



---

Interim Head of Service  
Planning & Building Standards Service  
East Ayrshire Council  
Opera House  
John Finnie Street  
Kilmarnock

18 January 2021

By email only

Dear Sirs,

**Application to discharge conditions 21/0012/AMCPP.**

I further object to aspects of the application to discharge planning conditions.

**Background**

Fundamentally, there is still an outstanding problem with past handling relating to this proposed housing development. I have stated these concerns in writing previously, but the objections require restatement.

The planning permission for land was conferred by the grant of planning permission in principle 01/0859/OL set out by decision letter dated 6 December 2012. Unless requisite approval is given within three-year period commencing at the date of the decision letter, and development commenced within two years of the requisite approval, the planning permission should lapse. Evidence and planning records indicate that planning permission in principle lapsed in December 2015, first because not all suspensive conditions were discharged and second because the permission was not lawfully implemented during its lifetime.

The previous applicant, Mrs. D Fraser, applied for requisite approvals in 2013 and 2014 under the planning references 13/0046/AMCPP and 14/903/AMCPP. It has never been disputed that sincere attempts were made to obtain requisite approval within the lifetime of the permission in principle. Suspensive planning conditions 1,2,3,4,5,7,8,9 and 14 were discharged by the Planning Authority by decision letters dated 22 February 2013 and 10 August 2015, however, three conditions 6, 7 and 13 were not recorded as discharged by the Council before the permission lapsed. The permission cannot have been implemented lawfully pending discharge of suspensive conditions 6, 7 and 13.

Furthermore, the handling of the requisite approval application lodged in 2014 was flawed. Planning conditions 1, 3 and 5, were discharged in error by the Council. This is explained further underneath. The significant error is that the site plan and boundary did not correspond with the approved site boundary regulated under the 2012 permission in principle. The layout drawing submitted, incorrectly subsumed a strip of land jointly owned and maintained as landscaped open space by the residents of Draffen Mount. The applicant proposed engineering and building operations and change of use of the open space to form front gardens, several driveway accesses, retaining walls, service installation and proposed main foul sewer connection and other utility and drainage connections, over third-party land that did not fall within the demise of the 2012 permission in principle. This has never been acceptable to the residents of Draffen Mount. Draffen Mount residents pay annual factoring and insurance charges for the upkeep

of the private open spaces and have done so for the past 17 years. This land and the tree belt provide important setting and maturity to established development and was originally intended to frame views towards Draffen House, which is a Listed Building.

The foul sewer route indicated by the drainage design drawing also traversed the private landscaped open space and interfered with the shared private driveway access serving 21-23 Draffen Mount. The foul sewer connection(s) is of course critical to the delivery of successful built development, yet the Council accepted and approved a deficient site plan and drainage design that involved engineering operations outside the demise of the planning permission.

The applicant failed to acknowledge or explain under what competent and legal mechanism the managed open space could be incorporated into the front gardens of the proposed new homes. Bizarrely, this arrangement would leave much of the front garden areas of the proposed new homes under the burden of maintenance and occupier liability of the current Draffen Mount co-proprietors, yet Planning Officials appeared quite sanguine about this. The applicant has also quietly subsumed other open space forming part of the Stane Brae development within the application site to provide a means of pedestrian access to Cutstraw Road and to comply with open space requirements. The approach was also flawed but the Council accepted it anyway.

Objections were submitted and the various deficiencies were highlighted also to the Planning Committee at a Hearing, but the Council proceeded to grant requisite approval, in the face of well-reasoned objections.

Nonetheless, the permission in principle issued in 2012 would not confer express approval to undertake operations on Draffen Mount and the 2014 requisite approval, cannot extrude the legal boundary of the permission, alter the legal planning position or the ownership position. The upset and concern caused by this flawed decision, largely abated following December 2015, when the planning permission lapsed.

However, it is now averred by the Council that the permission survived because development lawfully commenced during 2016, although this appears highly unlikely. Groundworkers appointed by Avant Homes appeared on site to fence off the land, strip the topsoil and set out the roundabout site access on 1 November 2020.

The Council will possess records of the date of grant of road construction consent and building warrant approval. The Health and Safety Executive must also be notified under CDM Regulations of site commencement. These dates are verifiable. It defies credibility to suggest that the development commenced in May 2016, (unnoticed by the closest neighbours) when the site has been continuously used by a local farmer for the grazing of cattle and sheep until late last year.

Lawful development cannot have commenced because not all the suspensive conditions were discharged timeously. If the pre-start planning conditions were discharged, which is moot, this would extend the time period for commencement to August 2017, however, there was no commencement observed until November 2020 when Avant Homes subcontractor Akela Construction were mobilised.

The notice of initiation under s27a published on the public file relates to archaeological investigation by AOC Archaeology - commissioned to discharge a suspensive planning condition. Notice under s27c was not displayed and certainly no meaningful operation took place around May 2016 that anyone can remember. While the Council avers that some road setting out took place by the placing of some pegs which was photographed, this appears contrived and there is no way to verify if the placing of the pegs in any way corresponded with the terms of the permission. The photograph exhibited by the Council as evidence is not convincing.

The nearest neighbours witnessed no site start and it is difficult to conceive how road or building setting out could be competently undertaken several years in advance of (i) the grant of road construction consent, (ii) grant of building warrant (iii) appointment of the groundworks contractor, (iv) site clearance of vegetation and topsoil, and (v) without the supervision and verification of a competent engineer.



The Council has acknowledged that not all suspensive planning conditions were discharged before December 2015. Evidence of a lawful and meaningful operation representing implementation is therefore extremely weak and unconvincing. Against this background, the existence of planning permission is challenged.

Application to discharge planning conditions.

The present application to discharge conditions assumes that there is a live planning permission although for the reasons set out in this letter, this assertion is still disputed.

It is assumed that the Council and developer intends to press on with this housing development regardless, and as the developer has now committed over £5m in land acquisition costs and groundworks, it is acknowledged that it may be impracticable and fraught to start matters entirely afresh though Development Management Procedures and administrative probity should demand this. Only today, the developer has erected advertisement signage without advertisement consent, and it has been apparent for several months now that the Council does not care to revisit past decisions.

Nonetheless, the Council's Depute Chief Executive recently acknowledged the problem with the planning permission cadastral and he assured the residents of Draffen Mount that the developer would be asked to look again at the part of the site adjacent to and fronting Draffen Mount. The latest drawing submissions and application to discharge conditions do not acknowledge this.

Conditions 2, 3, 9, 12 and 22 (14/0903/AMCPPP) although not suspensive in nature, require formal discharge before construction of the houses.

The submitted drawings detailing the traffic calming operations on Cutstraw Rd and Kirkford were required pursuant to suspensive condition 6 of 01/0859/OL but never formally submitted for approval. Consistent with previous objection, the details are now submitted to the Council out of time.

The road adoption and drainage layout drawings lodged continue to show development of the land opposite 1-7 Draffen Mount, via private land, outside the demise of the 2012 permission. The Council's Depute Chief Executive has acknowledged that the cadastral of the planning permission does not include this land. The submitted drainage drawings should be rejected by the Authority, which should not sanction development operations outside the original approved boundary or compound previous handling errors. The drawings should be adjusted and resubmitted, including redesign this section of the site.

The drainage drawing continues to detail new foul sewer and storm water drainage arrangements routed via Draffen Mount. Because these operations are not consented, it should not continue to form part of this submission. Also, the applicant has not yet sought to discharge planning condition 10. The outcome of further drainage assessment is perhaps required before final verification and approval of the drainage scheme. The previous flood assessment was produced in draft format and never updated. The submitted drawings indicate that unattenuated storm water is to be routed via Draffen Mount and Loudoun Street to an existing sewer opposite Netherfield House, which already suffers from intermittent flooding due to surcharge.

The drainage proposals may exacerbate the existing flooding problem and increase risk to Netherfield House. The Kaya flood investigation report did not fully consider this aspect, but the Planning Authority should take these matters into account to mitigate adverse impact upon neighbouring property which has already suffered one serious incident since groundworks commenced. The submitted drainage and adoption plan drawings also indicate significant earthworks, grading of land and formation of a new footpath on land adjacent to Stane Brae. These operations affect land that is under the ownership and



management of the Stane Brae residents which has the potential to cause further problems for the developer, unless necessary third-party agreements<sup>3152</sup> can be secured.

While some entitlement to construct an access may have been reserved to the developer under title, the servitude is legally moot, and it is far from clear if Avant Homes can deliver this pedestrian route connecting to Cutstraw Road. The consent of proprietors is required for the purposes of the road construction consent under ARA procedures and at this point neither the Stane Brae nor Draffen Mount proprietors have yet been notified by the applicant.

As the extent of earthworks, levels information and lighting details are incomplete it is difficult to determine the likelihood of light pollution affecting 23 Draffen Mount nor potential loss of privacy due to the siting and lighting of this new pedestrian route. Some cross sections would assist. The submitted adoption drawing should not be accepted without sections, a street lighting plan and explanation as to how the path is to be graded, finished ground levels, surface treatment, and information on how the route is to be maintained and insured prior to roads adoption.

Finally, the drainage drawing indicates a septic tank and rising main sewer route connecting to a manhole in Loudoun Street, adjacent to Cragston. The indicated rising main sewer falls outside the demise of the original and approved planning boundary. Engineering operations to lay a new sewer outside the original and approved boundary would require express permission, unless permitted development, which this is not. The wisdom of permitting a private septic tank arrangement to serve development of this scale is questionable, particularly as there is no indication of when the works to upgrade the local wastewater works will be implemented. As neither the planning permission in principle nor AMSC applications alluded to private wastewater treatment, these operations also require express consent. It is invalid to accept design changes involving bad neighbour development either as non-material or pursuant to a condition inconsistent with the description of the development and the permission.

In summary, the validity of the planning permission is challenged. The Planning Authority is aware of objections relating to the lapsed status of the permission and questions around the legitimacy of subsequent planning handling and decisions by the Council.

While it is maintained that the 2012 grant of planning permission lapsed over five years ago, near neighbours now seem reconciled to the development of land that is allocated for residential development. There is no strong appetite to escalate matters or to impose delays or costs on the new landowner if the Council maintains that the planning permission remains live. However, any operations undertaken by the developer Avant should fall entirely within the demise of this permission.

The latest submissions lodged to discharge planning conditions are deficient on several grounds and should be rejected pending redesign of the site layout, plots 1-7 that front Draffen Mount, related roadworks, drainage and service connections to avoid risk of trespass and abide by the written assurances provided by the Depute Chief Executive.

Yours sincerely,

