

Argyll and Bute Council
Comhairle Earra Ghaidheal agus Bhoid

Customer Services
Executive Director: Douglas Hendry



Kilmory, Lochgilphead, PA31 8RT
Tel: 01546 602127 Fax: 01546 604435
DX 599700 LOCHGILPHEAD
e.mail –douglas.hendry@argyll-bute.gov.uk

23 January 2013

NOTICE OF MEETING

A meeting of the **PLANNING, PROTECTIVE SERVICES AND LICENSING COMMITTEE** will be held in the **CLACHAN VILLAGE HALL, CLACHAN** on **WEDNESDAY, 30 JANUARY 2013** at **10:30 AM**, which you are requested to attend.

Douglas Hendry
Executive Director - Customer Services

BUSINESS

- 1. APOLOGIES FOR ABSENCE**
- 2. DECLARATIONS OF INTEREST (IF ANY)**
- 3. IAN DARBY NO 1 TRUST: ERECTION OF GATE PILLARS, CAST IRON GATES, FLANK WALLS AND RAILINGS: BALINAKILL COUNTRY HOUSE HOTEL, CLACHAN (REF: 12/01907/PP)**
Report by Head of Planning and Regulatory Services (Pages 1 - 34)

PLANNING, PROTECTIVE SERVICES AND LICENSING COMMITTEE

| | |
|------------------------------------|--------------------------------|
| Councillor Gordon Blair | Councillor Rory Colville |
| Councillor Robin Currie | Councillor Mary-Jean Devon |
| Councillor George Freeman | Councillor Fred Hall |
| Councillor David Kinniburgh | Councillor Alistair MacDougall |
| Councillor Robert Graham MacIntyre | Councillor Donald MacMillan |
| Councillor Alex McNaughton | Councillor James McQueen |
| Councillor Sandy Taylor | Councillor Richard Trail |

Contact: Fiona McCallum

Tel. No. 01546 604392

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Argyll and Bute Council
Development Services

Delegated or Committee Planning Application Report and Report of handling as required by Schedule 2 of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 relative to applications for Planning Permission or Planning Permission in Principle

Reference No: 12/01907/PP
Planning Hierarchy: Local
Applicant: Ian Darby No 1 Trust
Proposal: Erection of gate pillars, cast iron gates, flank walls and railings
Site Address: Balinakill Country House Hotel, Clachan, by Tarbert

DECISION ROUTE

Local Government Scotland Act 1973

(A) THE APPLICATION**(i) Development Requiring Express Planning Permission**

- Erection of gate pillars (part retrospective);
- Installation of cast iron gates;
- Erection of flank walls and railings.

(ii) Other specified operations

- Dismantling and re-erection of listed gate pillars (separate listed building consent already obtained)
-

(B) RECOMMENDATION:

It is recommended that planning permission be granted subject to the conditions and reasons listed in the report, and subject to a discretionary local hearing being held in response to the number of third party representations received and the complexity of the issues raised.

(C) CONSULTATIONS:

Area Roads Engineer (18.09.12) – no objection

West Kintyre Community Council (12.10.12) – object to the application on the basis that Balinakill residents will become part of a gated community and that emergency access might be prejudiced. They comment that they appreciate that the owner should be able to do as he wishes with his property but there should be consideration of other affected parties.

Scottish Ambulance Service (04.10.12) – has no specific comments about the proposal, but notes that in all cases access should be ideally unimpeded, any security mechanism such as a keypad should be shared with the emergency services as ambulance crews do not have the authority to use force to enter premises other than in life threatening circumstances.

Strathclyde Police – (19.10.12) – no objection, but comments that locked gates could impede emergency access and lead to the prospect of forced entry and consequent damage. Any keypad code should be shared with the emergency services and preferably with residents. Secured entry would restrict the police from carrying out routine patrols which could cause a security risk during those periods when the applicant's premises are unoccupied.

Strathclyde Fire Brigade (25.09.12 and 28.11.12) – no objection on the basis that the gates are not to be locked and will be electrically operated by a push button, with manual control in the event of failure, as proposed by the applicant. In response to additional information emerging about the proposed operation of the gates, confirmation that their position remains one of no objection, but given the need to use a key in the event of power failure, they recommend a condition to the effect that in the event of a power failure a representative of the hotel should be required to secure the gates in an open position until such time that power is restored.

Oban District Disability Forum (12.11.012) – no objection but recommend sufficient time delay in the operation of the gates to allow use by a person with a disability and recommend that the push button should be located 1200mm above ground level.

Comment: Consulted in the absence of a disability forum for Kintyre. The Kintyre Forum on Community Care has also been contacted in the absence of a local disability forum and any comments received will be reported subsequently.

Council Access Officer (30.11.12) – The driveway access is not recorded as a public right of way and it is unlikely in his view that it could be claimed to be such (although it remains open for a third party to seek to claim otherwise). Beyond this, in its capacity as Access Authority, the Council has a general duty to safeguard the public's rights of responsible access to land, subject to safeguarding sufficient land for the purposes of maintaining privacy about buildings. The Access Officer's view is that the main driveway is within Access Rights, although the spur from it providing access to the hotel and its immediate grounds would not be. His is of that view as the circumstances of the original house and estate have changed over the years as property has been sold off and new buildings developed and the use of the house altered to that of a hotel, so that the land required for the purposes of privacy for the occupiers of the hotel is less than that which would have been accorded to the original estate house.

Public access under the Land Reform Act extends to any non-motorised use, including walking, cycling and horse riding. The driveway is used by residents to access the centre of the village and for recreational access. In the event of permission being granted it should be a condition that a fingerpost be erected to confirm access rights beyond the gates, the pedestrian gate should provide 1.5m clear access (rather than the 1.0m shown) to allow access by horses, wheelchairs and pushchairs. The use of the electric gates by a horse-rider would not be appropriate given the possibility that a horse could be spooked by their operation so the pedestrian gate should be capable of being opened by a horse-rider without the need to dismount. If the purpose of the gates is to reduce speed this might be better achieved by warning signs, speed humps or some other form of traffic management

rather than by gating the access.

(D) **HISTORY:** 12/01430/LIB – listed building consent granted for the dismantling of gate pillars and their re-erection in the location proposed by this application, and for the addition of gates, flank walls and railings (24.08.12)

(E) **PUBLICITY:** The application has been publicised by means of site notice and newspaper advertisement (expiry date 12.10.12).

(F) **REPRESENTATIONS:**

Representations against the proposal have been received from the following:

J Griffiths, The Folly by Balinakill, Clachan (05.09.12, 15.10.12 & 26.11.12);
A and J Carter, Taigh Sona, Tayinloan (08.10.12);
N Smith Balinakill Cottage, Clachan (08.10.12);
R and F Fox, The Secret Garden, Clachan (10.10.12);
G Guy, 21 Croft Park, Tarbert (24.09.12);
N Baldwin, 14 Riverbank Street, Newmilns, Kilmarnock (06.10.12);
N and H Stewart, Balinakill Farm House, Clachan (05.09.12, 11.10.12, 12.11.12 & 26.11.12);
S Steel, Lenaig Farm, Tayinloan (05.09.12, 11.10.12 & 26.11.12);
D & J Griffiths, Kilcalmonell, Balinakill, Clachan (05.09.12, 11.10.12 & 26.11.12);
P Simpson, Canada View, Clachan (05.09.12, 12.10.12 & 26.11.12);
D & P Burke, Balinakill Farm Cottage, Clachan (05.09.12 & 17.09.12, 05.10.12, 13.11.12, 15.11.12, 17.11.12, 26.11.12 & 27.11.12)
M Mundell, North Lodge, Clachan (11.10.12)
D Craven, 12 Foundry Wynd, Woodside, Kilwinning (07.10.12);
E Ball, Dunultach, Clachan (11.10.12);

Summary of issues raised:

- A gated access will be inconvenient, restrictive, oppressive and detrimental to the amenity of those residents at Balinakill with servitude rights of access;

Comment: The applicant has advised that his intention is that the gates would be freely operable electric gates are not intended to impose a significant inconvenience to users of the access; residents or otherwise. The applicant has indicated that the speed of the operation of the gate can be controlled, but in the interest of safety it would be intended to set it on an opening cycle of 10 to 12 seconds (although in practice there would be a longer delay in approaching and operating the gates and accelerating away). Any conflict with servitude rights of access which individuals may have over the driveway would be a civil legal matter between the individual and the applicant rather than a legitimate planning consideration. Notwithstanding the applicant's stated intentions, recommended condition No. 2 requires that the gates should be permanently secured in an open position rather than being electrically operated and normally closed.

- Properties at Balinakill form part of one community and they will become separated from the remainder of the village at Clachan to the detriment of community cohesion, the amenity of these properties and the character of the

village as a whole;

Comment: Physically, properties at Balinakill form a separate cluster of buildings to the main part of the village, a situation recognised by the local plan in defining an intervening area of 'countryside around settlement' separating the two. No doubt there is common interaction between all the residents of Clachan, but no reason to consider that this would be necessarily curtailed by the addition of freely operable gates on the approach to Balinakill. It is, however, necessary to have regard to access rights which the public can legitimately exercise in terms of their rights under the Land Reform Act and to ensure that they are not inappropriately restricted

- Public right of access should remain available at all times to users of this road and should not be curtailed by locked entrance gates;

Comment: This driveway is a private access in the ownership of the applicant over which other parties hold servitude rights of access. It is neither a public nor a private road. Land Reform Act rights provide for any non-motorised use, including walking, cycling and horse riding, but these do not extend to vehicular use. Notwithstanding the applicant's stated intentions, recommended condition No. 2 requires that the gates should be permanently secured in an open position rather than being electrically operated and normally closed.

- A reduction in the entrance width from 20' to a gated 12' will create a deterrent to access and will inhibit free access;

Comment: The applicant has advised that it is intended that free access will be maintained. The pillars are to be located either side of the existing carriageway with only very marginal encroachment by the folded back gates when opened. The unusual width between the pillars in their current location is occasioned by the geometry of the bellmouth of the junction and this precludes their use for their designed purpose of supporting gates. In terms of available width, there is an existing gate on the driveway (beyond the site of the proposed gates and the hotel entrance) with a width of 3.7m (12'), so in terms of available width the installation of gates would impose no greater constraint on the usability of the driveway.

- The applicant has indicated a desire rather than a need for the development. In the absence of a locking mechanism the gates will be of doubtful security value;

Comment: The applicant is not required to demonstrate need in support of his proposal. It is indicated that the purpose of the gates is to deter casual access rather than to prevent legitimate access and to reduce vehicle speed, not to improve security.

- Government advice in 'Designing Places' recognises that small scale developments in rural environments can have large impacts and that successful places are ones which are welcoming with a distinctive collective identity, easy to move around in, inclusive, safe and pleasant. In this case the benefit to one property is outweighed by the detrimental effect upon others;

Comment: There is a presumption in favour of the applicant's desire to gate his property which should only be overridden in the event that Members consider that the land use planning consequences of the development are so prejudicial to the interests of residents and their environs that permission should be refused.

- The size and weight of the gates and the possibility that they could be locked raises material planning considerations in terms of equality implications for the

elderly and the disabled and ease of access by emergency services;

Comment: The applicant has stated that it is neither intended that the gates should have to be operated manually nor that they should be locked. The emergency services have been consulted for their views in the matter and have not raised objections on the understanding that the gates are not to be locked. Notwithstanding the applicant's stated intentions, recommended condition No. 2 requires that the gates should be permanently secured in an open position rather than being electrically operated and normally closed.

- Government advice in Circular 4/2009 requires observance of equal opportunities obligations in the determination of planning applications i.e. a requirement to ensure compliance, implementation and maintenance. Historic Scotland guidance requires that developments should seek to provide unassisted and dignified physical access for all;

Comment: Section 149 of the Equalities Act 2010 places a duty upon public authorities, in the exercise of their functions, to have due regard to the need to eliminate discrimination and foster good relations between persons who share a relative protected characteristic and persons who do not share it. The equal opportunities implications of the development are material to the decision at hand.

- The need to negotiate a gate will increase the incidence of vehicles meeting each other in circumstances where there are no passing opportunities;

Comment: The driveway has good forward visibility which would be maintained despite the development proposed. In the event that gates were to remain open at all times there would be no change in the current position, where vehicles may meet each other or encounter pedestrians on the carriageway. In the event that operating gates were to be installed, it would be necessary for a condition to be imposed to require passing places to be constructed either side of the gates in order to provide a standing space off the carriageway to allow vehicles to pass each other safely whilst the gates were being operated and also to provide for level access via the pedestrian gate, as it would not be appropriate for pedestrians to use an electrically operated gate mechanism designed primarily for vehicular use.

- The need to manually handle gates, or the possibility of locked gates, would be discriminatory in terms of the infirm, the elderly or the disabled. It is indicated that some current residents at Balinakill are elderly or subject to medical or mobility issues which could be seriously prejudiced by the proposal. This has corroborated by the GP and a second doctor who are conversant with the particular medical circumstances of one of the residents. They support that person's desire for the access to remain un-gated and the medical opinion has been expressed that an additional delay to the emergency services of even a minute could prove life threatening. The view is taken that this would contravene the human rights of the individual concerned contrary to the provisions of the Human Rights Act. It is suggested that the circumstances of this individual and the professional medical opinion expressed should be accorded significant weight in the determination of the application.

(Members should note that the individual concerned has given her express consent for those representations involving reference to her medical circumstances not to be treated confidentially).

Comment: The applicant has advised that it is not intended that the gates would be operated manually, other than in the event of electrical failure in which case the gates would default to

a battery back-up supply, and in the event of longer-term power loss, to manual operation. In such circumstances the applicant intends that the gates would be left open until power and normal operation is restored. Manual operation would therefore be an exception. It is not intended that the gates would be locked. In terms of delay during the normal functioning of the gates, the opening cycle is intended to be of the order of 10 to 12 seconds, so allowing for a vehicle to stop to allow activation of the push button, and the acceleration time away from the gates, the overall delay to travel time imposed could reasonably be expected to be of the order of 30 seconds. Such a delay would not be reasonably regarded as being significant in terms of routine comings and goings. However, the exceptional circumstances of a particular individual have been raised and accordingly the human rights implications of the proposal relative to that individual are addressed in Section E below. Notwithstanding the applicant's stated intentions, recommended condition No. 2 requires that the gates should be permanently secured in an open position rather than being electrically operated and normally closed.

- The application does not include details of the intended operating mechanism, nor does it provide confirmation that the installation will comply with disabilities and equalities legislation.

Comment: The applicant has advised subsequent to the initial application details that it is intended that the gates will be power operated by mains electricity with a battery back-up. In the event of permission being granted for gates on the basis of electrical operation, precise details of the installation required and operating arrangements could be controlled by condition, in which case implications for equality of access and for the setting of the listed structures can be assessed in the light of the finalised details of the operating system before further approval is given. Notwithstanding the applicant's stated intentions, recommended condition No. 2 requires that the gates should be permanently secured in an open position rather than being electrically operated and normally closed.

- In the event of electrical operation, loss of power would inhibit operation of the gates by the elderly or the disabled. It is not possible to provide all potential users with a means of remotely operating the gates. It has been suggested by the applicants that the gates will default to manual operation in the event of power failure, although the manufacturers state that override would need to be via a gate control key mechanism. As hotel staff are not present at all times, and certainly not overnight, and power failures are a regular occurrence, access could be impeded which is of particular concern in terms of emergency access. The lack of staff on hand to monitor the operation of the gates and to attend to any malfunction would not secure compliance with disability and equal opportunities legislation. Whilst a battery back-up has been proposed, objectors contend that the longevity of this reserve supply would be of the order of 8 hours rather than in terms of days as suggested by the applicant. In the event of recourse to manual operation, unfamiliarity with the procedure required to disengage the mechanism could cause delay, impeding emergency access, which in the case of the serious medical circumstances of one resident could prove life-threatening.

Comment: The applicant has clarified that it is his intention to install a battery back-up to the mains power supply. The applicant has stated that manufacturers indicate that this would provide for 2 to 3 days' supply with heavy usage and up to a week with light usage, as would reasonably be envisaged in this case, although it should be noted that objectors have contested the longevity of the battery supply. An indicator light on the battery would warn of the need for recharge, and the applicant indicates that it would be the subject of regular checks by hotel staff. In the event of prolonged mains failure or malfunction, manual override

would be afforded by a key which would be attached to the post by galvanised wire. This requires the key to be turned but does not require any other system intervention by the user, as the gates can then be swung open manually. Recourse to manual operation would be the exception and would be likely to be an infrequent occurrence given the provision of a battery back-up supply. It would be in the applicant's interest to address any malfunction promptly given that his business premises are situated beyond the gates. Notwithstanding the applicant's stated intentions, recommended condition No. 2 requires that the gates should be permanently secured in an open position rather than being electrically operated and normally closed.

- The need to clear the drive of snow to facilitate operation of the gates would impede emergency access in such conditions. Such circumstances ought not to be regarded as exceptional and should be planned for;

Comment: As this access is a private driveway rather than a road it is not expected that it would be either gritted or routinely cleared of ice and snow. Sufficient snow to impede the operation of the gates would be likely to affect usability of the driveway in any event. Such conditions should be legitimately regarded as being exceptional.

- The proposed gravel path through the pedestrian gateway would not be a surface suitable for all users;

Comment: The driveway is currently shared by pedestrians and vehicles as there is no footway. The applicant proposes to form a gravel path alongside the driveway between the road junction and a point just beyond the gates, which will encompass the pedestrian gate. Beyond that, pedestrians would need to re-join the carriageway. Accordingly, pedestrian-vehicle segregation along the length of the driveway is not achieved and there will be a continued need for pedestrians to use the carriageway. The purpose of the gates as envisaged by the applicant is, in part, is to slow traffic down to improve safety. In the event that gates were not to be closed the status quo would be maintained and vehicles and pedestrians would continue to share use of the driveway as at present. In this circumstance there would be no obligation to provide any footway and therefore little, if any, likelihood of pedestrian use of the pedestrian gate in this circumstance. In the event of electrical operation of the main gates, pedestrians would then be obliged to use the pedestrian gate. In such circumstances it would be possible to condition any consent to require that the pedestrian access connecting the carriageway either side of the gates, via the pedestrian gate, should be hard surfaced.

- It is not clear where any push button for electrical operation of the gates would be positioned such as to be operable from within a vehicle. If it required persons to leave a vehicle it would be unreasonably inconvenient for elderly or disabled persons. The area is unlit so unless illuminated it could be difficult to use at night. Operation of the pedestrian gate if manual could be prejudicial to the elderly or the disabled;

Comment: In the event of electrical operation of the gates, by way of condition it would be possible to control the means of operation to ensure usability by all. It would be unreasonable to expect the pedestrian gate to be electrically controlled given that the main gate is to be power operated, although it would be necessary to be capable of reasonable use by persons of all abilities. Pedestrian gates are a common feature of residential environments with no expectation that they should be power assisted.

- The development would interfere with agricultural traffic and access by farm machinery (a combine harvester requires 14'). In the event of vehicles meeting, lack of passing places might entail the reversing of large vehicles through a

narrow opening which would be difficult;

Comment: It is not clear what rights of access there are for agricultural vehicles and whether this extends to the width of machinery which may encroach beyond the width of the driveway. The applicant claims however, that there is no right of encroachment onto adjoining land beyond the width of the driveway This is essentially a civil matter between the applicant as landowner and the person exercising access rights. Such rights would not be set aside by the granting of any permission in conflict with those rights. An existing gateway beyond the proposed gates only affords an available width of 3.7m (12') at the moment. The residents contest the legitimacy of this constriction on available width in terms of their servitude rights, but the existence of this gateway is such that it is not clear how any vehicle in excess of that width is able to negotiate the access at present. The driveway at its narrowest point (by the hotel entrance) measures 2.8m (9' 2") in width.

- Who would be responsible in the event of damage caused to the gates?

Comment: This would be a civil legal matter between the person occasioning damage and the owner.

- Locked gates would impede access by emergency vehicles (It is stated that four emergency vehicles have used the access in the last year). Even if gates were not to be locked, delay in the operation of gates would place residents of affected properties at disadvantage in comparison with other residents of the village amounting to indirect discrimination under the Equality Act ;

Comment: Manual operation would be possible in the event of power failure, which would be the exception rather than the norm, particularly given the battery back-up proposed by the applicant. Emergency vehicles routinely visit gated premises and provided that gates are unlocked they do not provide an unreasonable constraint upon gaining access, as borne out by the comments received from the emergency services. Notwithstanding the applicant's stated intentions, recommended condition No. 2 requires that the gates should be permanently secured in an open position rather than being electrically operated and normally closed.

- In determining this application the Council should satisfy itself whether it can grant permission without infringing Human Rights legislation, namely Article 8 (right to respect for a person's private life and home), Article 1 (right to peaceful enjoyment of a person's possessions) and in the case of the medical circumstances of one resident, Article 2 (right to life). It is suggested that approval would infringe such rights in terms of there being introduced a psychological as well as a physical barrier which will impinge upon rights residents have to the peaceful enjoyment of their possessions and the sense of place associated with their homes. Consideration is also required as to whether the development would reduce the life-expectancy of a resident prejudiced by the development proposed.

Comment: Both the applicant and the objectors benefit from such rights to be able to enjoy their properties as they wish, subject to any necessary statutory consents being obtained and provided that other public or private rights are not infringed. The applicant has a reasonable expectation to be able to gate his property, provided that in so doing he does not unreasonably impinge upon the ability of other parties to continue to enjoy their homes and does not cause prejudice to their human rights. The planning system operates in the public interest and in the assessment of the residential amenity consequences of the development the planning authority is arriving at a conclusion as to whether the development infringes unreasonably upon the enjoyment of other persons' homes, whilst also ensuring that human

rights are not prejudiced. Consent should not be withheld unless it is concluded that the residential amenity or human rights of others would be so prejudiced by the presence or the operation of the proposed gates that there are legitimate land use planning reasons for not granting permission.

- It is reported by an objector that the Equality Advisory Service of the Equalities & Human Rights Commission has expressed the view that delay associated with the operation of gates could pose a real and significant risk to life in respect of persons with a non-resuscitation protocol established with the NHS.

Comment: There is no written confirmation of their opinion to that effect from the Commission. It is not open to the Council to engage directly with the Equality Advisory Service as they have pointed out (e-mail 30.10.12) that their service is confined to the provision of advice to individuals and not to public bodies, and that they are unable to assist in the matter.

- There are questions as to whether the preceding listed building consent is sound insofar as it addressed the requirements of the Equality Act 2010 and this application ought not to be determined until it is established that the preceding application was determined correctly.

Comment: The outcome of this planning application is not contingent upon the earlier listed building consent, nor is it influenced by the possibility of any legal challenge to that consent by a third party. Consent is required under both listed building and planning legislation to enable the development to proceed. The planning application addresses a wider range of material considerations than those raised in terms of listed building considerations.

- Should the applicant desire to make a grand statement linked to the listed hotel then the gates would be better positioned off the driveway at the entrance to the hotel where they would not impede access along the hotel drive by residents.

Comment: It is a matter for the applicant to determine where to locate the proposed gates in the application relative to the available length of the driveway. It is necessary for Members to confine themselves to the merits of the location for which permission has been sought.

- Whilst the applicant refers to the availability of 'alternative access' to residential properties, the access point to the north of the Balinakill driveway is not a credible alternative as residents do not possess servitude rights of access over it and it joins the A83 at a point without streetlights or a footway so it is unsuitable for pedestrian usage, particularly by schoolchildren. It also necessitates usage of an inferior wooden bridge, unsuitable for heavy vehicles, including emergency vehicles, and which is prone to flooding.

Comment: It is not clear who benefits from private access rights over either route and such rights are in any event not a material planning consideration. What is evident, is that the 'alternative' route discharges onto the carriageway of an A Class road, which would indeed be a less commodious and safe route for pedestrians than use of the driveway.

- The driveway proposed to be gated is not designated as a Core Path but is listed on the Scottish Paths Record so it is subject to protection of access rights by the Land Reform (Scotland) Act. It provides access to countryside beyond the residential properties at Balinakill. The Council's obligations under this Act to safeguard legitimate public access rights should be addressed as part of the

determination of this application.

Comment: See the Council's Access Officer's response under Section C above.

- Residents have sought advice from Capability Scotland and a copy of their response providing comments on the equality and human rights aspects of the proposal has been supplied (letter dated 26.11.12). This expresses the view that the applicants have obligations under the Equalities Act to disabled guests visiting their premises, but not towards Balinakill residents. The gate mechanism proposed is unlikely to discriminate against car borne visitors but a gravel path serving the pedestrian gate would as access via the carriageway gates would not be a practicable alternative due to the health and safety implications of such. The pedestrian access should therefore be level and hard surfaced and the gate opening mechanism should be operable by one hand without having to turn a wrist.

The Council, however, as Planning Authority has responsibilities under both the Human Rights Act and the Equality Act and must therefore give due regard to the needs of disadvantaged people resident at Balinakill. Although the gates are intended to be motorised, the possibility of power failure irrespective of a battery back-up remains a concern. A notice as to how the gate mechanism can be released would be advisable for visitors without prior knowledge of this contingency. Given that a disabled person resides at Balinakill for whom emergency response time could be a matter of life or death, there remains a potential conflict with Article 2 of the Human Rights Act. The view of Capability Scotland is that the equality and human rights issues are such that permission ought not to be granted.

Comment: Capability Scotland is a national charitable organisation providing support for people with disabilities both in terms of services and advice, and accordingly the opinion which they have expressed in the matter can be given weight in decision-making.

Response from the applicant to the representations received (letter and e-mail dated 09.11.12 and accompanying letter from Semple Fraser dated 09.11.12).

- Issues regarding the acceptability of the development in terms of the historic environment have already been addressed in the consideration of and the granting of listed building consent;
- The development will improve upon the current unbalanced, pointless and incongruous entrance;
- The access is a private drive over which there are servitude rights of access which will be respected. It is not public access;
- Access rights extend to the driveway only (about 12' wide) and not over any adjacent land;
- The proposed gates will be electrically operated and will allow unrestricted access to those enjoying access rights their visitors, emergency vehicles, service vehicles and so on at all times and the gates will remain unlocked;
- The operation of the gates will be similar to that used at public car parks, hospitals, offices and other public buildings who also have an obligation to

comply with equal opportunities legislation;

- A gate operation specification is supplied. It is intended that the gates will be operated by means of push button. Two will be located on the southern gate post, one either side whilst two will be mounted on cast iron posts 1.1m above ground level and positioned 5m from the gates where they will enable operation from within a vehicle;
- An alternative access exists which historically served the farm and adjoining buildings;
- The existing gate at the north-east end of the drive is 12' wide and therefore already limits agricultural vehicle size beyond that point;
- Legal opinion has been sought as to the effect of the Equality Act 2010 which confirms that the duty is to consider whether a physical feature puts a disabled person at substantial disadvantage in comparison with persons who are not disabled. The duty is to take reasonable steps not to cater for every possible eventuality. Given that the gates are designed so as to avoid disadvantage the proposals are Equality Act compliant.

(G) SUPPORTING INFORMATION

Has the application been the subject of:

- | | |
|--|--------------|
| (i) Environmental Statement: | No |
| (ii) An appropriate assessment under the Conservation (Natural Habitats) Regulations 1994: | No |
| (iii) A design or design/access statement: | Not required |
| (iv) A report on the impact of the proposed development eg. Retail impact, transport impact, noise impact, flood risk, drainage impact etc: | No |

(H) PLANNING OBLIGATIONS

Is a Section 75 agreement required: No

(I) Has a Direction been issued by Scottish Ministers in terms of Regulation 30, 31 or 32: No

(J) Section 25 of the Act; Development Plan and any other material considerations over and above those listed above which have been taken into account in the assessment of the application

(i) List of all Development Plan Policy considerations taken into account in assessment of the application.

'Argyll and Bute Structure Plan' 2002

STRAT DC 2 – Development within the Countryside Around Settlements
STRAT DC 9 – Historic Environment and Development Control

'Argyll and Bute Local Plan' 2009

LP ENV 1 – Impact on the General Environment
LP ENV 13a – Development Impact on Listed Buildings
LP ENV 19 – Development Setting, Layout and Design
LP TRAN 3 – Special Needs Access Provision
LP TRAN 4 – New and Existing Public Roads and Private Access Regimes

(ii) List of all other material planning considerations taken into account in the assessment of the application, having due regard to Annex A of Circular 4/2009.

- Scottish Planning Policy 2010
- Scottish Historic Environment Policy 2011
- Circular 4/2009 'Development Management'
- Planning Advice Note 78 – 'Inclusive Design' (2006)
- 'Designing Places' - Scottish Government (2010)
- 'Assessing Impact and the Public Sector Equality Duty : a guide for public authorities (Scotland)' - The Equalities and Human Rights Commission (2011)
- 'Equalities Act 2010 Code of Practice : Services, Public Functions and Associations Statutory Code of Practice' - The Equalities and Human Rights Commission (2011)

(K) Is the proposal a Schedule 2 Development not requiring an Environmental Impact Assessment: No

(L) Has the application been the subject of statutory pre-application consultation (PAC): No

(M) Has a sustainability check list been submitted: No

(N) Does the Council have an interest in the site: No

(O) Requirement for a hearing (PAN41 or other): The application has attracted a significant body of objection in the context of a small community raising a wide range of issues, along with objection from the community council, which warrants the holding of a discretionary local hearing in advance of the determination of the application.

(P) Assessment and summary of determining issues and material considerations

Listed building consent was granted earlier in the year (under delegated powers) for the relocation of gate pillars on the driveway serving Balinakill Country House Hotel at Clachan. In so doing, it was pointed out to the applicant that planning permission would also be required for the consented works and thus this further application has been prompted. This has attracted further representation to that received in response to the listed building consent application which warrants this planning application being determined by committee rather than by officers.

The gate pillars are to be repositioned further along the driveway from their current position close to the junction with the A83 in order to address the shortcomings of their existing location and to facilitate the installation of gates. The pillars were removed from their original historic location many years ago at the time of the bypassing of Clachan by the A83 and now stand astride a wide bellmouth at the junction with the road. Their current location is such that they are too far apart to support gates, and in any event they are located too close to the road to enable vehicles to stop safely to enable the operation of gates. Accordingly, the owner has elected to seek to dismantle the listed pillars and to re-erect them in a position where they would be capable of fulfilling their intended purpose of supporting gates.

The historic environment implications of a) the removal of the listed pillars from their present location b) their dismantling for re-erection in the alternative location proposed, c) the appropriateness of fitting gates, flank walls and railings of the design proposed, and d) the relationship of the development to the listed hotel and the implications for its setting, were all considered at the time of the granting of the listed building consent and were found to be acceptable. Further issues are now raised by the consideration of this associated planning application, particularly the matters raised by third parties as to the acceptability of the development in terms of the access regime which will be affected.

The former Balinakill estate is now fragmented with the listed house having been operated as a small hotel and latterly as a private venue for hire by groups and for corporate functions and the like. The access driveway serving the house (known locally as 'The Avenue') extends beyond the house to serve a group of residential properties substantially founded around the former Balinakill estate farm-steading, along with other private landholdings. The applicant claims that the occupiers of some (but not all) of these properties benefit from servitude rights of access over the driveway. The access is therefore to be regarded as a private access to the hotel which by virtue of the exercise of servitude rights affords access to multiple properties. It does not constitute a road over which unrestricted access is available to the public - where gating could not satisfy the requirements of the Roads (Scotland) Act). Any dispute as to the extent of private access rights would be a civil legal matter rather than a material planning consideration. It should be noted, however, that the Council's access officer considers that public are capable of exercising non-motorised Land Reform Act access rights on foot, by cycle or on horseback along the driveway.

The application has prompted objection from local residents which have been endorsed by the West Kintyre Community Council. The grounds of objection are detailed in Section F of this report, but in summary, the principal concerns are the unwelcome interference with unfettered access currently enjoyed (lawful or otherwise), the likely perception of a gated community removed from the remainder of the village of Clachan, concerns as to the extent to which access will be restricted,

and the implications for access by those with disabilities, by persons visiting, or those unfamiliar with the locality, and also in terms of any impediment which might be presented to access by the emergency services and consequences for those requiring the need of such services.

The applicant has indicated that the application is prompted by the desire is to control the number and speed of vehicles using the access in order to safeguard users of the grounds of the hotel, rather than being motivated by security considerations. The applicant's intention is that the gates are to be unlocked at all times and are to be operated electrically by push button, rather than by keypad or some other security mechanism. In the event of electrical failure they would be supported by a battery back-up, and in the event that was to be exhausted, they could then be opened manually and left open until normal operation was restored. In the absence of any security control it would be the applicant's intention that free access for visitors, deliveries, refuse collection and so on would be maintained to and from the hotel, as well as to those persons wishing to access the land and buildings beyond the hotel. The emergency services have not objected to the installation of gates on the basis of the information provided by the applicant that the gates are to be unlocked at all times and would be capable of being operated manually in the event of a power failure.

The proposal to introduce electrically operated gates across the carriageway, with a manually operated pedestrian gate, irrespective of conflicts with residents private servitude rights (which are not material planning considerations), raises issues in terms of continued useability for those persons seeking to exercise Land Reform Act access rights (on foot, by cycle or on horseback), and introduces the matter of potential delay to access to those properties unconnected with the applicant which lie beyond the hotel. Whilst delay associated with the operation of automated gates in the normal course of events would be unlikely to give rise to a minor inconvenience to either regular or occasional users, it has been disclosed that one resident suffers from exceptional medical circumstances, which in the opinion of two doctors familiar with her condition, would be seriously prejudiced by the introduction of delay to access even of a short duration. Such an avoidable delay could, in their view, prove to be life-threatening and hence represent a potential breach of Human Rights. In such circumstances, legitimate public access rights, equalities implications, consequences for emergency access and associated Human Rights issues are all to be regarded as legitimate planning considerations.

The introduction of electrically operated gates on the carriageway would principally facilitate ease of access by vehicle, and subject to an appropriate operating mechanism could suitably address the needs of disabled drivers in normal operation. Electric gates would lend themselves less to those requiring access on foot, by bicycle and on horseback. Cyclists and horseriders would therefore have to exercise discretion in either dismounting to use the electric gates with due care, or by negotiating the pedestrian gate. Issues would be raised by equipment failure or power loss but reasonable contingencies are advanced by the applicant in terms of battery back-up, manual override and the intention to leave gates open pending power operation being restored.

The Human Rights consequences of the delay involved in the normal operation of gates and any complications associated with their failure due to power loss or malfunction have also to be also taken into account, particularly in the knowledge of the exceptional circumstances of an individual whose life it is suggested could be jeopardised by delay or unfamiliarity associated with the operation of the gates by the ambulance services. Whilst the emergency services have all expressed their satisfaction with the operating arrangements and the contingencies advanced by the applicants in association with the intended electrical operation of the gates, and

although any delay would be likely to be a very small component in the travel time of an ambulance to this particular location, it is evident that the presence of operating gates would introduce an additional encumbrance over and above the situation which pertains at present, which could prove prejudicial to Article 2 of the European Convention on Human Rights (right to life), and which in the particular circumstances of this case warrants a precautionary stance being taken.

It is not considered that there is any other means of installation or any other operating regime which would be less prejudicial to access rights than that which has been proposed by the applicant. Approval of the installation as proposed by the applicant with conditions to control the operating mechanism of the main gates, the details of access via the pedestrian gate, and any contingencies arising from abnormal operating conditions would not however necessarily secure in full the interests of those persons exercising Land Reform Act access rights, nor in particular would it safeguard the Human Rights of the individual who has reasonable expectation that ease of access to her home will not be prejudiced by development contrary to her Human Rights.

In such circumstances it would be an over-reaction to the difficulties presented by the prospect of automated gates to refuse planning permission for the development as a whole, as the majority of the development proposed is readily acceptable in terms of its physical attributes (location, design, materials, consequences for the historic environment), as it is only the fact that the gates would be routinely closed and would require operation by a user, who may or may not be familiar with the means of operation and default position in the event of power failure, which presents complications in terms of access by others in general, and by the emergency services to the resident with a declared medical condition in particular. Accordingly, an option open to the Council would be to approve the development with a condition that the gates should be secured permanently in an open position.

This approach would have the benefit of not imposing any constraint on access or introducing any delay in the use of the driveway. On the face of it, such a condition might appear so contrary to the intentions of the applicant that such a decision could be regarded as being unlikely to be capable of implementation, and thus tantamount to a refusal. However, the development is not being advanced as a security measure (where the capability to close gates would be intrinsic to the intended purpose of the development), but is being proposed as a measure to address the shortcomings of the inappropriate positioning of the existing gate pillars, to enhance the approach to the hotel and to act as a deterrent to those who might not have legitimate need to take access past the hotel. All of those purposes would be secured by the development without gates being closed, and the only intention of the applicant which would not be secured in this way would be that of slowing the speed of traffic. That could be readily achieved by other means of traffic calming if needs be, such as surface treatments or speed humps, for example. It is not uncommon to find impressive gated entrances to estates and other properties where the gates are not automated, where the inconvenience of manual handling results in the gates being left permanently open; so it is not considered that a decision conditioned in this manner should be regarded as being irrational or perverse.

It is therefore recommended that permission should be granted with a condition requiring that the gates are permanently secured in an open position – in the knowledge that if at some point in the future circumstances are such that they would merit the effect of such a condition being reviewed, then that would be an option capable of being pursued by the applicant by way of a further planning application. With that in mind, it is considered that it would be legitimated for the applicant to be afforded the opportunity to install the necessary operating equipment at the outset

CONDITIONS AND REASONS RELATIVE TO APPLICATION 12/01907/PP

1. The development shall be implemented in accordance with the details specified on the application form dated 04.09.12 and the approved drawing reference numbers:
G844 L050A Location Plan;
G844 L050B Site Layout;
G844 L051 Elevations/detail;
unless the prior written approval of the planning authority is obtained for other materials/finishes/for an amendment to the approved details under Section 64 of the Town and Country Planning (Scotland) Act 1997.

Reason: For the purpose of clarity, to ensure that the development is implemented in accordance with the approved details.

2. The two vehicular gates hereby approved, shall be permanently secured in an open position and shall not be closed at any time unless on application to the Planning Authority consent has been granted to vary the effect of or to remove this condition.

Reason: The introduction of automated gates to be operated by those requiring access would present an avoidable delay to emergency services which could prove to be seriously prejudicial to the welfare of an individual with a declared medical condition which in the medical opinion of practitioners acquainted with the circumstances of that individual could prove life-threatening, thereby potentially infringing that individual's human rights.

3. In the event that despite the effect of condition 2 above, the developer elects to install automated gate control equipment concurrently with the implementation of the remainder of the development, details of the control mechanism shall be submitted to and be approved in writing by the Planning Authority prior to installation. Thereafter installation of any such equipment shall only take place in accordance with the duly approved details, and automatic operation shall not be introduced other than in the event of the effect of condition 2 being varied or removed.

The equipment shall be designed and installed to provide for:

- a) on-demand access without any security mechanism which shall be either operated by automatic approach control, or be capable of being operated from within a vehicle, with equipment installed and maintained so as to allow the gate to be freely electrically operable thereafter;
- b) in the event of push button operation, the control shall be installed on either side of the gates at a distance of 5.0m from the gates at a height of 1.2m above ground level;
- c) a battery back-up which shall be maintained at all times to address any power failure ;
- d) the ability for intended users to be able to default from the automated mechanism to manual operation in the event of battery power being exhausted, in which case the gates shall be maintained in an open position until such time as electric operation has been restored.

Reason: In order to enable assessment of the installation and its consequences for the

character and appearance of the listed structures and to ensure that the gates do not present an unacceptable impediment to disabled or other less able persons.

4. Notwithstanding the details shown on the approved plans the gate pillars shall be located so as to provide a clear opening width for the pedestrian gate of 1525mm.

Reason: To enable the pedestrian access to be used by persons of all abilities, and to cater for wheelchairs and pushchairs without the need to operate carriageway gates in the eventuality that those gates should be permitted to become operational at any point in the future.

NOTES TO APPLICANT

- The terms of this permission should be read in conjunction with the terms and conditions of Listed Building Consent 12/01430/LIB
- This application relates to works which have, in part, been commenced. It is not therefore subject to a time limit following which the permission will be considered to have lapsed. However, in order to comply with Section 27B(1) of the Town and Country Planning (Scotland) Act 1997 it is the responsibility of the developer to submit the attached 'Notice of Completion' to the Planning Authority specifying the date upon which the development was completed.
- In terms of condition 1 above, the Council can approve minor variations to the approved plans in terms of Section 64 of the Town and Country Planning (Scotland) Act 1997 although no variations should be undertaken without obtaining the prior written approval of the Planning Authority. If you wish to seek any minor variation of the application, an application for a 'non material amendment' (NMA) should be made in writing to Planning Services, Dalriada House, Lochgilphead, PA31 8ST which should list all the proposed changes, enclosing a copy of a plan(s) detailing these changes together with a copy of the original approved plans. Any amendments deemed by the Council to be material, would require the submission of a further application for planning permission.
- The applicant should be aware that in the event that it is intended to seek future consent for operation of the gates then vehicular passing places would be required either side of the gates, along with a section of hard surfaced footway providing level access through the pedestrian gate and connecting with the carriageway either side of the gate pillars, in order to provide standing and passing opportunities for vehicles and to enable all ability use of the pedestrian access, along with fingerpost signage to confirm public access rights beyond operating gates.

APPENDIX A – RELATIVE TO APPLICATION NUMBER: 12/01907/PP

PLANNING LAND USE AND POLICY ASSESSMENT

A. Settlement Strategy

The application site lies within an area of ‘countryside around settlement’ delineated by the adopted local plan which separates the main ‘settlement’ area for the village of Clachan from a subsidiary ‘settlement’ area which encompasses the hotel building and the other buildings at Balinakill. The ‘countryside around settlement’ zone is subject to the operation of approved structure plan policy STRAT DC 2 which presumes in favour of ‘small scale’ development in specified circumstances. In this case the proposal amounts to small scale development ancillary to the application property to which it relates, which in part entails the relocation of existing structures. As such it can be considered compliant with this policy.

B. Location, Nature and Design of Proposed Development

This application involves the repositioning of three stone gate pillars within the grounds of the Grade C(s) listed Balinakill Country House Hotel, along with the installation of new wrought iron decorative gates and the addition of flank walls and railings to match the style of the gates. The gate pillars are not listed in their own right, but are listed by virtue of being curtilage structures within the grounds of the listed building. Listed building consent has recently been given for the dismantling of the pillars and their re-erection in the location now proposed. Some excavation works were commenced in the intended location of the gate pillars prior to either the listed building consent application or this application being considered. Although these initial works have not been progressed, the application should be regarded as being in part retrospective.

The grounds of the original house have diminished over the years as land and buildings originally associated with the house have been sold off. A significant event has been the construction of the re-aligned Campbeltown road through Clachan during the 1960’s, which would have left the gate pillars stranded from the house to which they related had they not been relocated at the time. The gate pillars therefore have a historic association with the house but not with the particular location where they now stand.

The pillars originally formed one of two formal entrances, one serving the house and the other the remainder of the estate. Three pillars were required in order to provide a separate gated pedestrian entrance alongside the vehicular entrance gates. The pillars are 2.4m high, square in section and constructed in dressed stone, narrowly pointed, with blind carved shields to the front and rear faces and with ornamented sloping cruciform stone copings. Although the hinge attachments remain the gates have been removed. The remaining original entrance in Clachan village close to the dilapidated former gatehouse (now in separate ownership) retains wrought iron decorated gates, which gives an indication of the likely design of the original gates to the main house.

The gate pillars in their present location stand just off the main Campbeltown road astride the bellmouth to the private access serving Balinakill House and a number of disassociated properties beyond. The bellmouth is a wide one to allow vehicles from the north to negotiate the acute angle of the junction and therefore the gate pillars serving the vehicular access are necessarily widely spaced. The gate pillars are not inter-visible with the house some 400m away due to intervening vegetation, but they are readily visible to the public by those passing on the A83. Whilst the pillars on the south side of the entrance form a somewhat wide but nonetheless characteristic spacing of a

pedestrian access (minus a gate) at 2.4m, the remaining pillar to the north is now uncharacteristically separated from the opposing southern pillar by 6.2m, its position apparently dictated by the geometry of the bellmouth to the junction rather than with any intention to replicate an historically authentic spacing. No gates are fitted and it would appear impractical to do so, firstly due to the increased spacing between the gate posts, and secondly, due to the limited set back from the road which would have the potential to cause difficulties and conflict in terms of road safety were gates to vehicular traffic to be brought into use at this location. Presumably these considerations, not least the increased spacing relative to the size of the original gates, were influential as to why the original gates were not fitted when the pillars were relocated.

It is proposed that the pillars be relocated some 30m along the private access at a point where the drive is narrower than it is at the road junction. This will enable the vehicular access piers to be set closer together at a more characteristic estate entrance width of 3.7m, with the associated pillar serving the pedestrian gate to be set to the south of the main gate at a reduced width of 1.0m. It is intended that ornamented cast iron gates will be fitted to both the vehicular (two leaf gates) and the pedestrian (single gate) accesses. In addition, it is proposed to add short wing walls to either side of the two outermost gate pillars. These would comprise a low stone plinth with a coping to match the height of the plinth of the pillars, surmounted by cast iron railings of similar design, lesser scale, but equivalent overall height to the proposed new gates.

The location of the gate pillars set back from the road on the driveway serving the premises to which they relate is considered appropriate, as are the design of the gates and the materials to be employed, all of which are sympathetic to the listed structures and their settings. The issue in this case is with the operation of the gates rather than the physical works proposed. Clearly this issue would not arise if the gates were to be secured permanently in an open position for in access terms the status quo would be maintained. However it is the applicant's stated desire to introduce freely operable automated gates to the currently ungated access and the implications of this are considered in Sections D and E below.

The design and layout details of the proposal satisfy local plan policy LP ENV 19.

C. Historic Environment

The historic environment consequences of the development have already been assessed as part of the consideration of listed building consent 12/01430/LIB. That assessment considered the consequences for historic fabric in terms of the dismantling and relocation of the gate pillars, the appropriateness of the new location in relation to the setting of the listed hotel, and the character and design of the gates proposed and the associated walls and railings, relative to both the listed gate pillars and the hotel. Given that these were considered sufficiently satisfactory for listed building consent to be granted, the historic environment implications of the development do not warrant further consideration as part of this planning application.

The historic environment aspects of the proposal satisfy local plan policy LP ENV13a.

D. Access and equal opportunities considerations

The private access serving the hotel serves a number of residential properties beyond the hotel and various other landholdings. It also provides a means of Land Reform Act access to the countryside for non-motorised users. It is not therefore an exclusive private access to the hotel, but does not constitute a public road open to all traffic. It is

therefore open to the landowner to seek to gate it, provided that in so doing, no access rights legitimately exercisable by other persons are infringed in the process. If private individuals consider that development infringes their access rights either on foot or by vehicle they have civil remedies available to them at law to protect their right of access, irrespective of whether planning permission has been granted. The planning system operates in the public interest to enable the assessment of the land use planning merits of proposals and as such does not have a role in the safeguarding of the private access rights over property exercisable by individuals. It is not a legitimate planning consideration to have regard to who benefits from access rights along this driveway, nor to have regard to whether those rights might be infringed by the installation and operation of gates. It is noted that users of the private access have expressed concern that the development may be detrimental to those with disabilities. Section 149 of the Equalities Act 2010 places a duty upon public authorities, in the exercise of their functions, to have due regard to the need to eliminate discrimination and foster good relations between persons who share a relative protected characteristic and persons who do not share it. It will therefore be necessary in reaching a determination in respect of this matter to have this specific statutory consideration in mind.

It is important to note that the gates are positioned forward of the access and parking area serving the applicant's business. It is therefore necessary for him to provide free access through the gates so as to be able to conduct his business and in order that guests, deliveries, emergency vehicles and so on can come and go unhindered. With that in mind, it is his intention to install a freely operable electric operating mechanism which will allow those parties requiring access, including local residents and other persons requiring access to their properties, free access at all times. It is not the applicant's intention to lock the gates or to install any security mechanism which would restrict free access.

Local Plan policies LP TRAN 3 and LP TRAN 4 apply in this case. Policy LP TRAN 4 sets out principles applicable to private access regimes, including a requirement to facilitate access for emergency vehicles and public service vehicles. Policy LP TRAN 3 requires safe separation of pedestrians and vehicles and construction and layout which satisfies the needs of users of all abilities, including disabled persons.

A gated access could operate in a number of ways each of which would give rise to differing implications for freedom of access and equal opportunities:

- 1) If the development were to be implemented but the gates habitually maintained in an open position, then the status quo would be maintained and there would be no consequences for access and no impediment to the less able user. This would satisfy policies LP TRAN 3 and 4.
- 2) If the gates were to be manually operated only, then this would impose an inconvenience to the able bodied (by virtue of having to stop and leave a vehicle to open and close the gates) and could present an impediment to the less able (by virtue of the difficulty of operating large and heavy gates). This would not satisfy policy LP TRAN 3 as it would prejudice access by less able people.
- 3) If the gates were to be electrically operated but subject to some form of entry control (such as a keypad or other locking mechanism) for security purposes, then access would become restricted to authorised parties only. The location of the operating control would have implications for convenience and usability. This would not satisfy policies LP TRAN 3 or 4 as it would prejudice access by non-authorised persons requiring legitimate access to residential property (such as visitors, deliveries emergency services) and those exercising legitimate public access under the Land Reform Act.

- 4) If the gates were to be electrically operated on an on-demand basis (by infrared approach control or by a push button, for example) then free access for all would be maintained. Again, in the event of a manual control to operate the mechanism its location would have implications for convenience and usability. Provided that any manual control were to be located in a manner such as to be useable by all and without the need to leave a vehicle to operate it, then it would satisfy the requirements of policies LP TRAN 3 and 4, provided that alternative all ability access avoiding negotiation of the main gates were to be provided via the pedestrian gate.

The applicant has been contacted for confirmation as to how the gates are to be operated given that no details of the operating mechanism are indicated on the drawings. He has confirmed that the gates are to remain unlocked at all times to provide continued access to all properties with legal access rights. The gates are to be electrically operated by way of a push button and will close automatically after use. Should the electricity supply fail, the gates will be capable of being opened manually. The applicant originally indicated that the button would be attached to the gate posts, but in the event of an approval on the basis of electrical operation of the gates, the applicant has been advised that a free standing post-mounted button operable from a vehicle would be required by way of condition, in order to ensure the capability for operation from within a vehicle, so as to not prejudice less able users. He has subsequently provided details of the operating system and motor. It is intended that push buttons be mounted on the southern gate post (one either side) and that two other buttons be installed on free standing cast iron posts 5m away from either side of the gates to enable remote operation from within a vehicle.

Whilst it is noted that there is the potential for the gates to be locked, however the applicant has stated that this is not his intention. In deciding whether gates are to be operable or not, it is necessary for the owner to have regard to consequences for users under equal opportunities legislation, both in terms of persons having legal rights of access and in this case, hotel guests visiting the applicant's own property. The applicant has indicated that it would be his intention to introduce the electrical opening and closing arrangement in consultation with those having rights of access. Given the need for the applicant to secure arrangements to ensure that guests, deliveries and so on are able to access his hotel, this would necessitate workable access arrangements which could be introduced in a manner equally commodious to those third parties with private access rights, whilst at the same time safeguarding the interests of those who might wish to exercise public access rights. It is therefore considered that the development as proposed would have an almost negligible impact on persons who share a relative protected characteristic. The requirement to open and close gates manually in the event of a power failure, by virtue of their size and weight, does introduce equal opportunities issues in terms of access, although this could be simply overcome by retaining gates in the open position. From a planning point of view there is no requirement that the gates should have to be shut.

The applicant has also confirmed that the hotel is compliant with equal opportunities legislation and as such the operation of the gates will not discriminate against the interests of any parties, nor be prejudicial to access by deliveries, emergency vehicles and so on. It is indicated that Balinakill Country House is a successful business offering employment to local residents, caterers and tradesmen. The safety of guests is a priority hence the need to control the number and speed of vehicles using the driveway to provide the highest possible standard of safety for both visitors and staff.

There is nothing intrinsically prejudicial to access in terms of the development proposed. It affords a 3.7m width (as per the current driveway dimensions and in conformity with

the justification to policy LP TRAN 4) and the on-demand power operation of the gates, subject to appropriate location of the button to secure operation, would allow continued unrestricted access to both the hotel and to the residential properties benefitting from access rights over the driveway. Less able persons will not be any more disadvantaged or inconvenienced than able bodied persons by the need to operate the gates, other than in the unlikely event of a less able person being the first person to seek to use the gates following a power failure. The installation is designed to enable all ability access and the normal functioning of the gates will not have adverse equal opportunities implications.

In discharging the Council's responsibilities under the Equalities Act, the Equalities and Human Rights Commission (EHCR) advises that decision-makers are obliged to exercise 'scrutiny' role in determining whether the impact assessment has been robust enough, and gives sufficient information to enable due regard to be paid to equality when reaching a decision. It further notes that the extent of that scrutiny should be proportionate to the relevance of the decision to equality. In this case, proportionate consideration has been given to the extent to which the development may prejudice equal opportunities interests as part of the adjudication of the application. The EHCR indicates that discrimination in terms of equality of access will arise where circumstances for disabled or other persons can be regarded in terms of the Equalities Act as being 'unreasonably adverse'. Whilst the Act does not go on to define this, EHCR advice is that it is intended to represent the same level of difficulty as 'substantial' disadvantage. It does not therefore expect every eventuality to be safeguarded against, but does presume that suitable provision will be made for persons of all abilities in the general course of events. The remotely operated power driven gates are not to be installed or require to be operated in such a manner that would be prejudicial for less able users. Indeed, their design facilitates ease of use by less able persons. Were the gates to be maintained in an open position all users, pedestrian and vehicular, able and less able would be able to continue to use and share the carriageway, as at present. In the event that gates were to be closed and be electrically operated, this would introduce the need for pedestrians to be able to use the associated pedestrian gate, in which case level all ability access would need to be assured to safeguard those parties unwilling or unable to negotiate the main gates.

It is not considered that subject to appropriate conditions the development proposed would introduce 'substantial' disadvantage for disabled persons and the equality aspects of the proposal therefore satisfy local plan policies LP TRAN 3 and TRAN 4, having regard also to subsequent the Public Sector Equality Duty.

E. Residential Amenity and Human Rights Considerations

It has been suggested by objectors that the presence of gates and the need to operate those gates to access residential properties at Bailinakill will alter the ambience of those properties and will be socially divisive. It is further suggested that the imposition of a gated access against the wishes of residents may conflict with their human rights to be able continue to enjoy their homes without interference by a decision made in the interests of a third party.

The situation in this case is that the applicant owns the access over which certain residents have servitude rights of access. As owner, he can seek to gate and fence his property as he sees fit without the need to advance any particular justification in support of his applications for the necessary statutory consents. The proposed works are well removed from the objectors' properties and do not directly impinge upon their residential amenity by virtue of their physical relationship with the dwellings. The presence of the gates on the driveway to those properties, and the requirement to operate gates, may

however, have implications for the perception of those properties, and indeed, objectors claim that this will impinge on community cohesion and have consequences which are more psychological than physical.

In exceptional cases perceived harm, as opposed to quantifiable or demonstrable harm, can be a legitimate planning consideration in assessing the residential amenity implications of development. For example, anxiety associated with a perceived health risk has been held capable of diminishing the quality of life, despite any evidence to support the existence of such risk. However, it is not considered that this development would seriously prejudice residential amenity in this case. Only in the event that the presence of the gates could be considered to be so prejudicial to the amenity currently enjoyed by residents that living conditions would be materially worsened as a direct consequence, could permission be withheld on this basis. Although gates of this nature are not commonplace in the countryside, they are a feature of estates, which often contain residential properties, so there is no reason to believe that having to access a dwelling via a gated entrance is *per se* prejudicial to residential amenity. The expected routine operation of the gates would impose a time delay of the order of 30 seconds in travel time which in the normal course of events would not be regarded as being significant. We understand that the gates are being proposed unilaterally by the landowner, which has prompted the residents to express their views on the matter by way of making representations to the planning application, as the applicant does not appear to require their agreement to the proposals in their capacity as persons holding servitude rights of access. The applicant is intending to install an operating system and back-up power supply which is intended to minimise the encumbrance which the gates will pose to all uses of the access.

Beyond normal day to day operation of the gates, the particular medical condition of one of the residents affected by the potential installation of gates has been raised on the grounds that her situation is so exceptional that any additional delay in the ability to secure access by emergency services could be potentially life-threatening. Medical opinion has been expressed on her behalf by two practitioners familiar with her condition to the effect that an additional imposed delay of even the order of one minute could prove life-threatening in her particular circumstances, and it has been suggested that approval of the development could infringe her right to life as safeguarded by the Human Rights Act.

The evidential basis for the claimed threat to this individual's life in the context of the proposed gates must therefore be considered and given due regard prior to reaching a decision as to whether the development represents a "real and immediate threat" to the individual's life as a consequence of the erection of the gates. Her circumstance is that a protocol has been adopted in consultation with the NHS which provides for non-resuscitation in the event of organ failure. Although the Scottish Ambulance Service have expressed the view that ideally access should remain unimpeded, provided that they have details of any access constraint such as a security mechanism then they do not object. However, medical opinion expressed by two doctors familiar with the condition of the person in question is that in her particular circumstance any delay to an ambulance – even of a minute or less – could contribute to death.

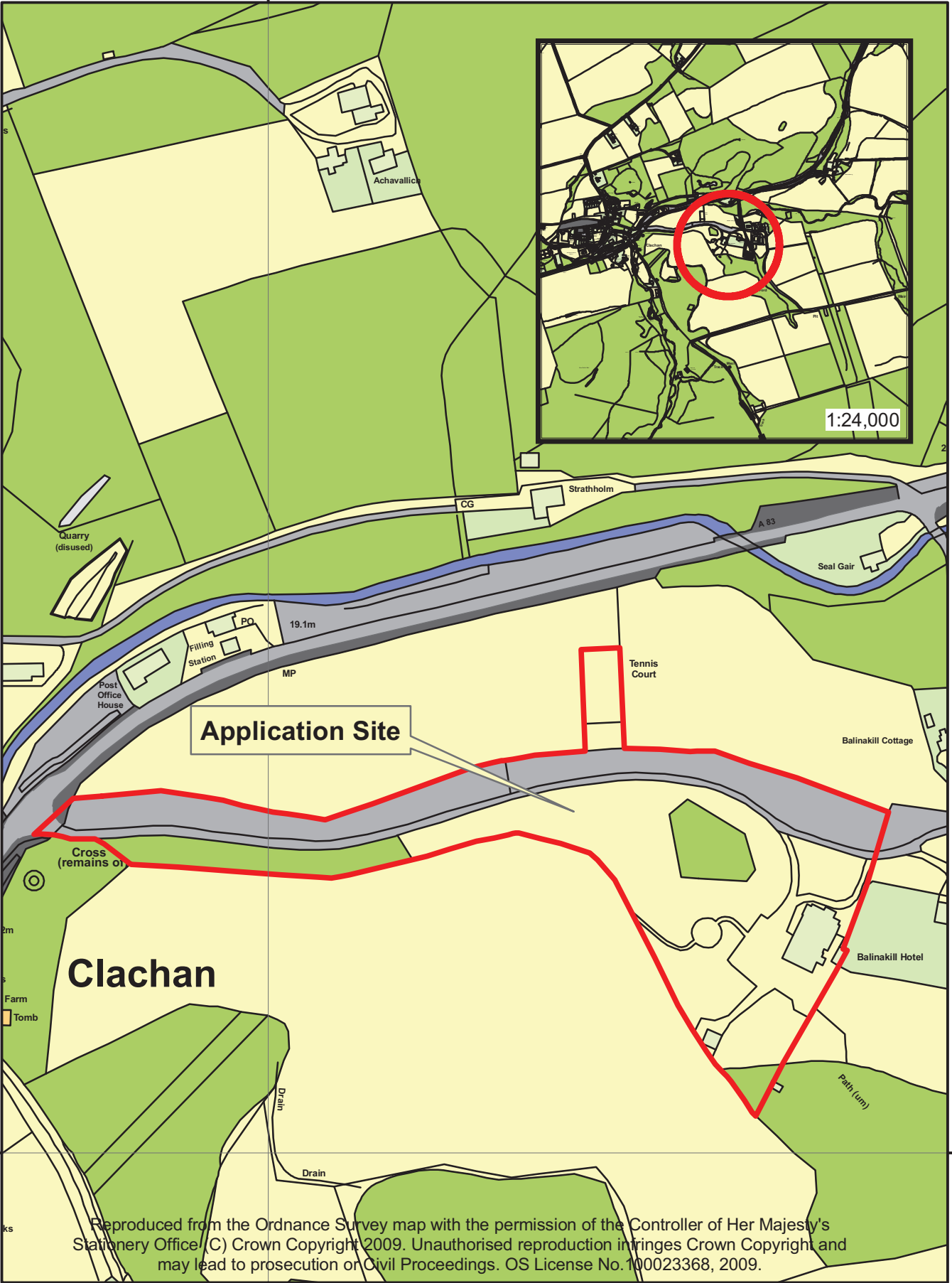
Planning decisions are primarily confined to land use and the public interest considerations, rather than personal circumstances which are not generally a material consideration. They are however capable of being a material consideration in special circumstances and where there is evidence of a real and immediate threat to life that would be caused by implementation of a planning decision, the Council has a positive obligation under Article 2 of the European Convention on Human Rights to take such steps within the scheme of the planning acts as can be considered reasonably to be expected in the light of the information available to prevent the threat to life.

It should be noted that anyone that might require an ambulance to attend to them urgently at their home and that delay of a minute or more over normal traffic conditions could pose a real and significant threat to their life. However, where an individual has an existing condition it increases the probability of such an event, and given the non-resuscitation protocol in place, the consequences of avoidable delay have clearly to be taken seriously. Whilst it should be noted that there are many factors which might influence the travel time of an ambulance to a location such as Balinakill, such as the origin of the journey, traffic conditions and so on, with the exception of the intended installation of operating gates none of these factors would be controllable by the planning authority. The extent of any delay occasioned by an ambulance encountering the gates would be depend on a number of contingent circumstances – if the power and the back-up system had failed, if the gate was then left in a closed position, if before hotel staff could rectify the failure the individual required an ambulance urgently, if the ambulance crew found difficulty in opening the gate manually, if it was significantly delayed as a consequence, and if that delay resulted in the individual not receiving timely care and so coming to harm. Whilst it is not possible to anticipate the extent of any delay attributable to the presence of operating gates, nor the degree to which they pose life-threatening consequences, it remains evident that operating gates would pose an additional encumbrance and a source of potential confusion for those unfamiliar with their presence and their mean of operation. This would introduce an albeit unquantifiable element of avoidable delay, depending on the circumstances and whether the gates were operating as designed or not. In such extreme circumstances it is therefore prudent to adopt a precautionary approach and to avoid the introduction of any unnecessary and avoidable impediment to the existing means of access.

If Members are of the view that the threat to life posed by the installation of operating gates on the basis proposed by the applicants is real and immediate, any interference with the applicant's right to peaceful enjoyment of his possessions should be the minimum necessary to secure the legitimate aim of protecting life, and insofar as it may apply Article 2 would not therefore require refusal of permission. These considerations would all avoided by permitting the development to take place but with a restriction by way of condition to prevent the gates from being closed. In this way, the status quo is maintained for all users of the access and no risk of potential infringement of Human Rights arises. In the event that the applicant accepts the premise that gated operation is not appropriate given the particular circumstances of the case, then it would be open to him to complete the development with manual gates secured in an open position, which would provide him with the formality of a gateway entrance providing a potential deterrent effect in terms of casual use, whilst not presenting any additional impediment to emergency access.

It is recognised that despite the effect of such a condition the applicant might retain a longer-term aspiration to introduce an operating system subject to permission being granted for its introduction, and that there may be a desire to install some or all of this at the onset of development in order to avoid the difficulties associated with the prospect of retro-fitting operating equipment at some future date. With that in mind the recommended conditions provide for that eventuality by setting out the requirements for an operating system to address all ability access, with an associated note to the applicant indicating additional physical works anticipated necessary in the event that the condition were to be varied or removed. In the event that the applicant were to simply opt to install manual permanently secured gates, then this condition would in effect become superfluous.

176800



1:24,000

Application Site

Clachan

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176800

656000

656000



**Location Plan relative to
Application Ref: 12/01907/PP**

Date: 29.10.2012

Scale: 1:2,500



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ARGYLL AND BUTE COUNCIL

PROCEDURE NOTE FOR USE AT

- | | |
|--|--------------------------|
| (1) Statutory Pre Determination Hearing | <input type="checkbox"/> |
| (2) Pan 41 Hearing | <input type="checkbox"/> |
| (3) Council Interest Application | <input type="checkbox"/> |
| (4) Discretionary Hearing | X |

HELD BY THE PLANNING, PROTECTIVE SERVICES & LICENSING COMMITTEE

1. The Director of Customer Services will notify the applicant, all representees and objectors of the Council's decision to hold a Hearing and to indicate the date on which the hearing will take place. The hearing will proceed on that day, unless the Council otherwise decides, whether or not some or all of the parties are represented or not. Statutory consultees (including Community Councils) will be invited to attend the meeting to provide an oral presentation on their written submissions to the Committee, if they so wish.
2. The Director of Customer Services will give a minimum of 7 days notice of the date, time and venue for the proposed Hearing to all parties.
3. The hearing will proceed in the following order and as follows.
4. The Chair will introduce the Members of the Panel, ascertain the parties present who wish to speak and outline the procedure which will be followed.
5. The Director of Development and Infrastructure's representative will present their report and recommendations to the Committee on how the matter should be disposed of.
6. The applicant will be given an opportunity to present their case for approval of the proposal and may include in their submission any relevant points made by representees supporting the application or in relation to points contained in the written representations of objectors.
7. The consultees, supporters and objectors in that order (see notes 1 and 2), will be given the opportunity to state their case to the Council.
8. All parties to the proceedings will be given a period of time to state their case (see note 3). In exceptional circumstances and on good case shown the Panel may extend the time for a presentation by any of the parties at their sole discretion.

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9. Members of the Panel only will have the opportunity to put questions to the Director of Development and Infrastructure's representative, the applicant, the consultees, the supporters and the objectors in that order.
10. At the conclusion of the question session the Director of Development and Infrastructure's representative, the applicant, any consultees present, the supporters and the objectors (in that order) will each be given an opportunity to comment on any particular information given by any other party after they had made their original submission and sum up their case.
11. The Chair will ascertain from the parties present that they have had a reasonable opportunity to state their case.
12. The Panel will then debate the merits of the application and will reach a decision on it. No new information can be introduced at this stage.
13. The Chair or the Committee Services Officer on his/her behalf will announce the decision.
14. A summary of the proceedings will be recorded by the Committee Services Officer.
15. If at any stage it appears to the Chair that any of the parties is speaking for an excessive length of time he will be entitled to invite them to conclude their presentation forthwith.

NOTE

- (1) Objectors who intend to be present and speak at a hearing are encouraged to appoint one or a small number of spokespersons to present their views to concentrate on the matters of main concern to them and to avoid repetition. To assist this process the Council will provide a full list of the names and addresses of all objectors.
- (2) Supporters who intend to be present and speak at a hearing are encouraged to appoint one or a small number of spokespersons to present their views to concentrate on the matters of main concern to them and to avoid repetition. To assist this process the Council will provide a full list of the names and addresses of all supporters.
- (3) Councillors (other than those on the Panel) who have made written representations and who wish to speak at the hearing will do so under category (1) or (2) above according to their representations but will be heard by the Panel individually.
- (4) Recognising the level of representation the following time periods have been allocated to the parties involved in the Hearing.

Ref: ABH1/2009

The Director of Development Services' representative – not more than half an hour

The Applicant - not more than half an hour.

The Consultees - not more than half an hour.

The Supporters - not more than half an hour.

The Objectors - not more than half an hour.

- (4) The purpose of the meeting is to ensure that all relevant information is before the Panel and this is best achieved when people with similar views co-operate in making their submissions.
- (5) Everyone properly qualified as a representee recorded on the application report who wishes to be given an opportunity to speak will be given such opportunity.
- (6) The Council has developed guidance for Councillors on the need to compose a competent motion if they consider that they do not support the recommendation from the Director of Development and Infrastructure which is attached hereto.

I:data/typing/planning/procedure note

COMPETENT MOTIONS

- Why is there a need for a competent motion?
 - Need to avoid challenge by “third party” to local authority decision which may result in award of expenses and/or decision being overturned.
 - Challenges may arise from: judicial review, planning appeal, ombudsman (maladministration) referral. All appeal/review processes have rights to award expenses against unreasonable/unlawful behaviour.
- Member/Officer protocol for agreeing competent motion:
 - The process that should be followed should Members be minded to go against an officer’s recommendation is set out below.
- The key elements involved in formulating a competent motion:
 - It is preferable to have discussed the component parts of a competent motion with the relevant Member in advance of the Committee (role of professional officers). This does not mean that a Member has prejudged the matter but rather will reflect discussions on whether opinions contrary to that of professional officers have a sound basis as material planning considerations.
 - A motion should relate to material considerations only.
 - A motion must address the issue as to whether proposals are considered consistent with Adopted Policy or justified as a departure to the Development Plan. Departure must be determined as being major or minor.
 - If a motion for approval is on the basis of being consistent with policy reasoned justification for considering why it is consistent with policy contrary to the Head of Planning’s recommendation must be clearly stated and minuted.
 - If a motion for approval is on the basis of a departure reasoned justification for that departure must be clearly stated and minuted. Consideration should be given to holding a PAN 41 Hearing (determined by policy grounds for objection, how up to date development plan policies are, volume and strength of representation/contention)
 - A motion should also address planning conditions and the need for a Section 75 Agreement.
 - Advice from the Scottish Government on what are material planning considerations is attached herewith. However, interested parties should always seek their own advice on matters relating to legal or planning considerations as the Council cannot be held liable for any error or omission in the said guidance.

DEFINING A MATERIAL CONSIDERATION

1. Legislation requires decisions on planning applications to be made in accordance with the development plan (and, in the case of national developments, any statement in the National Planning Framework made under section 3A(5) of the 1997 Act) unless material considerations indicate otherwise. The House of Lord's judgement on *City of Edinburgh Council v the Secretary of State for Scotland* (1998) provided 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.
2. 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, and
 - Assess whether these considerations warrant a departure from the development plan.
3. 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, and
 - It should fairly and reasonably relate to the particular application.
4. It is for the decision maker to decide if a consideration is material and 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.
5. 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
 - Scottish planning policy, advice and circulars
 - European policy
 - A proposed strategic development plan, a proposed local development plan, or proposed supplementary guidance

Ref: ABH1/2009

- Guidance adopted by a Strategic Development Plan Authority or a planning authority that is not supplementary guidance adopted under section 22(1) of the 1997 Act
 - A National Park Plan
 - The National Waste Management Plan
 - 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
6. 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 interest, 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.