



MORAY COUNCIL LOCAL REVIEW BODY

Review Decision Notice

Decision by Moray Local Review Body (the MLRB)

- Request for Review reference : Case 029
- Site address: 12 Seafield Place Cullen
- Application for review by Mrs Ann Mowat against the decision by an Appointed Officer of Moray Council.
- Application 10/011693/APP : Full planning permission for the removal of Condition 11 of the previous planning consent 07/00758/FUL.
- Date of Decision Notice: 27 July 2011

Decision

The MLRB agreed to uphold the request for review and remove Condition 11 from the previous planning consent 07/00758/FUL.

1.0 Preliminary

- 1.1 This Notice constitutes the formal decision notice of the Moray Local Review Body (MLRB) as required by the Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2008.
- 1.2 The above application for full planning permission was considered by the MLRB at meetings on 28 April and 30 June 2011. The Review Body was attended at both meetings by Councillors B Jarvis (Chairman), J Hogg & G Leadbitter.

2.0 Proposal

- 2.1 This is an application for full planning permission for the removal of Condition 11 of the previous planning consent 07/00758/FUL.

MLRB Consideration of request for review

- 3.1 Prior to considering of the request for review at the meeting of the MLRB on 28 April 2011 the Legal Adviser advised the meeting that, in accordance with the notification procedures set out in The Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2008, (the Regulations) the Clerk to the MLRB had notified interested parties of receipt of the request for review by email dated 9 March 2011 and advised that, In terms of the Regulations, they had 14 days from the date of the letter (23 March 2011) to make any further observations on the application or the applicant's grounds for seeking a review of the planning authority's decision to refuse. A statement, dated 16 March 2011, was received by the Clerk to the MLRB from the Moray Access Manager by email on 4 April 2011. On being advised that the Regulations do not allow for the acceptance of late responses and that the matter would be brought to the attention of the MLRB at this meeting the Moray Access Manager advised that the response had been prepared to be sent on 16 March 2011 however due going on special leave that day due to a family illness and subsequent death in the family, he had not emailed the response until his return to work from special leave. The Legal Adviser also advised the meeting that whilst the Regulations do not allow for any discretion to an LRB to accept late responses the MLRB has, once in the past, agreed, in the interests of natural justice, to accept a late response. It was noted however that the late response was accepted on that occasion as it was only a day late and was received over the Christmas period when the Council Offices were closed and that on notification, the applicant had indicated that they would not object to the late response being considered by the MLRB. Given the circumstances of this case the Clerk forwarded a copy of the late response to the applicant by email on 4 April 2011 advising that the circumstances would be reported to the MLRB at this meeting and it will be for the MLRB to decide whether or not to allow the late submission to be taken into consideration as part of the review papers.
- 3.2 The MLRB also noted that the Clerk had also sought the view of the applicant as to whether they would have any objection to the late response being taken into account by the MLRB and if not any comments on the content of the response should be submitted by 20 April 2011 in order to be included in the papers to be submitted to the meeting on 28 April. Whilst the applicant had not stated that she has no objection to the late response being taken into account she had included comments on the response in her response to the representations received from interested parties as set out in Appendix 4 of the case papers and it could therefore be presumed that she had no objection. The MLRB agreed to allow the late response to be taken into evidence as part of the case documentation.
- 3.3 On resuming consideration of the request for review Councillor Hogg enquired if the condition, subject of the review, were to remain in place would the applicant be required to do nothing in the interim other than to retain the strip of land in order to enable a link footpath to be constructed at some future undefined date and would not be required, in the short term, to construct the link footpath. The Planning Adviser advised the meeting the condition, subject of the review, states that the footpath is to be constructed in accordance with plans, to be submitted and approved by the planning authority, prior to the occupation of the dwellinghouse and thereafter kept clear and free from obstruction in perpetuity.

- 3.4 Councillor Hogg then enquired that were the condition to be complied with, would the footpath to be provided link two existing core paths, as shown on a map, or were the footpaths referred to aspirational and unconnected to any existing footpath arrangement evident on the ground. The Planning Adviser advised the meeting that whilst he was aware of what was on the ground he did not consider it would be appropriate for him to give a view and that Councillor Hogg's question may be better answered were the MLRB to consider visiting the site prior to determining the request for review. Subject to that caveat, the Planning Adviser advised the meeting that as will be seen from the submitted plans what can be seen on the ground is a public pavement to the north side of the property with nothing to the south of the site at present.
- 3.5 In light of the advice given Councillor Hogg suggested that a site inspection be undertaken prior to determining the request for review. Councillor Leadbitter requested that where extracts of documents/emails are referred to the full document be made available to the MLRB prior to any further consideration of the review. Clarification was also sought in regard to the reference in the applicant's response (pages 29 to 35 of the case papers) to the further representations received from interested parties and in particular that the report of handling only refers to 6 comments being received on the original application whereas the application website refers to 10 comments being recorded and the Clerk to the MLRB undertook to provide an explanation for the discrepancy to the MLRB when it came to resume consideration of the case following the site inspection.
- 3.6 Councillor Hogg intimated that whilst the use of the ground on either side of the required link footpath will become clear on the site inspection, he could find nothing in the case papers which defined when funds might become available or any moves made towards a start on the aspirational core path and requested that consideration be given to obtaining clarification on these issues prior to continuing consideration of the review. Councillor Hogg advised the meeting that his reasoning for requesting this clarification was that whilst he accepted the need to keep access availability between the public pavement and an aspirational core path he would be uncomfortable insisting in a footpath being provided which went nowhere.
- 3.7 Following consideration of the case papers the MLRB agreed that it did not have sufficient information in order to proceed to determine the request for review and agreed that an unaccompanied site inspection be undertaken, the purpose of which being to view the path in terms of the requirements of the planning condition subject of the review, the alternative route which has been suggested and the potential viability of the aspirational core path. The MLRB also requested that the Planning Adviser attend the unaccompanied site inspection.
- 3.8 The MLRB also agreed to seek the views of the Council's Moray Access Manager Applicant through the 'Written Submissions' procedure set out in Regulation 15 of the Town and Country Planning (Schemes of Delegation and Local Review Procedure)(Scotland) Regulations 2008 on when funds might become available or any moves made towards a start on the aspirational core path.
- 3.9 At the meeting of the MLRB on 30 June 2011 there was submitted a 'Summary of Information' report detailing the outcome of the MLRB's previous consideration of the request for review and advising that the unaccompanied site inspection was carried out on Thursday 29 June 2011.

- 3.10 In regard to furnishing full versions of extracts referred to in the case papers the Planning Adviser advised the MLRB that other than a consultation response dated 19 October 2010 from the Council's Legal Services all other extracts refer to documents contained in the case papers submitted to the MLRB. A copy of the consultation from Legal Services dated 19 October 2010 was appended to the report as an appendix. The MLRB noted that the author of the consultation response advised they were unaware of any rights of way in this area and recommended that the Moray Access Manager, who holds a copy of the records of Rights of Way in Moray, be contacted. The consultee concluded that unless the Moray Access Manager is aware of any strong local representation, in terms of Land Reform (Scotland) Act 2003, requiring access over the railway line then they could see no reason why the applicant must comply with the original condition.
- 3.11 Reference was also made to the Report of Handling which only referred to 6 comments being received on the original application whereas the application website referred to 10 comments being recorded and an explanation for this discrepancy was also appended to the report as an appendix. This was the same information conveyed to the applicant by the Clerk to the MLRB.
- 3.12 The MLRB also agreed to seek the views of the Council's Moray Access Manager through the 'Written Submissions' procedure set out in Regulation 15 of the Town and Country Planning (Schemes of Delegation and Local Review Procedure)(Scotland) Regulations 2008 on when funds might become available or any moves made towards a start on the aspirational core path and a copy of the Access Manager's response was appended to the report.
- 3.13 The response from the Moray Access Manager advised that:-

"At this stage there are no specific plans or programme to develop the Old Railway as a Cycle Route which remains purely aspirational. No central core budget exists within the Council to develop such routes which is not surprising given the current austenitic measures forced on local authorities. The Moray Core Paths Plan is intended to be formally adopted in June. In the Plan Policy 2 specifically relates to development of Aspirational Core Paths and Policy 6 refers to how Core Paths and the wider paths network (including Aspirational Core Paths) could be developed. In the Policy the measures for this include:

- Securing external grants and funding
- Encouraging and supporting initiatives by landowners, farmers and land managers to develop and manage paths through the Scottish Forestry Grant Scheme and Land Management Options Scheme under the Scottish Rural Development Programme
- Providing ongoing support of the activities of Local Community access Groups in their continuing efforts
- Working with local environmental and community support organisations to assist with routine paths maintenance of Moray Core Paths and the wider Moray Paths Network. Organisations include Criminal Justice Community Services.
- Pursuing 'in kind' resources from partner agencies including Scottish Natural Heritage, Historic Scotland and the Forestry Commission
- Seeking Developer Contributions through the statutory planning system to finance path improvements where there is a relevant direct impact from development which requires mitigation

- Consider setting up a Moray Countryside Access Trust or similar organisation

The Council will work towards developing Aspirational Core Paths in terms of Policy 6 through a partnership approach where opportunities arise.

The development of the Old Railway would require a feasibility study and technical appraisal and secured external funding before it could be realised. What is abundantly clear is that any such opportunity for development will be lost if the potential link is severed by removal of the requirement to remain the path line in relation to planning consent 07/00758FUL”

- 3.14 In regard to the unaccompanied site inspection carried out on Wednesday 29 June 2011 the Planning Adviser advised the meeting on 30 June 2011 that on arrival at the site members of the MLRB viewed the appellant’s property and considered the implications of complying with the condition to provide a footpath link through the property. The MLRB also viewed the existing footpath to the north of the appellant’s property and the railway embankment (aspirational path) immediately to the south and possible alternative routes for the footpath link as suggested by the appellant. The MLRB also viewed the railway embankment and R1 Designation from both the north and south ends of these locations.
- 3.15 The Planning Adviser also advised the meeting on 30 June 2011 that the grounds for refusal related to the desire to retain the railway line for possible future use as a public footpath retaining the link between New View Court to the north of the appellant’s property in a direct line through the appellant’s property to Seafield Farm to the south. The appellant however was of the view that given the ground levels, drainage, extent of overgrowth and steep sides to the railway embankment to the south it was not a practical route for a footpath and questioned whether it would ever be achievable. The appellant was also of the view that given that the footpath was an aspirational core path there was no statutory requirement to provide the link as required by the planning condition. The appellant also expressed the view that, in terms of public safety and crime prevention, there was a more appropriate and attractive route from Seafield Place to Seafield Farm through the R1 Housing Designation to the east of the appellant’s property.
- 3.16 The MLRB agreed that it had now had sufficient information and proceeded to determine the request for review.
- 3.17 Councillor Hogg expressed the view that, in his opinion, the site inspection had been invaluable. He referred to the Moray Local Plan 2008 policies cited in the grounds for refusal and expressed the view that policy CF3, which is cited as a prime reason for refusal, is quite specific in that it applies to rights of way and existing paths including routes from the Moray Core Paths Plan whereas, in this case the Condition 11 route is neither a right of way nor an existing footpath nor is it a core path, which is confirmed by the Council’s legal section in an email dated 19 October 2010 (Appendix1 to the Summary of Information Report dated 30 June 2011). In regard to policy T7 Councillor Hogg was of the opinion that, having had the opportunity to visit the site, both the elevation and enclosed orientation of the Condition 11 route is entirely unsuited to incorporation within an off road section the Aberdeen/Inverness cycle route, even with extensive engineering works. For these reasons he was of the opinion that policy T7 cannot be applied as a valid reason for the retention of Condition 11 of planning consent 07/00758/FUL. Councillor Hogg was also of the view that it was clear from the site inspection that, whilst it may be outwith the remit

of the MLRB, there were, in his opinion, at least two other suitable options to create the desired footpath link either through or around the R1 Housing Designation with a clear and open aspect, which the Condition 11 route does not, in his opinion, have. For these reasons Councillor Hogg moved that the appeal should be upheld and Condition 11 removed from planning consent 07/00758/FUL.

- 3.18 Councillor Leadbitter sought clarification in regard to the issue of non-compliance with a planning condition and whether or not, were the MLRB to uphold the request for review, there would be scope to vary the condition and seek a commuted payment towards a future footpath link or public footpaths in the area. The Planning Adviser advised the meeting that seeking a commuted payment, in lieu of the provision of the footpath link, as required by Condition 11 of planning consent 07/00758/FUL, would be outwith the remit of the MLRB. In regard to setting a non-compliance precedent the planning Adviser advised the meeting that whilst all conditions should be complied with each condition required to be considered on its individual merits and he did not consider that, in planning terms, the failure to comply with one condition set a precedent. In terms of alternatives to Condition 11 of planning consent 07/00758/FUL it would be a matter for the MLRB to explore the feasibility of any alternatives.
- 3.19 Thereafter the MLRB unanimously agreed to uphold the request for review and remove Condition 11 from planning consent 07/00758/FUL on the grounds that:-
- (i) neither policies CF3 or T7 of the Moray Local Plan 2008 provide valid reasons for the retention of Condition 11 of planning consent 07/00758/FUL;
 - (ii) the elevation and orientation of the proposed Condition 11 route makes it inherently unsuitable to be part of a core path whether aspirational or not; and
 - (iii) there are at least two other suitable options to create the desired footpath link either through or around the R1 Housing Designation with a clear and open aspect, which the Condition 11 route does not have.

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Rhona Gunn
Legal Adviser to the MLRB

TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997

Notification to be sent to applicant on determination by the planning authority of an application following a review conducted under section 43A(8)

Notice Under Regulation 21 of the Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2008.

- 1 If the applicant is aggrieved by the decision of the planning authority to refuse permission or approval required by a condition in respect of the proposed development, or to grant permission or approval subject to conditions, the applicant may question the validity of that decision by making an application to the Court of Session. An application to the Court of Session must be made within 6 weeks of the date of the decision.

- 2 If permission to develop land is refused or granted subject to conditions and the owner of the land claims that the land has become incapable of reasonably beneficial use in its existing state and cannot be rendered capable of reasonably beneficial use by the carrying out of any development which has been or would be permitted, the owner of the land may serve on the planning authority a purchase notice requiring the purchase of the owner of the land's interest in the land in accordance with Part V of the Town and Country Planning (Scotland) Act 1997.