

**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 2013 relative to applications for Planning Permission or Planning Permission in Principle**

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<b>Reference No:</b>	15/03260/PP
<b>Planning Hierarchy:</b>	Local Application
<b>Applicant:</b>	Mrs Iona Larg
<b>Proposal:</b>	Erection of beach hut for Blackhouse Watersports (retrospective)
<b>Site Address:</b>	Land north-east of Braehead, Balevullin Beach, Balevullin, Isle of Tiree

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**SUPPLEMENTARY REPORT No 4**

**A) INTRODUCTION**

Members will recall that this retrospective planning application was the subject of a discretionary local Hearing which took place at An Talla Community Hall, Crossapol, Tiree on the 28<sup>th</sup> November 2016. This Hearing was called in order to enable Members to fully consider any and all evidence put forward, both in support of the development and in objection to it and to debate the Planning Authority's recommendation that retrospective planning permission be refused for the reasons previously set out in the main report.

Shortly before this Hearing was to take place, an additional planning application for the retention of a related beach hut development at Gott Bay, Tiree (planning application reference 15/03364/PP) was withdrawn by the applicant. The withdrawal of this planning application was further confirmed by the applicant at the Hearing and a commitment was given by the applicant to remove the unauthorised building at Gott Bay by Friday 6<sup>th</sup> January 2016. This unauthorised building has subsequently been removed from the site, as confirmed by the Applicant and evidenced by photographs.

In respect of the planning application for the remaining beach hut development at Balevullin Beach, the Council's published minutes state that the following Motion was put forward and accepted:

***That the Committee continue consideration of retrospective planning permission to the meeting of the Planning, Protective Services and Licensing Committee on 18 January 2017 to allow Members to seek advice from officers in regard to a competent motion to support approval of the application and to allow for arrangements to be made for any requirement for an Area Capacity Evaluation (ACE).***

The consideration of retrospective planning permission has been continued to the meeting of the Planning, Protective Services and Licensing Committee to be held on

Wednesday 18<sup>th</sup> January 2017. In advance of this Meeting, a senior architect from McKenzie Strickland Associates, acting on behalf of the Applicant, has submitted a somewhat lengthy representation (emailed and dated 10<sup>th</sup> January 2017) seeking to put forward several 'motions' for the attention of and consideration by Members in advance of any decision in relation to this planning application.

This further Supplementary Report appraises Members of the contents of this submission and offers guidance relating to the various matters raised.

## **B) DETAILS OF THE SUBMISSION**

The representation which, it is understood, has been copied directly to Members can be viewed in full at:

[https://www.argyll-bute.gov.uk/Planning/lg/GFPlanningDocuments.page?Param=lg.Planning&SDescription=15/03260/PP&org.apache.shale.dialog.DIALOG\\_NAME=gfplanningsearch&viewdocs=true](https://www.argyll-bute.gov.uk/Planning/lg/GFPlanningDocuments.page?Param=lg.Planning&SDescription=15/03260/PP&org.apache.shale.dialog.DIALOG_NAME=gfplanningsearch&viewdocs=true)

In summary, this submission presents Members with 3 proposed 'motions' for their consideration as follows:

### **1st. Motion: No ACE is required**

The submission asks Members to determine the application without reference to any Area Capacity Evaluation (ACE) and argues that an ACE is not necessary or appropriate for a variety of reasons, these being that it is not required under the relevant provisions of the Local Development Plan (LDP); that it serves no useful purpose and that it duplicates existing planning assessments and considerations which have already been reported on in detail in the previously published report of handling and, in evidence, at the local Hearing – a process which also involved a site inspection. It is argued that having an ACE carried out, at this stage, would duplicate material in those prior reports and submissions and provide Members with no substantial new information. Doing so, it is argued, would cause additional expense and delay for the Planning Authority and the applicant. It is further commented that any ACE ought to have been carried out by officers prior to the first Meeting.

In addition, the submission argues that Members could, should they be so minded, support the development as a departure to the LDP and therefore without reference to policy LDP DM 1 or to an ACE.

### **2nd. Motion: If ACE is required**

The submission requests Members to agree that if they should determine that an ACE is indeed required (contrary to the proposed 'Motion 1' above) then the Applicant should be allowed a fair and adequate opportunity to respond to the ACE by agreeing a further continuation of the application in order to require officers to prepare and circulate the ACE; to send a copy of the ACE to the applicant no later than 21 days prior to the subsequent Meeting; to allow the Applicant and/or a landscape architect or other agent acting on her behalf the opportunity to issue a statement responding to the ACE; and to allow the Applicant to appear and be represented before Members at the subsequent Meeting.

The submission argues that the above-summarised terms are required in order to allow the Applicant to have a fair and impartial determination of her application by the Council as a public authority in accordance with her convention rights under the Human Rights Act 1998 and with natural justice and fairness at common law.

### **3rd. Motion: Next meeting**

The submission states that it is understood by the Applicant and those advising her that no ACE has yet been carried out, and that no ACE will be considered in determination her planning application, at the next meeting (on Wednesday 18<sup>th</sup> January). It is reiterated that should the ACE be considered by Members at the next meeting and without the applicant being afforded an opportunity to respond, then she would be denied a fair and impartial determination of her application in accordance with her rights.

The submission states that if, contrary to the Applicant's understanding, an ACE has, in fact, been carried out then a full copy of the ACE should be provided to the Applicant and her advisors by 1 pm on Wednesday 11<sup>th</sup> January 2017.

## **C) COMMENTARY**

In consideration of the '1<sup>st</sup> motion', that no ACE is required, Members were previously advised, both in the main report and in Supplementary Report 3, of the policy background to the proposed development: Planning Policy LDP DM 1 expresses a general lack of support for development in the open countryside other than where it constitutes small scale development closely related to existing buildings as either an 'infill' development of an appropriate gap site between two or more substantial buildings; as a 'rounding off' development of an appropriate gap site between one or more substantial buildings on one side and a substantial landscape feature on the other, or as an appropriate redevelopment or change of use of an existing building.

In this specific case, there can be no reasonable claim that the proposed development is an infill, a rounding-off, a redevelopment or a change of use of an existing building. This stance has been accepted by the applicant in the published supporting statement and confirmed within evidence presented at the Hearing.

Therefore, the proposed development can only comply with the fundamental requirements of key planning policy LDP DM 1 should Members consider that the applicant's claim of an 'exceptional case' as advanced by the application and in evidence at the Hearing can be substantiated and supported. Whilst Officers have presented their detailed and considered arguments as to why, in their opinion, the advanced 'exceptional case' argument fails, Members are entitled to take an opposing view should they decide that the relevant planning considerations would reasonably lead them to that conclusion.

However, should Members be minded to draw the opposite conclusion to Officers in their assessment of the 'exceptional case' arguments put forward by the Applicant, policy LDP DM 1 requires that this exceptional case be underpinned by an ACE in order to demonstrate that the proposed development will have no unacceptable physical impact upon an identified area of 'common landscape character'.

The purpose of an ACE is not entirely as described within the submission quoted above. Mr Russell has quoted superseded draft supplementary guidance which has

subsequently been replaced by supplementary guidance formally adopted in March 2016. SG LDP ACE 1 of the adopted guidance explains that an ACE should be used to inform the development management decision making process and that the Local Development Plan establishes that an ACE should be triggered through policy LDP DM 1 in certain circumstances, including, *“Within the Countryside Zone all development proposals which are not small scale infill, rounding off, or redevelopment will require to accord with an ACE subject to an exceptional case being made.”*

The purpose of the ACE, as described in the adopted supplementary guidance, actually reads as follows: *“The aim of the ACE process is simply to comprehensively and methodically assesses the capacity of the landscape to successfully absorb the proposed development. **The aim should not be to identify a definitive quantity or how much development can be accommodated in a landscape but to explore landscape ‘sensitivity’ to the particular development proposal under consideration.**”* (The bold text is contained within the source document).

Whilst it is correct that the impact of the proposed development upon its site and surroundings did form part of the original assessment of the proposed development as reported to Members in the main report of handling, the ACE process provides a significantly greater level of detailed landscape assessment and the scope to carry it out in a more methodical and uniform manner. The ACE process enables a detailed assessment of the degree to which a particular landscape character type or area of common landscape character is able to accommodate change without significant effects on its character, or overall change of landscape character type. This detailed area evaluation would only be required where it had been demonstrated, to the satisfaction of the Planning Authority, that the basic ‘exceptional case’ component of key planning policy LDP DM 1 had been met. There is no requirement to carry out a formal landscape capacity assessment in the manner prescribed unless this exceptional case has been demonstrated and accepted.

The ACE is, therefore, an essential and necessary component of key planning policy LDP DM 1 should Members be inclined to support the proposed development in accordance with the provisions of that policy. The suggestion that this development could be supported by Members under the relevant policy provisions of the Local Development Plan, without their consideration and critique of a relevant ACE is therefore incorrect.

Whilst it might be possible for Members to approve the proposed development as a departure to the LDP, and therefore without reference to policy LDP DM1 or to an ACE, , such a course of action would need to be underpinned by specific, detailed and robust reasoning. It is the opinion of officers that any such course of action would be difficult to substantiate in the context of the current planning application. The LDP is flexible enough to enable this development to be supported without a departure from the Councils key adopted planning policy, should Members decide to do so contrary to the recommendation of their officers and following their evaluation and critique of the ACE attached to the previous Supplementary Report 3.

In consideration of the ‘2<sup>nd</sup> and 3<sup>rd</sup> motions’ above, it has been explained why an ACE is required in this case and that it has been produced. This ACE has been prepared by officers in order to assist Members should they decide that they wish to support the development as being in accordance with LDP policy contrary to officer’s recommendation. The ACE is supplementary to the main report of handling and represents, in effect, an expansion to the previously tabled professional view of officers. The ACE, like the report of handling, serves to explain the professional view of officers and acts as an aid to Members in their determination of this planning

application. It is not a planning application in itself and it does not carry any special requirement to circulate it above and beyond what would normally be required for any report of handling. In addition, whilst the previous draft ACE guidance and methodology sought to also identify capacity for further future development within the wider landscape compartment, the current and adopted ACE process removed this requirement and, with it, any need for wider consultation and commentary. In this regard, the ACE merely expands upon the previously published professional recommendation of officers. This recommendation has already been afforded substantial opportunity for debate, consideration and counter-opinion, not least by the applicant in person and with full representation at the discretionary local Hearing held in November.

In regard to the 'Third Motion: Next Meeting', Members are advised that the ACE and its accompanying Supplementary Report 3 were published on the Council's website on 11<sup>th</sup> January 2017 and have since been available for public inspection. . The applicant's agent was sent an email on 11<sup>th</sup> January, one week before the Meeting of the Planning, Protective Services and Licencing Committee on 18<sup>th</sup> January, advising of the date and time of the meeting and that all papers pertaining to the hearing could be viewed by clicking on the link to the Council's website. The applicant was separately sent a letter containing the same information on 11<sup>th</sup> January 2017. Although the ACE was not submitted to the Applicant and her advisers by 1pm on 11 January as requested (the email to the Applicant's agent was not sent until that evening in accordance with the Council's usual practice) it is considered by officers that the Applicant has received intimation of the ACE in a timescale that is sufficient to afford the Applicant the opportunity to consider the ACE and to respond prior to the meeting of the Committee.

Members are advised that there is no statutory requirement to further continue the determination of this application in order to allow the applicant to review and respond to the supplementary ACE, although the Applicant is, of course, entitled to make further written representation before the Meeting should she so wish. Similarly, this application raises no special circumstances which would entitle the Applicant (or her representatives) to address Members during the forthcoming PPSL meeting. The suggestion that this approach would prejudice the Applicant's convention rights under the Human Rights Act 1998 and with natural justice and fairness at common law is a matter for the Council's head of Governance and Law to respond to. This opinion has been obtained. It is advised as follows;

The Court is permitted to insist on standards of procedural fairness beyond what is expressly required by statute and a challenge may be raised on the ground that the required standards of procedural fairness have not been met. Such a challenge would not relate to the content of the decision reached by Members but rather to the manner in which it was reached. The degree of procedural fairness required will vary depending upon the circumstances of each decision. For example an oral hearing cannot be demanded in every circumstance. Natural justice forms a procedural code implied by the common law. A breach of natural justice will fall under the head of 'procedural impropriety'. The right to be heard is a limb of natural justice. This includes the Applicants right to have the opportunity to present its case and know the basis of the case presented by the other side, as well as the right to a fair hearing. In determining a planning application the planning authority must assess, at each stage in the progress of the application, whether it has acted fairly in respect of all parties. As advised above the ACE has been published on the Council's website and correspondence has been sent to the Applicant and her agent providing details of the location at which the papers pertaining to the hearing can be found. The Applicant is aware of the case presented by officers. The ACE has been made available for the consideration of Members following the completion of the evidential part of the

Hearing. The Applicant has therefore not been afforded the opportunity to present her case in respect of it. Should Members consider that they wish to place reliance on the ACE in reaching a determination on the planning application, and the Applicant not yet have submitted a written response to the ACE by 18 January when the PPSL will next meet, it is advised that Members may wish to continue the hearing to afford the Applicant the opportunity to respond to it by way of a written submission. It is considered that such a course of action by Members would limit exposure to a risk of challenge on the grounds of procedural impropriety. It is not considered that Members would require to allow the Applicant to appear and be represented before Members to ensure compliance with natural justice and fairness at common law.

The actions of a planning authority will be considered with reference to the European Convention on Human rights (ECHR). This affects the decision making process and in particular the need to comply with the ECHR right to a 'fair trial' under ECHR Article 6. It has been held by the Courts that the statutory right of appeal to the courts, or potential for non-statutory judicial review, within the planning system satisfies the Article 6 requirement for an independent and impartial tribunal. Should Members determine that the planning permission be refused in accordance with officers recommendations the Applicant will have a right of appeal to the Scottish Ministers. It is considered that it will not be necessary for Members to afford the Applicant the right to make further representations in respect of the ACE or appear and be represented at the meeting of the PPSL at which the ACE will be considered in order to allow the Applicant to have a fair and impartial determination of her application in accordance with her convention rights under the Human Rights Act 1998.

### **C) RECOMMENDATION**

It is recommended that Members note the representation contained herein together with the relevant commentary and conclusions. These submissions do not alter the previous recommendation to refuse the application for the reasons set out in the main report and as advanced as evidence at the Hearing.

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Date: 13<sup>th</sup> January 2017

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