policy 1 'Criteria for All Development' of the Local Development Plan is an overarching policy, setting out key guiding principles that are relevant in the assessment of all planning applications. Paragraph vi. states that development will be supported where: "It does not result in an unacceptable level of risk to public health and safety". The consultation response from Roads Services highlights the road safety concerns due to the combination of the number of properties in the area and the lack of footway. The development is therefore considered contrary to Policy 1.

8. Conclusion and Recommendation

8.1.

The effect of approving this planning application, submitted under the provisions of Section 42, is such that a new and separate permission would exist for the development, with different planning conditions attached, in this case the conditions would match those attached to 22/060/PP, but with condition 07 varied. As stated throughout this report, the key consideration is therefore whether the development is acceptable with condition 07 being varied as proposed, namely the reduced length of

footway, the requirement for a street lighting duct omitted, and significant change to the proposed drainage.

8.2.

The proposed development has been assessed in relation to the policy principles of National Planning Framework 4 with regards sustainable transport, and the relevant policies of the Orkney Local Development Plan 2017 in respect of sustainable travel and the road network. The development cannot be considered to contribute to sustainable development as it would result in the delivery of additional housing development, within an existing housing group at the edge of a settlement, whilst failing to meet the footway requirement specified by the roads authority. Delivery of the development without the stretch of public footway required by condition 07 of 22/060/PP would result in an unacceptable risk in terms of road safety. Accordingly, the application is **recommended for refusal**, for the reason specified below.

9. Reason for Refusal

01. Construction of the footway as specified in condition 07 attached to planning application 22/060/PP is considered necessary. The variation proposed to condition 07, including changes to the extent of the footway and associated services and works, would result in the development of housing which would have an unacceptable impact on road safety and pedestrian safety, and would not deliver the necessary footpath provision or connectivity within Stromness, contrary to the sustainable travel/transport aims of policy. The current development proposed, to vary condition 07, is therefore contrary to the 'Sustainable transport' provisions and Policy 13 of National Planning Framework 4, and Policy 1 'Criteria for all development' and Policy 14 'Transport, Travel and Road Network Infrastructure' of the Orkney Local Development Plan 2017.

10. Contact Officers

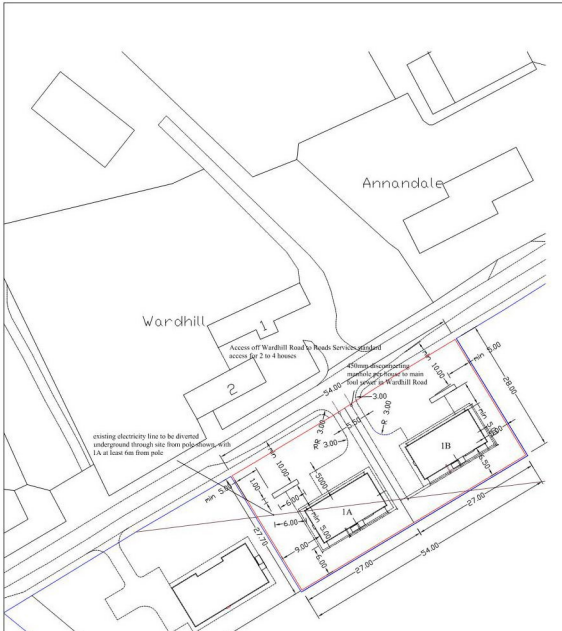
Jamie Macvie, Service Manager (Development Management), extension 2529, Email jamie.macvie@orkney.gov.uk

Margaret Gillon, Senior Planner (Development Management), Email margaret.gillon@orkney.gov.uk

11. Appendix

Appendix 1: Location Plan.

Appendix 1



Surface area to be drained per house is 116m² per house.
 Assuming 5m³ of soakaway per 100m² drained soakaway, size per house is 2.5m deep x 6m x 1m.
 Each soakaway to be a minimum 10m from the edge of the public road and 5m from buildings and boundaries

