

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

Reference No: 11/00901/PP
Planning Hierarchy: Local
Applicant: Miss Mairi Porter
Proposal: Erection of gates and fencing (retrospective)
Site Address: Holy Coo Restaurant, 22 Shore Street, Bowmore, Isle of Islay

DECISION ROUTE

Sect 43 (A) of the Town and Country Planning (Scotland) Act 1997

(A) THE APPLICATION

(i) Development Requiring Express Planning Permission

- Erection of timber gates (retrospective)
- Erection of timber fencing (retrospective)
- Amended design of raised decking area (retrospective)

(ii) Other specified operations

- Formation of ancillary outdoor seating area to restaurant (subject of previous permission)
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(B) RECOMMENDATION:

It is recommended that retrospective planning permission be granted.

(C) CONSULTATIONS:

Environmental Health	20.08.11	No objection subject to conditions in respect of noise levels and opening hours which is covered by conditions <i>Comment: This is not necessary as the seating area is ancillary to the previous approval which has noise and opening hours conditions applied.</i>
Scottish Water	27.09.11	No objections although advises access rights will be required which will be agreed between the applicant and Scottish Water
Area Roads Engineer	11.10.11	No objections
Scottish Rights of	12.10.11	Raises concerns in respect of a

Way Society		unrecorded right of way that may have been blocked by the gates
Access Officer	28.09.10	Raises a number of concerns in respect of the access being closed off to the public for access to the beach given that it is a possible right of way.
Local Biodiversity Officer	03.10.11	Notes that the area is on Coastal Shingle which if left to regenerate by native species can host a number of invertebrates. Comments that the Mean High Water springs is close to seating area which may affect the number of seats proposed.

(D) HISTORY:

10/00388/PP - Change of use from council offices (class 2) to craft shop and restaurant (Mixed use, class 1 and class 3) – granted 13.05.10

11/00909/ADV – Erection of externally illuminated projecting sign and 3 non illuminated fascia signs (retrospective) – granted 16.08.01

(E) PUBLICITY:

Conservation Area Advert – expiry 28.07.2011

(F) REPRESENTATIONS:

(i) Representations received from:

17 letter of objection have been received from 14 parties from 9 different households along with one letter of support.

Letters of objection:

Mrs Mary McColl, 24 Shore Street, Bowmore, Islay
Mrs Mary McColl, 24 Shore Street, Bowmore, Islay
Miss Rona McColl, 24 Shore Street, Bowmore, Islay
Miss Rona McColl, 24 Shore Street, Bowmore, Islay
Dr Brian Thomson, 24 Shore Street, Bowmore, Islay
Dr Brian Thomson, 24 Shore Street, Bowmore, Islay
Mrs Euphemia Donnelly, Bruce Hotel, 50 Shore Street, Bowmore, Islay
Karen Donnelly, House, Bruce Hotel, Shore Street, Bowmore, Islay
Roberta MacNeill, Chair Islay Community Council
Mrs E G Lindsay, The Highlands, Shore Street, Bowmore, Islay
Mairi MacArthur, The Highlands, Shore Street, Bowmore, Islay
Iain MacArthur, The Highlands, Shore Street, Bowmore, Islay
Margaret and Duncan MacArthur, Lochview, Shore Street, Bowmore, Islay
Fiona Hyslop, Kilmorich, Shore Street, Bowmore, Islay
Mrs Sharon McGurk, 82 Melbourne Avenue, Westwood, East Kilbride
Miss Tracy Kirk, 85 Melbourne Avenue, Westwood, East Kilbride
Mr and Mrs A. MacKenzie, Glencairn, Shore Street, Bowmore, Islay

Letter of support:

(ii) Summary of issues raised:

- Concerns have been raised in each letter in respect of the erection of fence and double gates which have been locked and restrict access to the beach. It is suggested that the public have had access along this route in excess of 30 years.

Comment: This application relates to the erection of timber fencing with gates and not a permanent obstruction such as a building or a wall. Whilst access can be denied by means of locking the gate, the use of a lock does not amount to development and cannot be controlled, monitored or enforced through planning legislation. However, the issue of access can be addressed and, if necessary, enforced under the Countryside Scotland Act 1967. Responsibility for this lies within the Council's 'Core Paths' Access team who are aware of the situation.

For information, this is not the only access to the shore which can also be accessed via slipways in both the west and to the east approximately 120 metres in each direction. This beach is only accessible at low tide. There are a number of nearby small lanes/routes leading to the beach from Shore Street however these are in residential occupation, with many of them also having gates across them.

- Concerns from neighbouring properties in respect of the restaurant area being open until at least 7pm with noise and privacy issues affecting the use of garden areas when customers are using the external seating area.

Comment: This external rear seating area is permitted by the previous planning approval (ref. 10/00388/PP) and does not require any further planning permission. It is subject to a condition attached restricting the hours of operation of 0900 and 2000 hours Monday to Saturday inclusive and from 1100 to 1800 hours on a Sunday and Bank Holidays, which was imposed with the interests of adjacent residents in mind. It should be noted that the original application ref. no. 10/00388/PP for the "change of use from council offices (class 2) to craft shop and restaurant (mixed use, class 1 and class 3)" received no letters of representation.

- Concerns have been raised a number of times in respect of the additional traffic generated at the cafe and the restricted street parking spaces which are used by residents.

Comment: This application is in respect of the fence and gates only which raise no road implications; in any event it is noted that the Council's Roads Manager has not raised objection to the proposal.

- Concerns have been raised by neighbouring properties that they require access to maintain the sea wall and to obtain items that may have blown out of the garden on to the beach and that the slipways are too far away to access the sea wall and obtain items.

Comment: As previously noted, the development to which this application relates retains a means of access to the foreshore via a gate. Whether the applicants are in a position to restrict public access is a matter to be addressed under access legislation rather than planning legislation. The applicant has advised that she is willing to allow access for residents to maintain their properties.

- Concerns has been raised that the applicant is advertising the beach as a private beach when she does not own it.

Comment: The beach is a public place and any signage referring to it as “a private beach” should be removed. A note to that effect will be attached to any grant of permission.

- The immediate neighbour, the Bruce Hotel, has concerns that the 6ft fence stops the access to their cellar door which is also a fire door which there is a court interlocutor against Miss Porter which was granted on the 17th June 2011 at Court of Session in Edinburgh.

Comment: The issue in relation to the Bruce Hotel fire escape door is an ongoing civil legal matter between the two owners and is not a planning consideration. The applicant has advised that she has always allowed access for emergency and maintenance purposes.

- One letter raises objection in respect of a large sycamore tree on the vacant gap site being removed.

Comment: This is not within this application site and is not material to the consideration of this application

Letter of Support – Issues raised:

- It was a pleasure to eat and relax in the seating area of the Holy Coo, The Holly Coo has formed a quiet haven to relax and have your meal with plants in keeping with the seaside theme. The previous visit the church (prior to the Holy Coo being opened) was very shabby and the beach at the rear of the building was littered with broken bottle and rubbish and empty beer cans.

(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: | No |
| (iv) | A report on the impact of the proposed development eg. Retail impact, transport impact, noise impact, flood risk, drainage impact etc: | No |

(H) PLANNING OBLIGATIONS

Is a Section 75 agreement required: No

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

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

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

'Argyll and Bute Structure Plan' 2002

STRAT DC 1 – Development within the Settlements

STRAT DC 9 – Historic Environment and Development Control

'Argyll and Bute Local Plan' 2009

LP ENV 1 – Impact on the General Environment

LP ENV 14 – Conservation Areas and Special Built Environment Areas

LP ENV 19 – Development Setting, Layout and Design

LP TRAN 1 – Public Access and Rights of Way

LP ENF 1 – Enforcement Action

(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
 - Third Party representations
 - Countryside Scotland Act 1967
 - Land Reform (Scotland) Act 2003
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(K) **Is the proposal a Schedule 2 Development not requiring an Environmental Impact Assessment:** No

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

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

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

(O) **Requirement for a hearing (PAN41 or other):** No. Despite the number of objections received, these substantially relate to access issues which are more appropriately addressed under access rather than planning legislation and which could not be properly adjudicated by means of a planning hearing.

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

This retrospective application relates to a converted church located within Bowmore Conservation Area, immediately adjacent to the retail area of the village. Previously planning permission (ref. no. 10/00388/PP) was granted on 13.05.10 for the change of use of existing Council offices to the current use as a small restaurant with ancillary craft shop (Class 1 and 3) which also incorporated a decking area to the rear to provide an additional restaurant seating area.

This application relates to the erection of a fence and double gates beyond the main entrance to the cafe/craft shop leading down to the external seating area and an amended (actually reduced) decking area to that previously granted consent under 10/00388/PP. All land subject to this application is within the ownership of the applicant; however the stone wall adjoining the site to which one gate is erected is within the ownership of Bowmore Distillery.

A 1.3m double timber fence and gate has been erect between her boundary and the boundary wall of the adjoining gap site under the ownership of Bowmore Distillery. This gate is locked and now restricts the access to the beach which has been the main reason for public objection to this application. There are no records of this route being registered as either a 'Core Path' or Right of Way' however it is understood that this may be an established right of way which would require to be investigated further by the Access Manager. A 2m high timber fence has also been erected on the boundary with the neighbouring property, The Bruce Hotel.

17 letters of objection have been received (from 14 different people for 9 different households) in respect of the development. The main concern is in relation to the gates which have been erected and locked, blocking a path which previously provided an informal means of access to the beach from Shore Street. This access may have been used in excess of 20 years but it is not a registered Core Path or a formal Right of Way. This is not the only access to the shore which can easily be accessed via slipways in both the west and to the east approximately 120 metres in each direction. Some other issues have been raised about the operation of the permitted use, but these are not material to the consideration of the application at hand.

Scottish Planning Policy advises that consideration should be given to access issues and should protect core and other important routes and access rights when making decisions on planning applications. Whilst due consideration has been given to the access issue here, the status of the route and the public rights to use it are not clear, and in the absence of it being a legitimate right of way it would be inappropriate to seek to protect access through the site. The gates are not considered permanent, in the same respects that a wall/fence or building which would be in permanently closing off a means of access. Should the gates remain unlocked, access could still be secured. Whether the gates could be legitimately locked would be a matter for consideration and enforcement if necessary by the Council's Access Manager under access legislation.

This application also seeks to reduce the size of the timber decking area previously granted from approx 30sqm to 15sqm. It is no longer proposed to use the decking area for tables and chairs for the public, but to use it as an access from the cafe to external seating areas now formed to the rear of the decking, and also to provide a means of disabled persons' access to the cafe.

(Q) Is the proposal consistent with the Development Plan: Yes

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

It is considered that the granting of retrospective permission for the timber decking area and the erection of timber fence and gates at this location will not result in any significant adverse impact upon the amenity neighbouring properties and will not give rise to a detrimental impact upon either the character or appearance of the Bowmore Conservation Area. There are no circumstances, including the matters raised by third parties and the potential for public access right to be successfully claimed, which would warrant refusal of permission for the works which have been carried out.

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

N/A

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

Author of Report: Kim MacKay **Date:** 01/02/12

Reviewing Officer: Peter Bain **Date:** 02/0212

Angus Gilmour
Head of Planning & Regulatory Services

NOTE TO APPLICANT

- For the purpose of clarity it is noted that this grant of permission does not preclude or negate any existing public right of access which may be proven to exist across the private land which is the subject of the application site. It is noted that the Council's Access Manager and the Scottish Rights of Way Society have raised concern during the processing of this application that the route across the application site between Shore Street and the beach/foreshore adjoining the application site might have sufficient grounds to be considered as a public right of access, in which event it would be afforded protection by the provisions of the Land Reform (Scotland) Act 2003/Countryside Scotland Act 1967. This grant of planning permission does not preclude or prejudice the Council's ability as Access Authority to undertake action at a future date in the event that it were to be satisfactorily established that a public right of access exists across this private land.
- It is advised that written representation received by the Planning Authority in the determination of this application have raised concern that the proposal will prevent/restrict private rights of access to adjoining property. It is noted that these are civil matters which would require to be resolved between the affected parties and as such are not material to the determination of this application. It is the responsibility of the applicant/developer to ensure him/herself that a development does not infringe the private rights of other parties who may have an interest either in the application site or adjoining land.
- The applicant must not at any time erect any signage or do anything to prohibit or deter responsible public access over or through the site. The Council as the Access Authority may on receipt of a complaint take action under Section 14 of the Act to require the removal of any inappropriate signage.

APPENDIX A – RELATIVE TO APPLICATION NUMBER 11/00901/PP

PLANNING LAND USE AND POLICY ASSESSMENT

A. Settlement Strategy

The application site is located within the 'settlement area' for Bowmore as defined in the Argyll and Bute Local Plan 2009 and wherein the provisions of Structure Plan policy STRAT DC 1 would support infill, rounding-off and redevelopment on appropriate sites of up to medium scale.

The application site itself relates to a previously disused portion of the curtilage area of an existing restaurant (class 3) and craft shop (class 1) which is operated from an existing building. The provisions of policy LP RET 3 sets out a general presumption in favour of retail development (defined in the policy as Use Classes 1, 2 and 3).

This retrospective application is in respect of the erection of a 1.3m high timber fence and double gates beyond the main entrance to the cafe/craft shop leading down to the external seating area, a reduced decking area to that previously granted consent under 10/00388/PP and a 2m high timber boundary fence.

B. Location, Nature and Design of Proposed Development

This retrospective application is in respect of the erection of a 1.3m high timber fence and double gates beyond the main entrance to the cafe/craft shop leading down to the external seating area and an amended decking area to previously granted consent under 10/00388/PP and a 2m high timber boundary fence. The signage displayed has been granted under a previous advertisement consent application ref. no. 11/00909/ADV.

The application site relates to an existing restaurant/craft shop and its curtilage which is located between the shore and Shore Street in the centre of Bowmore. The development is located on a vacant area of ground occupied by only a Scottish Water treatment station at the far end of the site. The ground subject to this application is within the ownership of the applicant; however the stone wall adjoining the site to which one gate is erected is within the ownership of Bowmore Distillery.

This retrospective submission as submitted seeks permission for four key elements which all give rise to separate considerations as follows:

External seating

Firstly, the application seeks retrospective permission for the change of use of previously unused land to the rear of the restaurant for use as an outdoor seating area by restaurant customers. It is however noted that the land in question is located within the boundary of the original permission which confers Class 3 use upon the planning unit. Furthermore the original permission included provision for 20 covers to be located on an extensive decking area to the rear of the property; in practice however a reduced deck has been built to facilitate disabled access to the building and the external seating has been provided at ground level utilising a previously disused rear portion of the planning unit. The use of this additional space has allowed for four additional tables to be incorporated within the planning unit. It is the consideration of officers that this aspect of the proposal does not constitute a material change in the use of the land as it is located within the same planning unit as the Class 3 restaurant and can therefore be legitimately operated as

ancillary to this permitted use. With that in mind, it is considered that further planning approval is not required for this particular element of the proposal.

It is noted that concern has been raised by the occupant of 24 Shore Street that the use of this rear portion of the planning unit for outdoor seating will give rise to a loss of privacy to this residential property and potential for noise nuisance. In this respect it is noted that views from the external seating area are across an intervening area of beach to which informal public access rights are claimed. Whilst a degree of privacy would be lost to the rear garden area, this is contained by a substantial boundary wall which affords a degree of screening. Given the relationship between the two, the seating area would not allow views into the rear facing rooms of no. 24 Shore Street – in any event the focus for restaurant customers would be views out of the site across Loch Indaal.

Having regard to the potential for noise nuisance, it is noted that the Council's Environmental Health Officers have not raised objection to this aspect of the proposal provided that limitations on the hour of operation are imposed. Given that this aspect of the proposal does not require planning permission it would be unreasonable to impose such conditions, it is however advised that identical conditions limiting the hours of operation of the main premises are in place, as the use rear seating area is ancillary to the main building and cannot be operated independently it therefore follows that the conditions already in force could be enforced on the external seating area if necessary.

Amended decking

Secondly, the proposal seeks retrospective permission for an amended decking design to that previously approved in permission ref. 10/00388/PP. The installed deck is identical to that previously approved with the exception that its depth has been reduced from 5.6m to 1.6m. This reduced decking area provides level access to the main building and is considered to be of appropriate design, scale, finish and appearance for the locale.

Gates

Thirdly, the proposal seeks retrospective permission for the installation of two 1.3m high access gates which are set back 2m from the front face of the building (onto Shore Street) and an associated 5m length of fence which rises from 1.3m high at the gate to 2.2m high and which provides a handrail that separates a pedestrian footpath to the beach/rear of the property and the means of level access to the restaurant. The timber gates are not exactly as shown in the submitted plans as they are of more rudimentary design rather than featuring the pointed top as shown in the drawings. These are red painted and are locked when the business is closed for security purposes, but are open to customers during the opening hours of the cafe. The owner has advised she has offered access to Scottish Water (who have a water treatment building to the rear of the cafe) and access to the neighbouring properties when access is required for maintenance or in an emergency.

Fence

Fourthly, a 2m high timber boundary fence has been erected on the boundary with the neighbouring property, The Bruce Hotel has a fire exit that opens into the rear curtilage of the subject site. The installed fence includes a gate into the rear curtilage of the restaurant which ensures that the emergency exit remains useable – it is further noted that the right of access across the rear curtilage of the subject site is presently the subject of on-going legal dispute

between the property owners. Suffice to say that any such dispute is not a material planning consideration and that the development as implemented remains capable of accommodating access to this property as required.

C. Access Issues

The gates installed to Shore Street are the main subject of the letters of representation that have been received, due to access from Shore Street now being restricted at times by the locking of these gates. This access has allegedly been an informal access to the beach for a number of years although it is not a recorded right of way.

The provisions of policy LP TRAN 1 set out that development proposals shall be required to safeguard public rights of way, core paths and important access routes. Where public rights of way, core paths or public access routes will be prejudiced by a development then the developer shall be expected to incorporate appropriate alternative or modified access routes.

In this instance, the access route in question lies a lane in private ownership which allows access to the rear of the restaurant building and also to a small beach (which sits behind a vacant plot of adjoining land) and the wider foreshore beyond at low tide. The route in question is not registered either as a public right of way or as a core path. Anecdotal evidence has been provided within written representation to the proposal as to the route having been used informally by the public to access the beach/foreshore for a considerable period of time, although this in itself is insufficient to demonstrate irrefutably that a public right of access exists over this private land.

The proposal seeks permission for the installation of a 1.3m high gate across the pedestrian access route. Planning permission is only required for this particular gate by virtue of its height exceeding 1m. It is noted that whilst the gate introduces an element of control over access, it does not in itself prevent access being taken as any restriction to wider public access would only be by means of the locking of the gate. The installation of a locking mechanism to a gate does not require the benefit of planning permission. Furthermore the installation of a lockable gate of no greater than 1m in height would not require planning permission at this particular location.

This beach can only be accessed from this pathway at mean low tide as at high tide the water will reach up to the ruined walls within the adjoining gap site. Furthermore this is not the only means of public access to the beach/foreshore, which can be accessed by foot from slipways accessed elsewhere on Shore Street in either direction from the application site. A number of additional small lanes/routes lead to the beach from Shore Street although these are across residential property with many of them also having restricted access by means of gates across entrances.

The applicant has claimed that the installation of a lock has been undertaken in the interests of security to prevent the unauthorised use of private property and vandalism of the rear seating area when the restaurant is closed.

In this instance whilst concern has been raised by the Scottish Rights of Way Society and the Council's Access Manager, neither have been able to confirm definitively that a public right of access does exist across the disputed route. The Access Manager's consultation comments suggest that it would be desirable to attach a condition to prevent installation and use of a lock on the gate. In the absence of confirmation that this route is indeed a definitive right of way such a condition would be unreasonable. In addition, it would prove difficult to monitor and enforce the locking of a gate using planning enforcement resources – furthermore given that specific enforcement powers

exist within the relevant access legislation, the use of a planning condition would prove unnecessary and an inappropriate duplication of powers to safeguard any public access rights which may exist across the site.

Having regard to the above, it is considered that the installation of a 1.3m high gate in use by customers would inherently preclude members of the public exercising any right of access which may exist to the beach across private land, and as such is compliant with the provisions of policy LP TRAN 1. It is however considered appropriate to attach a note to any permission advising the applicant of the provisions of the relevant access legislation and that a grant of planning permission would negate or remove any existing public rights of access which may exist across the land. In the event that a public right of access to the beach could be satisfactorily demonstrated, then it would be for the Council's Access Officers to undertake any enforcement action required.

Further representation has been received which raises concern that the locked gates restrict a private right of access across the site to the rear of the Bruce Hotel – it is noted that this is an ongoing civil legal dispute which would require to be resolved between the affected parties and as such is not a material planning consideration.

D. Built Environment

This application site is to the rear of the Holy Coo Cafe which is attached to a private house (or guest house) to the left hand side and a gap site to the right hand side, with a number of ruined walls which adjoin a residential dwellinghouse on Shore Street within Bowmore Conservation Area. The use of this part of the town is mixed use commercial/residential.

Within Bowmore Conservation Area consideration should be given to LP ENV 14 of the Argyll and Bute Adopted Local Plan whereby new development should be of a high quality and preserve the appearance of the Conservation Area. Only the gates and a section of the fence beyond are readily visible from Shore Street. The remainder of the development, including the deck is contained within the rear curtilage area of the planning unit and has resulted in the visual improvement of a previously untidy and neglected backland area.

Overall the development is minor in nature and considered acceptable in terms of LP ENV14 as the gates, deck and fencing are of a good quality design and finish the development is not considered to have adverse impact upon the character and appearance of the Bowmore Conservation Area.

E. Road Network, Parking and Associated Transport Matters

There are no traffic and parking issues and the gates are set well back from the public highway and shall not interfere with the free flow of either pedestrian or vehicular traffic. Roads Manager has not raised any objection to the proposal.