ENVIRONMENTAL SERVICES

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Mr Brian Higgs
Chairperson
Finderne Community Council

Sent via email

findernecc@gmail.com

Your reference:
Our reference: Comp 8728 JG/JC

25 October 2016

Dear Mr Higgs

Complaint Reference Number 8728
Finderene Community Council - Blervie House, Rafford

Thank you for your letter dated 19 September 2016 in connection with the above and I apologise for the delay in responding as I required a full investigation into the points you raised to be carried out.

Your letter is divided into two parts. The first of which centres around the **Land Reform Act** and in terms of outdoor access you raise three points a) the resolution of The Moray Council to agree to the current fence line as acceptable whilst the objectors still consider public access rights are still obstructed, b) the perceived lack of sufficient expertise within The Moray Council to determine whether the degree of access breach was acceptable without seeking external legal advice from counsel and , c) The Moray Council's abdication of access duty by not pursuing the locked gate as an obstruction of access rights. These three points are answered one at a time as follows:

(a) Acceptability of current fence line

Officers consider that they have worked hard both with access takers and the homeowner, Mr Thompson, to try to resolve the various issues at Blervie. The process to try to reach and negotiate a favourable outcome was robust and comprehensive. The attached chronology shows the extensive process that was gone through by Officers which included three meetings with Mr Thompson. The homeowner, as a result, made significant concessions in agreeing a compromise and acted reasonably by carrying out the works that were requested of him. These works included moving back the fence line to retain public access to the majority of existing desire line paths (that would have been blocked without the Council's intervention), paths improvements and waymarking.

The Moray Local Outdoor Access Forum (LOAF) is an advisory body to The Moray Council in their role as the Area Access Authority. The Moray LOAF visited the site and advised The Moray Council that they viewed the fence position and the measures taken by Mr Thompson to be acceptable given that such a large house

should have a large privacy zone around it. They therefore did not advocate enforcement action.

The Moray Council carefully considered the facts of the case and whilst it is accepted that the situation is not ideal, the homeowner has taken positive actions to accommodate outdoor access to the most intensively used part of Blervie Wood. In many ways his actions demonstrate that he is a responsible owner who has taken reasonable account of public access rights as outlined in the Scottish Outdoor Access Code (SOAC).

Much of the excluded area is part of landscaped policies and could be considered as forming part of the gardens of the house. The owner is permitted 'sufficient adjacent land for the enjoyment of privacy of a residential property' (known commonly as a privacy zone) and under the Land Reform (Scotland) Act 2003 such areas are exempt from public access rights. Whilst the fence does not, in the view of The Moray Council specifically designate the owner's privacy zone.

(b) Perceived lack of expertise within The Moray Council and resulting need for external advice from Counsel

Legal advice was sought at several stages in the process from The Moray Council's legal team which helped to advise and determine whether the approach taken was reasonable and legally competent. Investigation was undertaken to ascertain if the owner of Blervie House has taken reasonable account of public access rights as outlined in *The Land Reform (Scotland) Act 2003* ('the Act'). The Act gives everyone statutory rights to most land and inland water throughout Scotland. Everyone can access these rights at any time of the day or night if they do so responsibly by respecting people's privacy, safety and livelihoods. The Moray Council has a duty to uphold these rights. An exemption exists to these rights at section 6(1)(b)(iv) of the Act which gives occupiers of houses a certain degree of privacy preventing the public from taking access to what is called 'sufficient adjacent land'. This enables occupiers of these houses a 'reasonable measure of privacy' to ensure their reasonable enjoyment of the house.

The Moray Council's power to take enforcement action is a discretionary one. The decision whether or not to enforce is taken after careful consideration of all of the facts, on a case by case basis, taking into account proportionality and reasonableness. There is an outstanding issue in this case relating to whether the homeowner has a right to erect a fence and lock a gate for privacy reasons and whether or not the fence and locked gate could be classed as within the area forming part of the homeowners 'sufficient adjacent land for the enjoyment of privacy'. In this case, it is accepted that it is not clear whether the fence falls within the definition of 'sufficient adjacent land'. From the case law available it seems that only a court would be able to ascertain the extent of such an area and the question regarding what area of land can be defined as being 'sufficient adjacent land' is an subjective one. There is a test set down in the case of *Snowie and another v Stirling Council (2008) S.L.T (Sh Ct) 61* to assess what is 'reasonable' in the context of a decision about measures of privacy and enjoyment. The court interpreted the exemption as determining what a reasonable person living in a property of the type under consideration would require to have to enjoy reasonable measures of privacy and to ensure such enjoyment was not unreasonably disturbed.

Section 7(5) of the Act states that 'there are factors which go to determine what extent of land is sufficient the location and other characteristics of the house or other place'. Sheriff Michael Fletcher decided in the leading case of Gloag (*Gloag v*

Perth & Kinross Council and the Rambler's Association 2007 SCLR 530) that the provisions in Section 7 were 'extremely general and no help is given as to what is meant' The Sheriff based his decision on the house owned being 'of very substantial value such that only a small number of persons would be able to afford to own and run as a private house' and as such it required 'a larger rather than smaller area of ground' to satisfy Section 6 of the Act (i.e. land in respect of which access rights are not exercisable). According to Sheriff Fletcher, it would appear that the larger the house the more privacy a person can expect to demand. The Sheriff went onto state that the privacy exclusion is worded in a way that it should be considered from the point of view of the house occupier not the access taker.

Each case is taken on its own facts and the property at Blervie is large, of substantial value and set within a rural location, suggesting the owner of such a property would wish to live a private and secluded lifestyle. As such, it is fair and reasonable to assume that the owner of such a property would require to have reasonable measures of privacy and security to ensure their enjoyment of that property is not unreasonably disturbed.

Obtaining separate legal advice from Counsel is not a required part of the process of The Moray Council when dealing with access issues and would not have added any value to the decisions reached nor the actions taken. It was not considered to be necessary having regard to the facts of this case. All outdoor access cases are considered on their merits and there is no definitive legal interpretation that can be applied to reach a judgment. A position was taken by The Moray Council after all views were known, including the Moray Outdoor Access Forum, to reach what is considered to be an acceptable negotiated solution. The collaborative approach taken involving The Moray Council's Access Manager and legal adviser and the MLOAF ensures a fully reasoned decision was reached which is proportionate to the issues in this case.

(c) Not pursuing locked gate as an access obstruction

The Moray Council asked Mr Thompson to remove the lock on the vehicle gate installed in the re-positioned fence but he refused citing privacy. Removal of the lock would have effectively resolved the access issue so his response was unfortunate but not sufficiently compelling to merit enforcement when viewed alongside the other compromises made by Mr Thompson.

It is accepted that access rights are likely to apply to parts of the woodland immediately to the north of the fence which have been obstructed by the locked gate. Looking at the case proportionately, access rights can still be exercised to the area beyond by climbing over the gate (in the way access takers are currently allowed to exercise their access rights under the Act by climbing over boundary features of fields and woodlands (providing no damage results) where access rights apply).

The Moray Council's Legal Team's advice was sought and advised that if we took legal action on the locked gate we would most likely lose any subsequent court proceedings after the actions taken by Mr Thompson were taken into consideration. The degree of breach remaining was not therefore deemed to be of sufficient magnitude to merit enforcement given the other mitigating factors. This is a reasonable position for The Moray Council to have reached in assessing whether pursuing enforcement was justified.

The second part of your letter relates to the process of handling this case in relation to the **breach of planning control.**

In relation to the absence of a planning application for the erection of a 6 strand barbed wire fence immediately adjacent to the B9010 and the resulting lack of duty of care, and safety implications for pedestrians and cyclists I appreciate that you feel the issue of the fence around Blervie House was undoubtably complex from a legal perspective, highly contentious and emotionally charged. It is often these types of cases that can cause significant emotion amongst a community. The advice given to the Community Council from Ken Kennedy regarding the fence not requiring planning permission was in relation to the newly erected fences in Rafford Woods and was correct as this fencing is permitted up to 2.0m in height where it is more than 20 metres from a road. I apologise for any misunderstanding in this regard.

A letter was sent out to the owner of the fence requesting the submission of a retrospective planning application but no written response was received. However, the owner did subsequently indicate verbally that he would not be submitting an application. In circumstances such as these it is normal practice to conduct a planning and transportation consultation to assess whether the development is acceptable both from a planning point of view and a road safety perspective. These assessments were carried out in this case, the same way as if a planning application had been submitted to establish if planning enforcement action was expedient.

A planning assessment has been carried out which has involved a planning officer visiting the site and surrounding area to familiarise himself with roadside fencing and the character of the locality. This confirmed a mix of fence types of varying age, materials and style with barbed, plain and rabbit/deer proof wire, appropriate to a rural setting. The new fencing in question consisting of concrete posts with barbed and plain wire is not considered unacceptable in these circumstances and does not cause sufficient harm in terms of its visual appearance to warrant refusal (if it were to become the subject of an application) or to pursue formal enforcement action.

In addition the Transportation Section following consultation do not consider the barbed wire fence to be a road safety issue or to constitute a road safety hazard and had a retrospective planning application been submitted the fence would have been recommended for approval unconditionally.

In these circumstances and in conclusion the fence as erected complies with policies T2 and IIMP1 set out in the Adopted Moray Local Development Plan 2015 and there are no other material considerations that exist to pursue any enforcement action as this could not be supported or justified. I note your concern that the decision of the landowner not to submit a retrospective planning application essentially removed the opportunity for you to lodge representations, however the points that you have raised have been taken into consideration as part of the enforcement assessment process.

I am more than happy for you to come in and discuss any aspect of this response once you have had an opportunity to review the content of this response and attachment.

However/

However, should you remain dissatisfied with our decision or the way we have dealt with your complaint, you can ask the Scottish Public Services Ombudsman (SPSO) to look at the complaint. You should also be aware that the Ombudsman will not normally look at complaints that are received more than 12 months after the complainant first notified the Council about the complaint or where its outcome will be decided by a court of law.

You can contact the SPSO at:

Freepost SPSO
Tel: 0800 377 7330
www.spso.org.uk

Yours sincerely

Jim Grant
Head of Development Services

Enc - Chronology