

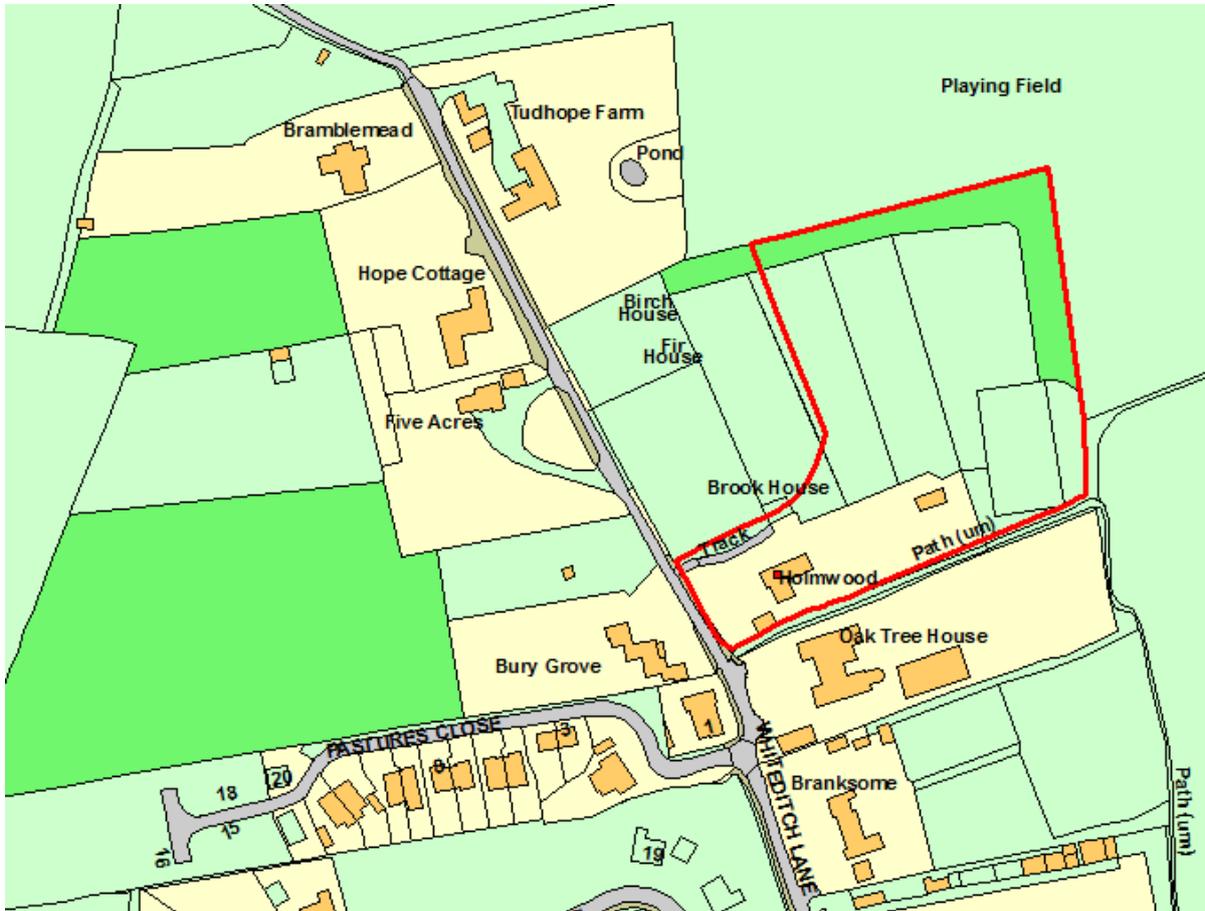
ITEM NUMBER: 7

PLANNING COMMITTEE DATE: 03 August 2022

REFERENCE NUMBER: UTT/22/1134/FUL

LOCATION: Land At Holmwood
Whiteditch Lane
Newport

SITE LOCATION PLAN:



© Crown copyright and database rights 2021 Ordnance Survey 0100018688
Organisation: Uttlesford District Council Date: 30/06/2022

PROPOSAL: Application to remove conditions 6 (highways) and 7 (highways) of UTT/15/0879/OP (allowed at appeal ref APP/C1570/W/15/3137906).

APPLICANT: Mr & Mrs P Stringer

AGENT: Mr G Fisher / GF Planning Limited

EXPIRY DATE: 21 July 2022

EOT Expiry Date: 04 August 2022

CASE OFFICER: Mr Avgerinos Vlachos

NOTATION: Outside Development Limits.
PROWs (Byway – W, Footpaths – S, E).

REASON THIS APPLICATION IS ON THE AGENDA: Major application

1. EXECUTIVE SUMMARY

- 1.1** This is an application for the removal of conditions 6 and 7 from the planning permission under UTT/15/0879/OP. The conditions refer to the submission of 'before' and 'after' surveys, as well as repair works before the development begins and after its completion. The case officer recommends that conditions 6 and 7 are removed and the application is approved.
- 1.2** Conditions 6 and 7 fail all the tests of paragraph 56 of the NPPF, including being unenforceable and unreasonable. The removal of the conditions would not make the development unacceptable, as improving highway safety and facilitating the passage of vehicles from a public highway are responsibilities that belong to the Essex County Council. The conditions attempt to create a mechanism to improve highway safety and ensure maintenance of the highway, which is the responsibility of Essex County Council. However, without there being a direct link to development that falls beyond the scope of planning and the responsibilities of the LPA. The practical difficulty and subjectivity in attributing specific damage of the highway to the development of the 12 no. dwellings make the conditions irrelevant to this specific development, unenforceable, unprecise, and

unreasonable. The wording of conditions 6 and 7 is also vague and unclear.

- 1.3 The possibility of varying the conditions as per s73(2)(a) of the Town and Country Planning Act 1990 was dismissed for similar reasons as above. The position of ECC Highways has not been consistent over the years. Other LPA decisions in the area have consistently approved the removal of such conditions and there is no material change in circumstances in comparison to those decisions that would indicate an alternative approach for the current application. The condition of the public highway is a matter for the Essex County Council.

2. **RECOMMENDATION**

Approve the removal of conditions 6 and 7 subject to the conditions set out at section 17 of this report.

3. **SITE LOCATION AND DESCRIPTION:**

- 3.1 The application site is 1.48 ha and lies at the northern end of Whiteditch Lane, 450m north of its junction with Bury Water Lane. It is rectangular in shape and previously was occupied by a bungalow along with its gardens, outbuildings, menage and a series of paddocks.

4. **PROPOSAL**

- 4.1 The proposal refers to the removal of conditions 6 and 7 imposed by the Planning Inspector when allowing the appeal under reference APP/C1570/W/15/3137906 (application ref. UTT/15/0879/OP). Both conditions refer to issues of highway safety in relation to the condition of Whiteditch Lane, requiring from the developer to provide comprehensive condition surveys before commencement and after completion of the development allowed on appeal.
- 4.2 The application is supported by the following:

Application form
UTT/15/0879/OP - Appeal Decision Notice

Additional information from the agent regarding conditions

5. **ENVIRONMENTAL IMPACT ASSESSMENT**

- 5.1 The development does not constitute 'EIA development' for the purposes of The Town and Country Planning (Environmental Impact Assessment) Regulations 2017.

6. **RELEVANT SITE HISTORY**

6.1

Reference	Proposal	Decision
UTT/15/0879/OP	Outline application for the erection of 12 no. dwellings with all matters reserved except access.	Allowed on appeal (24.07.2015).
UTT/19/1064/DFO	Details following outline application UTT/15/0879/OP for 12 dwellings (allowed on appeal under reference APP/C1570/W/15/3137906) Details of Layout, scale, appearance and landscaping.	Approved with conditions (24.01.2020).
UTT/20/3113/DOC	Application to discharge condition 4 (Access), 5 (construction method statement) and 8 (passing bay provision) attached to UTT/15/0879/OP (Previously approved under Appeal APP/C1570/W/15/3137906).	Discharged in part (04.03.2021).
UTT/21/1847/DOC	Application to discharge condition 4 (access), 6 (condition survey), 8 (passing bay), 10 (Biodiversity enhancement), 12 (surface water drainage) and 13 (foul water) attached to UTT/15/0879/OP (approved under Appeal APP/C1570/W/15/3137906).	Discharged in part (07.04.2022). <u>Condition 6 was not discharged.</u>
UTT/22/1422/DOC	Application to discharge condition 12 (surface water drainage scheme) attached to UTT/15/0879/OP (approved under Appeal APP/C1570/W/15/3137906).	<i>Pending consideration.</i>
UTT/22/1564/DOC	Application to discharge condition 4 (access) attached to UTT/15/0879/OP approved under APP/C1570/W/15/3137906.	<i>Pending consideration.</i>

7. **PREAPPLICATION ADVICE AND/OR COMMUNITY CONSULTATION**

7.1 No pre-application discussions.

7.2 The applicant did not submit a Statement of Community Involvement.

8. SUMMARY OF STATUTORY CONSULTEE RESPONSES

8.1 Highway Authority

8.1.1 Objections:

- a) Conditions no. 6 and 7 were applied by the planning inspector at appeal and therefore it would be reasonable to assume that the planning conditions imposed met criteria and are enforceable and it is not the place of the highway authority to go against the inspector's position.
- b) The conditions are consistent with ones that the highway authority would recommend on applications, either as standalone conditions or within a construction management plan, when we are concerned that the impact of the construction traffic on the highway will be significant.
- c) The requirement to carry out surveys supports the implementation of Section 9 of the Highways Act, 1980 which allows the highway authority to recover costs for damage caused by the 'extraordinary traffic' associated with development construction traffic
- d) The majority of the permitted development along Whiteditch Lane has been built out, and therefore the Whiteditch Lane will be subject to less construction traffic than was anticipated when similar conditions were removed from earlier applications. This will make the identification and apportionment of damage much more reliable.
- e) Any developer would be expected to make good any damage that was as a result of their construction traffic.

8.1.2 ECC Highways recommended a variation to the conditions into a single condition including three parts:

- a) Prior to commencement a comprehensive highway condition 'before' survey of Whiteditch Lane from its junction with Bury Water Lane to the application site shall be undertaken. The results of such "before" survey shall be submitted to and approved in writing by the local planning authority.
- b) Prior to occupation of the 11th dwelling a comprehensive highway condition 'after' survey of Whiteditch Lane from its junction with Bury Water Lane to the application site shall be undertaken (this survey should be undertaken in consultation with an Essex Highways engineer). The results of the 'after' survey and a schedule of works that rectify any damage that can be reasonably attributed to the construction traffic from this development shall be submitted to and approved in writing by the local planning authority.
- c) Prior to occupation of the 12th dwelling but after construction of that dwelling the repair works identified in the agreed schedule of works identified in b) shall be carried out at the expense of the developer and to the satisfaction of the highway authority.

9. NEWPORT PARISH COUNCIL COMMENTS

9.1 No comments received.

10. CONSULTEE RESPONSES

10.1 N/A.

11. REPRESENTATIONS

11.1 A site notice was displayed on site and expired on 27 May 2022 and notification letters were sent to nearby properties. The application was advertised in the press.

11.2 Support

11.2.1 No letters of support received.

11.3 Object

- 11.3.1**
- a) Whiteditch Lane in poor condition/disrepair (potholes, surface damages).
 - b) Previous developers were allowed not to repair the lane.
 - c) Cumulative detrimental impact from developments in the lane.
 - d) Location and size of the development adds to existing damages.
 - e) Accountability from developer necessary.
 - f) Difficulty in measuring new damages not enough justification to remove conditions.
 - g) Other future developers relieved from this responsibility.
 - h) Conflicting traffic and near misses.
 - i) In support of Highways view.
 - j) Traffic from a significant construction will cause further damage.
 - k) It would be beneficial for Highways to have repaired the lane first to have clearer negotiation over damage.
 - l) 'Before' survey useful to chase Highways.
 - m) Full repair beneficial to the applicant as the lane's defects reduce the value of the properties.
 - n) Revised condition that Highways must do the remediation within a time scale?
 - o) Difficult to assign specific patches/damages caused by the development.
 - p) Not the job of planning application to fix existing potholes.
 - q) Potholes are a direct result of other applications ignoring the issue.
 - r) Inspector decided the issue should not be ignored.

11.4 Comment

11.4.1 All material planning considerations raised by third parties were taken into account when considering this application.

12. MATERIAL CONSIDERATIONS

12.1 In accordance with Section 38 (6) of the Planning and Compulsory Purchase Act 2004, this decision has been taken having regard to the policies and proposals in the National Planning Policy Framework, The Development Plan and all other material considerations identified in the “Considerations and Assessments” section of the report. The determination must be made in accordance with the plan unless material considerations indicate otherwise.

12.2 Section 70(2) of the Town and Country Planning Act requires the local planning authority in dealing with a planning application, to have regard to

- a) The provisions of the development plan, so far as material to the application:
- b) (aza) a post-examination draft neighbourhood development plan, so far as material to the application,
- c) any local finance considerations, so far as material to the application, and
- d) (c) any other material considerations.

12.3 Section 73 of the Town and Country Planning Act 1990 (as amended) refers to the determination of applications to develop land without compliance with conditions previously attached:

(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.

(2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—

- (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
- (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

(2A) See also section 100ZA, which makes provision about restrictions on the power to impose conditions under subsection (2) on a grant of planning permission in relation to land in England.]

(3) Special provision may be made with respect to such applications—

- (a) by regulations under section 62 as regards the form and content of the application, and

(b) by a development order as regards the procedure to be followed in connection with the application.

(4) This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun.

(5) Planning permission must not be granted under this section [F4for the development of land in England] to the extent that it has effect to change a condition subject to which a previous planning permission was granted by extending the time within which—

(a) a development must be started;

(b) an application for approval of reserved matters (within the meaning of section 92) must be made.

12.4 Section 73 of the Town and Country Planning Act 1990 enables an applicant to apply to develop land without compliance with conditions attached to an extant permission. The LPA may amend or remove condition but may not amend any other part of the permission and therefore the original permission remains intact. Therefore, this means that a developer may elect which permission to implement.

12.5 The Development Plan

12.5.1 Essex Minerals Local Plan (adopted July 2014)
Essex and Southend-on-Sea Waste Local Plan (adopted July 2017)
Uttlesford District Local Plan (adopted 2005)
Felsted Neighbourhood Plan (made Feb 2020)
Great Dunmow Neighbourhood Plan (made December 2016)
Newport and Quendon and Rickling Neighbourhood Plan (made June 2021)
Thaxted Neighbourhood Plan (made February 2019).

13. POLICY

13.1 National Policies

13.1.1 National Planning Policy Framework (2021)

13.2 Uttlesford District Plan 2005

13.2.1 GEN1 – Access Policy

13.3 Newport, Quendon & Rickling Neighbourhood Plan (made 28 June 2021)

13.3.1 No relevant policies for the conditions proposed to be removed.

13.4 Supplementary Planning Document or Guidance

- 13.4.1 Uttlesford Local Residential Parking Standards (2013)
Essex County Council Parking Standards (2009)
Supplementary Planning Document- Accessible homes and play space homes
Essex Design Guide
Uttlesford Interim Climate Change Policy (2021)

14. **CONSIDERATIONS AND ASSESSMENT**

- 14.1 The main considerations in the determination of the original outline consent (UTT/15/0879/OP) relate to following issues.

- 14.2 **A) Principle of amendments**
B) Highway safety

- 14.3 As this application is made under Section 73 of the Town and Country Planning Act, consideration is limited to those matters which vary compared to the extant permission

14.4 **A) Principle of amendments**

- 14.4.1 The removal of conditions 6 and 7 is acceptable for the reasons elaborated in Section B of this report.

14.5 **B) Highway safety**

- 14.5.1 The application proposes the removal of conditions 6 and 7 from UTT/15/0879/OP for 12 no. dwellings that was allowed on appeal APP/C1570/W/15/3137906. Both conditions were recommended by the Highway Authority and the Inspector imposed them when overturning the refusal on 23 May 2016. The conditions read as follows:

- 14.5.2 Condition 6: No development shall take place until a comprehensive condition survey of Whiteditch Lane from its junction with Bury Water Lane to the application site has been completed, details of which have first been submitted to and approved in writing by the local planning authority for approval. The results of such “before” survey and any required repair work necessary to facilitate the passage of construction vehicles shall be submitted to and approved in writing by the local planning authority with any repair work being carried out prior to the construction period.

- 14.5.3 Condition 7: Following completion of the development, a further comprehensive survey of Whiteditch Lane from its junction with Bury Water Lane to the application site shall be completed in accordance with the details approved in condition 6 above. The results of the survey and any identified damage/repair work shall be submitted to and approved in writing by the local planning authority. Any repair works identified in the “after” survey shall be carried out within 3 months of the completion of the construction of the development to a programme to be agreed by the local planning authority.

14.5.4 The Inspector states the planning conditions requiring ‘before’ and ‘after’ surveys for the condition of Whiteditch Lane are necessary in the interests of highway safety (appeal decision, paragraph 25) and the surveys “*would ensure [the lane] would be capable of accommodating construction traffic and for any necessary repairs on completion of the development*” (appeal decision, paragraph 22).

14.5.5 The applicant applied to discharge condition 6 (UTT/21/1847/DOC), however, this was refused on 07 April 2022, as Highways objected for the following reasons:

“The condition survey has itemised a number of defects in which the report concludes ‘requires remediation prior to construction traffic entering the proposed development site’. I would like to see the Developer prepare a method statement or programme of works detailing how the defects will be remediated. If this is not something that is possible now, the development management team at Essex Highways could pick this up during the Technical Review phase as long as the Developer has accepted the general requirements”.

14.5.6 As part of UTT/21/1847/DOC, the applicant submitted a Highway Condition Survey (March, 2021), concluding significant verge damage and defects to the carriageway itself, as well as a number of repairs that have already been carried out along Whiteditch Lane (mostly in good condition) and “*a number of repairs that are still required including those to ‘temporary fixes’ that have been undertaken by residents*” (paragraph 3.2). The document ends saying it “*has detailed the defects that require remediation prior to construction traffic entering the proposed development site*” (paragraph 3.3).

14.5.7 The Highway Authority was consulted for the current application and raised **objections** to the removal of conditions 6 and 7 due to:

- a) It would be reasonable to assume that the conditions imposed by the Inspector met criteria and are enforceable and it is not the place of the highway authority to go against the inspector’s position.
- b) The conditions are consistent with ones that the Highway Authority would recommend on applications, either as standalone conditions or within a construction management plan, when we are concerned that the impact of the construction traffic on the highway will be significant.
- c) The requirement to carry out surveys supports the implementation of Section 59 of the Highways Act 1980 which allows the Highway Authority to recover costs for damage caused by the ‘extraordinary traffic’ associated with development construction traffic.
- d) The majority of the permitted development along Whiteditch Lane has been built out, and therefore Whiteditch Lane will be subject to less construction traffic than was anticipated when similar conditions were removed from earlier applications. This will make

the identification and apportionment of damage much more reliable.

- e) Any developer would be expected to make good any damage that was as a result of their construction traffic.

14.5.8 It is well-established law that previous decisions can be material considerations because like cases should be decided in a like manner, to ensure consistency in decision-making. However, previous Secretary of State or LPA decisions do not set a precedent for the assessment of similar developments; the benefits and harm, and the levels of each, depend on the specific characteristics of a site and scheme. Therefore, the application must be considered on its own merits, however, the weight to be attributed to other planning decisions in the area depends on whether there is a material change in circumstances in comparison to the time when those decisions were made.

14.5.9 In the following paragraphs, planning decisions from the area are discussed (see summary **Table** below). This analysis informs the weight to be allocated on those previous decisions. The conditions attached to those permissions are identical or very similar to the ones currently under scrutiny (see **Appendix 2**).

Ref. No.	Condition to be removed	Highways' consultation	Development	Decision
Current	6, 7	Objections.	12 no. dwellings (UTT/15/0879/OP)	-
UTT/17/0222/FUL (Tudhope Farm)	5, 6	No comments received	2 no. dwellings (UTT/16/1756/FUL)	Conditions removed
UTT/16/3663/FUL (Branksome)	7, 8	<u>No objections</u> to removal	1 no. dwelling (UTT/16/0280/FUL)	Conditions removed
UTT/16/0782/FUL (Tudhope Farm)	5, 6	No comment. LPA should assess the conditions' acceptability in planning terms	1 no. dwelling (UTT/15/3022/FUL)	Conditions removed

UTT/16/0786/DFO (Branksome)	Officer recommended conditions 10 and 11	Recommended conditions 10 and 11	Details following outline UTT/14/1794/OP for the erection of 15 no. dwellings	Conditions removed
--------------------------------	--	----------------------------------	--	--------------------

14.5.10 The applicant points to the most recent of those permissions (UTT/17/0222/FUL) granted on 03 Apr 2017 to remove conditions 5 and 6 from UTT/16/1756/FUL (2 no. dwellings – Land South of Tudhope Farm). The then case officer tested the conditions' compliance with paragraph 56 of the NPPF and his reasons for approving their removal are summarised below:

- (a) Controls outside planning legislation govern the necessary repairs, and thus not relevant to planning (test 2).
- (b) Impossible to quantify the impact of the development and attribute it to this specific development due to cumulative impacts from other developments on Whiteditch Lane, and thus not relevant to the development permitted (test 3) and not enforceable (test 4).

The case officer stated it would not be appropriate to impose alternative conditions. Highways did not provide any comments for that application.

14.5.11 Conditions 7 and 8 were removed (UTT/16/3663/FUL) on 16 Feb 2017 from UTT/16/0280/FUL (1 no. dwelling – Branksome). The reasons are summarised below:

- (a) Controls outside planning legislation govern the necessary repairs, and thus not relevant to planning (test 2).
- (b) Impossible to quantify the impact of the development and attribute it to this specific development due to cumulative impacts from other developments on Whiteditch Lane, and thus not relevant to the development permitted (test 3) and not enforceable (test 4).

As previously, the case officer considered it would not be appropriate to impose alternative conditions. It should be highlighted that Highways raised **no objections** on this occasion, and as such, the approach on the matter from Highways has not been consistent. The applicant also pointed out to UTT/16/0786/DFO which is discussed below.

14.5.12 Conditions 5 and 6 were removed (UTT/16/0782/FUL) on 11 Jan 2017 from UTT/15/3022/FUL (1 no. dwelling – Land South of Tudhope Farm). The reasons are summarised below:

- (a) It would be unreasonable to refuse the application for 1 no. dwelling if the conditions were not imposed, as this type of condition is usually imposed for large scale developments. Therefore, the condition is wider in scope than is necessary to achieve the desired objective (test 1).

- (b) ECC Highways requested the conditions to control matters outside the scope of the planning permission, plus the upkeep of the byway is their responsibility, and thus not relevant to planning (test 2).
- (c) The surveys are unlikely to identify only damages arising from the development permitted, as several projects are ongoing at the same time, and the conditions may require the developer to remedy an issue not created by the development (test 3).
- (d) Identifying only damages from the development permitted is beyond the applicant's control, and thus the conditions are not enforceable (test 4).
- (e) The end-result of the conditions is not precise (test 5).
- (f) Unreasonable for the above reasons.

Highways refrained from commenting and stated that "*suitability and appropriateness of the suggested highway related conditions in planning terms is for the planning authority to assess*".

14.5.13 The last permission in this list of relevant decisions is a reserved matters permission (UTT/16/0786/DFO – 15 no. dwellings) in which the case officer, following the advice of ECC Highways, recommended conditions 10 and 11 for 'before' and 'after' surveys. However, when discussing the application in planning committee (14 Dec 2016), Members decided to remove those conditions from the permission.

14.5.14 Paragraph 56 of the NPPF sets out the tests¹ that must be complied with by all conditions:

- (a) necessary;
- (b) relevant to planning;
- (c) relevant to the development permitted;
- (d) enforceable;
- (e) precise; and
- (f) reasonable in all other respects.

14.5.15 Both conditions are tested as follows:

- (a) **necessary**:
The question is whether the development would become unacceptable in planning terms if the condition was not there.

14.5.16 Both conditions were imposed by the Inspector in the interests of highway safety to ensure the lane is capable of accommodating construction traffic and for any necessary repairs on completion of the development. ECC Highways confirmed this on 27 Jun 2022, stating that the "*intention of the conditions was to ensure that any damage caused by construction vehicles to the highway is made good after construction is finished*".

14.5.17 However, as currently worded, conditions 6 and 7 are not necessary *by themselves* as their absence cannot make the development unacceptable in planning terms because it is not necessary to know the existing

¹ Each condition must comply with all the tests. If a condition fails even one test, it must not be imposed as per paragraph 56 of the NPPF.

condition of the byway (condition 6) or the final condition of the byway after completion of the development (condition 7), for the development to go ahead.

- 14.5.18** For condition 6, the requirement for repair works before construction even begins also fails the test, as it is not reasonably necessary to require repair works before the construction vehicles even use the highway.
- 14.5.19** Most importantly, conditions 6 and 7, by referring to ‘any required repair work necessary to facilitate the passage of construction vehicles’², they essentially place the responsibility of improving highway safety, maintaining the highway and ensuring the passage of vehicles to the developer and the LPA, whereas this task belongs de facto to ECC Highways. Therefore, conditions 6 and 7 are not necessary as their removal cannot make the development unacceptable in planning terms.
- 14.5.20** As the stated objective for conditions 6 and 7 is vaguely worded so as to ‘facilitate the passage’ of vehicles, and not, for example, ‘repair work necessary to offset damages caused by the development’. Therefore, notwithstanding the condition of the road and how it would affect other users, if a construction vehicle can simply pass from Whiteditch Lane, no repair works are required for the purposes of conditions 6 and 7.
- 14.5.21** Finally, the ‘after’ survey (condition 7) does not need to be completed in accordance with the details approved for the ‘before’ survey (condition 6). This vaguely worded statement ignores that the ‘after’ survey should be a survey on its own, so that comparisons can be made between the two surveys, and therefore, it is not necessary to accord with the findings of the ‘before’ survey.
- 14.5.22** (b) **relevant to planning:**
The question is whether the condition relates to planning objectives and it is within the scope of the permission to which it is to be attached. Matters solely governed by non-planning legislation would fail the above test.
- 14.5.23** The ‘before’ survey (condition 6) and the ‘after’ survey (condition 7) are only relevant to planning in combination with their counterpart surveys and the restoration of damages because it is only then that they serve the interests of highway safety. However, as discussed in the previous paragraph, improving highway safety and the upkeep of the highway are responsibilities of ECC Highways as their link to the development in context is somewhat tenuous (see further assessment below on conditions). In the words of the Highway Authority, s59 of the Highways Act 1980 allows the Highway Authority to recover costs for damage caused by the ‘extraordinary traffic’ associated with development construction traffic. Therefore, conditions 6 and 7 are somewhat tenuous in their link to the development, and as such, the conditions fail to establish their direct relevance to planning.

² Condition 7 links back to condition 6 where it states ‘completed in accordance with the details approved in condition 6 above’.

- 14.5.24** In addition, the ‘repair work’ required by condition 6 for the passage of vehicles before commencement of the construction is also governed by other legislation (ie Highways Act – s278 and s59 and the Highway Authority has a duty to maintain under s41) and thus the failure to link the requirements of conditions 6 and 7 to the development would fall outside the scope of planning.
- 14.5.25** (c) **relevant to the development permitted:**
The question is whether the conditions fairly and reasonably relate to the development permitted by reason of the nature or impact of this specific development.
- 14.5.26** The ‘repair work’ before construction begins (condition 6) is not relevant to the development permitted because the erection of the 12 no. dwellings has nothing to do with the current condition of the byway. A condition cannot be imposed to remedy a pre-existing problem not created by the development permitted.
- 14.5.27** Most importantly, the LPA cannot reasonably require from the developer repair works on the highway if the repair works cannot be specifically tied to the traffic associated only with this development. There is no effective traffic survey or monitoring that would be able to effectively apportion damages to the highway from the development of the 12 no. dwellings because other users (including existing neighbouring occupiers, visitors, delivery drivers, or construction vehicles for other developments in the area) would still use the lane at the same time as the construction.
- 14.5.28** ECC Highways stated (17 May 2022) the condition is used when there are concerns the impact of the construction traffic on the highway will be significant, and that the intention of conditions 6 and 7 is to ensure any damage caused by construction vehicles to the highway is made good after construction is finished (27 Jun 2022). Notwithstanding this, the afore-mentioned lack of mechanism to accurately attribute specific damages solely to the development of the 12 no. dwellings due to the cumulative impacts of developments in the area and the use of the highway by other users, makes conditions 6 and 7 irrelevant to the development permitted.
- 14.5.29** ECC Highways address this point (17 May 2022) by stating that the majority of the development along Whiteditch Lane has been built out, and therefore Whiteditch Lane will be subject to less construction traffic than was anticipated when similar conditions were removed from earlier applications, and this will make the identification and apportionment of damage much more reliable. However, this is not enough to escape ambiguity as per to what damages can be specifically attributed to the development in question (see also preciseness test).
- 14.5.30** (d) **enforceable:**
The question is whether:

- it is practically possible for the LPA to detect non-implementation or remedy any breach of the conditions.

the conditions relate to land not controlled by the applicant (outside the site only a Grampian condition may be valid).

- 14.5.31** The LPA would be able to detect non-implementation if a 'before' survey (condition 6), an 'after' survey (condition 7) and their results are not submitted, or if repairs are not delivered. However, conditions 6 and 7 are not enforceable for the reasons explained below.
- 14.5.32** In the previous test, it was concluded that there is no mechanism to accurately attribute specific damages solely to the development of the 12 no. dwellings due to the cumulative impacts of developments in the area and the use of the highway by other users. As this task is impossible, there is no policy or legal basis on which the LPA can oblige the developer to carry out repairs before starting the construction (condition 6) or after completion of the development (condition 7).
- 14.5.33** In addition, conditions 6 and 7 have not been consistently applied to all other developments in the area. The position of ECC Highways has been changed from providing no comments (UTT/16/0782/FUL) to even not objecting to the removal of the conditions (UTT/16/3663/FUL) that were originally recommended by them when consulted for UTT/16/0786/DFO (see **Table** in paragraph 14.1.5).
- 14.5.34** Despite the above, paragraph 73(2)(a) of s73 of the Town and Country Planning Act 1990 allows the variation of the conditions instead of their complete removal subject to the applicant's agreement in writing. This scenario was considered and supported by ECC Highways who suggested a variation of conditions 6 and 7 into a single condition with three parts:
- a. Prior to commencement a comprehensive highway condition 'before' survey of Whiteditch Lane from its junction with Bury Water Lane to the application site shall be undertaken. The results of such "before" survey shall be submitted to and approved in writing by the local planning authority.
 - b. Prior to occupation of the 11th dwelling a comprehensive highway condition 'after' survey of Whiteditch Lane from its junction with Bury Water Lane to the application site shall be undertaken (this survey should be undertaken in consultation with an Essex Highways engineer). The results of the 'after' survey and a schedule of works that rectify any damage that can be reasonably attributed to the construction traffic from this development shall be submitted to and approved in writing by the local planning authority.
 - c. Prior to occupation of the 12th dwelling but after construction of that dwelling the repair works identified in the agreed schedule of works identified in b) shall be carried out at the expense of the developer and to the satisfaction of the highway authority.

14.5.35 The Planning Practice Guidance³ addresses the issue of when can conditions be used relating to land not in control of the applicant (paragraph 009):

Conditions requiring works on land that is not controlled by the applicant, or that requires consent or authorisation of another person or body often fails the tests of reasonableness and enforceability. It may be possible to achieve a similar result using a condition worded in a negative form (a Grampian condition) – ie prohibiting development authorised by the planning permission or other aspects linked to the planning permission (eg occupation of premises) until a specified action has been taken (such as the provision of supporting infrastructure) (own emphasis).

14.5.36 Therefore, the varied condition suggested by ECC Highways is a more suitably worded Grampian-style condition in comparison to currently worded conditions 6 and 7.

14.5.37 However, the varied condition itself fails to meet the tests of paragraph 56 of the NPPF. The required ‘schedule of works that rectify any damage that can be reasonably attributed to the construction traffic from this development’ (own emphasis) is not enforceable or adequately precise, as discussed above. Even if a ‘margin of appreciation’ were to be agreed with by the LPA and the developer, there is no policy or legal basis on how to impartially set this threshold, and as such, the damages ‘reasonably attributed’ to the development can only be defined subjectively. If the LPA were to disagree with the developer in the latter’s assessment of what damages are ‘reasonably attributed’ to the development, there would be no robust basis to enforce the LPA’s position. Therefore, paragraph 73(2)(a) of s73 of the Town and Country Planning Act 1990 cannot be triggered and as such the case officer did not seek the applicant’s agreement to vary the conditions.

14.5.38 (e) **precise:**

The question is whether the condition is worded in a way that makes it clear to the applicant what must be done and when to comply with it.

14.5.39 Condition 6 states ‘any repair work’ instead of, for example, ‘all repair work identified in the survey’, plus it refers to ‘*repair work necessary to facilitate the passage*’ and not, for example, ‘repair work necessary to offset damages caused by the development’. Condition 7 states a ‘further comprehensive survey’, instead of, for example, a ‘further comprehensive condition survey’ as in condition 6, plus it refers to ‘any identified damage/repair work’ instead of being more precise in saying, for example, ‘all identified damage/repair work arising from the development permitted’. It also states ‘any repair work’ (as condition 6) instead of, for example, ‘all repair work identified in the survey’. Therefore, conditions 6

³ Last updated 23 July 2019 – website: <https://www.gov.uk/guidance/use-of-planning-conditions>

and 7 are not precise by reason of the wrong choice of words and their vagueness.

14.5.40 Again, ECC Highways (17 May 2022) state that the majority of the development along Whiteditch Lane has been built out, and therefore Whiteditch Lane will be subject to less construction traffic than was anticipated when similar conditions were removed from earlier applications, and this will make the identification and apportionment of damage much more reliable. However, this is not enough to escape ambiguity as per to what damages can be specifically attributed to the development in question. The practical difficulty and subjectivity in attributing specific damages to the development of the 12 no. dwellings for the reasons explained above is a failure of the preciseness test, not just irrelevant to the development permitted.

14.5.41 (f) **reasonable in all other respects:**

The question is whether the condition is reasonable in terms of not placing unjustifiable and disproportionate burdens on the applicant and following the *Wednesbury* principles⁴.

14.5.42 Notwithstanding the intention behind the use of conditions 6 and 7, it would not be justifiable or proportionate to require such repairs if they cannot be specifically tied to the developer and the construction traffic associated only with this development for the reasons elaborated above.

14.5.43 It is not reasonable for the LPA to require from the developer to do 'repair work' (let alone 'any repair work') on the byway before the development commences (condition 6) or after the development's completion (condition 7) as that fails the tests set out in paragraph 56 of the NPPF and would not be reasonable in any event (failing the *Wednesbury* principles⁵). More specifically, the principle of taking into account a matter which ought not to be taken into account for decision-making (as the repairs are not relevant to planning or the development permitted), as well as the principle of not being so unreasonable that no reasonable person acting reasonably could have made (as conditions require improvements on the highway even before the development commences and improvements to highway safety that fall outside the scope of planning). The reasons why the conditions fail the above test known as *Wednesbury* principles have been elaborated in the preceding paragraphs of this report.

14.5.44 It is also unenforceable to ask the developer to do the 'after' survey any time after the completion of the development and at the same time require

⁴ Associated Provincial Picture Houses Ltd v *Wednesbury* Corporation (1948) 1 KB 223.

This case law laid the reasonableness tests (*Wednesbury* principles): (A) whether the decision-makers have taken into account matters which ought not to be taken into account, (B) whether the decision-makers have failed to take into account matters which ought to be taken into account, and (C) whether the conclusion reached by the decision-makers was so unreasonable that no reasonable person acting reasonably could have made it.

⁵ *Ibid.*

the repair works to be carried out within 3 months from completion of the development. The time restrictions conflict with each other.

15. ADDITIONAL DUTIES

15.1 Public Sector Equalities Duties

15.1.1 The Equality Act 2010 provides protection from discrimination in respect of certain protected characteristics, namely: age, disability, gender reassignment, pregnancy and maternity, race, religion or beliefs and sex and sexual orientation. It places the Council under a legal duty to have due regard to the advancement of equality in the exercise of its powers including planning powers.

15.1.2 The Committee must be mindful of this duty inter alia when determining all planning applications. In particular, the Committee must pay due regard to the need to: (1) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act; (2) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and (3) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

15.1.3 Due consideration has been made to The Equality Act 2010 during the assessment of the planning application, no conflicts are raised.

15.2 Human Rights

15.2.1 There may be implications under Article 1 (protection of property) and Article 8 (right to respect for private and family life) of the First Protocol regarding the right of respect for a person's private and family life and home, and to the peaceful enjoyment of possessions; however, these issues have been taken into account in the determination of this application.

16. CONCLUSION

16.1 Overall, there is no material change in circumstances in comparison to those of the other applications to remove such conditions, and the previous LPA decisions must be attributed significant weight. Therefore, on this occasion, for the reasons of consistency in decision-making and after considering the application on its own merits, as well as after exploring and dismissing the possibility to vary the conditions for the reasons elaborated in the preceding paragraphs, it is recommended that **conditions 6 and 7 should be removed** from UTT/15/0879/OP as they fail to meet the tests of paragraph 56 of the NPPF.

17 Conditions

- 1 CONDITION 1 DELETED.
- 2 CONDITION 2 DELETED.
- 3 CONDITION 3 DELETED.
- 4 Prior to commencement of development, the provision of an access into the site as shown in principle on Drawing No. 14076/4F shall be provided with a minimum 5.5 metre carriageway width, details of which shall be submitted to and approved in writing by the local planning authority in consultation with the Highway Authority prior to the commencement of development. The approved scheme of works shall then be implemented in its entirety prior to commencement on site.
PENDING CONSIDERATION UNDER UTT/22/1564/DOC.
- 5 The development shall be implemented in accordance with the Construction Method Statement submitted to and approved in writing by the local planning authority under UTT/20/3113/DOC. The approved Statement shall be adhered to throughout the construction period, and shall provide for the parking of vehicles of site operatives and visitors; loading and unloading of plant and materials; storage of plant and materials used in constructing the development and wheel and underbody washing facilities.
- 6 THIS CONDITION IS REMOVED.
- 7 THIS CONDITION IS REMOVED.
- 8 The development shall be implemented in accordance with the passing bay of 6 metres in length along the site frontage in the position as shown on Drawing No. 14076/4F that was submitted to and approved in writing by the local planning authority under UTT/21/1847/DOC. The approved scheme of works shall be implemented in its entirety prior to first occupation of the dwellings hereby permitted.
- 9 The existing access shall be permanently closed incorporating the reinstatement to full height of the highway verge immediately the proposed new access is brought into use and retained as such thereafter.
- 10 The development shall be implemented in accordance with the Biodiversity Management Plan that was submitted to and approved in writing by the local planning authority under UTT/21/1847/DOC.
- 11 The development shall be implemented in accordance with the programme of archaeological trial trenching followed by open area excavation that was secured and undertaken in accordance with a written scheme of investigation which was submitted to and approved in writing by the local planning authority under UTT/21/0052/DOC.

- 12** The development shall be implemented in accordance with the detailed surface water drainage scheme for the site based on sustainable drainage principles and the assessment of the hydrological and hydrogeological context of the development that were submitted to and approved in writing by the local planning authority under UTT/22/1422/DOC. The scheme shall be implemented in accordance with the approved details prior to the first occupation of the dwellings hereby permitted.

- 13** The development shall be implemented in accordance with the foul water strategy that was submitted to and approved in writing by the local planning authority under UTT/21/1847/DOC. No dwellings shall be occupied until the works have been carried out in accordance with the approved foul water strategy.

APPENDIX 1 – STATUTORY CONSULTEES (ECC HIGHWAYS)

From: [Katherine Wilkinson - Strategic Development Engineer](#)
To: [Planning](#)
Cc: [Avgerinos Vlachos; Transport Development Admin Assistant](#)
Subject: [External] FW: UTT/22/1134/FUL Highways consultation response 16212
Date: 17 May 2022 15:22:56

UTT/22/1134/FUL | Application to remove conditions 6 (highways) and 7 (highways) of UTT/15/0879/OP (allowed at appeal ref APP/C1570/W/15/3137906). | Land At Holmwood Whiteditch Lane Newport Saffron Walden Essex CB11 3UD

Our ref 16212/4C

The highway authority would not support the removal of the above condition for the following reasons:

1. Conditions no. 6 and 7 were applied by the planning inspector at appeal and therefore it would be reasonable to assume that the planning conditions imposed met criteria and are enforceable and it is not the place of the highway authority to go against the inspector's position .
2. The conditions are consistent with ones that the highway authority would recommend on applications, either as standalone conditions or within a construction management plan, when we are concerned that the impact of the construction traffic on the highway will be significant.
3. The requirement to carry out surveys supports the implementation of Section 59 of the Highways Act, 1980 which allows the highway authority to recover costs for damage caused by the 'extraordinary traffic' associated with development construction traffic
4. The majority of the permitted development along Whiteditch Lane has been built out, and therefore the Whiteditch Lane will be subject to less construction traffic than was anticipated when similar conditions were removed from earlier applications. This will make the identification and apportionment of damage much more reliable.
5. Any developer would be expected to make good any damage that was as a result of their construction traffic.

Therefore from a highways point of view the highway authority would not wish for these conditions to be removed.

Kind regards,

Sophie Currey | Strategic Development Engineer



Sent: 27 June 2022 10:34
To: Avgerinos Vlachos
Cc: Sophie Currey - Strategic Development Officer
Subject: [External] RE: Conditions 6 and 7 - UTT/22/1134/FUL

Hi Avgerinos

Sorry I thought I had sent this. I have looked at the conditions and have the following comments. Let me know if you want to discuss anything?

The current condition that was applied by the inspector is copied below in italics. I believe that the intention of the conditions was to ensure that any damage caused by construction vehicles to the highway is made good after construction is finished. I think that the 2 conditions below that could be combined and streamlined to achieve this aim and be compliant with the tests.

In my view the revised condition should be in 3 parts

- a) Prior to commencement a comprehensive highway condition 'before' survey of Whiteditch Lane from its junction with Bury Water Lane to the application site shall be undertaken. The results of such "before" survey shall be submitted to and approved in writing by the local planning authority
- b) Prior to occupation of the 11th dwelling a comprehensive highway condition 'after' survey of Whiteditch Lane from its junction with Bury Water Lane to the application site shall be undertaken (this survey should be undertaken in consultation with an Essex Highways engineer). The results of the 'after' survey and a schedule of works that rectify any damage that can be reasonably attributed to the construction traffic from this development shall be submitted to and approved in writing by the local planning authority
- c) Prior to occupation of the 12th dwelling but after construction of that dwelling the repair works identified in the agreed schedule of works identified in b) shall be carried out at the expense of the developer and to the satisfaction of the highway authority.

Current conditions

6) No development shall take place until a comprehensive condition survey of Whiteditch Lane from its junction with Bury Water Lane to the application site has been completed, details of which have first been submitted to and approved in writing by the local planning authority for approval. The results of such "before" survey and any required repair work necessary to facilitate the passage of construction vehicles shall be submitted to and approved in writing by the local planning authority with any repair work being carried out prior to the construction period.

7) Following completion of the development, a further comprehensive survey of Whiteditch Lane from its junction with Bury Water Lane to the application site shall be completed in accordance with the details approved in condition 6 above. The results of the survey and any identified damage/repair work shall be submitted to and approved in writing by the local planning authority. Any repair works identified in the "after" survey shall be carried out within 3 months of the completion of the construction of the development to a programme to be agreed by the local planning authority.

Katherine Wilkinson | Strategic Development Engineer
Strategic Development

APPENDIX 2 – TABLE OF CONDITIONS ATTACHED TO OTHER PERMISSIONS IN THE AREA

	<u>Conditions on 'before' survey</u>
Current application	<p>Condition 6</p> <p>No development shall take place until a comprehensive condition survey of Whiteditch Lane from its junction with Bury Water Lane to the application site has been completed, details of which have first been submitted to and approved in writing by the local planning authority for approval. The results of such “before” survey and any required repair work necessary to facilitate the passage of construction vehicles shall be submitted to and approved in writing by the local planning authority with any repair work being carried out prior to the construction period.</p>
UTT/17/0222/FUL	<p>Condition 5</p> <p>No development shall take place until a comprehensive condition survey of Whiteditch Lane from its junction with Bury Water Lane to the application site has been completed, the details of such survey having first been submitted to and approved by the Local Planning Authority. The results of such 'before' survey and any required repair work necessary to facilitate the passage of construction vehicles shall be submitted to and approved in writing by the local planning authority with any repair work being carried out prior to the construction period.</p>
UTT/16/3663/FUL	<p>Condition 7</p> <p>Prior to commencement of development, a comprehensive condition survey of Whiteditch Lane from its junction with Bury Water Lane to the application site shall be completed, details of which shall be submitted to and approved by the Local Planning Authority. The results of such 'before' survey and any required repair work necessary to facilitate the passage of construction vehicles shall be submitted to and approved in writing by the local planning authority with any repair work being carried out prior to the construction period.</p> <p>REASON: In the interests of highway safety in accordance with ULP Policy GEN1 of the Uttlesford Local Plan (adopted 2005).</p> <p>Condition justification: The condition survey is required to enable White Ditch Lane to be in a physical condition of repair suitable to accommodate construction vehicles visiting the site in connection with the development hereby approved.</p>

UTT/16/0782/FUL	<p>Condition 5</p> <p>No development shall take place until a comprehensive condition survey of White Ditch Lane from its junction with Bury Water Lane to the application site has been completed, details of such survey having first been submitted to and approved by the Local Planning Authority. The results of such 'before' survey and any required repair work necessary to facilitate the passage of construction vehicles shall be submitted to and approved in writing by the local planning authority with any repair work being carried out prior to the construction period.</p> <p>REASON: In the interests of highway safety in accordance with ULP Policy GEN1 of the Uttlesford Local Plan (adopted 2005).</p>
UTT/16/0786/DFO	<p>Condition 10</p> <p>No development shall take place until a comprehensive condition survey of Whiteditch Lane from its junction with Bury Water Lane to the application site has been completed. Details of such survey having first been submitted to and approved by the Local Planning Authority. The results of such 'before' survey and any required repair work necessary to facilitate the passage of construction vehicles shall be submitted to and approved in writing by the local planning authority with any repair work being carried out prior to the construction period.</p> <p>REASON: In the interests of highway safety, in accordance with Uttlesford Local Plan Policy GEN1 (2005).</p>
<u>Conditions on 'after' survey</u>	
Current application	<p>Condition 7</p> <p>Following completion of the development, a further comprehensive survey of Whiteditch Lane from its junction with Bury Water Lane to the application site shall be completed in accordance with the details approved in condition 6 above. The results of the survey and any identified damage/repair work shall be submitted to and approved in writing by the local planning authority. Any repair works identified in the "after" survey shall be carried out within 3 months of the completion of the construction of the development to a programme to be agreed by the local planning authority.</p>
UTT/17/0222/FUL	<p>Condition 6</p> <p>Following completion of the construction of the dwellings, a further comprehensive survey of Whiteditch Lane from its junction with Bury Water Lane to the application site shall be completed in accordance with the details approved in 5 above. The results of the survey and any identified damage/repair work shall be submitted to and approved in writing by the Local Planning Authority. Any repair works identified in the 'after' survey shall be carried out within 3 months of the completion of the construction of the dwellings to a programme to be agreed with the Local Planning Authority.</p>

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">UTT/16/3663/FUL</p>	<p>Following completion of the construction of the dwellings, a further comprehensive survey of Whiteditch Lane from its junction with Bury Water Lane to the application site shall be completed in accordance with the details approved in 7 above. The results of the survey and any identified damage/repair work shall be submitted to and approved in writing by the Local Planning Authority. Any repair works identified in the 'after' survey shall be carried out within 3 months of the completion of the construction of the dwellings to a programme to be agreed with the Local Planning Authority.</p> <p>REASON: In the interests of highway safety in accordance with ULP Policy GEN1 of the Uttlesford Local Plan (adopted 2005).</p>
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">UTT/16/0782/FUL</p>	<p>Condition 6</p> <p>Following completion of the construction of the dwellings, a further comprehensive survey of White Ditch Lane from its junction with Bury Water Lane to the application site shall be completed in accordance with the details approved in condition 5 above. The results of the survey and any identified damage/repair work shall be submitted to and approved in writing by the Local Planning Authority. Any repair works identified in the 'after' survey shall be carried out within 3 months of the completion of the construction of the dwellings to a programme to be agreed with the Local Planning Authority.</p> <p>REASON: In the interests of highway safety in accordance with ULP Policy GEN1 of the Uttlesford Local Plan (adopted 2005).</p>
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">UTT/16/0786/DFO</p>	<p>Condition 11</p> <p>Following completion of the construction of the dwellings, a further comprehensive survey of Whiteditch Lane from its junction with Bury Water Lane to the application site shall be completed in accordance with the details approved in 5 above. The results of the survey and any identified damage/repair work shall be submitted to and approved in writing by the Local Planning Authority. Any repair works identified in the 'after' survey shall be carried out within 3 months of the completion of the construction of the dwellings to a programme to be agreed with the Local Planning Authority.</p> <p>REASON: In the interests of highway safety, in accordance with Uttlesford Local Plan Policy GEN1 (2005).</p>