

**KEY INFORMATION**

Ward Maryfield

**Proposal**

Application under Section 42 of Town & Country Planning (Scotland) Act 1997 to remove Condition 11 of planning application 09/00348/FUL which requires the footway on the east side of Mains Loan to be upgraded to adoptable standard

**Address**

James Keiller Buildings  
32 – 34 Mains Loan  
Dundee

**Applicant**

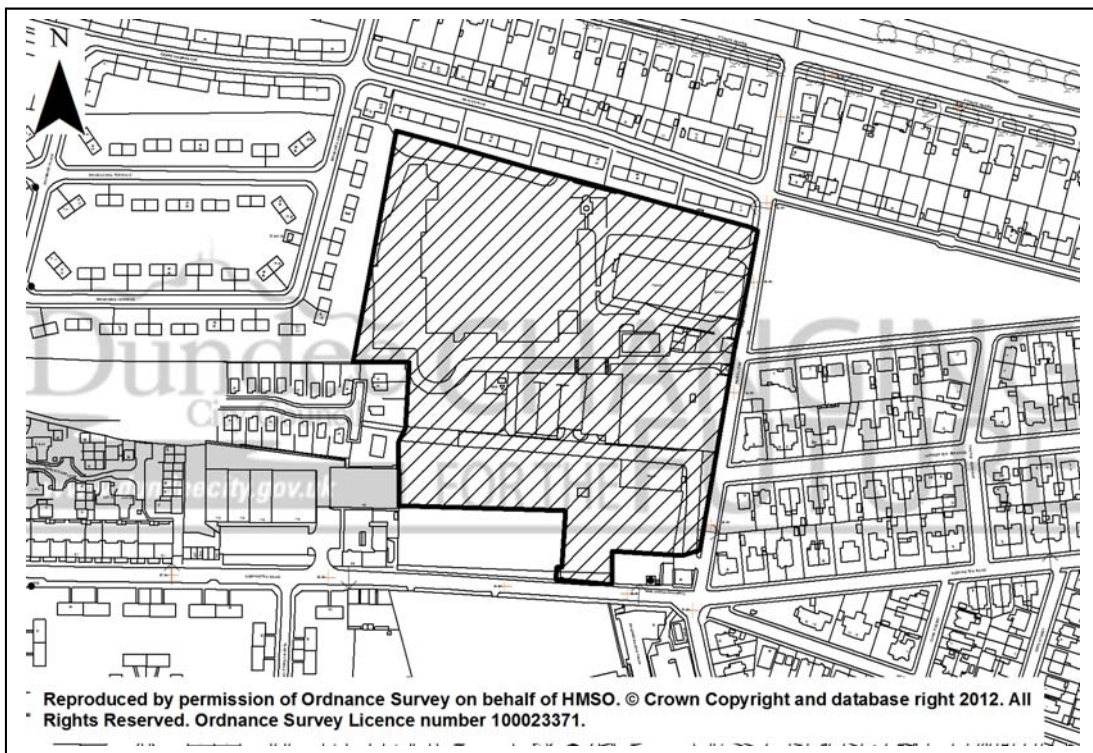
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**Agent**

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Registered 14 Nov 2012

Case Officer Paul Macari



## Removal of Requirement to upgrade Footway at Mains Loan Housing Development

The Application under Section 42 of Town & Country Planning (Scotland) Act 1997 to remove Condition 11 of planning application 09/00348/FUL which requires the footway on the east side of Mains Loan to be upgraded to adoptable standard is **RECOMMENDED FOR APPROVAL** subject to conditions. Report by Director of City Development.

### SUMMARY OF REPORT

- Permission is sought under Section 42 of the Town and Country Planning (Scotland) Act 1997 to remove Condition 11 of planning application ref: 09/00348/FUL which requires the footway on the east side of Mains Loan to be upgraded to an adoptable standard.
- The statutory Neighbour Notification procedure was carried out by the Council. This application was also advertised in the Dundee Evening Telegraph.
- No objections or representations have been received.

**RECOMMENDATION**

The proposals satisfy the requirements of the Development Plan. The material considerations support approval of planning permission. It is therefore recommended that planning permission is granted for the variation of Condition 1 and removal of Condition 11 of planning application ref: 09/00348/FUL.

## **DESCRIPTION OF PROPOSAL**

This application seeks planning permission under Section 42 of the Town and Country Planning (Scotland) Act 1997 to remove Condition 11 of planning application ref: 09/00348/FUL which requires the footway on the east side of Mains Loan to be upgraded to an adoptable standard.

Condition 11 of the planning permission, which was issued on 16 November 2009, stated:

"Prior to the development commencing on site, the footway on the east side of Mains Loan (from the junction with Clepington Road to the junction with the Kingsway) shall be brought up to an adoptable standard, at no cost to the Council, in accordance with details which have been agreed in writing by the Council."

The planning permission was for the erection of 131 dwelling houses on the site of the former James Keiller Buildings, 32-34 Mains Loan, Dundee.

Condition 11 was added at the request of an Elected Member during the Committee meeting after the Director of City Development had demonstrated in the report to the Development Management Committee for planning application ref: 09/00348/FUL that the proposed development would not adversely impact on the existing road and pedestrian traffic infrastructure surrounding the application site.

As the area of the application site is greater than 2Ha the proposals fall within the meaning of a Major Planning Application as defined by Regulation 2(1) of the Town and Country Planning (Hierarchy of Developments)(Scotland) Regulations 2008. In accordance with the Council's Scheme of Delegation, all Major Planning Applications must be reported to the Council's Development Management Committee.

Accordingly the applicant was required to undertake statutory pre-application consultation with the local community. This is evidenced in the Pre-application Consultation Report submitted as part of this application. In addition the pre-application consultation report the proposals are accompanied by a letter of support.

The application complies with the Development Plan and the procedures

for applications considered to be significantly contrary to the Development Plan do not apply.

An application under Section 42 opens up all of the conditions to consideration, not simply the condition that the applicant is seeking to have varied. The Committee can consider the other conditions if it so minded. Whilst all of the other conditions can be considered, this report concerns conditions 1 and 11 of planning application ref: 09/00348/FUL only.

## **SITE DESCRIPTION**

The site is a corner site situated on the west side of Mains Loan and north side of Clepington Road and is within the Maryfield area of Dundee. The site lies between two main arterial routes which cross the City, that is, the Kingsway to the north and Clepington Road to the south. The area to the east, west and north, up to the boundary with the Kingsway is primarily residential. There is a new residential development to the west of the site. A taxi office is located immediately to the southeast of the site. The site excludes a rectangular piece of ground fronting onto Clepington Road, which will be the subject of a future planning application for residential development. There are local shops and bus service provision located along Clepington Road. Caird Park and Caird Park Golf Course are located to the north of the Kingsway and the DISC and associated sports facilities are located a short distance to the south of the site. Stobsmuir Park, which provides open space, play areas and a boating lake is located a short distance to the east.

The site extends to approximately 5.843 hectares and was last used for business, light industry and storage and distribution. A substantial number of industrial buildings within the northern part of the site have been demolished. There are various level differences between the north and south parts of the site.

There are two accesses into the site off Mains Loan, with subsequent access onto the Kingsway and Clepington Road. The footpath on the western side of Mains Loan is illuminated and adopted. The informal footpath on the eastern side of Mains Loan is not surfaced and is not adopted by the Council.

## **POLICY BACKGROUND**

### **TAYplan Strategic Development Plan 2012**

There are no policies relevant to the determination of this application.

### **Dundee Local Plan 2005**

The following policies are of relevance:

Policy 81: Pedestrians.

### **Proposed Dundee Local Development Plan**

Policy 54: Accessibility of New Developments.

### **Scottish Planning Policies, Planning Advice Notes and Circulars**

Circular 4/1998 The use of Conditions in Planning Permission..

### **Non Statutory Statements of Council Policy**

There are no non statutory Council policies relevant to the determination of this application.

## **SUSTAINABILITY ISSUES**

There are no specific sustainability policy implications arising from this application.

## **SITE HISTORY**

Planning application ref: 09/00348/FUL sought planning permission for the erection of 131 houses on the site of the former Keiller Buildings 32-34 Mains Loan Dundee. This application was granted planning permission subject to conditions by the Development Management Committee on 16 November 2009.

During the Committee meeting concern was raised by an Elected Member that the footway on the eastern side of Mains Loan was un-adopted and that the development proposed by planning application ref: 09/00348/FUL would increase the level of footfall on Mains Loan. The Committee decided that in the interest of road and pedestrian safety it would be beneficial to upgrade the footpath on the eastern side of Mains Loan

opposite the application site to an adoptable standard. This matter was incorporated into the approval of planning application ref: 09/00348/FUL as a condition.

## **PUBLIC PARTICIPATION**

The statutory Neighbour Notification procedure was carried out by the Council. This application was also advertised in the Dundee Evening Telegraph.

No objections or representations have been received.

## **CONSULTATIONS**

No adverse comments have been received from consultees.

## **OBSERVATIONS**

Section 25 of the Act provides that an application for planning permission (other than for a national development) shall be determined in accordance the development plan unless other material considerations indicate otherwise.

## **The Development Plan**

The provisions of the development plan relevant to the determination of this application are specified in the Policy background section above.

Policy 81: Pedestrians - this policy advocates ease and safety of pedestrian access as a priority over all other modes. In particular, the implementation of measures designed to improve pedestrian safety, including footpath/ footway provision.

There is an existing adopted public footpath which follows the western side of Mains Loan immediately adjacent to the application site. This footpath provides safe access for pedestrians between Clepington Road, Kingsway and adjoining streets.

Although the upgrading of the un-adopted footway on the eastern side of Mains Loan would enhance the facilities available to pedestrians, the existing illuminated, safe and accessible footpath on the western side of the street is of a sufficient width and gradient to provide access for the existing level of pedestrian footfall as well as the additional footfall generated by the development proposed by planning application ref: 09/00348/FUL.

It should be noted that Condition 4 of planning application ref: 09/00348/FUL requires the existing footpath on the western side of Mains Loan to be upgraded and resurfaced in accordance with the Council's adoptive standards. The purpose of this condition is to ensure that the existing footpath is returned to a safe and accessible form once the development approved by planning application ref: 09/00348/FUL has been completed.

The access arrangements proposed by planning application ref: 09/00348/FUL are therefore considered to satisfy the requirements of Policy 81 of the adopted Local Plan.

It is concluded from the foregoing that the proposal complies with the provisions of the development plan.

## **Other Material Considerations**

The other material considerations to be taken into account are as follows:

### **A - Proposed Dundee Local Development Plan.**

The Proposed Dundee Local Development Plan was approved by the Council on 29 October 2012. It sets out the spatial strategy that will guide future development up to 2024 and shows which land is being allocated to meet the City's development needs. The proposed Plan contains policies and proposals covering the principal land use issues in the city and sets out where new development should and should not happen.

The proposed Dundee Local Development Plan will in time replace the Dundee Local Plan Review 2005. Approval of the Proposed Dundee Local Development Plan represents the Planning Authority's settled view as to what the final adopted content of the Plan should be. Whilst the Dundee Local Plan Review 2005 (along with TAYplan) constitutes the statutory Development Plan against which all applications require to be assessed in accordance with Section 25 of the Planning Act, the Proposed Dundee Local Development Plan has the status of a material planning consideration to be taken into account in the assessment of planning applications.

The provisions of the Proposed Dundee Local Development Plan relevant to the determination of this

application are specified in the Policy background section above.

The requirements of Policy 54: Accessibility of New Developments of the Proposed Dundee Local Development Plan is very similar to the requirements of Policy 81 of the adopted Local Plan. It has been concluded in the assessment of the proposals against the requirements of the adopted Local Plan that the development proposed by planning application ref: 09/00348/FUL satisfied the requirements of Policy 81. Therefore, the development proposed by planning application ref: 09/00348/FUL must also satisfy the requirements of Policy 54 of the Proposed Dundee Local Development Plan.

### **B - Condition 1 of Planning Application Ref: 09/00348/FUL**

Condition 1 of planning application ref: 09/00348/FUL restricts the validity of planning permission to 3 years in accordance with Section 58 of the Town and Country Planning (Scotland) Act 1997. Section 58 of the Planning etc (Scotland) Act 1997 was amended prior to the determination of planning application ref: 09/00348/FUL. The amendment to Section 58 stipulates that the validity of planning permission shall be controlled by direction as opposed to a condition. However, as the validity of planning application ref: 09/00348/FUL was restricted by condition the current application submitted under Section 42 of the Planning etc. (Scotland) Act 1997 allows the Council the opportunity to vary Condition 1 of planning application ref: 09/00348/FUL to extend the validity of planning permission for a further 3 years.

As there has not been a material change in planning circumstance since planning application ref: 09/00348/FUL was originally approved there is no reasoned justification for not allowing the validity of planning application ref: 09/00348/FUL to be extended for another 3 years.

### **C - Circular 4/1998 The Use of Conditions in Planning Permission**

The purpose of this circular is to provide guidance on the use of

conditions in granting planning permission. Circular 4/1998 stipulates that while the power to impose planning conditions is very wide, it needs to be exercised in a manner which is fair, reasonable and practicable. The Circular demonstrates that conditions that are fair, reasonable and practicable satisfy 6 tests:

- Necessary
- Relevant to planning
- Relevant to the development to be permitted
- Enforceable
- Precise
- Reasonable in all other respects

Condition 11 of planning application ref: 09/00348/FUL by virtue of its wording and "Grampian" style is enforceable and precise. However, it has been demonstrated in the assessment of the proposals against the requirements of the Development Plan that the existing pedestrian footpath on the west side of Mains Loan is of a satisfactory width, gradient and illumination to provide safe access for the existing level of footfall on Mains Loan as well as any additional footfall generated by the development proposed by planning application ref: 09/00348/FUL. Therefore, Condition 11 of planning application ref: 09/00348/FUL is not considered to be necessary, relevant to planning, relevant to the development to be permitted or reasonable in all other respects.

In this instance Condition 11 of planning application ref: 09/00348/FUL is not fair, reasonable or practicable and therefore does not accord with the guidance contained within Circular 4: 1998 The Use of Conditions in Planning Permission.

Paragraph 52 of Annex A of Circular 4/1998: The Use of Conditions in Planning Permissions suggests that, as a general rule, applications for the "renewal" of permissions should only be refused where:

- a there has been some material change in planning circumstances since the original permission was granted;
- b there is likely to be continued failure to begin the development and this will contribute unacceptably to uncertainty about

the future pattern of development in the area; or

- c the application is premature because the permission still has a reasonable time to run.

It is considered that Criteria (b) and (c) of Paragraph 52 are not relevant to the proposed removal of Condition 1 of planning application ref: 09/00348/FUL. This is because the applicant has made considerable effort and incurred significant costs to discharge the conditions attached to planning application ref: 09/00348/FUL. This is indicative that there is intention to develop the application site. In addition to this planning application ref: 09/00348/FUL has now expired.

With regard to Criteria (a) of Paragraph 52 it has been demonstrated in the assessment of the proposals against the requirements of the Dundee Local Plan Review 2005 and the Proposed Dundee Local Development Plan that there has been no material change in planning circumstances since planning application ref: 09/00348/FUL was approved. Therefore, there is no reasoned justification which demonstrates that Condition 1 of planning application ref: 09/00348/FUL should not be varied to extend the validity of planning permission for a further 3 years.

## **D - Supporting Information**

The letter submitted in support of the removal of Condition 11 of planning application ref: 09/00348/FUL argues that Condition 11 is not lawful as it does not comply with the guidance contained within Circular 4/1998 The Use of Conditions in Planning Permission.

This line of argument is endorsed by the assessment of Condition 11 of planning application ref: 09/00348/FUL against the requirements of Circular 4/1998 above.

The supporting statement demonstrates that the applicant has so far been unable to obtain ownership of the un-adopted footpath on the eastern side of Mains Loan and therefore has been unable to satisfy Condition 11 of planning application ref: 09/00348/FUL. The title to the land forming the un-adopted footpath on the eastern side of Mains Loan is fractured between the owners of the adjacent

properties and former owners who may not have passed the title on to more recent purchasers of the adjoining houses. As the applicant, is unable at this time to satisfy the requirements of Condition 11 of planning application ref: 09/00348/FUL the remainder of the permission which involves the erection of 131 houses cannot be implemented.

It should be noted that the application site is heavily contaminated by historic uses. The development proposed by planning application ref: 09/00348/FUL presents an opportunity for the decontamination of the site and the erection of housing which is a development type that is compatible with the suburban residential environment surrounding the application site.

The omission of Condition 11 of planning application ref: 09/00348/FUL has been assessed against the requirements of the Development Plan above. It has been concluded that the level of additional footfall generated by the proposed development will not be such that the existing adopted footpath on the western side of Mains Loan will be unable to provide safe access to and from Mains Loan. In this instance the omission of Condition 11 of planning application ref: 09/00348/FUL will not impact on connectivity, pedestrian safety or ease of access for pedestrians on Mains Loan.

It is concluded from the foregoing that the material considerations support the grant of planning permission for the variation of Condition 1 and removal of Condition 11 of planning application ref: 09/00348/FUL.

## **Design**

This application raises not issues of design.

## **CONCLUSION**

The proposals satisfy the requirements of the Development Plan. The material considerations support approval of planning permission. It is therefore recommended that planning permission is granted for the variation of Condition 1 and removal of Condition 11 of planning application ref: 09/00348/FUL.

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**RECOMMENDATION**

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It is recommended that consent be GRANTED subject to the following conditions:

- 1 Condition 1 is amended as follows: the development hereby permitted shall be commenced by no later than 1 January 2016.
- 11 Condition 11 is deleted.