

**Update on Planning Appeal Reference: PPA-130-2080 – Land south-east of Castle Toward, Toward, PA23 7UG, Argyll and Bute**

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## **1. INTRODUCTION**

This report provides an update on the recent decision by the Planning and Environmental Appeals Division in relation to Planning Appeal Reference PPA-130-2080, whereby the appeal was allowed (subject to the re-wording of original planning conditions) and the decision to refuse planning permission from the PPSL was overturned. There is a right of appeal to the Court of Session only in regard to a point of law and an appeal must be made within six weeks from the date of the appeal decision.

## **2. RECOMMENDATION**

Members are asked to note the content of this report.

## **3. DETAILS OF APPEAL DECISION**

Decision by: Mr Martin H Seddon, a Reporter appointed by the Scottish Ministers;  
Planning Appeal Ref.: PPA-130-2080;  
Site Address: Land south-east of Castle Toward, Toward, PA23 7UG;  
Appeal by: Keith and Denice Punler against the decision by Argyll and Bute Council;  
Application for Planning Permission Ref.: 19/00447/PP dated 1<sup>st</sup> March 2019 and refused by notice dated 20<sup>th</sup> January 2021;  
The Development Proposed: Erection of 1800mm high deer fence;  
Date of Site Visit by Reporter: 29<sup>th</sup> June 2021;  
Date of Appeal Decision: 23<sup>rd</sup> December 2021.

The appeal was upheld and the decision to refuse planning permission by PPSL was overturned and planning permission granted subject to conditions on appeal; a copy of the appeal decision is appended at Appendix 1 hereof.

Whilst the Reporter upheld the appeal, he was in agreement with the Council's view that the public access requirements should be safeguarded and improved in line with Argyll and Bute Local Development Plan policies LDP 11 and SG LDP TRAN1. The Reporter concluded that conditions 2d and 4 of permission ref: 17/02052/PP were reasonable and necessary and met the tests in Circular 4/1998, having regard to policy LDP 11 of the Argyll and Bute Local Development Plan (LDP) and supplementary guidance SG LDP TRAN 1 and allowed the appeal and grant planning permission for the erection of 1800 mm high deer fence in accordance with the application ref: 17/02052/PP subject to the conditions included in the schedule at the end of the decision (refer to APPENDIX 1 below).

The appeal was accompanied by a claim for expenses on the grounds that the Council had acted unreasonably by imposing conditions which in the applicants' view clearly failed to meet the criteria set out in Circular 4/1998: The use of conditions in planning permissions.

The Reporter found that the relevant planning conditions met the six tests in Circular 4/1998 and relevant development plan policies and declined to make any award of costs. The Reporter concluded that he did not consider that the Council had acted in an unreasonable manner in refusing planning permission or that any unnecessary costs were incurred by the appellant. The decision in respect of this matter is attached as Appendix 2 below.

There is a right of appeal to the Court of Session only in regard to a point of law and an appeal must be made within six weeks of the date of the appeal decision.

#### **4. IMPLICATIONS**

- 4.1 Policy – None – the Reporter concluded that the appeal proposal was consistent with the relevant provisions of the development plan.
- 4.2 Financial – None – the Reporter declined to award cost against the Council.
- 4.3 Legal – None
- 4.4 HR – None
- 4.5 Fairer Scotland Duty:
  - 4.5.1 Equalities – protected characteristics – None
  - 4.5.2 Socio-economic duty – None
  - 4.5.3 Islands - None
- 4.6 Climate change - None
- 4.7 Risk – None
- 4.8 Customer Service – None

**Kirsty Flanagan – Executive Director with Responsibility for Development and Economic Growth**

**Councillor David Kinniburgh – Policy Lead for Planning and Regulatory Services**

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

**For Further Information Contact:** Peter Bain – Development Manager – 01546 604204

**Appendices:**

**Appendix 1 – Appeal Decision Notice**

**Appendix 2 – Appeal Expenses Decision Notice**

## APPENDIX 1: APPEAL DECISION NOTICE

Planning and Environmental Appeals Division

Appeal Decision Notice

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Decision by Martin H Seddon, a Reporter appointed by the Scottish Ministers

- Planning appeal reference: PPA-130-2080
- Site address: Land south-east of Castle Toward, Argyll PA23 7UG
- Appeal by Keith and Denise Punler against the decision by Argyll and Bute Council
- Application for planning permission reference 19/00447/PP dated 1 March 2019 and refused on 20 January 2021 to carry out the development without compliance with conditions 2d and 4 imposed in the grant of planning permission ref: 17/02052/PP dated 26 January 2018.
- The development proposed: erection of 1800 mm high deer fence
- The conditions appealed against are:
  - Condition 2d: 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. Reason: *To ensure continued public access around Castle Toward Estate and to ensure consistency with policy SG LDP TRAN 1.*
  - Condition 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, 1.8 m width and 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 of 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.*
- Date of site visit by Reporter: 29 June 2021

Date of appeal decision: 23 December 2021

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### Decision

I allow the appeal and grant planning permission for the erection of 1800 mm high deer fence in accordance with the application ref: 17/02052/PP subject to the conditions included in the schedule at the end of this decision.

### Reasoning

1. The appeal relates to the refusal of an application under Section 42 of the Town and Country Planning (Scotland) Act 1997 which sought to remove two conditions from a permission for the erection of a deer fence. The determining issues in this appeal are

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whether the disputed conditions 2d and 4 of permission ref: 17/02052/PP are reasonable and necessary and meet the tests in Circular 4/1998: The use of conditions in planning permissions, having regard to policy LDP 11 of the Argyll and Bute Local Development Plan (LDP) and supplementary guidance SG LDP TRAN 1.

2. The appellants have submitted a claim for the award of expenses against the council. That is the subject of a separate decision.

3. LDP policy LDP 11 indicates that the council will support all development proposals that seek to maintain and improve internal and external connectivity and make best use of existing infrastructure. Several relevant criteria are listed including that public access is safeguarded. Supplementary guidance SG LDP TRAN 1 provides additional detail to LDP policy LDP 11 and sets out measures where development would have a significant effect upon public access interests.

4. Public access to the immediate grounds of Castle Toward was physically restricted by the erection of an enclosing deer fence. The appellants inform me that the new fence was erected on the line of a previous traditional 1 m high estate fence. Around 80% of the new deer fence had been erected prior to the submission of planning application ref: 17/02052/PP which sought approval of the development.

5. The only formal right of way which crosses the Castle Toward estate is Core Path C208 which leads up the western side of the property and heads north towards the Chinese Lakes. The appellants have applied for a Path Diversion Order under Section 208 of the Town and Country Planning (Scotland) Act 1997 to divert a small section of the core path which is affected by the new deer fence. Although there is a 'claimed' right of way affecting the estate it has no statutory status. The Land Reform (Scotland) Act 2003 (the Act) established statutory public rights of access to land for recreational and other purposes. The appellants accept the principle of the Right to Roam on their land outwith the area enclosed by the new deer fence.

6. Section 6 of the Act concerns land over which rights are not exercisable. Section 6 (b) includes land which consists of land contiguous to and used for the purposes of a school. "School" is defined as not only a school within the meaning of section 135(1) of the Education (Scotland) Act 1980, but also any other institution which provides education for children below school age within the meaning of that provision.

7. Prior to the acquisition of the estate by the appellants it was owned by Argyll and Bute council. The council submits that Section 6 (1) (b) (iii) of the Act considers the use of the land and not the planning use class. In the council's view as soon as the school closed, and the main building was unoccupied, the public would have had a legal right of access right up to the building until permission to allow redevelopment of the building as a dwellinghouse was granted and work commenced. This appears to be a reasonable view because Section 6 (1) (b) (iii) of the Act refers to 'used for the purposes of a school'. The actual date when the land ceased to be used for the purposes of a school is quoted by the council as November 2009, whereas the appellant cites its later use for a residential primary school visit and a residential orienteering event in 2012. Despite this, and based upon the actual use of the land, rather than its planning status, there would have been public access to the estate under the right to roam up until permissions refs: 16/00996/PP for a change of use from Class 8 (residential institution) to Class 9 (dwellinghouse) and

16/02356/MPLAN for a masterplan, including areas of private grounds, had been implemented. On that basis the provision of the deer fence would have excluded access to land, which for a short period at least was available to the public under the right to roam. However, even if the appellant's submissions on this matter were to be accepted, regard still has to be had to development plan policies relevant to the erection of the deer fence.

*Whether the disputed conditions 2d and 4 of permission ref: 17/02052/PP are reasonable and necessary and meet the tests in Circular 4/1998*

8. Circular 4/1998 sets out six tests with which to assess the validity of planning conditions:

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

9. At my site inspection I walked along the informal footpath which links the east and west estate driveways at the southern side of the estate. Much of the route runs parallel to the coast road, and it forms a means of access from the west to the ruins of the original Castle Toward. The path winds its way through woodland, grassland and areas dominated by bracken. It was dry sunny weather at the time of my site inspection, but it was apparent that poor drainage would result in muddy conditions during and after rain, and as demonstrated in submissions from interested members of the public. The general area had been used in the past for military purposes, evidenced by occasional concrete footings. Although the path is passable for the able-bodied, in certain places access for anyone with ambulant disabilities would be difficult.

10. The appellants consider condition 2d to be unreasonable because they contend that no rights of access previously existed to land within the area enclosed by the deer fence and the public have access to various informal routes within the rest of the estate through the right to roam principle. Reference is made to the improvements that they have carried out to the estate and that 'continued public access around Castle Toward estate', as stated in the reasons for the condition, is already established. The appellants consider that condition 2d imposes an unreasonable and unjustified financial burden and maintenance responsibility which, in their view on balance, outweighs the nature of the consent for the deer fence that benefits from planning history and precedent. The appellants also assert that condition 2d lacks precision by referring to 'path/s to the south of the enclosed area' without providing details of which paths are concerned.

11. Condition 2d is one of the requirements of criteria a-f set out in condition 2. Condition 2 commences with a requirement for the appellant to submit a detailed access plan including mitigation measures for the written approval of the planning authority within 3 months of the date of permission ref: 17/02052/PP (26 January 2018).

12. In determining the application, the council had regard to relevant development plan policies. The reason for condition 2d was: "*To ensure continued public access around Castle Toward Estate and ensure consistency with policy SG LDP TRAN 1*". Access

through the woodland to the south of the area now enclosed by the deer fence would be open to the public through the right to roam. However, I consider a signed and maintained footpath is likely to provide a much better recreational facility for people rather than just an area of accessible woodland. It would also allow the appellants to manage access more readily. Policy SG LDP TRAN 1 (A) requires development proposals to, amongst other things, enhance public rights of access to the outdoors in a manner that is appropriate and proportionate to the specific characteristics and the scale and impact of the proposed development on access issues. The footnotes to the policy explain that this includes walking paths and significant areas, including woodland, where there are wider rights of access under the Land Reform Act 2003. Condition 2d therefore secures compliance with policy SG LDP TRAN 1 and LDP policy LDP 11.

13. The appellants consider that the reference in condition 2d to required improvements to the path/s to the south of the enclosed area, without providing detail of the exact path or path lacks precision. However, it also provided flexibility for the appellants to submit a scheme of their choice as part of the required access plan and to their benefit in terms of the chosen footpath routeing following determination of the application. I do not find a clear failure to meet the test of precision in this respect. Now that a route is discernible with the passage of time, and as followed at the site inspection, the matter is able to be further clarified.

14. Condition 2d includes a requirement for standard cross section construction details for the southern footpath, including width. I consider that this would not be particularly onerous or unreasonable in all other respects. Therefore, I find that the condition is reasonable and necessary and meets the six tests in Circular 4/1998.

15. Condition 4 requires further detail of the southern footpath, prior to commencement of works. The appellants have referred to the other work carried out to the route of the path linking the Chinese Lakes with the eastern driveway. I walked the route at my site inspection and acknowledge the improvements undertaken, including the provision of a new footbridge. Nevertheless, details of the construction and mitigation measures for that route were required under condition 2 a-c of permission ref: 17/020052/PP.

16. The appellants also state that they have carried out other improvements across the estate, and outwith the deer fence at significant expense which they consider provide sufficient and ample access opportunities. Reference is made to council officers being satisfied with the path network and in particular the written comment dated 12 July 2019 in relation to condition 2d and the southern path that *"This is the area we walked as an 'informal route' but required various improvements to make this route available as an east-west link. No details submitted although we have discussed what minor improvements may make this route acceptable"*. Also, in relation to condition 4: *"This is the key condition which requires to be satisfied but the time limits specified make it difficult to vary. We have walked a potential informal route linking Toward Castle with the western entrance. Subject to some minor improvements, this informal path route could be provided as an east-west link"*. The comments were made in respect of a breach of condition notice ref: 18/00197/ENBOC3, following an unsuccessful Local Review Body appeal against conditions 2, 3 and 4 of permission ref: 17/02052/PP (erection of the deer fence) and the submission of application ref: 19/00447/PP to remove conditions 2d and 4 from permission ref: 17/02052/PP.

17. I note that further correspondence in October 2019 resulted in the council requesting the submission of details pursuant to conditions 2,3 and 4 of permission ref: 17/02052/PP. It seems to me that the appellants were given the opportunity by the council to reach agreement over the route and specification for the southern path, but the appellants eventually sought to remove the requirement for the path altogether.

18. The reason given for condition 4 was: *"To improve access around the estate and address any loss of access resulting from the development hereby approved"*. I consider that the establishment of the southern footpath would improve access around the estate by establishing a defined route in an area of woodland otherwise having more general public access through the right to roam. I therefore consider that the condition is reasonable and necessary and complies with policy SG LDP TRAN 1 and LDP policy LDP 11. It is relevant to planning and relevant to the development which has been permitted. The appellants' concerns relate to the expense involved in upgrading the path. As mentioned above, the council had made reference to 'minor improvements' to the path. Given that this would be a rural pathway passing mainly through woodland there is the possibility that an over-engineered solution could affect its character and enjoyment by users. It would be important that the footpath was unobstructed for its users, well drained and maintained.

### Conditions

19. In allowing the appeal a new planning permission is granted. I have consulted the appellants, the council and Mr Trybis who attended the site inspection, on a set of suggested draft conditions. I have had regard to all the conditions appertaining to the original permission and the comments of the parties consulted and conclude that the conditions should be retained, varied or omitted for the following reasons:

#### *Condition 1.*

20. Concerns the details of the scheme. Retained with no change.

#### *Condition 2.*

21. The original condition 2 required a detailed access plan for the estate. The council agrees with the appellants' rewording of condition 2 which essentially refers to a revision for the previously submitted access plan, but with the inclusion of conditions 2a and 2b. I agree that condition 2c may be deleted as the pedestrian bridge has been completed and is in use.

22. The appellants consider that conditions 2a, and 2b have been purified under a different, but materially relevant consent (ref:17/00400/PP). However, the appeal before me relates to the wording of conditions imposed on permission ref: 17/02052/PP. The council has advised that condition 2a is still required as it forms the eastern component of access arrangements which depend upon works at the eastern driveway entrance being completed to allow suitable access on to the main drive to reach the Chinese Lakes. The council also informs me that whilst very basic information was received about the construction of the path it was never formally agreed or the condition discharged. Therefore, I consider that condition 2b should be retained to ensure that the details may be formally approved. Condition 2d is modified in line with the suggested draft condition for clarity now that a single route for the southern footpath is discernible. The word 'pedestrian'

has been omitted from my suggested draft condition 2f to reflect that access is not just for pedestrians.

*Condition 3.*

23. This condition required gates within the deer fence to be left open until alternative access routes were provided and available for public use. The council agrees with the appellant's alternative wording requiring temporary measures to be put in place. I consider that this is reasonable given that access will be available via the western entrance gates, or via the opening in the stone wall at the eastern entrance (which the council advises will require some improvement to the short diversion route) and improved route along the southern access link between the western and eastern entrances. However, I have amended the wording of the condition to ensure that it meets the six tests.

*Condition 4.*

24. Condition 4 concerns the southern footpath link. I have added a requirement for directional signage to my alternative wording, as suggested by the council. Mr Trybis has requested a specific condition covering the new short section of entrance access path between the A815 at the eastern entrance and the eastern driveway inside the vehicle gate in order to ensure ease of access similar to that which would be available if the eastern gate was open. The appellants dispute that there has been any previous disabled access on the site that would require restoration and they advise that adequate protocols are in place to facilitate disabled access where necessary. The council has not commented upon the suggested need for a condition. However, in the interest of equal opportunity of access, I consider that condition 4 should include a reference to the eastern entrance access path in order that the council may have control over its construction details.

**Conclusion**

25. I conclude that conditions 2d and 4 of permission ref: 17/02052/PP were reasonable and necessary and met the tests in Circular 4/1998, having regard to policy LDP 11 of the Argyll and Bute Local Development Plan (LDP) and supplementary guidance SG LDP TRAN 1. I allow the appeal and grant planning permission for the erection of 1800 mm high deer fence in accordance with the application ref: 17/02052/PP subject to the conditions included in the schedule at the end of this decision.

*Martin H Seddon*

Reporter

**Schedule of Conditions**

26. The conditions listed below have been re-numbered in instances where other previous conditions have been omitted.

1. The development shall be implemented in accordance with the details specified on the application form dated 28 July 2017 and the approved drawing reference numbers: 1544\_L(P.7)700 Rev A and 1544\_LP(P.7)701 Rev A, unless the prior written approval of the Planning Authority is obtained for an amendment to the



approved details under section 64 of the Town and Country Planning (Scotland) Act 1997.

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

2. Within three months of the date of this permission, the previously submitted 'Access Plan' (1544\_L(MP)005) submitted through application ref: 16/02356/MPLAN shall be revised as necessary and 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 the width to be 1.8 m and the finishing materials;
  - c. The route of the proposed path linking the east and west driveways within the southern part of the estate below the 'ha-ha' including start and finishing points;
  - d. 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 Access Plan will need to show the line of the diversion;
  - e. Location and details of public access points to the estate and directional signage to be provided to guide and manage public access on the estate.

Reason: To ensure continued public access around Castle Toward Estate and to meet the requirements of Argyll and Bute Local Development Plan policy LD P11 and supplementary guidance policy SG LDP TRAN 1.

3. Within 3 months of the date of this permission details of temporary measures to provide adequate means of access along the southern boundary of the estate prior to or during the implementation of improvement works in the southern area of the estate as detailed in condition 4, shall be submitted for the written approval of the Planning Authority. The temporary measures shall be carried out in accordance with the approved details within one month from the date of approval.

Reason: In order to facilitate continued access to the general estate grounds.

4. Within 3 months of the date of approval of the Access Plan, details shall be submitted for the written approval of the Planning Authority of the improvement works for the footpath that will link the east and west driveways within the southern area of the estate, in accordance with the route approved in the Access Plan. Such details shall include but are not limited to:
  - a. Location including start and finishing points and proposed directional signage,
  - b. Construction details that shall include 1.8 m width, details of the eastern entrance access path, sections of the route where footpath drainage is proposed, and sections of the route which require a type 1 finish.
  - c. Timetable of works with the footpath improvements and directional signage to be completed within three months of the approved improvement works details.
  - d. The footpath improvement works shall be carried out in accordance with the approved drainage and surfacing details, and unobstructed public access along the footpath and adequate surface drainage thereafter retained.

Reason: To improve access around Castle Toward Estate, address loss of access resulting from the development hereby approved, and to meet the requirements of Argyll and Bute Local Development Plan policy LDP 11 and supplementary guidance policy SG LDP TRAN1.

## APPENDIX 2: APPEAL EXPENSES DECISION NOTICE

Planning and Environmental Appeals Division

Claim for an Award of Expenses  
Decision Notice

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Decision by Martin H Seddon a Reporter appointed by the Scottish Ministers

- Appeal reference: PPA-130-2080
- Site address: Land south-east of Castle Toward, Argyll
- Claim for expenses by Mr Keith and Denice Punler against Argyll and Bute Council
- Date of site visit by reporter: 29 June 2021

Date of decision: 23 December 2021

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### Decision

I find that the council has not acted in an unreasonable manner resulting in liability for expenses and, in exercise of the powers delegated to me, I decline to make any award.

### Reasoning

1. The claim was made at the appropriate stage of the proceedings. The appellants consider that the council acted unreasonably in imposing conditions which in their view clearly failed to meet the criteria set out in Circular 4/1998: The use of conditions in planning permissions.
2. The council submits that it did not act unreasonably as suggested by the appellants but required necessary safeguarding conditions to ensure that continuous public access was available through certain parts of the estate and also in line with the appellants' vision of the estate stated in their approved Masterplan.
3. Circular 6/1990: awards and expenses, advises that in planning proceedings the parties are normally expected to meet their own expenses and expenses are only awarded on grounds of unreasonable behaviour. In my appeal decision I have set out my assessment of the two disputed conditions (conditions 2d and 4 of permission ref: 17/02052/PP) having regard to the six tests in circular 4/1998. Examples of unreasonable behaviour include if a council imposes conditions on a grant of planning permission which clearly fail to meet these tests.
4. Having regard to the representations from the appellants I found that condition 2d and condition 4 both met the six tests. In response to the appellants' submission regarding the lack of precision of condition 2d, I consider the issue of which southern path/s required to be improved could have been resolved when details were submitted to the council for approval of a detailed Access Plan in accordance with condition 2. I found that both conditions met the requirements of relevant development plan policies.

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5. I conclude that unreasonable behaviour by the council in imposing conditions on the grant of permission ref: 17/02052/PP has not been demonstrated. Consequently, I have no reason to find that any unnecessary expense has been caused for the appellants in this appeal.

*Martin H Seddon*  
Reporter