

Argyll and Bute Council
Development and Economic Growth

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

Reference No: 19/00447/PP

Planning Hierarchy: Local Application

Applicant: Mr Keith and Denice Punler

Proposal: Removal of planning conditions 2d (path improvements) and 4 (footpath link) relative to planning permission 17/02052/PP - Erection of 1800mm high deer fence (retrospective).

Site Address: Land south-east of Castle Toward, Toward, Argyll

DECISION ROUTE

- Local Government (Scotland) Act 1973
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(A) THE APPLICATION

(i) Development Requiring Express Planning Permission

- Removal of planning conditions 2d (path improvements) and 4 (footpath link) relative to planning permission 17/02052/PP - Erection of 1800mm high deer fence (retrospective).

(ii) Other specified operations

- None.
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(B) RECOMMENDATION:

Having due regard to the Development Plan and all other material considerations, it is recommended that the application be **refused** for the reason appended to this report.

(C) HISTORY:

Listed Building Consent (ref. 97/00883/LIB) for internal alterations and installation of wheelchair ramp was granted on 25th July 1997 and implemented.

A masterplan proposal (ref. 16/02356/MPLAN) in respect of Strategic Masterplan Area 1/2 and Potential Development Area 2/42 relating to mixed use development (including

tourism/leisure/housing/business) was endorsed by the PPSL Committee at a discretionary hearing on 13th December 2016.

Listed Building Consent (ref. 16/01405/LIB) for the demolition of enclosed fire escape, metal fire escape and metal clad sheds. Installation of new doorway, ventilation louvre, balcony railings, 3 new windows, 2 sets of external doors, new glazed roof over existing courtyard. Internal alterations to accommodate leisure facilities at basement level, removal of wall between ballroom and function room, installation of lift and toilets at ground floor level, removal of partitions and installation of partition walls to provide en-suites to first and second floor bedrooms was granted on 24th November 2016.

Planning permission (ref. 16/00996/PP) for a change of use from Class 8 (residential institution) to Class 9 (dwellinghouse), including ancillary housekeeper's accommodation and Sui Generis use as a commercial/leisure events venue was granted 14th December 2016.

An application for the reinstatement of the east driveway, erection of 2 gate lodges, vehicular and pedestrian entrance gates with stone piers and a secondary set of vehicular gates at the head of the eastern driveway with stone piers (ref.17/00400/PP) was granted 24th November 2017.

An application for the erection of wedding venue comprising, storage building with gateway entrance to timber decking enclosed with decorative metal panels with posts and a decorative pergola for the wedding ceremony (ref.17/00401/PP) was refused on 27th June 2018.

Planning permission (ref. 17/00402/PP) for the erection of metal gates for vehicular and pedestrian access on the existing west driveway at the road junction and additional set of gates further along the west driveway was granted 16th October 2017.

An application for the erection of 2 lodges (ref.17/00420/PP) was refused by the Local Review Body on 28th June 2018.

Planning permission (ref. 17/02052/PP) for the erection of an 1800mm high deer fence was originally granted on 26th January 2018. The applicants subsequently lodged an appeal (ref. 18/0005/LRB) against conditions, 2, 3 and 4, which was refused by the Local Review Body on 28th June 2018.

(D) CONSULTATIONS:

Core Paths Officer (responses dated 6th September 2020 and 26th October 2020): Request for simplified Access Plan showing route of proposed path systems and standard cross section details in addition to a supporting statement. Refer to report.

Scottish Rights of Way Society (Scotways): (response dated 2nd May 2019): Object on the basis that the conditions the application seeks to remove are reasonable mitigation for the deer fence's impact on public access rights. If the applicant is not willing to accept the reasonable mitigation proposed via the planning conditions, then it is the Society's view that the logical and responsible alternative is for the landowner to accept and enable those public access rights which apply within the deer fence.

South Cowal Community Council (response dated 26th April 2019): We understand that the access in question was put in place after a retrospective application to erect a six foot high deer fence was submitted. The granting of the permission for the fence

was conditional on this access and access to the Chinese Lakes remaining open, indeed we understand that the deer fence application would have been refused had this access not been included, and we feel should therefore remain open.

We believe the access in question has been designated a Core Path by the council so consider that it should remain open. We also believe that the owners have appealed the condition of this access and that the appeal was refused. We feel that this planning application is simply another appeal, and as such should be refused. The Community Council can see no reason for the previous decisions of the Planning Department to be overturned, or for any need to close off this access, and therefore request that this application be refused.

(E) PUBLICITY: Listed Building/Conservation Advert, publication date 22nd March 2019; expiry date 12th April 2019. Neighbour notification expired on 29th March 2019.

(F) REPRESENTATIONS:

Letters and emails of objection have been received from the following 17 individuals.

1. Mr R Trybis, Stoneywood, Toward, Dunoon (emails dated 20th March 2019, 28th March 2019, 27th May 2019, 30th May 2019);
2. Ian Marshall, no address given, former Chair of Dunoon Hill Runners (email dated 29th March 2019);
3. Gary R Brown, no address given, Manager Student Tours Scotland, Glasgow (email dated 1st April 2019);
4. Mrs A Mackenzie, 79 Mountcastle Drive South, Edinburgh (email dated 3rd April 2019);
5. Mr Dave Souza, Secretary of Inverclyde Ramblers, 16 Park Terrace, Gourrock (email dated 5th April 2019);
6. Mr Dennis Archer, 2 The Meadows, Toward, Dunoon (email dated 5th April 2019);
7. Sheila Falconer, no address given, local resident (email dated 11th April 2019);
8. Mrs J Trybis, Stoneywood, Toward, Dunoon (email dated 11th April 2019);
9. Tom Goodfellow, no address given, part of Dunoon Walkers (email dated 11th April 2019);
10. Agnes Harvey 33 Loch Eck, Hunters Quay, Dunoon (email dated 11th April 2019);
11. Mr David Eaglesham, Ardachuidh, Colintrave (email dated 11th April 2019);
12. Jacqueline Couch, no address given, part of Cowal Walking Group (email dated 11th April 2019);
13. Miss Margaret Bicket, 2 Hafton Court, Dunoon (email dated 12th April 2019);
14. Vickie Poole, no address given (email dated 12th April 2019);
15. Ross Morley-Trapnell, 22 Albert Place, Sandbank, Dunoon (email dated 25th April 2019);
16. Alison McCrossan, 11 Glenacre, Innellan, Dunoon (email dated 25th April 2019);
17. Mr Norman New, 11 Wyndham Park, Rothesay, Isle of Bute (email dated 26th April 2019);

The various concerns raised are detailed below.

- *This is not a planning application, it is an appeal against conditions attached to planning consent '17/02052/PP - Erection of 1800mm high deer fence (retrospective)' which was granted on 26th January, 2018. Those conditions have already been subject to an appeal which, on 28th June 2018, unanimously concluded that the conditions were reasonable, that consent would have been refused without them, and that they should remain. The applicants subsequently breached the conditions and enforcement notice '18/00197/ENBOC3 Breach of*

Conditions 2, 3, and 4 Relative to planning Permission 17/02052/PP' was served on 1st November, 2018. The enforcement notice had a time limit for compliance, which has expired. There is no appeal against an enforcement notice, but this application is in effect an appeal. The notice stressed, as did the original consent, the need for all gates within the deer fencing to remain 'open' until alternative access routes along the southern and eastern boundary of the estate were provided and available for public use. That also has not been complied with. To further consider appeal 19/00447/PP would be a breach of the normal planning process, also nothing substantive has changed since the original appeal, it would use the scarce time of Council Officers, waste Taxpayers money, and amount to maladministration.

- *If the Council does further consider appeal 19/00447/PP then I would request that all conditions pertaining to the original planning consent should be retained. The applicants' problem with the conditions is one of their own making. As property developers they should surely have realised that planning consent would be required for enclosing such a large area in the centre of an estate, on which "Right to Roam" applied, in deer fencing. There is some old, patchy, deer fencing on the boundary of the estate which was, no doubt, used by the Forestry Commission to protect young trees. That is very different from extensive fencing within the heart of the estate for which there is no precedent. Had consent been applied for before the fencing was erected then the planning process may well have delivered a fencing route that was much less disruptive to the network of paths within the estate and so required less conditions.*

The fencing completely blocked the connection between the east and the west to the north of the mansion. It also completely blocked the Right of Way.

The appeal tries to suggest that the deer fencing is necessary to restore the estate to its original condition e.g. "... existing traditional estate fence, which had comprised 1000mm wrought iron estate railings, erected probably around 1930 when the estate was extensively upgraded, to delineate the ornamental gardens of the estate". In fact historically the estate was parkland, it did have not ornamental gardens. If you refer to document 21461065 Consultee Response - Historic Scotland Thursday, September 29, 2016 you will see that Historic Scotland state that the parterre on the lawns and parkland to the south of the house "represent a significant change to the appearance and character of this part of the designed landscape, of which there is no historical precedence".

They go on to state "...we have concern that the proposed parterre, a very large and formal garden feature which will fill the entire area of the open ground to the south of the house, may have a significant impact on the character of this part of the GDL, which formed the informal, picturesque parkland setting of Hamilton's marine villa and the later enlarged mansion house. It will also change the function and understanding of the ha-ha, which under the proposals will no longer divide lawn from parkland but become a terrace within a large formal garden".

Yes, in the past there were some areas with low wrought iron fencing, but the fencing provided no real barrier to people never mind deer. One can imagine that in a parkland setting having deer within the trees and indeed on the lawns was actually a feature. Historically the kitchen garden and ornamental area were of course contained safely away from deer within the estate's walled gardens.

In their submission Historic Scotland actually stated "You may wish to consider whether reducing the scale of the parterre- perhaps confining it to the former south lawn or relocating this formal garden feature to the East Walled Garden, which was historically a more formal area of the designed landscape". The reality therefore is that deliberately introducing a large parterre garden, which is a significant deviation

from the original design intent, results in the need for extensive deer fencing to protect it. This in turn acts as a significant barrier to public access.

- Although the appeal describes the paths to the south of the estate as "informal" these paths are of sufficient standing to appear in maps dating right back to the 1800s, and they include stone bridges. The actual line of the low wrought iron fence is not known accurately but no doubt it contained gates when crossing paths that appeared in maps.*
- In their Master Plan the owners described the East Gate as being the main public access into Castle Toward Estate. They obtained consent for the gate there on the basis that it would include a pedestrian section which would be kept open in perpetuity. This would have allowed the public to enter the estate on a good solid driveway. Contrary to their own plans the owners erected a gate with no pedestrian section. They now appear to be intending that the public enter via path to the right. This raises a couple of issues;
There needs to be a formal planning record that the path is the public access and that it has to be kept open in perpetuity so that in 5-10years time it is not simply closed or allowed to become overgrown.
The path as it presently stands is not complete as it contains a muddy central section and the route is also likely to become overgrown, which was not the case with the gate solution that was originally proposed and consented. The alternative path needs to be of a better standard than it is at this point in time, and the owners need to be obliged to keep it usable.
It is good to see that there is a sign reading; Castle Toward / Chinese Lakes / Walkers Welcome. However once you are in the estate it is not at all obvious how you get to the Chinese Lakes as you have to go across grass that does not obviously lead to a path. Prior to the fencing the route to the Lakes was entirely on paths. There needs to be a simple sign showing where to depart from the driveway to find the path to the Lakes. Regarding crossing from the West Driveway to the East Driveway; originally you could simply walk along one drive onto the other and that route would of course always be open and it was used by wheelchair users and others with lesser disabilities. Now a path through the woods has been strimmed, but that will quickly become overgrown with rhododendrons and bracken even if it is being used quite often, it is also quite muddy in places. While the course taken by the strimmed path is fine the path does need to be to a somewhat higher standard. I don't expect that it will be up to disabled access standard but it should at least be reasonably dry underfoot and clearly a permanent woodland path. Again I hope there will be some sort of planning record for the path and the need for it to be kept open.*
- The applicants seem to be riding roughshod over the planning process at Castle Toward. This application clearly included a pedestrian gate and the consent that was granted contained a condition that the pedestrian gate should be left open "in perpetuity", to permit public access. No pedestrian gate has actually been installed, only a vehicle gate and that is kept padlocked. The applicant should be made to install the original design that was approved. If alternative arrangements are going to be made for public access to the East Drive then they should be to an adequate standard and signposted so that people know the entrance is there and that they can use it. Formidable padlocked gates are clearly designed to create the impression that access is not allowed. Until the situation is resolved the vehicle gates should be left open. Conditions attached to another planning application 17/02052/PP have not been complied with despite long standing enforcement notices and application 19/00447/PP seeks to remove some of those conditions. The problem with the gates*

demonstrates why those conditions should be retained and why signage is required so that the public are aware of the existence of entrances.

- I really do think the current application to have conditions removed should not be allowed. I can understand that if somebody is granted planning consent and, after commencing works, then discovers issues which mean conditions are unduly onerous it is fair to let them attempt to have the conditions changed. That is not what is happening here though. In this case the works were done first then the consent was sought. The applicants appealed the conditions and the appeal was rejected. Nothing has changed since the appeal. They have not discovered problems in the course of works and so allowing what is in effect a further appeal seems to be a breach of process. I do hope that the conditions will be retained.*
- As it happens "Student tours Scotland" have been in touch with me. As well as the issues at Castle Toward they have also had some problems at Puck's Glen. As a result they wrote "If this keeps up the tour will not be reappearing". Cowal needs visitors and access to places such as Castle Toward is important.*
- As I understand the situation with this application, the company who bought Toward castle put up deer fences restricting access then applied for retrospective planning permission. This was granted with conditions to maintain reasonable access. These conditions were breached and the company now wants them set aside. If this is correct why was planning permission not revoked and the fences removed? The walking routes around the castle have been used for leisure walking for many years by many people and, in my opinion access should not be restricted without good reason. There is an obesity epidemic in this country and walking is an important factor in mitigating its effects. Walking is a social activity with health benefits and no doubt helps to reduce the cost of health and social care to the council. Walking helps to attract visitors to the county. The council should aim to expand areas for walking not reduce them. Allowing a private company to flout regulations will encourage others to do the same. My interest is that the Isle of Bute ramblers group regularly walk from Inellan to the Chinese pools and it is a popular fixture on our schedules. I accept that the company may have legitimate concerns over use of the land but they must not be allowed to use illegitimate means to achieve those ends.*
- Castle Toward grounds have historically permitted relatively free access to members of the public. Despite transfer of this building to private ownership, the public's "right to roam" within these grounds should not unreasonably be restricted.*
- I wish to object to the removal of these planning conditions and believe that the original conditions should be complied with.*
- I would like to strongly object to planning application 19/00447/PP as a member of the Cowal walking group.*
- As secretary of Inverclyde Ramblers I write to object to application 19/00447/PP. We regularly provide well-attended led walks in Cowal and Bute, and the paths currently closed are crucial to some popular routes. Our members, both in Inverclyde and in Cowal, are very disappointed that there has been delay in restoring public use of these historically interesting rights of way. Access to the scenic outdoors makes the area attractive to tourists and residents, so it's surprising that the developers seem to be going out of their way to cage them off. Far from obstructing these paths, the developers should promptly meet their legal obligations to comply fully with the*

planning consent conditions, to provide well-maintained amenity access for the public along the network of paths.

As well as leading walks, our remit includes encouraging countryside access, and we note that the Applicants proposed an information area for the Estate with a guide to the walks available, as well being required to provide signage to ensure continued public access around the Estate. We will be glad to make use of this information when planning future walks, and in promoting Cowal as a destination.

We've begun publicising two walks near Benmore Garden with a leaflet (in partnership with The Bothy walking and cycling facility at Gourock railway station), and online at www.inverclyderamblers.org.uk/pucks-glen/. It's available at venues, including the Benmore Cafe, The Queen's Hall and the Burgh Hall in Dunoon, who welcomed it. In particular, The Argyll Hotel was delighted as they'd been discussing local visitor attractions for their guests. This underscores the importance of maintaining the rights of the public to use these paths for access.

- During a weekend break in Cowal I decided to revisit Castle Toward. When I got there I found my access blocked by locked gates and fencing, not a great welcome for tourists. Unsure of where the fencing ran or if any of the paths were open I left, but not before seeing a notice pinned up regarding this planning consent. When I read about the planning application I was really annoyed to discover that the gates which had kept me out should have been open (condition 3), and that there also should have been signs to show available paths (condition 2f). The planning application says that considerable research was undertaken to identify the route of a wrought iron fence erected around 1930. The logic of this defeats me. Why would the path of a fence erected in 1930, for an unknown reason, determine a person's access rights 89 years later? I tried to find maps or photographs of the old estate and came across this one which shows a fence running up the side of a drive. Surely it would be just a logical to say that that is where the fencing should have been erected? As I discovered the fencing seems to have been put up not just for privacy but in a way that makes it difficult for people to enjoy the land on which there should be public access. All the conditions in the original planning application are sensible and fair and should be completed sooner rather than later.*
- I am writing to submit a formal objection with regards to the planning application - 19/00447/PP. The objection is for the following reason-
The existing conditions should be retained i.e.
d. Improvements to the paths to the south of the enclosed area to mitigate the loss of public access within the area enclosed by the proposed deer fence Including standard cross section construction details, showing width;

4. Prior to the commencement of works details shall be provided of a footpath that will link the east and west driveways within the southern area of the estate below to the 'ha-ha'. Such details shall include but are not limited to:
Location Including start and finishing points,
Construction details that shall include suitable drainage, 1.8m width and a type one finish, Timetable of works with the footpath to be completed within three months of the details approved. The full details shall be submitted to the planning authority for approval and the works complete within three months from the date of approval unless otherwise agreed in writing with the planning authority.*
- I wish to object to the removal of these planning conditions and believe that the original conditions should be complied with. I have two reasons for this:
I have a firm belief that Councillors are elected by the public to ensure that laws and other regulations are upheld in the public interest. I feel that there is a danger that*

planners are not applying regulations with sufficient rigour and determination. In particular, I cite the manner in which recent objectors to the application for the Ardtaraig windfarm were allowed to desecrate the countryside for far too long without correct permissions. Laws were not enforced properly. Here is another instance. Planners have a duty to enforce regulations otherwise planning consent becomes a nonsense. I am a resident of Toward who walks regularly in the parish. I do so for pleasure and for my health. It is always unacceptable to me for the selection of footpaths and access points to be reduced. Access to Toward Castle is especially significant. As a newish resident, I had never even been aware that I should have this access and feel strongly that all existing access rights should be restored and indeed properly indicated.

- *I would like to put in a new objection to Planning application 19/00447/PP Removal of Planning conditions 2d (path improvements) and 4 (footpath link). I have no issue with the development of Castle Towards as long as the following conditions are met. I was under the impression these were now being met and yet after several years I have seen no improvement or any work to this effect. I would like to see paths around Toward Castle Ruin looked after. These should include access from the coach and car parking on the main road. There are two access points along the main road with waterlogged and sodden paths that are not maintained at all. With some gravel paths or wooden slats with mesh these could be excellent access points for the castle ruin. Otherwise the large fenced off gravel area would be perfect for some coach parking or car parking to allow easy access along the approach path to Toward Castle ruin. This is currently fenced off and waterlogged. My tour company currently brings regular business to Dunoon and Benmore Gardens with a stop at Toward. However as conditions fail to improve it would mean no longer stopping here. I was also told from the planners that access around Toward Castle ruin would be improved with signage, info boards and access paths. None of this has appeared and so I would like to renew my objection until these conditions are met.*
- *I wish to submit an appeal against any condition to remove the original conditions set out by Argyll and Bute council in relation to the erection of the deer fence around Toward Estate. It is essential to preserve the rights of the public including walkers, runners, horse riders and such others to ensure they can continue to maintain access and use of these paths. I am the previous Chair of Dunoon Hill Runners, recently retiring from this position 5 years from setting up the club. We have seen our membership grow to over 100 members and many of them use these access paths to either walk or run on. To lose them would incredibly upsetting and diminish the rights that the public so wonderfully have within Scotland.*
- *Please record my objection to planning application 19/00447/PP. One of the owners of Castle Toward was once quoted in the local newspaper as saying that she fell in love with the place when she walked there as a child. When my children were young they too enjoyed walking and cycling there. Unfortunately today's youngsters cannot experience that because of fencing. Of course the owners should have privacy but they could have put up the fencing in a way that gave them privacy without blocking so much access. For three years I have been patiently waiting for reasonable access to be restored to the grounds. When I heard that enforcement notices had been served I thought that the end was at last in sight. Now I have read this planning application which is trying to remove sensible and necessary conditions rather than simply complying with them. How is it that despite the Right to Roam people have been excluded from so much of the estate for so long? As I understand it the conditions have already been appealed and the decision was that planning consent would not have been awarded without them. So why is this coming up again? If consent would not have been granted without the conditions and the owners don't want to abide by the*

conditions is the solution not a simple one - remove all the fencing. That would return access to the way it operated, without any problem, since the current owners were children. Recently I read that French planning authorities have ordered the demolition of a £49m villa because it did not comply with planning conditions, and it only took them 2 years to decide that. The Council's appeal decision was correct and it should stick by it.

- *I would like to express concern about any loss of public access to walking routes around Castle Toward and its environs. As a member of Cowal Walking Group and a supporter of Cowalfest the area is valued by local people and visitors who enjoy walking in this specific part of Cowal's countryside. I would hope that consideration of the application makes due provision to safeguard public access for walkers.*
- *As a member of the public, I wish to object to Planning Application 19/00447/PP 'Removal of planning conditions 2d (path improvements) and 4 (footpath link) relative to planning permission 17/02052/PP- Erection of 1800mm high deer fence (retrospective). The Applicants are in receipt of conditions attached to the original consent I 7/02052/PP, granted retrospectively. Following an Appeal, the Local Review body, in June 2018, unanimously agreed that the conditions were reasonable, that consent would have been refused without them, and that they should remain. These conditions have not been complied with. It is entirely unacceptable that the Council' s conditions are not being met and that the public's traditional use of the estate severely curtailed, to the detriment of their health and wellbeing. The deer fencing and heras fencing have cut off easy access from the eastern drive to the western drive and fragmented the network of paths in the southern part of the estate; the gates through the deer fencing have not remained 'open' to allow public access; and the Right of Way SA181 has been blocked in several places. In addition, a footpath linking the east and west driveways within the southern area of the estate requires to be planned and maintained to improve public access around the estate, and the Core Path's location determined. I expect the Council, with vigour and determination, to pursue the non-compliance with Enforcement Notice 18/00197 /ENBOC3 ' Breach of Conditions 2, 3, and 4 relative to Planning Permission 17 /02052/PP and ensure that their conditions are met timeously.*
- *I would like to object to the restrictions that the owners of Castle Toward have been placing on their land. It is being done to prevent responsible users having access to the land. They cannot be permitted to go against the Scottish Rights to Roam. I would like the Council to continue to retain and enforce all conditions as they are fair and sensible way to restore access blocked by deer fencing and locked gates.*

Comment: For comment on all of the concerns raised above, refer to report Appendix A section B

NOTE: Committee Members, the applicant, agent and any other interested party should note that the consultation responses and letters of representation referred to in this report, have been summarised and that the full consultation response or letter of representations are available on request. It should also be noted that the associated drawings, application forms, consultations, other correspondence and all letters of representations are available for viewing on the Council web site at www.argyll-bute.gov.uk

(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:** Yes. A supporting statement by the applicants has been submitted

“Supporting Statement: Section 42 Application for Removal of Conditions 2 (d) and Condition 4.

The applicants have submitted a number of planning applications to the council in the recent past, associated with their acquisition from the council of the former residential school at Castle Toward, a 144 acre estate. These include approval for change of use from class 8 residential use to class 9 dwelling house (ref 16/00996/PP and approval for a Masterplan for the subjects (ref 16/02356/MPLAN).

Several meetings had been held between the applicants and the council planning officers. The application 17/02052/PP was submitted in response to a request from Argyll and Bute planning to submit a retrospective application for an 1800mm high deer fence which had been erected within the grounds of the estate.

The erection of the fence had commenced several weeks earlier after confirmation was received from Argyll and Bute that an application was not needed for the works and the request to retrospectively submit the application was therefore a surprise. However it was not believed to be a contentious application and further discussions with the planning officer confirmed this, so we subsequently lodged the application. Works to continue the fence were prudently suspended in the meantime, although approximately 80% of it had been erected.

The fence is contained wholly within the estate, generally several hundred metres from any boundary, with the exception of a short section that runs parallel to (and set back approximately 2.5 metres back from) the boundary with the forestry commission. Historically deer fences exist elsewhere on the estate, for which no record of planning applications can be found. It is therefore difficult to tell whether these existing fences were erected during the tenure of Argyll and Bute Council or its predecessors Strathclyde Region, but in any event it sets a precedent for the erection of the fence in question. These deer fences remain in place particularly on the north east boundary of the estate adjoining the Forestry Commission land.

The new fence was erected by the applicants along the route of an existing traditional estate fence, which had comprised 1000mm wrought iron estate railings, erected probably around 1930 when the estate was extensively upgraded, to delineate the ornamental gardens of the estate. Considerable research had been undertaken to identify the route, much of which had become substantially overgrown due to invasive rhododendron species etc

The fence is required to protect the ornamental gardens from the large population of deer prevalent on the estate and on the adjoining forestry land, as considerable new investment is being expended upon the ornamental gardens and planting, in line with the detailed Landscape Maintenance Plan (attached in support of this application) submitted to the council. Previous deer fences on the estate particularly abutting the

boundary with the forestry commission land are now incomplete, additionally since these had been erected Argyll and Bute Council had designated a route on the estate to become a Core Path, and this route passes through the estate and is unfenced and ungated, therefore providing further routes for deer to access the ornamental gardens. Approximately 25% of the route of the new deer fence follows the route to the inside of the existing core path.

The granting of approval of the application was not a surprise based on previous discussions with the planning officers, neither were the conditions pertaining to the requirement for a new pedestrian bridge and access arrangements towards the Chinese Lakes on the East side of the estate (which are included as requirements under a separate planning application ref 17/0400/PP), but the requirement to construct a further new path (condition 4) through heavily wooded landscape outwith the boundary of the fence to the south but within the estate, was. Condition 2 (d) is very similar to condition 4 but it could be considered that condition 2 (d) is already met by the informal network of routes throughout the estate.

The estate was previously a residential school and therefore accepted as being outwith the remit of the right to roam Land reform Act. Planning permission was secured by the applicants to change the use from residential School to dwelling house (under consent 16/00996/PP). It was accepted by the applicants that in securing such a change in use, the majority of the subjects would then become subject to public access rights under the Land Reform Act. Extensive discussions took place with the vendors of the estate (Argyll and Bute Council) as to what extent of the subjects would be deemed "private" and what land would therefore be subject to the right to roam. The applicants secured a statement from Legal Services, confirming that no rights of access existed on the subjects, other than the Core path to the west which is not disputed. Approximately 80% of the estate would become applicable to the Land Reform Act giving responsible public access. The applicants agreed to facilitate improved access to the Chinese Lakes with the replacement of a pedestrian footbridge (the previous footbridge now in the ownership of the Forestry Commission and having become considerably dilapidated) so that informal public access could be secured around the northern part of the estate from east to west. These works are being completed by the applicants at a cost to them of in excess of £50,000.

Summary

The path does not merit inclusion in the conditions for the following reasons:

- a) The fence follows the route of an existing 1000mm high original fence*
- b) The deer fence encloses formal gardens as well as an area identified on the approved masterplan 16/02356/MPLAN as a helicopter landing area. The dangers of deer in the vicinity of such aircraft activities are well recognised, the Joint Agency Statement and Guidance on deer fencing 2004 states "Road traffic accidents (RTAs) involving deer directly or indirectly are a Public Safety issue as is the presence of deer on airfields."*
- c) The applicants have already secured consent for a diverse Masterplan for the estate under application 16/02356/MPLAN. An element of that approved plan is for the creation of a deer farm/park within the outer estate area. A deer fence as submitted under the application in question is a necessary prerequisite to the establishment of the deer park.*

- d) *There is already an accepted principle pertaining across the estate, outwith the deer fence area, of the Right to Roam throughout the areas identified in the condition for the route of the path and members of the public already take informal access in these areas*
- e) *A pedestrian right of way does not exist across the estate and therefore does not need to be formalised by any condition, indeed when the matter of potential rights of way were reviewed at the time of acquisition of the estate by the applicants, three firms of solicitors all concurred that there were no formal rights of way from the east of the estate through to the west. This was further ratified by Argyll and Bute Council legal services department who confirmed that no such right existed nor would one be recognised by the council.*
- f) *The reason given for the inclusion of the condition is **“To improve access around the estate and address any loss of access resulting for the development hereby approved.”** There is no loss of access which arises from the inclusion of the deer fence, as it can be legally demonstrated (by three firms of solicitors as well as the council’s own legal services team) that there are no public access rights within the deer fence enclosure. The formation of the pedestrian bridge and links to the north and east of the deer enclosure as required by condition 2 of the consent is considered to be sufficient to improve access around the estate*
- g) *The council is called upon to provide examples of precedence for the inclusion of such a condition for a deer fence within a private estate, when the route follows the line of an existing fence and follows the boundary of a legally accepted private dwelling boundary. A review of the council’s planning website indicates that there have been seven applications for deer fencing (including the current application) recorded since 2002, six of those since 2011. None of the conditions attaching to the approvals makes any kind of reference to conditions other than those that one might expect e.g. approval of materials to be used or keeping back a short distance from a public road etc, with the exception of application 17/02052/PP*
- h) *The former use of the premises was as a school and as such the entire grounds were inaccessible under the right to roam act, a previous change of use application that was successfully submitted by the applicants (ref 16/00996/PP) resulted in around 80% of the estate grounds now being included under the Land Reform Act. The applicants therefore believe that improved public access has been secured to an immeasurable extent and that condition 4 of the current application therefore serves no purpose as it seeks to start a path at an unspecified point within the estate and end at an unspecified point in the estate. The applicants have expended a considerable six figure sum on improvements to the estate outwith the deer fence enclosure, works including tree and scrub clearance, reinstatement of woodland walks, drainage, improved safe means of access to the estate through a new pedestrian entrance, all items that contribute to improved public access and which the applicants believe the planners have failed to take into account when including condition 2d) and condition 4.*
- i) *The applicants have been advised by their insurers to resist the conditions on the basis that the creation of such a path will result in an increased liability, currently the premise that exists for members of the public taking access under the Land Reform Act is one of doing so at their own risk. This would no longer be the case if a formal path was created as a duty of care would then be imposed on the applicants*

- j) *The condition calls for a path that would be more acceptable in a suburban environment and not a remote country estate. It would be quite alien to the landscape which is heavily wooded. The estate business plan creates an environment for movie makers, foragers and wildlife experts, all of which could be impacted by the creation of the proposed path*
- k) *The path would be required from some unspecified point on the east of the estate to an unspecified point to the west of the estate i.e. it would not link to any existing paths that are of a similar type and finish*
- l) *The construction of this new path would place significant maintenance obligations on the applicants. It is noteworthy that the council have themselves closed the well used woodland path at Morag's Fairy Glen, in Dunoon only five miles from the subjects, citing the cost of maintenance of woodland paths as sufficient justification for the paths closure.*
- m) *There already exists a large network of informal woodland paths and walks throughout the estate and if members of the public wanted to access through the estate from east to west they could already do so, either passing to the north of the mansion house, or to the south.*
- n) *Previous owners of the estate, most recently Argyll and Bute Council, have not kept up the grounds and therefore there is windblown timber etc at various locations throughout the grounds. The applicants have embarked upon an ambitious plan of restoration of the grounds. The imposition of the condition is seen as a "backdoor" attempt to formalise a "right of way" that does not currently exist*
- o) *Other conditions contained within the consent e.g. condition 2 a) to c) are being adhered to by the applicants, with the proposed new footbridge due to be completed within the next month. The construction of this footbridge effectively provides a link from the east of the estate to the west of the estate, at considerable cost to the applicants, and makes use of part of the existing core path, the formally recognised route within the area. The imposition of a further path as required by condition 4 therefore serves no purpose*
- p) *The proposed route of any path required by condition 4 is through natural woodland which currently has informal routes. The topography does not lend itself to the construction of any formal path and the cost is estimated at in excess of £125,000. It is considered that the imposition of such a condition is penal*
- q) *The proposed route of the path to the south of the main estate would follow closely the existing Loch Striven public road which already offers public access. This road follows the foreshore in front of the estate, the foreshore itself offering further public access.*
- r) *Had the requirement to provide a path from east to west passing through the south of the estate been an important element of public access, the council as landowners of the estate until 2016, could have chosen at any time to create or formalise this, including at the time when creating core paths. Instead they chose to identify the path on the west of the estate as the core path, this is the obvious and chosen route for public access in the area and offers public the opportunity to access from east to west across the estate taking the northern route*

Conclusion

“National Planning Circular 4/1998 (Use of Conditions in Planning Permissions) states that planning conditions should only be used where they meet ALL 6 of the following tests.

- necessary*
- relevant to planning*
- relevant to the development to be permitted*
- enforceable*
- precise*
- reasonable in all other respects.*

In the present case Conditions 4 and 2 d. of planning permission 17/02052/PP are not needed (for all of the above reasons) to make the development acceptable in planning terms and fail the necessity test. Further, Conditions 4 and 2 d. are unreasonable and the Circular cautions against imposing onerous conditions. “

- (iv) A report on the impact of the proposed development e.g. Retail impact, transport impact, noise impact, flood risk, drainage impact etc: No**
-

(H) PLANNING OBLIGATIONS

Is a Section 75 obligation 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 Local Development Plan (26th March 2015)

LDP STRAT 1 Sustainable Development;
LDP DM1 Development within the Development Management Zones (the application site is located within the Countryside Zone);
LDP PROP 3 The Proposed Potential Development Areas;
LDP 3 Supporting the Protection, Conservation and Enhancement of our Environment;
LDP 5 Supporting the Sustainable Growth of our Economy;
LDP 9 Development Setting, Layout and Design;

Argyll and Bute Supplementary Guidance (March 2016)

SG LDP ENV 1 Development Impact on Habitats, Species and our Biodiversity;
SG LDP ENV13 Development Impact on Areas of Panoramic Quality (APQs);
SG LDP ENV14 Landscape;
SG LDP ENV 15 Development Impact on Historic Gardens and Designed Landscapes;
SG LDP ENV 16(a) Development Impact on Listed Buildings;
SG LDP ENV 20 Development Impact on Sites of Archaeological Importance;

SG LDP SERV7 Flooding and Land Erosion - The Risk Framework for Development;
SG LDP TRAN1 Access to the Outdoors;
SG2 Sustainable Siting and Design Principles.

(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 (SPP) (June 2014);
Scottish Historic Environment Policy 2014;
Applicants Supporting Information;
Planning history;
Views of statutory and other consultees;
Legitimate public concern expressed on 'material' planning issues.
Argyll and Bute Proposed Local Development Plan 2 November 2019.

(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. No

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

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

The Castle Toward Estate was purchased from the Council by Mr. and Mrs. Punler on 21st October 2016.

(O) Requirement for a hearing: No

In deciding whether to hold a discretionary hearing, the Council will consider:

- How up to date the Local Development Plan is, the relevance of the policies to the proposed development, and whether the representations are on development plan policy grounds which have recently been considered through the development plan process.
- The degree of local interest and controversy on material considerations, together with the relative size of community affected set against the relative number of representations and their provenance.

Whilst letters of objections have been received from seventeen individuals, the concerns have been listed in the report in Section (F) above. The determining factor of this application is procedural in that the applicants are attempting to remove planning conditions previously appealed to a Local Review Body but dismissed on the grounds that the original planning conditions were reasonable and that without these conditions the proposal would not have been consistent with policy SG LDP TRAN 1. As the application is being recommended for refusal, it is not considered that a hearing would

add value to the determination process and therefore it is recommended that Members do not undertake a hearing prior to the application being determined.

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

The Castle Toward estate is identified as a Potential Development Area (PDA) 2/42 within the adopted Argyll and Bute Local Development Plan (LDP) as being suitable for mixed uses, comprising tourism, education, leisure, housing and business. Castle Toward is also identified as a Strategic Masterplan Area (SMA) MAST 1/ 2 which is identified for the same uses as the PDA. The PDA and SMA areas are bounded by the C10 Glenstriven Road to the west and south and by Ardyne Farm and Strathclyde Cottage to the north. The site is bounded to the east by farmland belonging to Toward Farm.

The Castle Toward estate is identified as being within a Garden and Designed Landscape that stretches north and east beyond the PDA / SMA boundaries. With the exception of land around Toward Castle, the majority of the PDA / SMA site also lies within a wider Area of Panoramic Quality.

Letters of objection have been received from 17 individuals concerning public access issues and previous conditions and decisions relating to the path systems within the estate and impact of the deer fence and closed gates on public access.

The department have been advised by the Council's Access Officer on public access rights but have endeavoured to work with the applicants to try to find a mutually agreeable solution for alternative path systems within the estate. Whilst the applicants have installed directional signage at various points, the alternative path systems along the "southern access link" connecting the west entrance with Toward Castle and eastern links from the eastern entrance up to the Chinese Lakes are considered to be sub-standard and not immediately obvious, albeit following the route of existing informal path systems.

The erection of the deer fence was required to protect the estate from deer and to mark the extent of the dwellinghouse within a large estate which has historically had open access to the public and continues to offer public access routes through the estate but not directly to the mansion house and walled gardens. The closure of the east entrance gates and gates within the new deer fencing meant that public access has been temporarily restricted during construction works and ongoing woodland management works. The east entrance gates remain closed however a recently constructed new pedestrian access via a break in the rebuilt stone boundary wall serves as a short diversion back onto the main eastern drive northwards to the Chinese Lakes.

Whilst the line of the southern and eastern alternative routes through the Castle Toward Estate have been agreed between the department and the applicants, there are sections which still require additional improvement. The applicants had been advised to maintain these routes to allow public access with removal of obstructions, additional drainage and surfacing improvements however these have not been implemented and the routes do not currently offer a suitable alternative as directed under LDP policy SG LDP TRAN1 Access to the Outdoors.

The applicant's choice to submit a Section 42 application to remove conditions previously appealed and dismissed would appear to be at odds with the earlier decision by the Local Review Body on 28th June 2018 where Members deliberated on similar themes but unanimously agreed that the original planning conditions attached to

planning permission ref. 17/02052/PP were reasonable and necessary to ensure that suitable alternative access provisions were provided in lieu of land now contained within the estate's deer fencing. Whilst a Section 42 application could hypothetically allow the Planning Authority the opportunity to attach different conditions to permission ref. 17/02052/PP, it is apparent that the applicant's may not be content with such conditions and therefore would not resolve the current situation.

Despite several meetings with the applicants, it is unfortunate that an agreement could not be reached to improve two main access routes along the southern portion of the estate and up the eastern flank. Whilst these informal path routes are open to the public with directional signage in place, they would benefit from additional signage, improved drainage measures, better surfacing, regular strimming and removal of obstructions in the form of fallen trees or tree roots. In the absence of any notable improvements in the last year, the applicants have left the department with no other option than to recommend refusal of this application as it does not address previous breaches of planning conditions and the decision taken by the Local Review Body in 2018.

The proposal is inconsistent with the relevant development plan policies. There are no other material considerations, including responses from consultees and representations from third parties, nor matters raised in the assessment of the proposals, which would warrant the setting aside of adopted Local Development Plan policies in favour of the development. Refer to Appendix A below for full details and assessment.

(Q) Is the proposal consistent with the Development Plan: No.

(R) Reasons why Planning Permission should be refused.

1. The Council previously granted planning permission (ref. 17/02052/PP) to the applicants to allow them to erect the deer fencing on condition that access elsewhere on the estate was improved to mitigate the loss of public access to land within the area enclosed by the deer fence. The current application to remove these conditions without carrying out necessary improvements for alternative path systems would be contrary to Policy LDP 11 – Improving our Connectivity and Infrastructure and Policy SG LDP TRAN 1 – Access to the Outdoors of the Argyll and Bute Local Development Plan that requires development proposals to safeguard and enhance public rights of access to the outdoors in a manner that is appropriate and proportionate to the specific site characteristics and the scale and impact of the proposed development on access issues. The proposal to remove these conditions would also be contrary the decision taken by The Local Review Body on 28th June 2018, when the applicants lodged an appeal (ref. 18/0005/LRB) against conditions, 2, 3 and 4 of Planning Permission (ref. 17/02052/PP) for the erection of an 1800mm high deer fence.

Whilst the route of the '*southern access path*' and '*eastern flank*' path systems have been agreed and are currently in use, these informal paths are considered to be unsatisfactory in providing suitable alternative paths for those closed off by the erection of the deer fence. The '*southern access path*' and '*eastern flank*' path systems would benefit from better surfacing, additional signage, improved drainage measures, regular strimming and removal of obstructions in the form of fallen trees or tree roots. Without these necessary improvements to provide suitable alternative public access routes, the proposal would be inconsistent with policies to Policy LDP 11 and SG LDP TRAN 1 of the adopted Argyll and Bute Local Development Plan which seek to safeguard and

enhance public rights of access to the outdoors in a manner that is appropriate and proportionate to the specific site characteristics and the scale and impact of the proposed development on access issues.

(S) Reasoned justification for a departure from the provisions of the Development Plan N/a

(T) Need for notification to Scottish Ministers: No

Author of Report: Brian Close

Date: 14th December 2020

Reviewing Officer: Howard Young

Date: 5th January 2021

Fergus Murray

Head of Development and Economic Growth

REASON FOR REFUSAL RELATIVE TO APPLICATION REFERENCE 19/00447/PP

1. The Council previously granted planning permission (ref. 17/02052/PP) to the applicants to allow them to erect the deer fencing on condition that access elsewhere on the estate was improved to mitigate the loss of public access to land within the area enclosed by the deer fence. The current application to remove these conditions without carrying out necessary improvements for alternative path systems would be contrary to Policy LDP 11 – Improving our Connectivity and Infrastructure and Policy SG LDP TRAN 1 – Access to the Outdoors of the Argyll and Bute Local Development Plan that requires development proposals to safeguard and enhance public rights of access to the outdoors in a manner that is appropriate and proportionate to the specific site characteristics and the scale and impact of the proposed development on access issues. The proposal to remove these conditions would also be contrary the decision taken by The Local Review Body on 28th June 2018, when the applicants lodged an appeal (ref. 18/0005/LRB) against conditions, 2, 3 and 4 of Planning Permission (ref. 17/02052/PP) for the erection of an 1800mm high deer fence.

Whilst the route of the '*southern access path*' and '*eastern flank*' path systems have been agreed and are currently in use, these informal paths are considered to be unsatisfactory in providing suitable alternative paths for those closed off by the erection of the deer fence. The '*southern access path*' and '*eastern flank*' path systems would benefit from better surfacing, additional signage, improved drainage measures, regular strimming and removal of obstructions in the form of fallen trees or tree roots. Without these necessary improvements to provide suitable alternative public access routes, the proposal would be inconsistent with policies to Policy LDP 11 and SG LDP TRAN 1 of the adopted Argyll and Bute Local Development Plan which seek to safeguard and enhance public rights of access to the outdoors in a manner that is appropriate and proportionate to the specific site characteristics and the scale and impact of the proposed development on access issues.

APPENDIX A – RELATIVE TO APPLICATION NUMBER: 19/00447/PP

PLANNING LAND USE AND POLICY ASSESSMENT

A. Settlement Strategy

The Castle Toward estate is identified as Potential Development Area (PDA) 2/42 within the adopted Argyll and Bute Local Development Plan (LDP) as being suitable for mixed uses, comprising tourism, education, leisure, housing and business. Castle Toward is also identified as a Strategic Masterplan Area (SMA) MAST 1/ 2 which is identified for the same uses as the PDA. The PDA and SMA areas are bounded by the C10 Glenstriven Road to the west and south and by Ardyne Farm and Strathclyde Cottage to the north. The site is bounded to the east by farmland belonging to Toward Farm.

The Castle Toward estate is identified as being within a Garden and Designed Landscape that stretches north and east beyond the PDA / SMA boundaries. With the exception of land around Toward Castle, the majority of the PDA / SMA site also lies within a wider Area of Panoramic Quality.

Location, Nature and Design of Proposed Development

The Toward – Castle Toward PDA site is located on the south eastern coast of the Cowal Peninsula and bounded by the Firth of Clyde to the east and south and by farmland and woodland to the west, north and east. In a wider context, the PDA is bounded by Ardyne PDA 2/43 and Knockdow Estate PDA 2/44 to the west. The nearest settlement is Toward which lies some 2km to the south-east.

The Castle Toward designed landscape occupies a site at the southern end of the Toward Peninsula, 10km south-west of Dunoon and is accessed via the A815. The mansion house and grounds occupy the lower south-facing slopes of Toward Hill, at the southernmost point of the Toward Peninsula with views south to the Island of Bute and beyond to the Firth of Clyde.

The designed landscape designation at Castle Toward extends northwards up Toward Hill to include the Chinese Lakes (reservoirs on Toward Hill to supply the estate which were made into an attractive landscape feature) and Ardyne Farm to the north-west. The C10 Glenstriven Road forms the southern and western boundaries, and to the east, the boundary takes in old estate parkland and is bounded by a commercial coniferous plantation on what was probably former policy woodland. A belt of old policy woodland is included in the designed landscape, which stretches east of the old ruins of Toward Castle. The principal features of the designed landscape, except for the Chinese lakes, are contained within the current estate boundary comprising approximately 150ha (370 acres).

The existing Core Path network begins at Toward Memorial Hall and enters Castle Toward estate from the existing western vehicular entrance. The Core Path C208(c) then follows the entrance to Castle Toward just beyond the Nissen Huts at the rear, where the path strikes left and northwards towards the junction to Ardyne Farm to the north. The Core Path follows the track up to and past Strathclyde Cottage where it then splits north-west to the Ardyne Car Park and west around the Chinese Lakes where it splits again with a western and eastern route around Corlarach Forest.

Accordingly, the proposal would be consistent with the settlement plan for the estate and in accord with policies LDP STRAT1, LDP DM1 and LDP 3 of the Argyll and Bute Local Development Plan.

B. Location, Nature and Design of Proposed Development

The Proposal

The proposal relates to the removal of planning conditions 2d (path improvements) and 4 (footpath link) relative to planning permission 17/02052/PP - Erection of 1800mm high deer fence (retrospective).

The original conditions approved for planning permission ref. 17/02052/PP were

2. *Within three months of the date of this permission, a detailed Access Plan including mitigation measures shall be submitted for the written approval of the Planning Authority. Such an Access Plan shall include but not limited to :*
 - a. *The route of the proposed path linking the Chinese Lakes with the eastern driveway;*
 - b. *Standard cross section detail for the construction of the path, showing width to be 1.8m and the finishing materials;*
 - c. *Detail drawing for the timber bridge across the burn along the eastern footpath, including dimensions;*
 - d. *Improvements to the path/s to the south of the enclosed area to mitigate the loss of public access within the area enclosed by the proposed deer fence including standard cross section construction details, showing width;*
 - e. *Location of the Core Path a short section of which will need to be diverted since it will be obstructed by the proposed fence and gates. The plan will need to show the line of the diversion.*
 - f. *Location and details of any directional signage to be provided to manage public access on the estate, referred to in the Report of Handling for the Masterplan;*

Reason: To ensure continued public access around Castle Toward Estate and to ensure consistency with policy SG LDP TRAN 1.

4. *Prior to the commencement of works details shall be provided of a footpath that will link the east and west driveways within the southern area of the estate below to the 'haha'. Such details shall include but are not limited to:*
 - *Location including start and finishing points,*
 - *Construction details that shall include suitable drainage, 1.8m width and a type one finish,*
 - *Timetable of works with the footpath to be completed within three months of the details approved.*

The full details shall be submitted to the planning authority for approval and the works complete within three months from the date of approval unless otherwise agreed in writing with the planning authority.

Reason: To improve access around the estate and address any loss of access resulting from the development hereby approved.

These conditions (in addition to condition 3 below) were appealed against by the applicants and an appeal (ref. 18/0005/LRB) submitted to the Argyll and Bute Local Review Body on 28th June 2018. Condition 3 states the following:

3. *Notwithstanding the submitted information, all gates within the deer fencing shall remain 'open' until alternative access routes along the southern and eastern boundary of the estate have been provided and available for public use.*

Reason: In order to maintain access for pedestrians and horse riders.

The LRB discussed matters relating to difficulties posed by the established access on the estate; the right to roam and the reasonableness of the conditions imposed on the retrospective planning consent, with all Members agreeing that they did not find the planning conditions unreasonable. The Chair indicated that he believed that the original application would have warranted refusal if the conditions had not been applied at this time as without these conditions, the proposal would not have been consistent with policy SG LDP TRAN 1. The Local Review Body unanimously recommended that the conditions remain as per the officer's recommendations and that the appeal be dismissed.

The 2018 decision by the Local Review Body is therefore considered to be a significant material consideration in an assessment of this application.

As a result of the decision by the Local Review Body to dismiss the appeal, two enforcement files were opened to address outstanding matters. These were ref. 18/00197/ENBOC3 : Breach of Conditions 2, 3 and 4 relative to Planning Permission 17/02052/PP, opened on 29th October 2018 and 18/00198/ENBOC3 : Breach of Condition 4 relative to Planning Permission 17/00400/PP, opened on 29th October 2018.

Breach of Conditions Notices for 18/00197/ENBOC3 and 18/00198/ENBOC3 were served on 5th November 2018. Both enforcement cases remain outstanding having been effectively 'put on hold' during deliberation of the current application ref. 19/00447/PP

C. Public Access

The Land Reform (Scotland) Act 2003 (which came into force in 2005) gives everyone rights of access over land and inland water throughout Scotland, subject to specific exclusions set out in the Act and as long as they behave responsibly. These rights are sometimes referred to as 'freedom to roam'.

Local Development Plan Policy

Policy SG LDP TRAN1 Access to the Outdoors provides additional detail to policy LDP 11 – Improving our Connectivity and Infrastructure of the adopted Argyll and Bute Local Development Plan.

(A) Argyll and Bute Council requires development proposals to safeguard and enhance public rights of access to the outdoors* in a manner that is appropriate and proportionate to the specific site characteristics and the scale and impact of the proposed development on access issues. Accordingly, the Core Paths Plan, claimed Public Rights of Way and public rights of access to land and water under the Land

Reform (Scotland) Act 2003 (LRSA) will be material considerations in assessing planning applications.

(B) Where development would have a significant adverse effect upon the public access interests identified in (A) alternative access provision will be sought at the developer's expense either by diverting the route or incorporating it into the proposed development in a way that it is no less attractive, safe or convenient for public use. Unless such appropriate provision is demonstrated, the proposal will be resisted.

(C) Where development would have a significant effect upon the public access interests identified in (A) the developer is required to submit an Access Plan** which addresses access issues to the satisfaction of the Council.

(D) The Core Paths Plan, claimed Public Rights of Way and public rights of access to land and water under the LRSA will be material considerations in considering planning applications.

**including; Core Paths, Launching Points, claimed Public Rights of Way, identified safe routes to school, Long Distance Routes, walking paths, cycle ways, equestrian routes, trod earth paths, waterways and significant areas where there are wider rights of public access under the LRSA i.e. woodlands, agricultural land, the foreshore and fresh water loch shores;*

***This should show all the existing paths and tracks on the site, together with proposed public access provision after completion of the development and should include links to the existing path networks and the surrounding area as well as launching points and access to the foreshore or water where appropriate. For larger developments close to settlements a phased approach may be required to the management of access during construction.*

The Council's Access Officer comments that, *"the applicants started to erect the Deer Fence around Castle Toward in June 2017 and because it affected the setting of a Listed Building, a retrospective planning application was required.*

The Land Reform Scotland Act 2003 places a legal duty on Argyll & Bute Council to protect and assert Public Rights of Access. Whilst an area of land immediately around Castle Toward is land to which the public do not have a right of access to protect the reasonable privacy of the occupants the area enclosed by the deer fence is substantially greater. The deer fence encloses a proposed Parterre Garden that the applicants need to exclude deer from to protect the ornamental plants. The applicants have also stated that the area enclosed by the deer fencing offers privacy to the occupants of the building and ensures an area required for the commercial viability of the approved use. The Council granted planning permission to the applicants to allow them to erect the deer fencing on condition that access elsewhere on the estate was improved to mitigate the loss of public access to land within the area enclosed by the deer fence. This is in accordance with the Local Development Plan Policy SG LDP TRAN1 Access to the Outdoors.

The application was approved in January 2018. The Planning decision notice included conditions requiring the applicant to provide improved public access to a number of paths on the estate to mitigate the loss of public access to areas not enclosed by the deer fence. These are the same conditions that this application is asking to remove".

The applicants have stated (a) to (p) below, that they believe that the conditions should be removed because;

a) *The fence follows the route of an existing 1000mm high original fence*

Access Officer Comment – This is not material to the planning application or the conditions imposed upon the applicant. The fence erected in 1930 predates the Land Reform Scotland Act by many decades.

b) The deer fence encloses formal gardens as well as an area identified on the approved masterplan 16/02356/MPLAN as a helicopter landing area. The dangers of deer in the vicinity of such aircraft activities are well recognised, the Joint Agency Statement and Guidance on deer fencing 2004 states Road traffic accidents (RTAs) involving deer directly or indirectly are a Public Safety issue as is the presence of deer on airfields.”

Access Officer Comment – The deer fence encloses an area of land part of which is land to which the public would otherwise have a right of access. The Council’s Policy SG LDP TRAN1 makes Access Rights a material consideration when considering planning permission and (B) requires the developer to provide alternative access where the proposed development has a significant adverse impact on public access interests. The reason that the public’s rights of access are being impacted is not a consideration.

c) The applicants have already secured consent for a diverse Masterplan for the estate under application 16/02356/MPLAN. An element of that approved plan is for the creation of a deer farm/park within the outer estate area. A deer fence as submitted under the application in question is a necessary prerequisite to the establishment of the deer park.

Access Officer Comment – The Masterplan did not grant the applicant permission to undertake any development and it is expected that as work on the estate progresses separate applications will be submitted for each element. The Masterplan also identified sites for a number of new houses along the southern boundary of the estate and the proposed path could be required to mitigate the loss of access in this part of the estate and provide access to the Memorial Hall where the few public facilities in the area are located. Planning Permission for deer fencing would not be required to establish a deer farm unless parts of the fencing were adjacent to the public road or affected the setting of a listed building.

The applicant would however need to ensure that they considered public rights of access when erecting fencing, ensuring that existing routes are not obstructed and that the public will continue to be able to exercise their rights of access by providing gates where necessary.

d) There is already an accepted principle pertaining across the estate, outwith the deer fence area, of the Right to Roam throughout the areas identified in the condition for the route of the path and members of the public already take informal access in these areas

Access Officer Comment – Whilst it is accepted that the public’s rights of access can be exercised across much of the estate as the landowner is required to permit by the Land Reform Scotland Act 2003 the conditions purpose is to mitigate the loss of public access to an area of land to allow the Council to grant permission for the proposed development.

e) A pedestrian right of way does not exist across the estate and therefore does not need to be formalised by any condition, indeed when the matter of potential rights of way were reviewed at the time of acquisition of the estate by the applicants, three firms of solicitors all concurred that there were no formal rights of way from the east of the estate through to the west. This was further ratified by Argyll and Bute Council legal services department who confirmed that no such right existed nor would one be recognised by the council.

Access Officer Comment – The public have a legal right of access across much of the estate under the Land Reform Scotland Act 2003 and the purpose of the conditions is not to recognise, protect or establish a Public Right of Way. The creation of the path will permit the public to exercise their rights of access more easily across an area of woodland that has become very overgrown, poorly drained in places and is difficult to navigate across. The proposed path will allow the public to park at the Memorial Hall and walk directly to the ruined Toward Castle, which is associated with the Clan Lamont and attracts visitors from around the world. The alternative routes are along the public road or via the Chinese lakes; although not busy the road is more hazardous, the second route to the north is considerably less direct.

f) The reason given for the inclusion of the condition is “To improve access around the estate and address any loss of access resulting for the development hereby approved.” There is no loss of access which arises from the inclusion of the deer fence, as it can be legally demonstrated (by three firms of solicitors as well as the council’s own legal services team) that there are no public access rights within the deer fence enclosure. The formation of the pedestrian bridge and links to the north and east of the deer enclosure as required by condition 2 of the consent is considered to be sufficient to improve access around the estate.

Access Officer Comment - The applicants’ state that because the estate was previously a residential school the public did not have a right of access to the grounds which in law is correct. However, the school closed in November 2009 and for around seven years until it was purchased in October 2016 the public had a legal right of access to all of the land around what was an unoccupied building. Representations made in response to a call for evidence in support of the claimed right of way during 2015 suggest that the public had had unrestricted access to much of the estate for a period in excess of twenty years. This was whilst the building was in use as an Outdoor Education Centre and suggests that the school staff made no concerted attempt to deter public access. The Land Reform Scotland Act was not enacted until 2005 therefore for much of this period it would appear that access was not discouraged even though the public did not have a legal right.

g) The council is called upon to provide examples of precedence for the inclusion of such a condition for a deer fence within a private estate, when the route follows the line of an existing fence and follows the boundary of a legally accepted private dwelling boundary. A review of the council’s planning website indicates that there have been seven applications for deer fencing (including the current application) recorded since 2002, six of those since 2011. None of the conditions attaching to the approvals makes any kind of reference to conditions other than those that one might expect e.g. approval of materials to be used or keeping back a short distance from a public road etc., with the exception of application 17/02052/PP.

Access Officer Comment – Generally, developers are not required to submit planning applications for deer fencing which they can erect under Permitted Development Rights unless they are close to a public road. Castle Toward is unusual because permission is required because the fence affects the setting of a listed building. Landowners still have to meet their legal obligations under Section 3 of the Land Reform Scotland Act 2003 to respect the public’s rights of access. This would typically be achieved by installing gates on existing tracks and paths and ensuring that they are not locked. Where there is no provision for public rights of access the Council has powers under Section 14 of the Land Reform Act to issue a notice requiring the landowner to unlock existing gates or provide suitable gates.

h) The former use of the premises was as a school and as such the entire grounds were inaccessible under the right to roam act, a previous change of use application that was successfully submitted by the applicants (ref 16/00996/PP) resulted in around 80% of the estate grounds now being included under the Land Reform Act. The applicants therefore believe that improved public access has been secured to an immeasurable extent and that condition 4 of the current application therefore serves no purpose as it seeks to start a path at an unspecified point within the estate and end at an unspecified point in the estate. The applicants have expended a considerable six figure sum on improvements to the estate outwith the deer fence enclosure, works including tree and scrub clearance, reinstatement of woodland walks, drainage, improved safe means of access to the estate through a new pedestrian entrance, all items that contribute to improved public access and which the applicants believe the planners have failed to take into account when including condition 2d) and condition 4.

Access Officer Comment – See the comment on item “f”. The Land Reform Scotland Act considers the use of the land not the Planning Use Class. Therefore, as soon as the Residential School closed and the building was unoccupied the public would have had a legal right of access right up to the building until Planning Permission to allow the redevelopment of the building as a dwellinghouse was granted and work commenced. The history of access is not relevant to whether or not the public currently have a right of access to an area of land enclosed by the deer fence around Castle Toward. Several of the works listed above would have been required as part of the redevelopment of the estate whether or not public access was permitted, i.e. woodland management work and resurfacing of the east and west driveways. Where other access improvements have been provided these are required by other conditions, i.e. the path links and bridge to the Chinese Lakes and the pedestrian entrances. The later only comprise a part of the total cost of reinstating the main entrance gates.

i) The applicants have been advised by their insurers to resist the conditions on the basis that the creation of such a path will result in an increased liability, currently the premise that exists for members of the public taking access under the Land Reform Act is one of doing so at their own risk. This would no longer be the case if a formal path was created as a duty of care would then be imposed on the applicants.

Access Officer Comment – The additional risks and liability arising as a result of creating the path required are minimal provided that the work is carried out competently and adequate maintenance work is carried out. The public in exercising their legal rights of access take responsibility for their own safety and indeed the case law has supported this approach in the Scottish Courts.

j) The condition calls for a path that would be more acceptable in a suburban environment and not a remote country estate. It would be quite alien to the landscape which is heavily wooded. The estate business plan creates an environment for movie makers, foragers and wildlife experts, all of which could be impacted by the creation of the proposed path.

Access Officer Comment – The condition suggests that the path is constructed using Type 1 which is crushed stone and is the same standard used by the Forestry Commission Scotland for the majority of its paths which are not known for their suburban appearance. This type of path construction has been suggested because the costs are lower than any of the alternatives. If the applicants wish to propose a higher specification which is more in keeping with the surroundings the council will consider this.

k) The path would be required from some unspecified point on the east of the estate to an unspecified point to the west of the estate i.e. it would not link to any existing paths that are of a similar type and finish.

Access Officer Comment - The Planning Conditions require the developer to submit an Access Plan for the Council's written approval. To date, no Access Plan has been submitted in association with this application. The Access Plan is expected to identify a suitable route for the path. There is no requirement for the path to be constructed to the same standard as the East and West Drives, which are primarily intended for vehicular use.

l) The construction of this new path would place significant maintenance obligations on the applicants. It is noteworthy that the council have themselves closed the well-used woodland path at Morag's Fairy Glen, in Dunoon only five miles from the subjects, citing the cost of maintenance of woodland paths as sufficient justification for the paths closure.

Access Officer Comment - The path at Morag's Fairy Glen has been constructed on steep slopes adjacent to a burn which is a much more challenging location to maintain a path, therefore it is not surprising that from time to time the path has to be closed to allow repairs to be made. The proposed path crosses ground that is level or has gentle gradients and is likely to require minimal maintenance.

m) There already exists a large network of informal woodland paths and walks throughout the estate and if members of the public wanted to access through the estate from east to west they could already do so, either passing to the north of the mansion house, or to the south.

Access Officer Comment – The purpose of the Conditions is to mitigate the loss of public access within the fenced area by enhancing public access elsewhere on the estate. Although there are alternative routes that allow people to cross the estate, for the reasons given in (e) these are not considered sufficient.

n) Previous owners of the estate, most recently Argyll and Bute Council, have not kept up the grounds and therefore there is windblown timber etc at various locations throughout the grounds. The applicants have embarked upon an ambitious plan of restoration of the grounds. The imposition of the condition is seen as a "backdoor" attempt to formalise a "right of way" that does not currently exist

Access Officer Comment – Although the Council previously owned the estate, the tenant from c1997 was a charity called Actual Reality. It is not known which body had responsibility for the maintenance of the estate however, it is apparent that insufficient resources were available leading eventually to the sale of the estate to the applicants. See comments on (b) above regarding the rationale for the conditions.

o) Other conditions contained within the consent e.g. condition 2 a) to c) are being adhered to by the applicants, with the proposed new footbridge due to be completed within the next month. The construction of this footbridge effectively provides a link from the east of the estate to the west of the estate, at considerable cost to the applicants, and makes use of part of the existing core path, the formally recognised route within the area. The imposition of a further path as required by condition 4 therefore serves no purpose.

Access Officer Comment – Conditions 2(a-f) detail the content of the required Access Plan which the applicants were supposed to submit to the Council within three months

of the planning approval being given in January 2018. This should have been received by the Council by the end of April 2018 but has yet to be submitted to the Council. The applicants have been served with a Planning Enforcement Notice requiring them to address these deficiencies. Condition 3 requires the applicants to keep all gates in the deer fence open until such time as the alternative access routes to the south and east are available for public use. Again the applicant has not complied with this condition which is also the subject of enforcement action. The footbridge referred to above is finally being delivered over one year later than required. The purpose of the path required by Condition 4 is to meet SG LDP TRAN1 explained in the paragraph (b) at the start of this document.

p) The proposed route of any path required by condition 4 is through natural woodland which currently has informal routes. The topography does not lend itself to the construction of any formal path and the cost is estimated at in excess of £125,000. It is considered that the imposition of such a condition is penal.

Access Officer Comment - The applicants have been given the freedom through the Access Plan to determine the best route for the proposed path, allowing them to decide whether it is better to improve an existing informal route or choose a new route that minimises construction costs. They also have the opportunity to propose the use of crushed concrete waste from demolition at Castle Toward or stone quarried on site to further reduce costs. The ground over which the path is to be constructed is generally level although there are areas where drainage will be an issue. There is dense vegetation that will need to be cleared along much of the route although this is being undertaken across the estate as part of a programme of woodland management. Using costs provided by the Paths for All Partnership, the costs of constructing the path estimated to be c750 metres in length are as follows. Without a detailed site survey it is not possible to estimate the costs more precisely. The proposed path is 750m in length and 1.8m wide. The estimate includes allowances for clearing vegetation, drainage and path construction. The suggested specification is designed to be appropriate to a woodland location. The incorporation of geotextile and geogrid with 150mm of stone subbase will provide a sufficiently robust path over soft ground to withstand equestrian use whilst minimising future maintenance costs. As suggested earlier the stone for the subbase could be obtained by opening a small quarry on the estate or using crushed demolition waste generated from the refurbishment of Castle Toward”.

Department Comments

The department have strived to work with the applicants, mindful of the Access Officer’s comments, to find a mutually agreeable solution for alternative path systems within the estate. Whilst the applicants have installed directional signage at various points, the alternative path systems along the “southern access link” connecting the west entrance with Toward Castle and eastern links from the eastern entrance up to the Chinese Lakes are considered to be sub-standard and not immediately obvious, albeit following the route of existing informal path systems.

Whilst the line of the southern and eastern alternative routes through the Castle Toward Estate have been agreed between the department and the applicants, there are sections which still require additional improvement. The applicants had been advised to maintain these routes to allow public access with removal of obstructions, additional drainage and surfacing improvements however these have not been implemented and the routes do not currently offer a suitable alternative as directed under LDP policy SG LDP TRAN1 Access to the Outdoors and Access Officer’s comments above. The applicants choice to submit a Section 42 application to remove conditions previously appealed and dismissed would appear to be at odds with the earlier decision by the Local Review Body on 28th June 2018 where Members deliberated on similar themes

but unanimously agreed that the original planning conditions attached to planning permission ref. 17/02052/PP were reasonable and necessary to ensure that suitable alternative access provisions were provided in lieu of land now contained within the estate's deer fencing. Whilst a Section 42 application could hypothetically allow the Planning Authority the opportunity to attach different conditions to permission ref. 17/02052/PP, it is apparent that the applicant's may not be content with such conditions and therefore would not resolve the current situation.

It is worth noting that there have been significant improvements to the Castle Toward Estate since acquisition by the applicants. The mansion house has undergone significant investment with additional improvement works to historic walled gardens, outbuildings, main east and west entrances and positive woodland management taking place. The erection of the deer fence was required to protect the estate from deer and to mark the extent of the dwellinghouse within a large estate which has historically had open access to the public and continues to offer public access routes through the estate but not directly to the mansion house and walled gardens. The closure of the east entrance gates and gates within the new deer fencing meant that public access has been temporarily restricted during construction works and ongoing woodland management works. The east entrance gates remain closed however a recently constructed new pedestrian access via a break in the rebuilt stone boundary wall serves as a short diversion back onto the main eastern drive northwards to the Chinese Lakes.

Conclusion

Despite several meetings with the applicants, it is unfortunate that an agreement could not be reached to improve two main access routes along the southern portion of the estate and up the eastern flank. Whilst these informal path routes are open to the public with directional signage in place, they would benefit from additional signage, improved drainage measures, better surfacing, regular strimming and removal of obstructions in the form of fallen trees or tree roots. In the absence of any notable improvements in the last year, the applicants have left the department with no other option than to recommend refusal of this application as it does not address previous breaches of planning conditions and the decision taken by the Local Review Body in 2018.

Given the above, the proposal is considered to be inconsistent with the provisions of policies Policy LDP 11 and SG LDP TRAN 1 of the adopted Argyll and Bute Local Development Plan.

D. Natural Environment and Impact on Trees

The proposal relates to existing footpath systems therefore no new path systems are proposed and no trees require to be felled as a result of the agreed path systems. There are no habitat or species issues that are not already covered by ongoing woodland management around the estate.

Accordingly, the proposed development would be consistent with policies LDP STRAT1, LDP3, SG LDP ENV1 and SG LDP ENV6 of the Argyll and Bute Local Development Plan in terms of nature conservation interests.

E. Built Environment – Listed Buildings and Designed Landscape

The proposal relates to existing path systems within the southern and eastern part of the Castle Toward estate with no impact on the setting of Castle Toward Mansion House, a category B listed building, and the Toward Castle which is a Scheduled Ancient Monument.

The proposal would have no adverse impact on the Castle Toward Garden and Designed Landscape designation as it relates to existing path systems within the southern and eastern parts of the estate.

It is considered that the proposed development would not have a detrimental impact on the setting of Castle Toward, the Castle Toward Garden and Designed Landscape and Toward Castle. Accordingly, it is considered that the proposed development would be consistent with policies LDP STRAT1, LDP 3, SG LDP ENV15 and SG LDP ENV19 of the Argyll and Bute Local Development Plan.

F. Road Network, Parking and Associated Transport Matters

Castle Toward Estate is currently served by the A815 from Dunoon and then the C10 Glenstriven Road which begins at the Toward Lighthouse junction. Recent proposals for Castle Toward Estate by the applicants have reinstate the eastern driveway. Works are currently underway to install new ornamental gates on the main western driveway.

The proposal relates only to informal existing path systems within the Castle Toward estate with no impact on existing vehicular access arrangements.

On the basis of the above, the proposal is considered consistent with policies LDP STRAT1, LDP 11, SG LDP TRAN 4 and SG LDP TRAN6 of the Argyll and Bute Local Development Plan.

G. Landscape

The application site lies within an Area of Panoramic Quality (APQ) which derives from the scenic qualities of the wider landscape and the interrelationship between narrow sea channels, sea lochs and surrounding steep sided hills. The Kyles of Bute National Scenic Area is approximately 5km to the north-west.

As the proposal relates specifically to path systems within the Castle Toward Estate there would be no impact on the wider landscape and APQ given the dense deciduous woodland within the estate.

On the basis of the above, the proposal is considered consistent with policies LDP STRAT1, LDP 3, LDP9, SG LDP ENV 13, SG LDP ENV14 and SG LDP ENV 15 of the Argyll and Bute Local Development Plan.

H. Other Scottish Government Advice

Scottish Planning Policy (SPP) (June 2014) advises that local development plans should safeguard access rights and core paths, and encourage new and enhanced opportunities for access linked to wider networks (para 228).

It is considered that the proposal is inconsistent with the elements of SPP in that it does not enhance existing access for walkers around the Castle Toward Estate and currently does not provide suitable alternative routes for land now contained within the deer fencing.