

**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**

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**Reference No:** 12/01907/PP  
**Planning Hierarchy:** Local  
**Applicant:** Ian Darby No 1 Trust  
**Proposal:** Erection of gate pillars, cast iron gates, flank walls and railings  
**Site Address:** Balinakill Country House Hotel, Clachan, by Tarbert

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**SUPPLEMENTARY REPORT No. 1**

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**(A) FURTHER INFORMATION**

1. Additional Consultation Response

Since the production of the report to the December meeting, a further consultation response has been received as detailed below:

Kintyre Forum on Community Care (19.12.12) - The justification advanced in support of the gates is as a speed control measure rather than as a security measure, although there does not seem to be any representation that there is excessive use by unauthorised vehicles or that they are speeding and a danger to others. If there is any real concern this could be addressed by a notice stating that the driveway is only for access and with a speed suggestion at the entrance and a notice for hotel users to note that vehicles maybe using the driveway. While there is no objection by emergency services as these vehicles already have some distance to travel they are likely to be at their maximum time for reaching an emergency so any delay would be of importance.

With regard to pedestrian access via the side gate – a gravel path would not be suitable for any wheeled use and would also be difficult for anyone with a mobility problem – regardless of age. There should therefore be a hard standing path through the gate and the driveway be kept in a condition suitable for access by the public.

For accessing a control system of a locked/unlocked gate there should be suitable lighting and notices to alert people (walking /riding /vehicular) as to how the system works and what to do if the gates do not work. Reliance on an electric and battery system to the number of different scattered residences could be a problem.

If the application is approved conditions should be applied to ensure the safety of the public in general.

2. Additional Third party Representation

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A further letter of objection has also been received from:

G Lewin, Hillcrest, Clachan - on the grounds that it may hinder her obtaining access as a carer to one of her clients at Balinakill and could present an access problem for emergency services, visitors to the residents and persons wishing to access the countryside. It could also be regarded as a threat to the cohesion of the community in Clachan.

This representation brings the total number of objectors to 20.

3. Matter raised by applicant in respect of recommended planning conditions

In response to the report prepared for the December meeting, and having had sight of the recommended conditions, the applicant has expressed concern at the intention to secure a minimum opening width of the pedestrian gate of 1.5m. The reason for this is that the standard pedestrian gate supplied by the manufacturers to match the design of the vehicular gates is 900mm, which allowing for fixings provides a clear opening width of 1.0m. The manufacturers are not able to supply a wider version. He points out that the width supplied has been devised with disabled persons' access in mind, meets that required for Building Regulations purposes in respect of openings in buildings to suit the needs of the disabled, and also satisfies 'Housing for Varying Needs' (Scottish Homes 1998), a design guide produced to set out standards for access in and around buildings, which recommends 850mm for wheelchair access and 1000mm for twin-child buggies.

In view of this, the Council's Access Officer has been re-consulted as his initial wish was to secure a wider opening, principally to facilitate access by horses. In view of the applicant's comments he has consulted the British Horse Society (BHS) for advice in the matter. Their view is that there should be no need for horses to be led through the pedestrian gate as automatic electronic gates, operated by a push button, in their opinion, pose no danger to the ridden horse. The BHS feels that horses should be able to cope with an electrically operated gate providing their riders take the time to get them used to the new experience on the first few occasions they use it and accordingly the Access Officer has overstated the risk to horse riders arising from these gates.

Accordingly the Access Officer is content that the opening width of the pedestrian gate be specified in condition at 1000mm, given the ability of those requiring more clearance to use the electrically operated vehicular gates. Importantly the 1000mm width will provide sufficient clearance for wheelchair users to meet recognised standards. The standard cast iron gate supplied by the manufacturer weighs 128kg so increasing size unnecessarily would increase weight to the disbenefit of the majority of users.

4. Human Right Implications

Since the last meeting, regrettably, I have to report a material change in circumstances which has arisen as a result of the death of Mrs Pauline Burke. Mrs Burke's GP has written to confirm that as a consequence of this the Kintyre Medical Group now have no further interest in the application.

Members will be aware from the last report, that the particular medical circumstances of this person, and the implications of any development which might have infringed her right to life as safeguarded by the Human Rights Act, were of significant weight in the assessment of the merits of the application. Accordingly, the recommendation at that time had regard not only to the equalities implications of the development

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proposed, but also the Human Rights consequences of particular personal circumstances at that time. These circumstances were persuasive in arriving the recommendation that the development should be permitted, but that the gates should be maintained in an open position by virtue of the effect of recommended condition 2. Following Mrs Burke's death, those exceptional circumstances no longer pertain, and Members should now confine themselves to the equality implications of the proposal in respect of the community at large.

#### 5. Equality Impact Assessment

In arriving at a conclusion about the merits of the proposal relative to the interests of the community at large, it is necessary to consider the equality aspects of the proposal to establish whether it meets the requirements of local plan policy LP TRAN 3 and also whether satisfies the Public Sector Equality Duty. In this case, approval of the development with gates maintained in an open position as originally recommended would not have given rise to any identified adverse consequences for minority or disadvantaged groups. It is therefore only the prospect of the operation of the gates and the fact that they may be encountered in a closed position which raises implications in this regard. In those circumstances it becomes necessary to consider the implications of a gated access for the disabled, other mobility impaired and less able persons, such as the elderly. The proposal does not raise implications for any other groups in terms of gender, sexuality, religion and so on.

Section 149 of the Equality Act 2010 obliges the Council, in the exercise of its functions, to have:

*"due regard to the need to advance equality of opportunity between persons who are a relevant protected characteristic and persons who do not share it". This involves*

*"having due regard, in particular, to the need to remove or minimise disadvantage suffered by persons who share a relevant protected characteristic that are connected to that characteristic."*

Both age and disability are relevant 'protected characteristics' for the purposes of the Equality Act. Members should therefore regard the Public Sector Equality duty as a material consideration in the determination of this application and it is necessary to ensure a design of the gate which allows access to a diverse group of people (residents, visitors, hotel guests and those accessing the countryside) regardless of their physical abilities. It is important to note, however, that the duty is to consider the prospect of disadvantage as a material consideration, rather than to take any particular steps to achieve certain results.

In determining planning applications there is an expectation that developments should provide for people with various needs and should not be discriminatory. Scottish Government's advice in PAN 78 states:

*"By considering people's diversity, inclusive design seeks to provide an environment which addresses our varying needs. In this way it can break down barriers and remove exclusion. It is accepted, however, that inclusive design will not always be able to meet every need."*

Therefore, although varying needs must be taken into consideration, there is recognition that it may not be possible to meet them all.

Policy LP TRAN 3 of the local plan requires developments to be compliant with the Disability Act and meet the special requirements for groups such as the disabled, the

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infirm and the elderly. The issue in this case is the varying impediment that operating gates would present to persons requiring access by virtue of their physical abilities, and the degree to which that impediment can be mitigated by means of design, construction and operating practice, so that discriminatory disadvantage does not arise.

The presence of operating gates would require those gates to be operated on-demand by any person requiring access. That would routinely involve visitors, deliveries and so on to the applicant's hotel premises and also those residents exercising private servitude rights to access their homes at Balinakill via the driveway, along with visitors and deliveries to their properties. Such access is likely to be taken predominantly but not exclusively by vehicle. Less frequent access is likely to be taken by the general public exercising Land Reform Act public access rights to the countryside beyond Balinakill, and this could legitimately include access by cycle and on horseback, as well as access on foot.

Gates pose a potential encumbrance to the less able due to the following:

- i) The weight of the gates and the ease by which they may be open and closed;
- ii) The ease by which they may be operated by persons other than those on foot;
- iii) Their available opening width;
- iv) The condition of the surface of the access route through the gates;
- v) Their operation in hours of darkness

Point i) is proposed to be addressed by the applicants by means of electrical operation of the vehicular gates so as to avoid manual handling. This raises issues as to how a user would activate the gates and whether this would disadvantage the less able. In response, the applicant is proposing a free to use post-mounted push button on either side of the gates by which activation of the gates can be prompted. The gates would operate on a variable timed opening cycle which could be set to an appropriate speed. They would close automatically following the passage of a vehicle.

In terms of point ii) in order to be easily accessed from within a vehicle and to avoid the less able having to leave a vehicle to operate gates, the push buttons should be located remote from the gate pillars at an appropriate height, which can be prescribed by means of planning condition.

Given the possibility that mains power supply may be interrupted, the applicant is proposing to install a battery back-up supply in order to minimise the prospect of the need to operate the gates manually. Even though the requirement for manual operation is therefore unlikely, it has been necessary to consider how this would be effected. The applicant proposes that an over-ride key be permanently attached to the gate pillar in order to enable on-demand and free to use disengagement of the operating mechanism, so as to permit manual opening. A planning condition would be appropriate to require that this be the case and that instructions for manual use be displayed for those unfamiliar with the operation of the gates. Once opened manually it is intended by the applicant that the gates be left in an open position until electrical operation is restored.

The means of operation described above is not considered discriminatory in that it is intended and has been purposely designed so as to facilitate on-demand access free to use by all. The prospect that a less able or mobility impaired user is the first to encounter gates with an exhausted battery supply following a power failure remains a possibility, but a relatively remote one in the routine operation of the gates. Such an eventuality would be no different to where a lift is the intended means of access to a

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multi-storey building and a disabled person becomes disadvantaged in exceptional circumstances by or equipment failure or maintenance operations. As with all developments, there must be acceptance that potential disadvantage cannot be eliminated entirely. What matters is that all reasonable steps are taken to consider disability implications and to make such provision as is reasonably practicable to secure all ability access under all but the most exceptional circumstances.

In terms of point iii) (available width) the applicant proposes that the gate pillars be located either side of the existing carriageway so as to maintain current available width for vehicles. A separate pedestrian access is proposed alongside the vehicular access utilising the third gate pillar. The pedestrian gate would be manually operated. Subject to an appropriate condition regarding the available width for pedestrians and the means of operation of the latch, manual operation would be achievable by persons of all abilities, and by horse-riders and cyclists not wishing to use the vehicular gates.

In terms of point iv) (surfacing) the applicant has indicated his intention to provide a gravel path through the pedestrian gate. As it would not be appropriate for disabled persons using the surfaced carriageway to have to negotiate the electrically operated gates, a level hard surface should be required through the pedestrian gateway connecting with the carriageway either side of the gates, in order to provide a suitable all-ability route.

In terms of point v) (lighting) users should be capable of operating the gates at night and reading the instructions in terms of manual operating requirements. This matter can be addressed by way of planning condition requiring illumination of the push buttons and the operating notice.

Disability organisations, the emergency services and the Council's access officer have been consulted as part of the application process. None of these have identified the gates as being discriminatory, subject to appropriate measures to facilitate use which can be addressed by means of planning condition.

## 6. Legal advice

Given the issues associated with this case, the Head of Governance and Law has sought advice from the Council's legal advisors Brodies LLP as to the Council's obligations in arriving at a decision. In particular, advice has been sought as to whether it would be competent to grant planning permission having regard to Section 149 of the Equality Act 2010 and to the Human Rights Act 1998, and the implications for access rights exercisable under the Land Reform Act 2003 have also been considered. The original report to Members at the December meeting has been reviewed by them, as have the current circumstances which now pertain.

In summary, they have advised as follows:

- The Public Sector Equality duty stemming from the Equality Act is a material planning consideration and requires the Council to have due regard to the need to remove or minimise disadvantage from those sharing a 'relevant protected characteristic', such as age or disability.
  - This duty does not require a particular course of action, what is important is that the Council must understand the facts in relation to this duty.
  - In addition to equality, safety is also a material consideration. This has been addressed in this case by consultation with the emergency services.
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- Consideration of both emergency access and safety is required by Local Plan Policy TRAN 3.
- Public Authorities are obliged to discharge their functions in a manner compatible with the European Convention on Human Rights. Article 2 safeguards the right to life, and there may be a positive duty for public authorities to do protect life if there is a serious risk to health or a risk to life associated with the discharge of its functions or inaction on its part. In this case, a gated access could lead to delay, but that would only be one of a range of contingencies affecting the response time of the emergency services. In such circumstances it would be difficult to see the gated entrance constituting a 'real and immediate threat' to life.
- If the Council were to conclude that such a threat was posed by the gates, it would be open to the Council to consider what steps it could take to prevent that threat, such as the imposition of conditions regarding operation and maintenance. Only if such conditions were not sufficient to meet Article 2 obligations would refusal be warranted.
- Human rights in respect of the peaceful enjoyment of possessions and the right to a private and family life have also been raised. The applicant benefits from such rights as well as the third parties. In this case, it is considered that the implications for those rights are substantially the same as for Article 2 rights.
- It is suggested that public access rights under the Land Reform Act 2003 may apply. In that event, it is necessary to consider what weight to place on any potential encumbrance as a material consideration in the assessment of the gates.

Firstly, the presence of the gates might deter legitimate access. However, that could be the case by virtue of the presence of the existing gate piers and the appearance of the access as a private drive, which could deter those unfamiliar with the area.

Secondly, many public access routes are gated, which can present both delay and discouragement to users.

Thirdly, most gates up to 2m in height are 'permitted development' and do not require planning permission. Permission is only required in this case as the pillars (not the gates) exceed 2m in height and the development is proposed in the grounds of a listed building.

Fourthly, the operating regime proposed is intended to afford free access, which to those aware of their rights, will make access easier than most gated routes.

If the gates were operated in a manner to prevent or deter legitimate access there are Land Reform Act enforcement powers available to the Council.

## 7. Conclusion

Circumstances since those outlined in the report of 13<sup>th</sup> December 2012 have altered in view of those matters reported above. The Human Rights implications relevant at that time were instrumental in the recommendation that the development should be

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permitted, but that the gates should be maintained in an open position by virtue of the effect of recommended condition 2. The current position is that there are no exceptional personal circumstances requiring to be addressed, and therefore consideration should be in terms of the equality implications in respect of the community at large. An Equality Assessment conducted to fulfil the requirements of the Public Sector Equality duty and development plan policy has concluded that operating gates can meet disability requirements and not be discriminatory, subject to appropriate design and operating safeguards, which can be secured by way of planning conditions. A revised list of recommended conditions to that accompanying the report to the December meeting is therefore attached to this report.

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**(B) RECOMMENDATION:**

It is recommended that the application be granted subject to the conditions and reasons appended to this report.

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**Author of Report:** Richard Kerr

**Date:** 23<sup>rd</sup> January 2013

**Reviewing Officer:** Ross McLaughlin

**Date:** 25th January 2013

**Angus Gilmour**  
**Head of Planning and Regulatory Services**

## CONDITIONS AND REASONS RELATIVE TO APPLICATION 12/01907/PP

1. Other than as provided for by the terms of the conditions below, the development shall be implemented in accordance with the details specified on the application form dated 04.09.12 and the approved drawing reference numbers:  
G844 L050A Location Plan;  
G844 L050B Site Layout;  
G844 L051 Elevations/detail;  
unless the prior written approval of the planning authority is obtained for other materials/finishes/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.*

3. The two vehicular gates hereby approved, shall be operated by means of automated gate control equipment the full details of which shall be submitted to and be approved in writing by the Planning Authority prior to installation. Thereafter installation of any such equipment shall only take place in accordance with the duly approved details and the gates shall remain power operated thereafter.

The equipment shall be designed and installed to provide for:

- a) on-demand access without any security mechanism which shall be either operated by automatic approach control, or be capable of being operated from within a vehicle, with equipment installed and maintained so as to allow the gate to be freely electrically operable thereafter;
- b) in the event of push button operation, the control shall be installed on either side of the gates at a distance of 5.0m from the gates at a height of 1.2m above ground level and the push buttons should be either internally or externally illuminated;
- c) a battery back-up supply which shall be maintained at all times to address any mains power failure;
- d) the ability for intended users to be able to default from the automated mechanism to manual operation on demand in the event of battery power being exhausted, in which case the gates shall be maintained in an open position until such time as electric operation has been restored;
- e) the display of externally illuminated instructions for manual operation in the event of power or equipment failure.

*Reason: In order to enable assessment of the installation and its consequences for the character and appearance of the listed structures and to ensure that the gates do not present an unacceptable impediment to disabled or other less able persons.*

4. The gate pillars shall be located so as to provide a clear opening width for the pedestrian gate of 1000mm, and the gates shall not be first brought into operation until

a pedestrian route connecting the carriageway either side of the pedestrian gate, and of an equivalent width to the gateway opening, has been completed in a bound bituminous material or similar sealed surface. The latch serving the gates shall be capable of being operated by a pedestrian without the user having to turn a wrist

*Reason: To enable the pedestrian access to be used by persons of all abilities including the disabled, and to cater for wheelchairs and pushchairs without the need for users to operate carriageway gates.*

5. The vehicular gates hereby approved shall not be brought into use until hard surfaced passing places of sufficient size to enable a vehicle to stand clear of the carriageway have been constructed on the approach to either side of the gates. These passing places shall be retained available for use thereafter.

*Reason: To provide for the passing of opposing vehicles in the vicinity of the gates having regard to the increased likelihood of vehicles meeting each other as a result of the additional delay associated with the operation of gates.*

6. Prior to the gates being first brought into use a fingerpost mounted on a post at least 2.4m high shall be erected on the approach to the pedestrian gate from the A83 to advise of the existence of Land Reform Act access rights. The wording to be used shall be as agreed in advance in writing by the Planning Authority in consultation with the Council's Access Officer. This fingerpost shall be maintained for the purposes of direction thereafter.

*Reason: To ensure that the presence of the gates does not deter legitimate public access exercisable under the provisions of the Land Reform Act 2003.*

## **NOTES TO APPLICANT**

- The terms of this permission should be read in conjunction with the terms and conditions of Listed Building Consent 12/01430/LIB
- This application relates to works which have, in part, been commenced. It is not therefore subject to a time limit following which the permission will be considered to have lapsed. However, in order to comply with Section 27B(1) of the Town and Country Planning (Scotland) Act 1997 it is the responsibility of the developer to submit the attached 'Notice of Completion' to the Planning Authority specifying the date upon which the development was completed.
- In terms of condition 1 above, the Council can approve minor variations to the approved plans in terms of Section 64 of the Town and Country Planning (Scotland) Act 1997 although no variations should be undertaken without obtaining the prior written approval of the Planning Authority. If you wish to seek any minor variation of the application, an application for a 'non material amendment' (NMA) should be made in writing to Planning Services, Dalriada House, Lochgilphead, PA31 8ST which should list all the proposed changes, enclosing a copy of a plan(s) detailing these changes together with a copy of the original approved plans. Any amendments deemed by the Council to be material, would require the submission of a further application for planning permission.