

Item: 4.1

Planning Committee: 8 March 2023.

Erect a Three Storey Block of 15 Flats and Alter Access, with Associated Car Parking, Landscaping and Infrastructure at Great Western Road Car Park (Land Near), Kirkwall.

Report by Corporate Director for Neighbourhood Services and Infrastructure.

1. Summary

1.1.

It is proposed to erect a block of 15 flats on a site at the junction of Great Western Road and Burnmouth Road, Kirkwall. The principle of the development is acceptable, as the development of a site within the settlement boundary. Adequate details have been submitted in respect of access and parking, management of flood risk, surface water drainage and protection of infrastructure. The design is considered appropriate, in the context of surrounding development and the relevant development brief. However, the application is subject to objection from Environmental Health on noise grounds, connected with the proximity of 'Fusion' nightclub which, although currently not operating, retains planning status as a music venue. A technical solution exists; however, the applicant has confirmed that the development should be determined as submitted. The application has been called in by two Councillors and, in accordance with the Scheme of Administration, the application must be reported to Committee for determination. No public representations have been received. Based on the Environmental Health objection and potential legal implications, the application is recommended for refusal.

Application Number:	21/266/PP.
Application Type:	Planning Permission.
Proposal:	Erect a three storey block of 15 flats and alter an access, with associated car parking, landscaping and infrastructure.
Applicant:	Orkney Builders Limited.
Agent:	Bracewell Stirling, 5 Ness Bank, Inverness, IV2 4SF.

1.2.

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

2.1.1.

Roads Services initially recommended provision of additional information:

“Roads Services do not object to this development proposal but there are concerns which are noted below and should be dealt with by either requesting further information, amendment of drawings, addition to design statement or by appropriate conditions being applied.

- The proposed development in its current form is to be partially built upon the existing Great Western Road, while Roads Services do not object to this there could potentially be land ownership issues that will need to be addressed as well as the loss of public infrastructure. The developer should therefore provide details of any proposed public realm works that will be carried out to offset the loss of the area of public road required for this development.
- While drawing 4742-02-03 Rev B Proposed Site Layout inc. Roof Plan indicates that there will be ten parking spaces provided within the boundary of the site, there is insufficient manoeuvring space provided to enable the two parking spaces adjacent to the Ayre Hotel Annex to be used effectively. This therefore reduces the number of parking spaces being provided to eight when it would normally be expected that fifteen parking spaces is provided for a development of this nature.
- There is a bin storage area indicated on the site plan provided but there is no bin collection point identified. Given the location of the bin store and its distance from the adopted public road all waste and recycling bins must be presented at the side of the public road, however there is a concern that this could have a negative impact given the proposals to narrow the existing public road. Consideration must therefore be given to providing a waste collection point closer to the adopted public road.
- The site plan provided shows a new footway being constructed across Great Western Road at its junction with Burnmouth Road, while in the longer-term Roads Services would not object to this proposal it is considered that it is not required at this time and should be removed from this development proposal. As a result of removing the section of footway the proposed tree adjacent to the junction would also have to be removed at this time.”

2.1.2.

Following amendments in April 2022 to the site layout and alterations to the public road and footway surrounding the site, Roads Services confirmed no concerns regarding access, parking provision, disabled parking bay, or bin storage. It was also confirmed that public realm works, tree planting within the street, and public parking provision were acceptable, as well as the extent of the existing public road included in the application site. Surface water drainage requirements were separately assessed by Engineering Services.

2.2. Scottish Environment Protection Agency

2.2.1.

“Unfortunately, we object to this planning application on flood risk grounds. We will be pleased to review this objection if the issues detailed in the attached Appendix, which contains further detailed advice, are adequately addressed. “

2.2.2.

Following submission of additional information, SEPA was reconsulted and provided an updated response in March 2022, confirming no objection.

“We have reviewed additional information provided and we are now in a position to remove our objection to the proposed development on flood risk grounds.

We previously objected to this application as based on our understanding of flood risk in the area (from the Strategic Flood Risk Assessment undertaken for OIC in 2010) the site and surrounding area would be at risk of flooding during a 1 in 200-year event from combined surface water and small watercourses and no flood free access and egress could be provided.

We have now been provided with updated information by OIC from the Scottish Water s16 model outputs for Kirkwall. This updated information indicates that the site ground levels are around the same level as the predicted flood level and flooding will occur to a depth of up to 0.3m on Great Western Road adjacent to the development. However, there is flood free access to Burnmouth Road and the finished floor levels of 2.9mAOD will provide appropriate freeboard above the predicted flood level of 2.2mAOD.”

2.3. Engineering Services

The Engineering Services consultation response was received between the two SEPA consultation responses.

“We note the objection of SEPA to the proposed development due to surface water flood risk.

The latest detailed surface water modelling for Kirkwall that OIC holds is the 2019 Section 16 model by Scottish Water. This modelling took the most up to date information on the drainage system available at that time and, along with other scenarios, used rainfall data from the October 2006 rainfall event (assessed as being a 1:208 year event at that time).

The worst outcome for Great Western Road/Burnmouth Road from the 2019 modelling was obtained when the 2006 rainfall data was applied. However, the outputs for this model suggest that Burnmouth Road adjacent to the proposed development would not be flooded away from the junction with Great Western Road.

The S16 model predicts that Great Western Road adjacent to the eastern edge of the main building would flood to depth of up to 0.3m but that this would get

progressively shallower towards the southern end of the development near the proposed car park access.

Information held by OIC does not therefore suggest that the development would be surrounded by surface water flooding in an event with a return period of around 1in200 years. We do not object to the proposed development.”

2.4. Scottish Water

“Scottish Water has no objection to this planning application...”

2.5. Environmental Health

2.5.1. 27 July 2021 – Noise

“Having reviewed the planning application, it is noted that the proposed development is located within close proximity to a storage yard, and the rear entrance to the Fusion Night Club.

There has been no Noise Impact Assessment (NIA) submitted in support of the application and therefore a decision cannot be made on the noise impacts of the local environment on the proposed development.

Environmental Health therefore request that an NIA is submitted to the planning Authority for consideration.

- The NIA should consider, as a primary noise source, noise from the Fusion Night Club due to the rear doors being opened allowing musical sounds to escape and having a smoking area with revellers on the street directly opposite the proposed site during key sensitive times of the night. It is suggested that an assessment of musical breakout noise is undertaken that assesses this noise to the proposed noise sensitive development using octave band frequencies between 63Hz to 8kHz with criteria of meeting NR20 in living rooms and NR15 in bedrooms. NR15 is considered similar to inaudibility.
- The NIA may also wish to consider the building yard to the east which may impact the development from yard operations, which may occur in the early morning. This type of noise and road traffic noise can be assessed using the criteria found in BS8233:2014 and the WHO Guidelines for Community Noise:1999.

Should the developer choose not to submit an NIA for further consideration then Environment Health have no option but to recommend REFUSAL of this application.”

2.5.2. 4 November 2021 - Contaminated Land

“Further to our original response in July 2021, we wish to pass further comment following the submission of the Combined Phase 1/Phase 2 Site Investigation Report which was carried out following a request from Orkney islands Council Building Standards Section for an investigation to be undertaken. The reason for the request via this route, and not by planning condition as would usually occur is because unusually the applicant has submitted a building warrant for the proposed development prior to the submission of a planning application.

Having read the report, there are a small number of minor amendments that will need to be addressed and these will be directly communicated to the applicant in due course. However, I am in agreement with the conclusions and recommendations that have been made, and therefore should planning consent be given to this development it is recommended that the following condition is applied:

No development shall commence until a detailed contaminated land remediation method statement has been submitted to, and approved in writing by, the Planning Authority, in conjunction with Environmental Health. This remediation method statement shall follow the recommendations of 'Report Reference: ESL2173 - Combined Phase 1/Phase 2 Site Investigation: Land at corner of Burnmouth Road & Great Western Road, Kirkwall, Orkney, KW15 1QY' previously submitted and shall detail the extent and method(s) by which the site is to be remediated, to ensure that unacceptable risks are not posed to identified receptors at the site and shall detail the information to be included in a validation report. The remediation method statement shall also provide information on a suitable discovery strategy to be utilised on site should contamination manifest itself during site works that was not anticipated. Thereafter, the Planning Authority shall be provided not less than two weeks prior written notice of the commencement of the remediation works on site, and the works shall be undertaken wholly in accordance with the approved details."

2.5.3. 26 May 2022 – Noise

"Following the submission of the Noise Impact Assessment that was submitted on the 3 May 2022 in support of the above application, Environmental Health have now reviewed this report.

The site is located adjacent to the rear entrance to the Fusion Night Club. This is considered to be the main concern for the noise impact assessment. There are two potential noise sources from this nightclub. A) Music noise breakout from the dancefloor via the rear fire exit doors used to allow access to a smoking area. B) Patron noise from people talking whilst smoking or waiting outside the rear access doors of the nightclub. Noise emanating from the front of the nightclub will not be of significance in relation to this development site.

The NIA covers nightclub-related noise and other general noise from the area not associated with the nightclub. The general noise impact assessment of ambient noise would seem to be acceptable in terms of its methodology and conclusions. However, we do have several comments to make regarding the nightclub assessment, which makes up the remainder of this review.

In response to the report, the following comments are made:

It is not considered appropriate to use the BS8233:2014 internal ambient noise levels directly for the assessment of musical based sound. It is not considered a steady anonymous noise and instead has specific characteristics that make it distinguishable with tonal components that could attract attention when the source is heard.

If the internal noise level was set at 30dB, as per BS8233:2014, this would permit an internal noise level similar to having a quiet radio on inside the residential dwelling. This is not acceptable and could lead to future complaints.

For this reason, it is the opinion of Environmental Health to adopt more stringent criteria to avoid the potential of future residents complaining and subsequently negatively impacting upon the effective operation of the nightclub. NR15 has been chosen to provide reassurances that music-based noise, including dominant bass frequencies, will be at a noise level that will reduce the likelihood of complaint to a minimum. This service cannot support the use of less stringent criteria.

However, other noise sources, not related to the nightclub, can be assessed to BS8233:2014.

Patron noise from a smoking area is more complex to quantify in terms of assessment criteria. So, does need to be open to opinion. BS8233 states that individual noise can be dealt with by LAmax and the WHO states that sleep disturbance occurs when the LAmax exceeds 45 dB. It could be argued that the underlying hubbub of conversation is steady and so could be assessed to BS8233:2014's LAeq of 30 dB at night, although based on a 1hr time period not 8hr. However, shouting and screaming cannot be quantified as typical, and instead should be controlled by way of noise management from the nightclub; this may affect the Ayre Hotel to a similar degree.

The NIA's assessment of music noise from the nightclub assumes that out of three sets of doors that separate the dancefloor from the outside during operation, only one will be kept closed. In theory, to enable this; at least two sets of doors would need to be kept closed, as when one is opened to pass through there is still another closed. If one door is closed and this door is opened, then there are no doors closed and musical sound can pass directly outside. Also, there is no factual evidence for this assumption from an active night at the nightclub; we know the nightclub is currently closed, but discussion may be required with the owner to confirm.

Furthermore, the assessment of the closed door is based on the door being identified as a "Shadbolt's 'AG 20 37dB Shadmaster 60 54mm non-fire/FD30/FD60' door". This is quite a high-performance door with a Rw of 37 dB. To utilise this door in the assessment, there must have been some dialogue with the nightclub to identify this door specification. Evidence should be provided.

To allow an assessment to be made based on the potential for doors to be opened and closed, we consider that the NR level predicted using a 5-minute sample period would be acceptable i.e., if the door is opened 6 times in 5 minutes and it takes 10 seconds for the door to open and then close, this would equate to $6 \times 10s = 1$ minute of open time verses 4 minutes of closed time. This assumption would allow an overall noise level, corrected to 5 minutes, to be established and include both open and closed doors.

It is recommended that the assessment is updated and based upon musical noise being assessed against NR15 (5-minute period). Mitigation in the form of double glazing to reduce external noise to compliant internal noise levels with ventilation

provided by other means would be considered acceptable. The report should not be restricted to the glazing preferred to be fitted by the design team on the project, it should be up to the acoustic consultant to recommend the appropriate specification to permit compliant internal noise levels.

In conclusion, it should be noted that the success of this application is wholly dependent on the residential development having fresh air delivered by MVHR and not using open windows for ventilation. Provided the Planning Authority are comfortable that ventilation to the flats can be provided by other means than an open window, this would be the first step to allow residential development on to the site as open window ventilation would instantly restrict any form of residential development on the site.

Provided this is acceptable, the report would need to be updated and assessed against the NR15 (5-minute) based on the potential of open and closed doors. Confirmation should be obtained to establish what the sound insulation performance would be for the closed-door scenario or if only closed doors was assessed. Mitigation recommendations should be provided by the acoustic consultancy to achieve compliant internal noise levels.”

2.5.4. 3 November 2022 – Noise

“Having assessed the amended report that was submitted in early September, please see below our comments and recommendations:

We are in agreement, that the assessment demonstrates that, assuming a glazing and ventilation strategy implemented onsite meets those specified in the report, the internal noise levels will meet the assessed NR Level criteria.

It should again be noted that this can only be achieved by having fresh air delivered by MVHR and not using open windows for ventilation. The assessment confirms that the internal noise levels cannot be met fully with the windows open. Unfortunately, it is also stated in the report that their recommendations do not extend to having fully sealed windows, rather that ‘opening the windows would compromise the internal acoustic environment and that it would be the choice of the resident based on their individual circumstantial requirements’

If the windows are able to be opened thus compromising the internal noise levels, then this will not be acceptable irrespective of whether it was the residents decision or not. Provided the Planning Authority are comfortable that ventilation to the flats can be provided by other means than an open window, then it will have to be a condition of planning that sealed window units are used. Furthermore, irrespective of whether the windows are sealed or not the report is clear that the internal noise level assessments do not meet the NR internal noise level criteria as set out within the assessment using the glazing already suggested by the applicant. The applicant should therefore submit details of appropriately specified windows as detailed in the report in order to achieve the required internal noise levels.

To ensure that the proposed development achieves the internal noise levels as per the noise assessment, should permission be granted a condition requiring pre-

completion testing to be undertaken to show compliance prior to the first occupation of the development should be attached.

Environmental Health can provide the suggested wording for such a condition in due course.”

2.5.5. 22 November 2022 – Noise

“Further to recent correspondence provided by Development Management that the applicant does not wish to specify fixed (sealed) windows, and wishes to retain opening windows on the North and East elevations, Environmental Health wish to reiterate the following comments and recommendation:

The assessment confirms that the internal noise levels cannot be met fully with the windows open. If the windows are able to be opened thus compromising the internal noise levels, it is not acceptable that the responsibility for the control of a potential noise nuisance is placed in the hands of those who will be affected, i.e. the residents of the proposed flats.

Therefore, Environmental Health OBJECT to the above application, on the grounds that the residential amenity of the proposed development will be affected by the existing night club.”

2.5.6. 15 February 2023 – Noise

“In response to your recent re-consultation on the above proposed development, and the need for detailed clarification on the reasoning for Environmental Health’s continued objection to this proposal, we offer the following comments:

Complaints about noise nuisance can place particular pressure on music venues, potentially leading to additional costs for them to remedy negative impacts, or to cease certain operations such as live music, thus potentially endangering the viability of a business altogether. Sometimes these complaints can be generated as a result of new development being carried out in the vicinity of existing music venues.

Planning policy clearly places the responsibility for mitigating any detrimental impact of noise on neighbours with those carrying out the new development or operations. So for example, where a new residential property is to be developed within the vicinity of an existing music venue, the responsibility for mitigating adverse effects should sit with the housing developer. Conversely, if a new music venue is proposed, or an existing venue is to be extended, that responsibility would be with the venue operator.

In this particular case, as per my correspondence dated 22 November 2022, it is clear from the noise impact assessment that was submitted in support of this application, that internal noise levels cannot be met fully with the windows open. If the windows are able to be opened thus compromising the internal noise levels, it is not acceptable that the responsibility for the control of a potential noise nuisance is

placed in the hands of those who will be affected, i.e. the residents of the proposed flats.

The applicant has been advised that a way of mitigating against this impact is for fixed (sealed) windows to be installed (in compliance with the relevant building standards) on the North and East elevations, which they have declined to do.

If the Council as the Planning Authority, were to side with the applicant and approve the development while allowing the retention of opening windows on the North and East elevations contrary to the advice provided by Environmental Health then you will wish to be aware of the following possible repercussions:

a) If Environmental Health were to receive a noise complaint from one of the proposed flats for noise relating to the neighbouring nightclub, we (that is to the say the council) would be required by law to investigate. On investigation if it is deemed that there is a "statutory nuisance" due to excess noise form the nightclub impacting the flat, we would be required under section 80 of the Environmental Protection Act 1990 to serve a notice to abate the noise. Failure to do this would lead to the council being accused of not meeting a statutory duty, and resultant criticism and reputational damage arising from any Ombudsman intervention.

b) In order to abate the noise this may lead to significant/additional costs to the existing nightclub operators to remedy negative impacts (assuming that they are able to do so). Given that it would have been decisions made by the Council, that has allowed this circumstance to occur, then the nightclub operators may have a strong civil case against the council, which in turn could lead to costs and damages being awarded along with consequential reputational damage. As a business the nightclub would also be entitled to raise a "best practicable means" defence to counter any action, and it maybe that an element of that defence would be that they relied on the application for their nightclub going through the planning process.

c) A mitigative action that could potentially be explored as an alternative to fixed (sealed) windows, would be for a Planning application be submitted to Development Management for an amendment to the nightclub where access via the rear door which is having a direct impact on the development, restricting it for fire escape use only. This will then mitigate against any break out noise form the venue. However, this would need to be addressed with the nightclub owner and thus can only really be considered a "management control" as it would rely upon the management of the premises to ensure such a condition was complied with, and any breach of such a condition would need to be considered against the current planning enforcement protocols, which may deem it not expedient to enforce."

3. Representations

None.

4. Relevant Planning History

None.

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:
 - The Spatial Strategy.
 - Policy 1 – Criteria for All Development.
 - Policy 2 – Design.
 - Policy 5 – Housing.
 - Policy 8 – Historic Environment and Cultural Heritage.
 - Policy 13 – Flood Risk, SuDS and Waste Water Drainage.
 - Policy 14 – Transport, Travel and Road Network Infrastructure.
- Supplementary Planning Guidance: Central West, Kirkwall Development Brief (2011).
- National Planning Framework 4.

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 Lord’s 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 Lord's 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.

The development is contrary to Policy 23 of NPF4 which confirms that development which is likely to raise unacceptable noise issues will not be supported.

6.8.

Additional legal comment has been given within the body of the report where required.

7. Assessment

7.1. Background and principle

7.1.1.

The application site is located on the junction of Great Western Road and Burnmouth Road in Kirkwall. Formerly the Scarth Centre, the site is currently vacant following the demolition of the building, with only sections of the boundary wall retained. The application site includes the former footprint of the building and a section of Great Western Road.

7.1.2.

Policy 5A: Housing in Settlements notes that applications for housing development in redevelopment sites are supported where they accord with the relevant settlement statement and any adopted Development Brief. Specifically, there is a presumption in favour of appropriate residential development outwith allocations where it consists of infill development, or the redevelopment of derelict land. Therefore, as development of derelict land within the settlement boundary of Kirkwall, the principle of the development is acceptable.

7.1.3.

The site is included within the extent of the Supplementary Planning Guidance (SPG): Central West, Kirkwall Development Brief (2011), in the 'Scarth Centre site' triangular parcel of ground between Great Western Road to the east, Burnmouth Road to the north and Burgh Road to the south. The development brief requires development to establish positive facades to Great Western Road and Burnmouth Road and connect with the proposed new pedestrian route through the 'Jewsons Yard' site. The scale, massing and form of new development must be carefully designed to ensure that it responds effectively to the existing townscape. In terms of design and layout, the development is considered compatible with the development brief.

7.2. Proposal

7.2.1.

It is proposed to erect a three-storey block of flats, immediately on the building line at the back edge of the footway of Great Western Road and Burnmouth Road, including the chamfered corner similar to the corner detail of the former Scarth Centre building, as indicated in the Site Plan attached as Appendix 1 to this report. The building would be finished with a light render, dark grey aluminium-clad windows and a slate roof with skewers at the gables, taking a similar design approach to the detached annex for the Ayre Hotel, located immediately to the west on Burnmouth Road. The building would ensure a positive façade to both streets as required by the development brief.

7.2.2.

The building line is approximately three metres further east than the former Scarth Centre building, into Great Western Road. A new footway would be formed, in addition to various street works including a build-out, crossing point and street tree planting to the north of the building, and amended on-street parking to the east of the building on Great Western Road.

7.2.3.

Other works are proposed within the application site boundary, including an area for surface water drainage, bin storage and collection points, vehicle parking including a disabled parking bay and an electric vehicle charge point, and shared hard and soft landscaping.

7.3. Design

7.3.1.

It is considered that the design adequately meets the terms of the Central West, Kirkwall Development Brief (2011), and the finalised plot layout and building design is in line with advice provided by the planning authority. With reference to historic buildings and other relatively recent development in the vicinity, the development is sympathetic to the character of the local area, would have a positive effect on the appearance of the area, and by virtue of the street works, would be appropriately connected to pedestrian routes and would encourage pedestrian access, all as required by Policy 2: Design. The proposed building is large but is seen in the context of the Kiln Corner flats, Fusion nightclub, the Ayre Hotel annexe and the Ayre Hotel main building, and can be accommodated within the streetscape in that location. The form matches that of nearby buildings, of a relatively long narrow plan, and the proportions includes a steeply pitched roof typical in the vicinity. The proposed materials and way in which the plan addresses both street frontages are critical in the application being considered acceptable.

7.3.2.

The Ayre Hotel and Fusion nightclub (a former fish processing plant) are both category B listed buildings. In terms of scale, form, materials and relationship to

other existing development, it is considered that the development is designed and sited to preserve the character and setting of listed buildings, in accordance with Policy 8: Historic Environment and Cultural Heritage.

7.4. Access and Parking

Roads Services has no objection to the application, in terms of works within and surrounding the site. The parking and footway design is to the appropriate standard. Roads Services is satisfied with the proposed parking provision, noting that the development be subject to an electric vehicle car club, designed to allow membership of the car club by each of the flats. In accordance with Policy 14C: Road Network Infrastructure, the development would be connected to the existing network of roads and paths, it could be safely and conveniently accessed by service and delivery vehicles, and the proposed new access has been designed to an adoptable standard.

7.5. Flood Risk

The site is protected from coastal flooding by the Kirkwall Harbour Flood Prevention Scheme. SEPA initially objected to the application on grounds of surface water flood risk. Following site survey, modelling information and provision of additional information, both SEPA and Engineering Services have confirmed no objection to the development on grounds of flood risk, in accordance with Policy 13: Flood Risk, SuDS and Waste Water Drainage.

7.6. Surface Water and Foul Drainage

7.6.1.

Development of the scale proposed is required to incorporate sustainable drainage systems (SuDS). The submission includes a drainage design which demonstrates compliance with best practice, including surface water drainage calculations as required by Engineering Services and submitted in support of the application. Engineering Services and Roads Services have no objections to the application, in accordance with Policy 13: Flood Risk, SuDS and Waste Water Drainage.

7.6.2.

The development would connect to the public foul drainage system and would not place an unacceptable burden on existing infrastructure services, in accordance with Policy 1: Criteria for All Development.

7.7. Affordable Housing

Policy 5B requires that “All housing proposals within Orkney’s settlements must demonstrate that they have considered and incorporated housing types and tenures which meet local housing requirements as outlined in relevant settlement statements, developments brief and masterplans”. There is no set number or proportion of units that would have to be delivered as affordable units by this policy provision, and it is a matter for the developer to reach agreement with the Planning Authority, in consultation with the Housing service, in relation to local housing requirements and the number and tenure of affordable units to be provided. It is

available to the developer during that correspondence to provide a viability assessment and make any case that provision of affordable units would not be viable due to the costs of remediating the contaminated land or other matters; this has not formed part of negotiations to date and would be addressed by planning condition.

7.8. Contaminated land

Environmental Health provided comment, following submission of a Combined Phase 1/Phase 2 Site Investigation Report, carried out following a request from Building Standards for an investigation to be undertaken. The report was requested by Building Standards, and not by planning condition as would usually occur, as an application for building warrant has been submitted prior to determination of the planning application. Having reviewed the Site Investigation Report, Environmental Health has recommended minor amendments, but agrees with the conclusions and recommendations and therefore has no objection to the development on grounds of contaminated land, subject to submission of a detailed contaminated land remediation method statement, and for the site to be developed in accordance with the method statement thereafter.

7.9. Privacy and daylight

7.9.1.

Windows facing towards the existing hotel annexe to the west would be at an adequate distance to protect residential amenity, and properties on the other three sides are non-residential, comprising the nightclub to the north, a yard to the east across Great Western Road and a car park to the south.

7.9.2.

As non-residential development is located to the north and east, there would be no unacceptable loss of daylight or sunlight to an existing property caused by the proposed development. Regarding these specific matters, therefore, the proposed development would have no unacceptable adverse impacts on the amenity of adjacent or nearby properties or users, in accordance with Policy 1: Criteria for All Development.

7.10. Noise

7.10.1. Local Development Plan

Residential amenity is relevant when considering whether a proposed development is appropriate in any given location. Policy 1: Criteria for All Development requires that development must not result in an unacceptable level of risk to public health and confirms that development must not be prejudicial to the existing use of the wider area surrounding a development site. In this regard, noise is a critical consideration in relation to the current proposed development.

7.10.2. Agent of Change

A Letter from the Chief Planner, published in February 2018 and which is a material planning consideration, provided advice about the Agent of Change principle. The following are extracts from that letter:

“...Complaints about noise nuisance can place particular pressure on our music venues, potentially leading to additional costs for them to remedy negative impacts, or to cease certain operations such as live music, or to endanger the viability of the business altogether. Sometimes these complaints can be generated as a result of new development being carried out in the vicinity of existing music venues.

The Agent of Change principle clearly places the responsibility for mitigating any detrimental impact of noise on neighbours with those carrying out the new development or operations. So for example, where a new residential property is to be developed within the vicinity of an existing music venue, the responsibility for mitigating adverse effects should sit with the housing developer, as the 'agent of change'. Conversely, if a new music venue is proposed, or an existing venue is to be extended, that responsibility would be with the venue operator.

This principle is consistent with the statutory requirement that planning decisions be made in accordance with the development plan, unless material considerations indicate otherwise. In planning decisions, it is normal to take into account both the potential impact of the new development on existing nearby uses, and also the potential impact of those existing uses on the new development. That approach should be taken in considering whether a proposed development is acceptable, or what steps would be required to make it acceptable...

...In the meantime though, I wanted to take this opportunity to highlight the Scottish Government's support for the Agent of Change principle, including its relationship to established policy and expected practice, and to advise of our intention to implement the principle explicitly through future national policy. I would ask that you ensure issues around the potential impact of noise from live music venues are always appropriately assessed and addressed when considering proposals either by venues themselves or for development in their vicinity, and that decisions reflect the Agent of Change principle...”

7.10.3. Status of 'Fusion'

In this case, the key consideration is the proximity of the proposed development to the rear of Fusion nightclub. The nightclub has not operated since prior to the Coronavirus pandemic; however, in planning terms it retains its lawful planning use as a nightclub, falling under Class 11 of The Town and Country Planning (Use Classes) (Scotland) Order 1997. For the purposes of determining the current planning application, the neighbouring property must be regarded as its lawful planning use as a nightclub, and therefore as a planning application for flats adjacent to that nightclub.

7.10.4. Pre-application Advice

The issue of noise was raised with the agent in writing the application advice in April 2021, including the Agent of Change principle, as follows:

“Also note that Environmental Health will be consulted in relation to the proximity of the development to the exit door of the nightclub opposite, with a view to protecting the residential amenity of any occupants of the proposed development. The Agent of Change principle would be applied and place the responsibility for mitigating any identified adverse effects with the housing developer, and not the existing music/nightclub venue.”

7.10.5. Environmental Health Consultation Response, July 2021

The first consultation response was received from Environmental Health in July 2021, which confirmed that a noise impact assessment (NIA) was required. It was clarified that the NIA must consider, as a primary noise source, noise from Fusion due to the rear doors being opened during opening, allowing music and sounds to escape, as well as the smoking area with revellers on the street directly opposite the proposed site during key sensitive times of the night. It was noted that an assessment of musical breakout noise was required.

7.10.6. Noise Impact Assessment, May 2022

The NIA was duly submitted in May 2022. Fusion had not opened or operated during that intervening time; therefore, an alternative source noise level spectrum was used to determine the impact of noise contributions from Fusion, at the façades of the proposed receptors. When assessing for partially open windows, internal noise levels exceeded the criteria for flats with rooms on the eastern and northern façades.

7.10.7.

On that basis, provision for an alternative means of ventilation and enhanced glazing were further considered within the NIA. When assessing for a closed window situation, the daytime and night-time internal noise levels were concluded as below the criteria for the proposed flats on the eastern and northern façades. Furthermore, the internal noise levels on the eastern and northern façades were assessed as meeting the standard proposed for night-time maximum noise levels for all dwellings.

7.10.8. Environmental Health Consultation Response, May 2022.

A further Environmental Health response was provided, recommending that the NIA be updated, while confirming that mitigation in the form of double glazing, to reduce external noise to compliant internal noise levels, with ventilation provided by other means, would be considered acceptable. Environmental Health confirmed that the NIA should not be restricted to the glazing preferred by the design team, and that it should be for the acoustic consultant to recommend the appropriate specification to permit compliant internal noise levels.

7.10.9.

Environmental Health concluded that for the development to be considered acceptable, it must utilise mechanical ventilation with heat recovery (MVHR) and not

have opening windows in the affected facades: "...that the success of this application is wholly dependent on the residential development having fresh air delivered by MVHR and not using open windows for ventilation. Provided the Planning Authority are comfortable that ventilation to the flats can be provided by other means than an open window, this would be the first step to allow residential development on to the site as open window ventilation would instantly restrict any form of residential development on the site."

7.10.10. Noise Impact Assessment, September 2022.

An updated and finalised NIA was submitted, following previous comments from Environmental Health. It is calculated that, given the proposed façade construction and with stated specification of double-glazing and MVHR system, as concluded previously, the internal noise levels indicate that, when assessing for a closed window situation, the daytime and night-time internal noise levels were concluded as below the criteria for the proposed flats on the eastern and northern façades. Furthermore, the internal noise levels on the eastern and northern façades were assessed as meeting the standard proposed for night-time maximum noise levels for all dwellings.

7.10.11.

Critical to the conclusion of the NIA and the subsequent advice from Environmental Health, and ultimately assessment of the application, is a confirmation within the NIA that, "As part of the proposed development, it has been confirmed that an MVHR system will be utilised to meet the ventilation requirements for the site. On this basis no consideration has been given to the use of through façade ventilation in the following assessments". Therefore, the development was assessed on the basis that windows would be closed, as ventilation was provided by other means.

7.10.12.

Building Standards has confirmed that the proposed development can meet relevant requirements of the building regulations, whilst making use of an MVHR for ventilation. This is a relatively common approach, often for flats where there is a reason that windows in specific elevations be fixed.

7.10.13. Environmental Health Consultation Response, November 2022.

Environmental Health confirmed agreement that the NIA:

"...demonstrates that, assuming a glazing and ventilation strategy implemented onsite meets those specified in the report [the NIA], the internal noise levels will meet the assessed NR Level criteria.

It should again be noted that this can only be achieved by having fresh air delivered by MVHR and not using open windows for ventilation. The assessment [the NIA] confirms that the internal noise levels cannot be met fully with the windows open. Unfortunately, it is also stated in the report that their recommendations do not extend to having fully sealed windows, rather that 'opening the windows would compromise the internal acoustic environment and that it would be the choice of the resident based on their individual circumstantial requirements' If the windows are able to be

opened thus compromising the internal noise levels, then this will not be acceptable irrespective of whether it was the residents decision or not.”.

7.10.14.

This consultation response is a critical confirmation that, to meet acceptable internal noise levels, the relevant windows in the north and east elevations – those closest to the rear door of Fusion – are fixed units. The development fails the Environmental Health assessment if residents of the flats are provided the ‘option’ of whether to compromise their own internal acoustic environments.

7.10.15.

Had the use of sealed units in those elevations been considered unacceptable, there would be no feasible option for the flats. To provide a pragmatic planning solution, and with the confirmation that sealed units are acceptable in terms of the building regulations and an approach used elsewhere in Kirkwall for flatted developments, it was proposed to the developer that the relevant windows be made sealed, to allow a positive recommendation. This pragmatic approach would be pursued in all applications, but in this case particularly important given the negotiations of a range of aspects of the development for over a year.

7.10.16. Confirmation from Applicant

Following further discussion with Environmental Health, it was confirmed to the agent that: “If a hybrid ventilation system is proposed, that relies, at least in part, on the windows being openable, then that is not the basis of the NIA. As I said, we’ve given complete consideration to the matter, given the length of time it’s taken to receive the NIA(s) and subsequent specialist assessment of those, and also the anticipated response that you’d prefer openable windows. It would indeed be disappointing if it failed on a technicality at this stage, although it is an issue that was raised at the very outset of advice and it’s taken until now to have that adequately assessed; it was always a risk.”.

7.10.17.

Development Management was therefore very clear in the implications of openable windows, and again provided the option of sealed units. The agent provided the developer’s final position: “Following your below email, we have received an instruction from Orkney Builders Ltd confirming they would like to move forward with determination of the planning application (as submitted) on the basis that they would want to avoid any condition imposed in relation to fixed windows. Given the above, I would be grateful if you can please confirm possible date for determination?”. The application must therefore be determined as submitted.

7.10.18. Environmental Health Consultation Response, November 2022

Environmental Health provided a clear response on that basis: “Further to recent correspondence provided by Development Management that the applicant does not wish to specify fixed (sealed) windows, and wishes to retain opening windows on the North and East elevations, Environmental Health wish to reiterate the following comments and recommendation: The assessment [the NIA] confirms that the internal

noise levels cannot be met fully with the windows open. If the windows are able to be opened thus compromising the internal noise levels, it is not acceptable that the responsibility for the control of a potential noise nuisance is placed in the hands of those who will be affected, i.e. the residents of the proposed flats. Therefore, Environmental Health OBJECT to the above application, on the grounds that the residential amenity of the proposed development will be affected by the existing night club.”.

7.10.19. Call-In

The application was called in by two Councillors at that stage of the negotiations.

7.10.20. The Town and Country Planning (Scotland) Act 1997, as amended

Section 41A of The Town and Country Planning (Scotland) Act 1997, as amended, at 41A(1), confirms that, “A development that is the subject of an application for planning permission is a “noise-sensitive development” if residents or occupiers of the development are likely to be affected by significant noise from existing activity in the vicinity of the development (a “noise source”).”.

7.10.21.

Section 41A goes on to confirm that (a) when considering whether to grant planning permission for a noise-sensitive development, planning authorities must take particular account of whether the development includes sufficient measures to mitigate, minimise or manage the effect of noise between the development and any existing cultural venues or facilities (including in particular, but not limited to, live music venues), or dwellings or businesses in the vicinity of the development, and (b) may not, as a condition of granting planning permission for a noise-sensitive development, impose on a noise source additional costs relating to acoustic design measures to mitigate, minimise or manage the effects of noise.

7.10.22.

This confirms in statute that the proposed development is a ‘noise-sensitive development’, and the submitted NIA and the Environmental Health consultation response confirm that, if windows are not sealed, it cannot be demonstrated that sufficient measures are implemented to mitigate, minimise or manage the effect of noise between the development and any existing cultural venues or facilities.

7.10.23.

Policy 23 of NPF4 states that, “e) Development proposals that are likely to raise unacceptable noise issues will not be supported. The agent of change principle applies to noise sensitive development. A Noise Impact Assessment may be required where the nature of the proposal or its location suggests that significant effects are likely.”.

7.10.24. Environmental Health Consultation Response, February 2023

A final response was provided by Environmental Health, including implications for the Council should the development be approved.

The current situation was first reiterated:

“In this particular case, as per my correspondence dated 22 November 2022, it is clear from the noise impact assessment that was submitted in support of this application, that internal noise levels cannot be met fully with the windows open. If the windows are able to be opened thus compromising the internal noise levels, it is not acceptable that the responsibility for the control of a potential noise nuisance is placed in the hands of those who will be affected, i.e. the residents of the proposed flats.

The applicant has been advised that a way of mitigating against this impact is for fixed (sealed) windows to be installed (in compliance with the relevant building standards) on the North and East elevations, which they have declined to do.”

Amongst a wider response, the following potential implications are stated by Environmental Health:

“a) If Environmental Health were to receive a noise complaint from one of the proposed flats for noise relating to the neighbouring nightclub, we (that is to say the council) would be required by law to investigate. On investigation if it is deemed that there is a “statutory nuisance” due to excess noise from the nightclub impacting the flat, we would be required under section 80 of the Environmental Protection Act 1990 to serve a notice to abate the noise. Failure to do this would lead to the council being accused of not meeting a statutory duty, and resultant criticism and reputational damage arising from any Ombudsman intervention.

b) In order to abate the noise this may lead to significant/additional costs to the existing nightclub operators to remedy negative impacts (assuming that they are able to do so). Given that it would have been decisions made by the Council, that has allowed this circumstance to occur, then the nightclub operators may have a strong civil case against the council, which in turn could lead to costs and damages being awarded along with consequential reputational damage. As a business the nightclub would also be entitled to raise a “best practicable means” defence to counter any action, and it may be that an element of that defence would be that they relied on the application for their nightclub going through the planning process.”

7.10.25. Environmental Health Additional Information, February 2023

Environmental Health has provided additional information, relating to conclusions reached in previous consultation responses, and the objection to the application as submitted. The additional information, in full, is as follows:

“What does the consultant’s report say?”

We note the applicant has engaged the services of a competent acoustic consultant and we have shared a copy of the submitted report with the council’s own acoustic consultant. We note that the applicant’s acoustic report concludes (at page 15) that the development cannot meet the internal noise levels with the windows open and opening the windows would “compromise the internal acoustic environment” and “it

will be a choice of the resident” whether to open or close their windows based on their individual circumstances.

Why cannot the windows just be shut if the occupier experiences noise?

Human Rights Act 1998 entitles persons to the peaceful enjoyment of their possessions and states that no one shall be deprived of their possessions except in the public interest and subject to the conditions provided for by law. Therefore, it is reasonable that the occupier of the proposed development should be able to enjoy the development with the windows open or closed. As per Royal Environmental Health Institute of Scotland (REHIS) briefing note 017 “noise guidance for new developments”, (October 2020) which states at para 4.5 that in the case of noise sensitive dwellings brought to an existing noise source, developers will need to demonstrate that all mitigation methods have been considered to achieve both satisfactory internal noise levels within any noise sensitive property and protect external amenity areas. This is in accordance with the agent of change principal set out in National Planning Policy Framework version 4.

As well the quantitative assessment provided in the applicant’s report, Scottish Government Technical Advice Note (TAN) “Assessment of Noise” para 2.36 describes the value of a qualitative assessment to provide additional information to support the outcomes of the quantitative assessment. This is because the impact of noise is also subjective.

To assist in this process, it is important to understand the extent to which the noise impact affects the amenities associated with the noise sensitive receptor under consideration.

For example, in the case of residential properties, the associated amenities would include qualities which are conducive to: undisturbed sleep; ability to relax; ability to concentrate i.e. reading-listening to radio/ TV; able to converse. Should noise complaints be received, these are factors which would be considered when investigating the complaint along with how much of an impact the noise causes the occupier to change their behaviour in response to the noise. Therefore, these qualitative factors need to be taken into account at the planning stage as per para 2.35 of the TAN.

How would the council investigate complaints of noise nuisance?

Any noise complaint received would be investigated in accordance with the council’s duty to investigate complaints of statutory nuisance as per section 79 of the Environmental Protection Act 1990. The council has a standard procedure for investigating nuisance complaints which may include monitoring and site visits, to ascertain the details of the complaint and the impact of the noise. As per the REHIS briefing note at para 4.6 predictions of internal noise levels within noise sensitive properties must be calculated based on an open window scenario.

Furthermore, Table 2.5 in TAN categorises the qualitative impacts of noise on residential properties, and notes in the context of perception categories “Noticeable (disruptive)” as being when the noise causes an important change in behaviour

and/or attitude, e.g. avoiding certain activities during periods of intrusion. Potential for sleep disturbance resulting in difficulty in getting to sleep, premature awakening and difficulty in getting back to sleep.

These impacts would be taken into account when making an assessment of noise nuisance.”

7.10.26.

The development is considered contrary to Policy 1: Criteria for All Development, as the development could result in an unacceptable level of risk to public health (from nuisance) and on the basis the development would be prejudicial to the existing use of the wider area surrounding the development site. The development is also contrary to Policy 23 of NPF4 which confirms that development which is likely to raise unacceptable noise issues will not be supported. The agent of change principle applies in this case, to noise sensitive development. A Noise Impact Assessment has been submitted and concludes acceptable noise levels only with sealed units in the relevant elevations. The development is submitted with opening windows.”

8. Conclusion and Recommendation

8.1.

The development of flats on the application site is supported by Policy 5, as the provision of residential units within the settlement boundary, in a location subject to a development brief. The development is an appropriate design, in the context of its surroundings including nearby listed buildings. Over a lengthy period of negotiation, technical matters have been resolved, including management of surface water, flood risk, access and parking and street works.

8.2.

The agent of change principle applies in this case, to noise sensitive development. The development is considered contrary to Policy 1: Criteria for All Development, as the development could result in an unacceptable level of risk to public health (from nuisance) and on the basis the development would be prejudicial to the existing use of the wider area surrounding the development site. The development is contrary to Policy 23 of NPF4 which confirms that development which is likely to raise unacceptable noise issues will not be supported. A Noise Impact Assessment has been submitted and concludes acceptable noise levels only with sealed units in the relevant elevations. The development is submitted with opening windows.

8.3.

Given the satisfactory conclusion of other matters, it is a frustration that the development cannot be supported based on a single issue. This is exacerbated by the fact that a technical solution exists. However, this was made clear to the developer, and it is confirmed by the developer that the application must be determined as submitted, which includes opening windows. This is confirmed as unacceptable by Environmental Health, relying on residents to manage noise impact rather than the development being designed to mitigate against it. This is described

by Environmental Health in a consultation response: it is not acceptable that the responsibility for the control of a potential noise nuisance is placed in the hands of those who will be affected.

8.4.

Environmental Health has objected to the development as presented and has set out the potential implications for the Council should the application be approved. The development is contrary to Policy 1: Criteria for All Development of the Orkney Local Development Plan 2017 and Policy 23 of NPF4. Accordingly, the application is recommended for refusal.

9. Reason for Refusal

The development is considered contrary to Policy 1: Criteria for All Development, as the development could result in an unacceptable level of risk to public health (from nuisance) and the development would be prejudicial to the existing use of the wider area surrounding the development site. The development is contrary to Policy 23 of NPF4 which confirms that development which is likely to raise unacceptable noise issues will not be supported. The agent of change principle applies in this case, as the proposed development is 'noise sensitive development'. A Noise Impact Assessment has been submitted which concludes that the development as submitted is not acceptable.

10. Contact Officer

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11. Appendix

Appendix 1: Site Plan.



Development Location Plan
(Scale 1:2500)



Development Layout Plan
(Scale 1:200)

B	Development Layout Updated to Correspond with Architects Amended Development Plan	JMA	23/03/22
A	Development Layout Updated to Correspond with Architects Amended Development Plan	JMA	22/06/21
Issue	Revision	Initial	Date

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Client:
Orkney Builders

Project:
Housing Development
Scarth Centre
Burnmouth Road, Kirkwall

Drawing Title:
Development Layout &
Location Plan

Status:
Building Warrant

Scale: As Stated @ A2 Date: 24/02/21
By: JMA Checked: JMA Approved: RAG

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