

**Delegated 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:** 19/01854/PP  
**Planning Hierarchy:** Local  
**Applicant:** Mr and Mrs C and J Easthaugh  
**Proposal:** Change of use of vacant land to form residential garden ground (retrospective)  
**Site Address:** Cairnview, Baluachrach, Tarbert

---

**DECISION ROUTE**

Local Government Scotland Act 1973

---

**(A) THE APPLICATION**

**(i) Development Requiring Express Planning Permission**

- Change of use of land from vacant ground to residential garden (retrospective)
- Erection of fence line (retrospective)
- Erection of garden shed with associated decking (retrospective)
- Engineering works to install retaining wall (gabion baskets, retrospective)

**(ii) Other specified operations**

- General landscaping works
- 

**(B) RECOMMENDATION:**

It is recommended that the application is refused for the reasons detailed below in section (R).

---

**(C) CONSULTATIONS:**

**ABC Access Manager**, 4<sup>th</sup> October 2019

After substantial investigation it has been advised that a right of way exists at this location.

**Scot Ways**, 15<sup>th</sup> November 2019

Reminded officers of their requirement to maintain rights of way and protect them from inappropriate forms of development.

**Historic Environment Scotland, 16<sup>th</sup> September 2019**

The proposals have the potential to impact on the setting of Castle Tarbert but there are no specific comments to make.

---

**(D) HISTORY:**

07/02281/OUT - Site for erection of two dwelling houses and upgrading of existing vehicular access – Approved 14<sup>th</sup> March 2008

09/00912/DET - Erection of 2 No. one and a half story detached dwellinghouses and creation and upgrade of access – Approved 7<sup>th</sup> September 2009

19/00135/ENBOC2 – Associated planning enforcement enquiry – pending outcome of this planning application.

---

**(E) PUBLICITY:**

Regulation 20 advert expiry 11<sup>th</sup> October 2019

Neighbour notification expiry 25<sup>th</sup> September 2019

---

**(F) REPRESENTATIONS:**

**(i) Representations received from:**

**Comment:**

Lynne Elizabeth Clark, C/O SBS Law, Kinloch Hall, Lochend Street, Campbeltown, PA28 6DL (9<sup>th</sup> September 2019)

**Objection:**

Arthur McFarlane, Mount Pleasant, Tarbert, PA29 6TU (23<sup>rd</sup> September 2019, 24<sup>th</sup> September 2019 and various direct correspondence with case officer)  
Rose Rivendale, No address supplied

**(ii) Summary of issues raised:**

- Lynne Clark has a right of access over the ground in question and has objections to any proposal that seeks to prevent this right.  
*Comment: The applicant has gates installed in the fence line that continues to allow Ms Clark her right of access.*
- Section 9 of the planning application form is wrongly completed. The proposal does impact on access rights as it was vacant land. The form should be completed 'Yes' as members of the public would have a right to roam over the land in question.  
*Comment: The applicant has contacted the planning authority and requested formal authorisation to amend this section of the form. It is not considered such a material change as to warrant a fresh submission.*

*There would be no individuals or organisations who would be affected by this alteration.*

- The proposal seeks to block an ancient Right of Way called The Royal Way. This is shown on historic maps and was walked by the objector since 1951. The local authority has a duty to maintain such rights.  
*Comment: The claimed right of way has been informed by a separate investigation through the Land Reform (Scotland) Act 2003 and led by the Council's Access Officer. This is assessed in greater detail below.*
- The original approval for Cairnview showed a pedestrian access gate that clearly demonstrates the builder's intentions to maintain the right of way.  
*Comment: The original plans do show a pedestrian gate, however it is unlikely that a footpath would have been maintained through someone's garden in such a manner. The expectation is that this gate was for the private use of the occupier and would allow Mrs Clark, owner of the adjacent land, continued access.*
- The applicant owns more land around the property and could buy more land to re-arrange their garden and then maintain the access through the garden.  
*Comment: The planning authority cannot require an individual to act in this manner. It would be for the applicant to undertake this suggestion. Regardless, this is not material to the determination of this application.*
- It is worth noting that a Scottish Lands Tribunal sitting in Edinburgh on 13<sup>th</sup> August 2013 heard from two local witnesses that around 2005 the owners of South Cottage, Baluachrach erected a gate across land in their ownership but which users of The Royal Way considered was obstructing their use of the right of way. The tribunal heard that after taking legal advice and following what was described as 'an outcry from the people of Tarbert' the owners of South Cottage removed the gate.  
*Comment: Noted, but this is not a material planning consideration.*
- Over the past few years at least three people have contacted the council over the applicants' attempts to block the Royal Way.  
*Comment: Noted, but this is not a material planning consideration and is better considered through the Land Reform (Scotland) Act 2003 investigation.*
- The applicants have stopped people using The Royal Way by virtue of erecting signs stating 'No Public Right of Access'. This is unlawful under the Act.  
*Comment: This is noted.*
- The applicants have not provided evidence to support that The Royal Way is not a right of way. They should provide such evidence or re-open The Royal Way.  
*Comment: The applicant is not required to demonstrate that the route is not a RoW. It is for concerned third parties to demonstrate. This is detailed further in Appendix 1.*
- Rose Rivendale was not notified of the application.

*Comment: Neighbour notification was undertaken correctly. Regardless Ms Rivendale is aware of the application and has made representation.*

---

**(G) SUPPORTING INFORMATION**

**Has the application been the subject of:**

- |  |     |
|--|-----|
| <b>(i) Environmental Statement:</b>  | No  |
| <b>(ii) An appropriate assessment under the Conservation (Natural Habitats) Regulations 1994:</b>  | No  |
| <b>(iii) A design or design/access statement:</b>  | No  |
| <b>(iv) A report on the impact of the proposed development eg. Retail impact, transport impact, noise impact, flood risk, drainage impact etc:</b> | Yes |

The applicant has submitted general supporting information querying the right of way and the evidence received by officers. They claim the path was never used with such regularity as suggested and that there is a more appropriate alternative path readily available.

---

**(H) PLANNING OBLIGATIONS**

**Is a Section 75 agreement required:** No

---

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

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

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

**'Argyll and Bute Local Development Plan' Adopted March 2015**

LDP STRAT 1 – Sustainable Development  
LDP DM 1 – Development within the Development Management Zones  
LDP 3 – Supporting the Protection Conservation and Enhancement of our Environment  
LDP 9 – Development Setting, Layout and Design  
LDP 11 – Improving our Connectivity and Infrastructure

**'Supplementary Guidance to the Argyll and Bute Local Plan 2015' (Adopted March 2016)**

**Natural Environment**

SG LDP ENV 1 – Impact on Habitats, Species and our Biodiversity

**Landscape and Design**

SG LDP ENV 14 – Landscape

**Historic Environment and Archaeology**

SG LDP ENV 19 Development Impact on Scheduled Ancient Monuments

SG LDP ENV 20 – Impact on Sites of Archaeological Importance

**Enforcement Action**

SG LDP ENF – Enforcement Action

**Sport, Leisure, Recreation and Open Space**

SG LDP REC/COM 2 – Safeguarding Sports Fields, Recreation Areas and Open Space Protection Areas (OSPAs)

**Transport (Including Core Paths)**

SG LDP TRAN 1 – Access to the Outdoors

**(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 3/2013.**

- Scottish Planning Policy
- Land Reform (Scotland) Act 2003
- Third party representations raising material planning considerations
- Consultee comments
- Argyll and Bute proposed Local Development Plan 2 (November 2019) – The unchallenged policies and proposals within pLDP2 may be afforded significant material weighting in the determination of planning applications at this time as the settled and unopposed view of the Council. Elements of the pLDP2 which have been identified as being subject to unresolved objections still require to be subject of Examination by a Scottish Government appointed Reporter and cannot be afforded significant material weighting at this time. The provisions of pLDP2 that may be afforded significant weighting in the determination of this application are listed below:
  - Policy 26 – Informal Public Outdoor Recreation and Leisure Related Development

---

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

---

---

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

---

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

---

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

---

**(O) Requirement for a hearing:** No – the application does not raise sufficient levels of public interest nor of such complexity as to warrant a discretionary hearing. As such it is not considered that a Hearing would add value to the process.

---

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

The proposal seeks to retrospectively extend a domestic garden. This application has come about due to an enforcement investigation following complaints from third parties. The property, Carinview, was built in 2011 with a discrepancy between the approved planning permission plans and those for the building warrant. This error was never resolved by the developer and surfaced during an enforcement investigation. As per the Planning Enforcement and Monitoring Charter officers sought a planning application to regularise the breach of planning control. During the processing of this application it became evident that the extension would block a right of way.

Policies LDP 11 and SG LDP TRAN 1 seek to protect rights of way and access routes from forms of development that would block them. The primary issue with this proposal is that the works block the Royal Way contrary to the aforementioned policies.

In all other respects the application is acceptable. However, given the status of the right of way the application must be recommended for refusal.

---

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

---

**(R) Reasons why Planning Permission or Planning Permission in Principle Should be Refused:**

The proposed change of use to form an extension to a garden blocks an established right of way, known as the Royal Way. The proposal is therefore contrary to the effects of policies LDP 11, SG LDP TRAN 1 and the provisions of the Land Reform (Scotland) Act 2003.

---

**(S) Reasoned justification for a departure to the provisions of the Development Plan**

N/A

---

---

**(T) Need for notification to Scottish Ministers or Historic Environment Scotland:**  
No

---

**Author of Report:** David Love

**Date:** 30/9/21

**Reviewing Officer:** Peter Bain

**Date:** 7/10/21

**Fergus Murray**  
**Head of Development and Economic Growth**

## **APPENDIX A – RELATIVE TO APPLICATION NUMBER: 19/01854/PP**

### **PLANNING LAND USE AND POLICY ASSESSMENT**

#### **A. Background**

The application has arisen out of an enforcement investigation following a complaint over access through the garden ground of Cairnview. The application for the property was originally granted in 2009 under reference 09/00912/PP for two properties with plot two, subject of this application, receiving a temporary occupation certificate on 6<sup>th</sup> December 2011. The garden ground was clearly set out in the planning permission but then differed in the approved plans for warrant. The warrant plans were those built out by the development resulting in a breach of planning control. Given that a change of use of land does not become immune from planning enforcement action for a period of ten years then this retrospective application was sought.

#### **B. Settlement Strategy**

Policy LDP DM 1 sets out the council's settlement strategy with respect to appropriate scale and form of development in the interests of sustainable economic growth. In this instance the site is located within the settlement of Tarbert and is of an appropriate domestic scale.

**The application is considered consistent with the provisions of policy LDP DM 1 by virtue of being a householder submission within the designated settlement zone of Tarbert.**

#### **C. Location, Nature and Design of Proposed Development**

The land in question is a small sliver adjacent the approved garden and has been used as such for the last nine years. Unbeknownst to the applicant, the use of this land represented a breach of planning control. It is worth noting that the garden shed, fence and engineering works have all been installed for a period of almost ten years. However, because they have been erected on land not forming part of the garden they do not benefit from deemed consent. Should this application be refused these elements will require to be moved.

There is a gate in the fence line that allows a local landowner access to the area to the north east for purposes of land management and animal husbandry. This is a private agreement between the relevant parties and does not form part of the consideration of this application.

The land to the north and east is a designed Open Space Protection Area (OSPA). These areas are protected from inappropriate forms of development by policies LDP 8 and SG LDP REC/COM 2. However, this proposal is directly adjacent the OSPA and does not have an adverse impact on its setting or status.

The garden ground itself 'reads' as a logical extension to the property with the OSPA as a backdrop.

It is worth noting that the change of use of land and associated structures will become immune from planning enforcement action on 6<sup>th</sup> December 2021 by virtue of the passage of time.

**Considering the above, the proposal is consistent with the provisions of policies LDP 8, SG LDP Sustainable and SG LDP REC/COM 2 by virtue of an appropriate volume of land used for garden ground which is a logical extension to the property.**

#### **D. Natural Environment**

Policy SG LDP ENV 1 – Impact on Habitats, Species and our Biodiversity seeks to protect our environment and habitats from inappropriate forms of development.

The land to the north and east of the site is heavily wooded and is used for animal grazing. The land slopes upwards from the property into this land. It is not considered that a domestic garden area on the edge of woodland will have an adverse effect on its setting, interests or habitats.

**The proposal is considered consistent with the provisions of policies LDP 8, SG LDP REC/COM 2 and SG LDP ENV 1 and will not have an adverse impact on the qualifying interests of the OSPA.**

#### **E. Access to Countryside.**

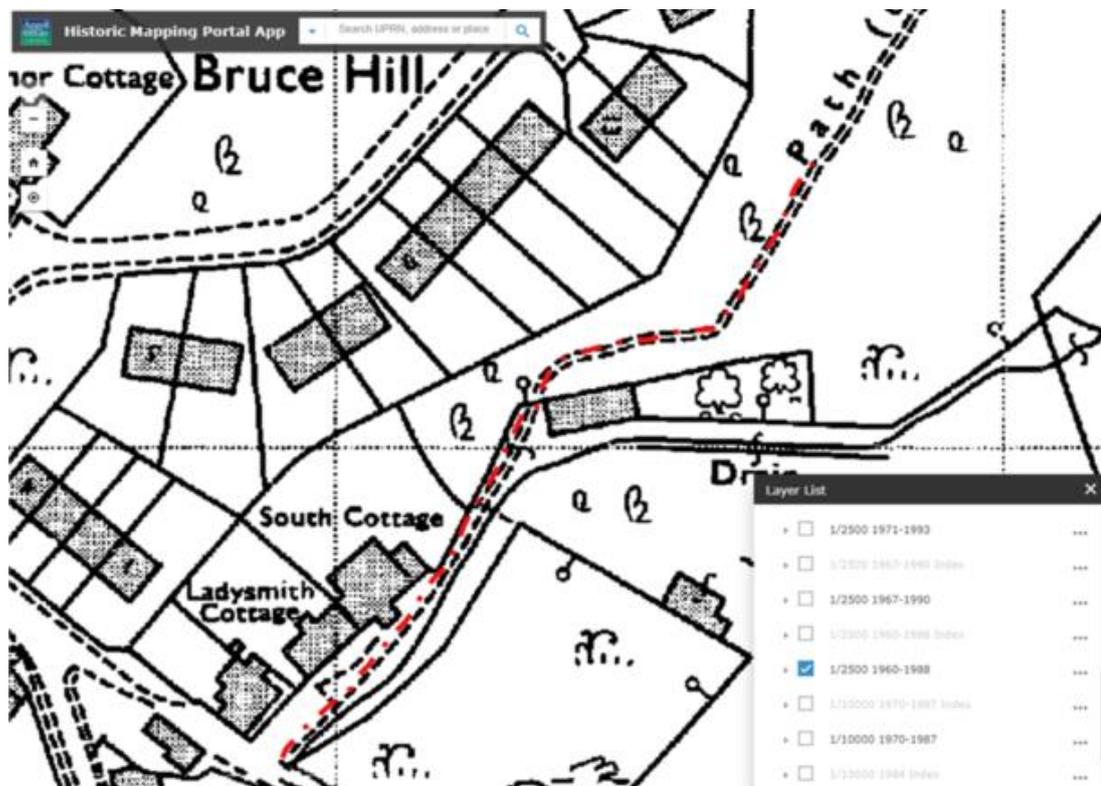
Policies LDP 11 – Improving our Connectivity and Infrastructure and SG LDP TRAN 1 – Access to the Outdoors seek to maintain access to the Argyll countryside and ensures proposals are consistent with the provisions of SPP in this regard. Access rights are afforded to the general public by the provisions of the Land Reform (Scotland) Act 2003. Specifically this Act, and the policies of the LDP, protect recognised rights of way from inappropriate development.

A right of way route must meet all the following conditions to be considered so:

- It must join two public places (e.g. public roads or other rights of way)
- It must follow a more or less defined route,
- It must have been used openly by the general public, not just those who live along the route or those who use it for the purposes of work,
- It must have been used as a matter of right, not only with the permission of the landowner,
- It must have been used without substantial interruption for at least twenty years.

There is a claim that a RoW runs through the garden ground to Tarbert Castle known as the Royal Way. This route is claimed to run through Kings Way, past Tarbert Academy, through Baluachrach to approach the western walls of Tarbert Castle. As a consequence of the development not conforming to the approved planning drawings this right of way has been significantly blocked. It is now no longer passable due to the erection of fencing at Cairnview and the neighbouring property. The original planning permission would have ensured that the path remained free of obstruction. In terms of ground conditions the land is fairly free draining until beyond Cairnview where it can be quite boggy. A third party raised the issue of an informal path being visible from the rear of the applicant's house toward the castle. It is understood that this was laid by the applicant for dog walking as the ground was always damp. This has been verified by officers. It should be noted that there is an alternative access to the castle from this part of Tarbert through Bruce Hill. This is a more formal and manageable route to take than that claimed RoW.

The route of the Royal Way is indicated below from an ordnance survey map dated 1988. This has been 'lifted' from the council's GIS with the route marked in red.



Such paths can fall out of use as they become less desirable through ground conditions or more attractive alternatives being provided. It is also common for such paths to move over time. This is a natural process and often comes with deterioration of ground conditions. The map below shows the original route and how it would interact with the approved houses.



It is suggested by officers that it would be appropriate to consider the route to have moved as per the image below. This is due to the planning approval for two houses, Cairview and Glengarisdale.



An investigation was undertaken by the council's Access Manager to ascertain the extent of the use of this path. It is important to impress upon members the planning enforcement history. Through the last nine years there have been two complainants regarding the use of the path. The Access Manager sought to interview interested parties as part of his investigation to support the planning officer. He has established some four users of the path with limited evidence of its use. However, consultation with Scot Ways and the council's solicitors has confirmed that this is sufficient to establish the presence of the right of way.

It is also worth noting that officers have tried to negotiate an alternative route with the adjacent land owner. Unfortunately, these discussions did not reach a fruitful conclusion.

It is incumbent upon planning authorities to determine applications as per the requirements of the LDP and material planning considerations. Although officers express some sympathy with the applicant and accept this has been a genuine mistake, the issue remains that a right of way has been established and blocked by the development. In this regard the proposal is not consistent with the provisions of policies LDP 11 and SG LDP TRAN 1.

**Considering the extensive investigation by the Access Officer and opinion of Scot Ways it is considered by Officers that the proposal is not consistent with the effects of policies LDP 11, SG LDP TRAN 1 and the provisions of the Land Reform (Scotland) Act 2003.**

#### **F. Historic Environment**

Policy SG LDP ENV 20 – Impact on Sites of Archaeological Importance seeks to protect historic archaeological assets insofar as possible. Although Tarbert is rich in such assets it is not considered that the use of land as garden ground will have an adverse impact on such given there are no ground breaking works associated with this application.

Policy SG LDP ENV 19 seeks to protect scheduled Ancient Monuments (SAMs) from inappropriate works that impact on their setting. In this instance Historic Environment Scotland (HES), despite not raising objection, commented that the proposals have the potential to impact on the setting of Tarbert Castle. Officers consider that given approval was granted for the house and associated elements that moving this a few meters will not adversely impact on the wider setting of the castle.

**Considering the nature of the application the proposal is consistent with the provisions of policies SG LDP ENV 19 and SG LDP ENV 20 and will have a neutral effect on archaeological assets.**

#### **G. Other Key Policy Matters**

Matters of land ownership are not material to the determination of a planning application subject to the relevant notices served on the owning parties as part of the application process. In this instance it is worth noting that officer investigations demonstrated that the land in question belongs to ACHA. They have been notified of the situation and they have acknowledged our correspondence but provided no comment. Equally, part of the Royal Way has been blocked by the adjacent property owner at Glengarisdale. They have not returned our attempts at contact.

Should Members be minded to refuse the application then officers must turn their attention to enforcement proceedings. This is considered further in an associated enforcement report ready for member discussion depending on the outcome of this application.