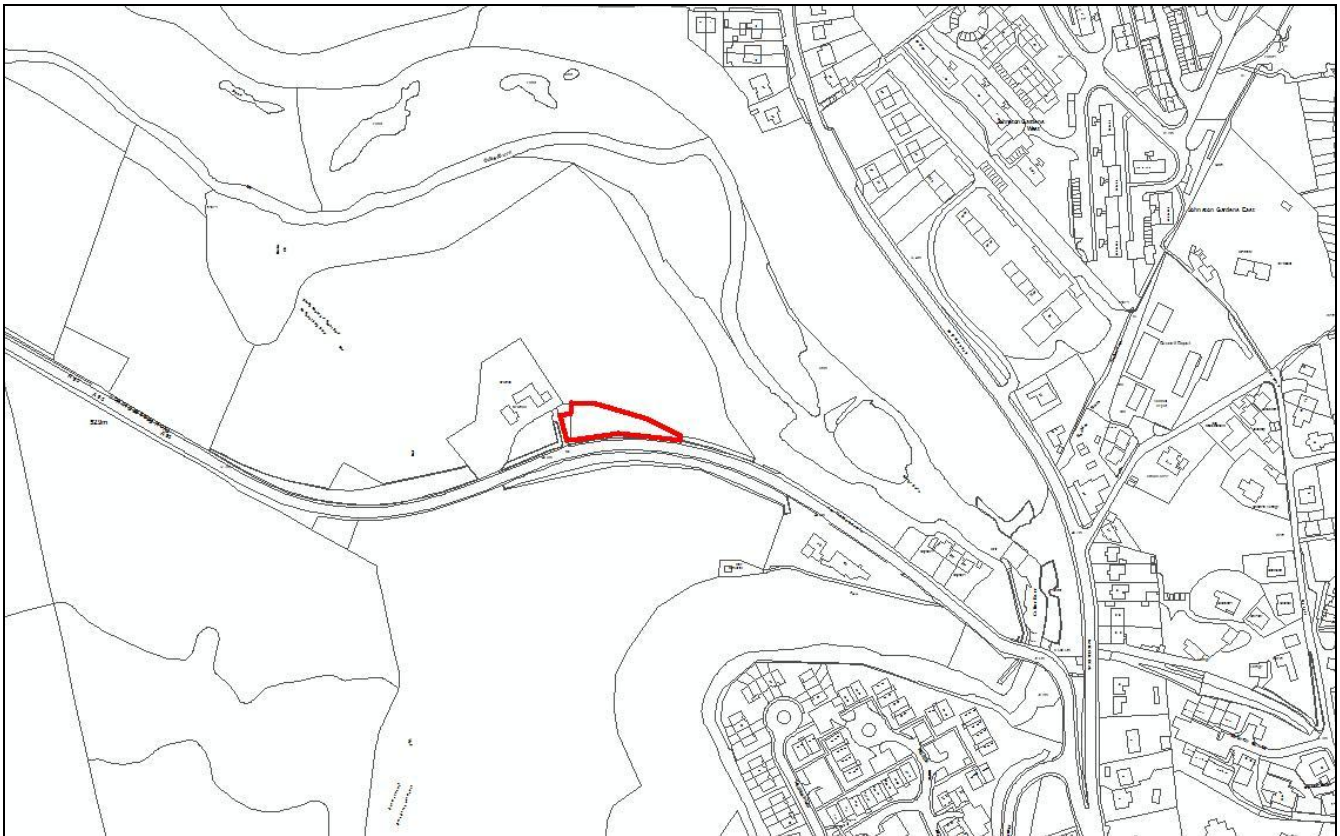


LAND ADJ TO NEWMILL, NORTH  
DEESIDE ROAD, PETERCULTER

SECTION 42 VARIATION OF CONDITION 1  
OF PLANNING CONSENTS P110663 AND  
A8/1017 TO ALLOW UNRESTRICTED  
OCCUPANCY

For: Mr Kevin McDonald

Application Type	: Section 42 Variation	Advert	:
Application Ref.	: P121357	Advertised on	:
Application Date	: 28/09/2012	Committee Date	: 21 March 2013
Officer	: Matthew Easton	Community Council	: Comments
Ward: Lower Deeside (M Boulton/A Malone/M Malik)			



**RECOMMENDATION: Approve Subject to Conditions**

## DESCRIPTION

The site is a dwellinghouse located in the Green Belt to the west of Peterculter, close to the city boundary and adjacent to the Aberdeen to Banchory road (A93). It comprises an area of ground, which is roughly triangular in shape and extends to 0.1 hectares on which a recently complete house is situated.

The house is 1½ storeys, is of traditional appearance, featuring pitched roof finished in dark grey synthetic roof slates. The walls are finished in grey granite chip on the walls.. It includes four bedrooms and an integral double garage.

The field to the rear slopes down steeply towards Culter Burn. There is a bund of approximately 3 metres in height close to the boundary with the road. The site also includes numerous small trees and bushes, which are generally located close to the boundaries. Access to the site is from the main road via a shared entrance with two adjacent houses, which are located immediately to the north west.

## HISTORY

- Outline planning permission (A4/1454) for the construction of a house on the site was refused by the Planning Committee in accordance with officer recommendation in December 2004.

The refusal was on the grounds that the proposal would (1) undermine the principles of controlling development and preventing sporadic housing in the Green Belt leading to the erosion of the character of such areas and adversely affecting the landscape setting of the City in general and the A93 road approach in particular by reason that the applicant has failed to demonstrate that the proposed house is required to provide residential accommodation for an essential agricultural worker who must be housed immediately adjacent to his place of employment or that there is a proven local economic need for the house and (2) would set an undesirable precedent for applications of a similar nature which would result in the proliferation of sporadic housing in the Green Belt leading to the erosion of the character of such areas and the landscape setting of the City.

- Detailed planning permission (A8/1017) for the construction of the existing house with integral double garage was granted a willingness to approve against officer recommendation, by the Planning Committee in February 2009. The application was referred to Scottish Ministers because it represented a departure from the development plan. Scottish Ministers chose not to call-in the application and it was therefore approved conditionally.

Condition 1 was a restriction on the occupancy of the house to a person employed in the applicant's livery/horse breeding business. The business was due to move from Chapel of Stonewood to the Newmill site and this was the applicant's justification for the new house. Conditions 2 and 3 related to the design of the house and retention of the existing bund in order to screen the house.

- A section 42 variation (100990) to alter condition 3 relating to the provision of the earth bund was approved by delegated powers in August 2010. Rather than retaining the existing earth banking, it is proposed to form a new earth banking closer to and parallel to the A93 road.

## **PROPOSAL**

The application is submitted under the provisions of Section 42 of the Town and Country Planning (Scotland) Act 1997 to allow the implementation of planning permission A8/1017 without complying with Condition 1 of that consent.

Condition 1 states that –

*“the dwelling house hereby granted planning permission shall not be occupied unless the applicant's livery/horse breeding business currently located at Chapel of Stoneywood, Bucksburn, Aberdeen has been relocated to the field adjacent to the application site, in accordance with the details and undertakings given in the appendix to the letter by PW Design (Aberdeen) Limited, dated 14th November 2008. The dwelling house shall not be occupied by any person other than a person employed full-time in the said business and the dependants, widow or widower of such a person in accordance with the planning authority's policy of restricting isolated developments in the countryside unless specifically required in connection with an essential rural occupation - in order to preserve the amenity and integrity of the Green Belt and the Council's Green Belt Policy.”*

The applicant has advised that the reason for seeking the removal of the condition is that at the time of the original application the applicant, Mr McDonald, was in a relationship with the owner of the livery/horse breeding business located at Chapel of Stoneywood. At no time did the applicant, Mr McDonald, own any of the horses of the livery business. This relationship has now broken down and as a result there is no possibility of the horses or livery business moving to the application site. The applicant's ex partner has now moved all the horse related to the business from the adjoining fields. As a result the applicant now wishes to occupy the completed house without the associated horse or livery business being located adjacent to the site.

A statement of support has been submitted by the applicants agent.

## **REASON FOR REFERRAL TO SUB-COMMITTEE**

The application has been referred to the Sub-Committee because Culter Community Council have objected to the application. Their comments are summarised below and full comments attached to this report.

## **CONSULTATIONS**

ROADS SECTION – No observations.

ENVIRONMENTAL HEALTH – No observations.

COMMUNITY COUNCIL – Culter Community Council object to the application and removal of the condition on the following grounds –

- The condition maintains control of development in the green belt in accordance with the development plan in order to prevent sporadic development which would be detrimental to the character and landscape setting of the city.
- The removal of the condition would set an alarming and unwelcome precedent for other applications of a similar nature.
- The changes to the applicants personal circumstances do not preclude him from pursuing a business similar to the one indicated was owned at the Chapel of Stonewood. e.g by leasing gazing in the area and appointing a manager to live in the house.
- The development plan already ensures that a large number of new homes will be built in the north east in the next five years.
- If the applicant does not own the business at Chapel of Stonewood which in support of his original application he indicated he did own, it raises the question of the legitimacy of planning permission A8/1017.

FLOOD PREVENTION UNIT – No observations.

## **REPRESENTATIONS**

None received.

## **PLANNING POLICY**

### ***Aberdeen Local Development Plan (2012)***

Policy NE2 – Green Belt – No development will be permitted in the green belt for purposes other than those essential for agriculture, woodland and forestry, recreational uses compatible with an agricultural or natural setting, mineral extraction or restoration or landscape renewal.

Proposals for development associated with existing activities in the green belt will be permitted but only if all of the following criteria are met:

- the development is within the boundary of the existing activity.
- the development is small-scale.
- the intensity of activity is not significantly increased.
- any proposed built construction is ancillary to what exists.

## ***National Policy and Guidance***

Scottish Planning Policy – Green Belts – The purpose of green belt designation in the development plan as part of the settlement strategy for an area is to –

- direct planned growth to the most appropriate locations and support regeneration,
- protect and enhance the quality, character, landscape setting and identity of towns and cities, and
- protect and give access to open space within and around towns and cities.

Letter from the Chief Planner on Occupancy Restrictions and Rural Housing – The Scottish Government’s Chief Planner wrote to planning authorities in November 2011 to clarify the Scottish Government’s views on the use of conditions or planning obligations to restrict the occupancy of new rural housing.

In summary the letter states that –

*“A number of issues have arisen with the use of occupancy restrictions, some of which have been exacerbated by the current economic situation. Some people have found it difficult to get a mortgage to buy a house with an occupancy restriction. Others have found it difficult to sell the house, or have the restriction lifted, when they are forced by necessity to move.”*

*“While it may be possible to include provisions in the condition or obligation that attempt to address these issues, any use of occupancy restrictions introduces an additional level of complexity (and potentially expense) into the process of gaining consent for a new house. Occupancy restrictions can also be intrusive, resource-intensive and difficult to monitor and enforce.”*

The Scottish Government believes that occupancy restrictions are rarely appropriate and so should generally be avoided.

However, the letter importantly goes on to state that *“In areas, including green belts, where, due to commuter or other pressure, there is a danger of suburbanisation of the countryside or an unsustainable growth in long distance car-based commuting, there is a sound case for a more restrictive approach.”*

It was with this intent that the occupancy restriction was attached to the planning permission for the house in 2008. The sole reason for permitting the house was to allow the equine business to move to the adjacent site and therefore in order to control sporadic housing development in the green belt it was regarded as appropriate to attach the occupancy restriction.

## EVALUATION

### Update since Deferral of Application

At its meeting on 15th February 2013, the Sub-Committee deferred determination of the application. This was in order that planning officers could consider whether a suitable condition could be drafted which would restrict the occupancy of the house to only agricultural workers.

Where a new dwellinghouse is built on an existing agricultural holding, the Council operate a policy of restricting the occupancy of the new dwellinghouses to someone who works in agriculture on that specific farm. The standard condition used by the Council in that situation is as follows –

*“the dwelling house hereby granted planning permission shall not be occupied by any person other than a person employed full-time in agriculture (as defined in Section 277 of the Town and Country Planning (Scotland) Act 1997) on the adjacent farm known as xxxxx and the dependants, widow or widower of such a person in accordance with the planning authority's policy of restricting isolated developments in the countryside unless specifically required in connection with an essential rural occupation - in order to preserve the amenity and integrity of the Green Belt and the Council's Green Belt Policy.”*

The circumstances in this case however are different in that the agricultural business did not exist at the site and it was planned to move the business there from another location.

In order for the applicant to comply with the above standard condition or any variation thereof relating to control of occupancy and to be able to live in the house without breaching it, they would need to be employed in agriculture. The applicant has already advised that the relocation of the equine business with which he was to operate with his former partner, will no longer happen due to the break down of their relationship.

Therefore planning officers have considered the likely outcomes if the existing condition was replaced with the condition above or a variation thereof.

1) With the original agricultural operation no longer being a means through which the applicant could adhere to the condition, the first option would be for the applicant to gain employment in another agricultural business in the area or to set up his own business. Both these prospects are unreasonable as the applicant may not have the necessary skills, financial capability or willingness to fulfilling either of the approaches and, furthermore, work may well not be available in this field. Forcing an individual to work in a particular field of employment could also be considered as intrusive and a matter beyond which the planning authority should reasonably be involved in.

2) If a condition were attached, the applicant would be unable to live in the house or would have to sell up and find a buyer who did work in agriculture. Again this is considered unreasonable. If the house remained empty then it would represent a wasted resource.

3) The applicant could submit an appeal to the Scottish Ministers in order to have the condition removed. When the following advice and precedents are taken into account, it is considered that the Council would have difficulty defending an appeal –

- Advice within Scottish Government Circular 4/1998 deals with the use of conditions in planning permission. It highlights that *“once an occupancy condition has been imposed, it will not be appropriate to remove it on a subsequent application unless it is shown that circumstances have materially changed and that the agricultural need which justified the approval of the house in the first instance no longer exists”*. The circumstances in this situation have clearly changed since approval of the application.
- An appeal decision (P/PPA/110/607) at Hatterseat Farm, Balmedie in 2007 found in favour of removing an occupancy restriction in similar circumstances. The reporter found that *“the house on the appeal site, without the condition, would no longer conform to the terms of the development plan, but that circumstances have materially changed; that the agricultural need which justified the approval of the house in the first instance no longer exists; and that the condition is now unreasonable and hardly capable of enforcement”*.
- Notwithstanding the requirement for a more restrictive approach to be taken in the green belt, which is acknowledged by the Chief Planner, his letter of November 2011, regarding the use of occupancy conditions highlights that *“occupancy restrictions can also be intrusive, resource-intensive and difficult to monitor and enforce.”* In this case it would be difficult to determine whether or not an occupier of the house was employed in agriculture or otherwise. When attaching an occupancy restriction, normally the Council would have the comfort that the existence of the restriction would be noted by the solicitors of potential buyers and that they are unlikely to purchase and live in the property unless they can meet the restrictions within the condition. However, in this instance the applicant already owns the property. It would be extremely difficult and intrusive to monitor the employment of the applicant and attempts to do so by the planning authority are likely to be considered unreasonable.

With this in mind it is considered that the use of the standard condition would be unreasonable, difficult to enforce and difficult to defend at appeal and would, therefore fail to comply with the requirements of conditions specified in government guidance (Circular 4/1998). Furthermore, no other form of condition is envisaged which could achieve the same aim without encountering the same fundamental difficulties. If the condition were to be imposed, it is considered highly likely that any appeal to the Scottish Ministers against its imposition would be successful. Taking the foregoing into account it is recommended that a new condition is not attached restricting the occupancy of the dwelling to those employed in agriculture.

Therefore, with no planning circumstances or material considerations having changed since the last time the Sub-Committee considered the application, the rest of the evaluation and remains as previously presented.

## **Legal Challenge to the Aberdeen Local Development Plan**

Tesco Stores Ltd has submitted an appeal to the Supreme Court against the decision of the Inner House of the Court of Session to refuse its application to quash the Aberdeen Local Development Plan. Tesco has been unsuccessful regarding both an interim suspension and a full appeal in front of three judges in the Inner House and the Council has received robust advice from Counsel that the reasoning of the Inner House is sound and there are strong grounds to resist the appeal.

Planning applications continue to be determined in line with the Aberdeen Local Development Plan but the appeal is a material consideration and the Council has to take into account the basis for the legal challenge when determining applications. It should also be pointed out that the Court indicated that, even if Tesco's arguments had found favour, it would have been inclined to quash the plan only in so far as it related to Issue 64 (Allocated Sites: Woodend...Summerhill... etc.) and that it would be disproportionate to quash the whole plan.

This evaluation has had regard to and taken into account the legal challenge. None of the policies or material considerations which apply to this application would be affected by the terms of Tesco's challenge. The recommendation would be the same if the application were to be considered in terms of the 2008 Aberdeen Local Plan.

### **Background**

The purpose of the house at Newmill was to accommodate an agricultural worker required in connection with the equine business which was to move from Chapel of Stoneywood to the site. The condition allows only a person employed full time in this specific business to live in the house.

It is accepted that the circumstances have changed and the business will no longer be relocated. However, because the condition relates to a specific business and requires the person living in the house to be employed by that business, the result of this situation is that absolutely no one can live in the house without breaching planning control.

It is considered that it was entirely reasonable and correct to attach the condition to the approval granted in 2008, in order to ensure that sporadic housing in the green belt is minimised. The legitimacy of the planning permission has been questioned by the Community Council; however the decision was based on the planning merits of the proposal at the time.

Therefore the determining factor in this application is whether it is reasonable to require the house to remain unoccupied in light of the change in circumstances.

### **Proposed Removal of Condition**

Policy NE2 (Green Belt) permits only certain types of development within the green belt. In their determination of the application the Development



Management Sub-Committee accepted the argument that the house was required in association with the proposed equine business. The house has now been built and therefore the development has taken place. Any impact the presence of the house has on the green belt and landscape setting of the city has already occurred and removal of the condition or otherwise would not change this. Therefore it is considered that Policy NE2 would be immaterial to this assessment of this application.

Guidance from the Chief Planner to planning authorities in November 2011 emphasised that occupancy restrictions in relation to houses in the country side are rarely appropriate and so should generally be avoided. However, in areas, including green belts, where, due to commuter or other pressure, there is a danger of suburbanisation of the countryside or an unsustainable growth in long distance car-based commuting, there is a sound case for a more restrictive approach.

However, circumstances have moved on and we are in the unfortunate situation where the business associated with the house will not be moving to the site. The guidance from the Chief Planner indicates that the Scottish Government see the use of such conditions as introducing an extra layer of complexity to the planning process. When conditions are causing problems for those living in the property or circumstances change, it is clear from the letter that the Scottish Government encourages the removal of such conditions.

The alternative to removing the condition is refusing the application which would result in the restriction remaining. This could result in –

(a) the house remaining vacant due to the restriction. Considerable time and effort have gone into the construction of the house and allowing this house to remain unused would be unreasonable and unsustainable, despite the fact as the Community Council highlight, there is land zoned for many thousands of other new homes within the city boundary. Furthermore, despite what the Community Council suggest in their representation, it would be irrational to require an agricultural worker to live in the house when there is no agricultural business associated with the house.

(b) the house is occupied by someone who is not employed in agriculture and a breach of planning control occurs. The Council would have the option to serve a breach of condition notice against the occupier with the potential conclusion being the forced removal of someone from their home.

However, given the advice from the Scottish Government on the use of occupancy restrictions, it is considered that the likelihood of the Council being successful at taking enforcement action would be uncertain. The reasonableness of such action by the Council would also be questionable.

Therefore taking the circumstances into account and the advice on the matter from the Scottish Government and despite the fact the removal of the condition would be contrary to the fundamental purpose of the green belt which is to control inappropriate development within its boundaries, it is considered that the

only reasonable way forward is to remove the condition, with the result that house can be occupied by anyone.

Finally, the concerns of the Community Council with regards to precedent are considered unfounded. On this occasion there are a very specific set of circumstances in which the application must be considered against. Each application is assessed on its own merits and the same outcome may not occur in similar requests at other locations.

## **RECOMMENDATION**

**Approve subject to conditions**

## **REASONS FOR RECOMMENDATION**

Taking into account the changed circumstances since the approval of application A8/1017 and the advice on the removal of occupancy conditions from the Scottish Government, it is considered that it would be unreasonable and unsustainable to require the restriction on the house to remain. Therefore the only realistic option is to approve the application and permit the removal of the occupancy condition allowing unrestricted occupancy of the house.

## **CONDITIONS**

**it is recommended that approval is granted subject to the following conditions:-**

(1) that the roof of the dwelling house hereby granted planning permission shall be finished in natural slates, details of which shall be submitted to and agreed in writing by the planning authority prior to the commencement of the development - in order to preserve the character and appearance of the green belt.

(2) that no development shall take place unless there has submitted to and agreed in writing by the planning authority a scheme detailing the retention of the earth banking along on the frontage of the site with the A93 road - in order to ensure that the proposed house is adequately screened from the A93 road, in the interests of preserving the character and appearance of the green belt.

**Dr Margaret Bochel**

Head of Planning and Sustainable Development.