

5. **LRB 415** – Notice of Review Against Refusal Full Planning Permission for Change of Use of Public Open Space to Garden Ground, Alterations to Dwellinghouse and Erection of Double Garage Store at 17 Hilltop Gardens, Westhill, AB32 6PN – Reference: APP/2017/2765

- (ii) Agent's Response to Additional Information Requested



**FURTHER WRITTEN SUBMISSION**

on behalf of

**MR AND MRS GROVE**

relative to the the review of the refusal of planning permission for the change of use of public open space to garden ground, alterations to dwelling house and erection of double garage/store at 17 Hilltop Gardens, Westhill, Aberdeenshire

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## INDEX

		Page No.
1	INTRODUCTION	1
2	HOW DID THE PLANNING SERVICE IDENTIFY THE AREA OF LAND AS " <i>PUBLIC OPEN SPACE</i> " AND HOW DID THEY COME TO THAT CONCLUSION?	2
3	WHETHER THE DECISION FOR THIS APPLICATION HAD BEEN INFLUENCED USING INCORRECT INFORMATION?	3
4	CONCLUSION	4

## **FURTHER WRITTEN SUBMISSION**

on behalf of

### **MR AND MRS GROVE (“the Applicants”)**

relative to the the review of the refusal of planning permission for the change of use of public open space to garden ground, alterations to dwelling house and erection of double garage/store at 17 Hilltop Gardens, Westhill, Aberdeenshire

### **LRB Reference: LRB415**

#### **1 INTRODUCTION**

- 1.1 The Local Review Body met on 25 May 2018 to consider the Review of refusal of planning permission for the change of use of public open space to garden ground, alterations to dwelling house and erection of double garage/store at 17 Hilltop Gardens, Westhill, Aberdeenshire, which Review was submitted on behalf of Mr and Mrs Grove on 15 March 2018.
- 1.2 In accordance with Regulation 13(2) of the Town and Country Planning (Schemes of Delegation on Local Review Procedures) (Scotland) Regulations 2013, the Local Review Body determined that further information was required from the Planning Service to enable them to determine the Review and that further information should be provided by means of Written Submissions and an inspection of the land to which the Review relates.
- 1.3 By email dated 25 May 2018 the Committee Officer to the Local Review Body advised that the Local Review Body had requested a response from the Planning Service to the following specific questions:
  - (i) How did the Planning Service identify the area of land as “*public open space*” and how did they come to that conclusion. Reference to the Report of Handling, Section 11, paragraph 5.
  - (ii) An error was identified in the Report of Handling Section 2 where the Appointed Officer had referred to historic planning permission from 1982 and the Local Review Body queried whether the decision for this application had been influenced using incorrect information.
- 1.4 By letter dated 7 June 2018 the Committee Officer provided a copy of the response from the Planning Service answering the specific questions.
- 1.5 In accordance with Regulation 15, this is the further Written Submission on behalf of the Applicants in response to the answers provided by the Planning Service to the Local Review Body.

2 **HOW DID THE PLANNING SERVICE IDENTIFY THE AREA OF LAND AS “PUBLIC OPEN SPACE” AND HOW DID THEY COME TO THAT CONCLUSION?**

2.1 The Planning Service in their response to the Local Review Body advised that paragraph 5 of Section 11 of the Report of Handling “*confirms*” that the area of land in question is an area of open space for the residential development in which the site sits. The Local Review Body had asked the Planning Service to identify how they had come to the conclusion within paragraph 5. The Planning Service has failed to provide any evidence, by way of plan or other document, which shows the area identified as public open space.

2.2 This is in contrast to the Applicants who have provided copies of their title deeds showing the land included within their feu. As highlighted in the Review Statement (paragraph 2.14) the Applicants provided the Planning Officer with copies of their title deeds in 2016 and the status of the land was also highlighted in correspondence with the Planning Service in 2017 (paragraph 3.2). At no point has the Planning Service been able to provide evidence that the land is identified anywhere as public open space.

2.3 The Planning Service’s response seeks to justify their conclusion that the land is public open space, which was the second part of the Review Body’s question, but without any evidence to support their findings, it is submitted that no weight can be attached to their argument. In any event, the justification put forward by the Planning Service does not stand up to scrutiny.

2.4 The Service argues that the land lies beyond the domestic curtilage and is therefore not considered to be private garden ground. This response completely ignores the terms of the Disposition of the land from CALA Homes (Aberdeen) Ltd to the original owner in 1984 (Document GRO8) which clearly demonstrates that the area was sold by the Developer as part of the domestic property. It also ignores the terms of the Deed of Conditions which applies to the property (Document GRO12) and the obligations imposed on the Applicants under Clauses THIRD and FIFTH to use the land solely for a private dwelling and garden. This obligation prevents public use of the land.

2.5 Furthermore, the Deed of Conditions prohibits the erection of boundary walls or fences around the land by the house owners without the prior written consent of the Developers. The Developers did not want each garden fenced off from the road.

2.6 The response from the Planning Service professes that the physical appearance of the piece of land suggests that it would be free to use by members of the public at any time because there are no physical barriers to the site, such as a fence. As noted above, proprietors were prohibited from erecting fencing around their property. The lack of a fence does not mean that the land is free for use by members of the public.

The Planning Service cannot claim the land as public open space simply based on its lack of fencing.

- 2.7 The Service has also ignored the case law on the determination of curtilage (as set in the Review Statement in paragraphs 6.25-6.30 and Documents GRO 16 and 17) which does not require ground to be marked off or enclosed in any way to be considered as part of the curtilage of a house or building.
- 2.8 It should also be noted that the Planning Officer is adopting a completely different approach from the Council who granted full planning permission for the erection of a fence (retrospective) at nearby 24 Hilltop Gardens, Westhill, Aberdeenshire (Document GRO23). Prior to the erection of the 1.8m high vertically boarded hit and miss timber fence the land attached to No. 24 was also unfenced. There is no suggestion in Report of Handling on that application that the lack of a boundary fence meant that the land in question was public open space and free to be used by members of the public at any time. It is inequitable for the Applicants to be treated differently.
- 2.9 The Planning Service's comment that the area of land "*also contributes to the open space provision for this development*" is simply wrong if that is a reference to it being public open space as it was sold to a private householder to be used as garden ground by the proprietors as noted above. However, unlike No. 24 Hilltop Gardens, the Applicants do not propose to erect a fence around the land which adjoins the pavement and as such, their garden with its shrubs and trees will continue to have an open "feel" and as such will continue to contribute to the overall development's "*sense of place*" as advocated by the Planning Service.

### 3 **WHETHER THE DECISION FOR THIS APPLICATION HAD BEEN INFLUENCED USING INCORRECT INFORMATION?**

- 3.1 The Planning Service advises that Section 2 makes no reference to a 1982 application. Rather it refers to 3 planning application from 1995, 2003 and 2016. This is factually correct. There appears to be an error in the question.
- 3.2 It is the Applicants' position that the Report of Handling should have referred to planning consent reference G/82/P/721 as it is pursuant to that consent that number 17 Hilltop Gardens was constructed by CALA Homes (Aberdeen) Ltd in 1983. Instead, the Report of Handling refers to planning consent 95/1483/01 for the erection of 92 dwelling houses and access roads at Gullymoss, Westhill in the planning history for the site. The Service now admits that despite listing this permission, it has no relevance to the application site. Despite that error, the Service claims that it did not use that incorrect permission in the determination of the Applicants' application. Once again, this claim does not stand up to scrutiny.
- 3.3 At various sections of the Report of Handling there are references to No 17 being "*within a large residential estate*", forming "*part of the open space network within*

*the development”, that “the area is indeed ‘open space’ and that it lies beyond the domestic curtilage of number 17 Hilltop Gardens. This is confirmed by the established property boundary wall as well and the planning history of the site” and that the open space is “consistent with the maps and planning history available relating to the site”.*

- 3.4 In paragraph 5 of Section 11 the Report states *“although since the original application for housing development, a change in ownership has occurred, this does change the role of this area as open space*, Further reference to the planning history for the property at No. 17 is made in the penultimate paragraph of Section 11 of the Report.
- 3.5 Since the planning history only mentions the 1995 permission for a large residential development and not the 1982 permission, it is disingenuous of the Planning Service to now claim that the Report was not referencing the 1995 consent when referring to the original permission establishing the land as open space.
- 3.6 The Planning Service has failed to provide any evidence to show that the area was established as public open space in the original development.
- 3.7 In contrast, it has been demonstrated by the Applicants, through the production of the documents in support of the application, and submitted as part of this Review, that the application site has always formed part of a domestic property and as such forms the garden ground effeiring to No. 17.

#### 4 **CONCLUSION**

- 4.1 The Planning Service has failed to provide any evidence to support their assertion that the area of land is public open space. Their justification for concluding that the land is public open space is flawed and ignores case law on curtilages.
- 4.2 In the absence of any evidence to demonstrate that the land is public open space, the Local Review Body is respectfully invited to prefer the Applicants’ detailed submissions, supported by documentary evidence, that the application site forms part of their garden ground and as such, the Review should be upheld and planning permission granted.

BURNES PAULL LLP  
Solicitors, Aberdeen

AGENT FOR THE APPLICANTS

19 June 2018