

THE HIGHLAND COUNCIL

**CAITHNESS, SUTHERLAND AND EASTER ROSS
PLANNING APPLICATIONS COMMITTEE – 20 APRIL 2010**

Agenda Item	3.4
Report No	19/10

**09/00479/FULSU: Mrs Ann Mackay
Annandonin, 8 Chapel Hill, Portmahomack**

Report by Area Planning and Building Standards Manager

SUMMARY

Description : Erection of fence

Recommendation - REFUSE

Ward : 8 Tain and Easter Ross

Development category : Local Development

Pre-determination hearing : None

Reason referred to Committee : Local Members requested referral to Committee.

1. PROPOSED DEVELOPMENT

- 1.1 Erection of a timber 2 metre high fence to the front and side of 8 Chapel Hill.
- 1.2 No pre-application consultations.
- 1.3 No existing infrastructure.
- 1.4 No supporting documents.
- 1.5 No variations made to application.

2. SITE DESCRIPTION

- 2.1 The site comprises the front and rear garden area of 'Annandonin', 8 Chapel Hill, together with the common access lane between it and the adjacent house to the south.

3. PLANNING HISTORY

- 3.1 None

4. PUBLIC PARTICIPATION

- 4.1 Advertised : Neighbour Notification (expiry date 4.12.2009).
Re-advertised : Development in Conservation Area (expiry date 26.02.2010).

Representation deadline : 26.02.2010

Timeous representations : 4 representations, 4 households

Late representations : 0

4.2 Material considerations raised are summarised as follows:

- 2m high fence is not permitted so close to the road
- Right of way is split equally across land ownerships of 7 and 8 Chapel Hill, but due to the fence the right of way can only now be maintained on the land ownership of No.7, which is inequitable
- Fence should be dismantled and re-erected (if necessary) a minimum of 1m within No.8 boundary line, providing the necessary width for the right of way in the event that a fence were erected at 7 Chapel Hill
- Site lies within the Conservation Area and fence spoils the traditional streetscape, with a loss of amenity to the area

4.3 All letters of representation can be viewed at the Area Planning Office and will also be available for inspection immediately prior to the Committee Meeting.

5. CONSULTATIONS

5.1 **Access Officer** has indicated that the proposal must be considered with regard to the common law on rights of way and the provisions of the Land Reform (Scotland) Act 2003. Local Authorities have a duty to uphold access rights and thus have powers to remove obstructions on any path or place where access rights apply. In doing so, the Planning Authority seeks to retain the original character of the path in relation to its width. The path in this instance is quite wide and has two owners. One owner has decided to erect a fence on their boundary and the remaining path is solely in one ownership. There is acceptance that this path is a 'right of way'.

It could be argued in this case that the path is not obstructed given that there is sufficient space remaining for passage. However, common law does not permit a public right of way to be obstructed to any material extent and any form of obstruction must be justified by the owner as non-material (Lord Donnington v Mair 1894). In another case (Midlothian Council v MacKenzie 1985), the judge ruled that an owner "is not entitled permanently to restrict the width of a public right of way, even where the reduced width is sufficient to allow of pedestrian passage".

It may be possible under the procedure of applying for a Diversion of a Right of Way to reduce the width after local consultation but a minimum width of 2 metres would still be required and it would need to be fair to both owners.

6. DEVELOPMENT PLAN POLICY

The following policies are relevant to the assessment of the application

6.1 **Highland Structure Plan 2001**

G2 Design for Sustainability

BC5 Listed Buildings and Conservation Areas

6.2 **Ross and Cromarty East Local Plan**

General Settlement Policy Housing The Council will safeguard the function and character of established residential areas and will encourage appropriate development

Portmahomack
Conservation Area

7. **OTHER MATERIAL CONSIDERATIONS**

7.1 **Draft Development Plan**

Not applicable

7.2 **Highland Council Supplementary Planning Policy Guidance**

Not applicable

7.3 **Scottish Government Planning Policy and Guidance**

Scottish Planning Policy – Conservation Areas (para 115-117); Open Space and Physical Activity (para 150).

8. **PLANNING APPRAISAL**

8.1 Section 25 of the Town and Country Planning (Scotland) Act 1997 requires planning applications to be determined in accordance with the development plan unless material considerations indicate otherwise.

8.2 This means that the application requires to be assessed against all policies of the Development Plan relevant to the application, all national and local policy guidance and all other material considerations relevant to the application.

8.3 **Development Plan Policy Assessment**

The site lies within the Portmahomack Conservation Area. Under section 64 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, the Planning Authority has to pay special attention to the desirability of preserving or enhancing the character or appearance of the Conservation Area. A Conservation Area is identified due to its special architectural or historic interest, the character of which it is desirable to preserve or enhance.

The development conflicts with this designation (see below).

8.4 **Material Considerations**

The proposal involves the erection of a fence along the street frontage of Chapel Hill, extending down the side of the house and across the common access lane (identified as a public right of way on the submitted plan) between it and the adjacent house ('Sunnybrae' No. 7) to the south, leading downhill and to the south and west towards the playpark and harbour. The right of way is around 4m wide.

The fence is timber, approximately 2m high all the way around (no variation in height towards the front at Chapel Hill), is painted in an off-white/grey/milky colour and has been erected. The fence is well constructed and finished, and in a good state of repair. It is of wide vertical boarding and affords privacy to the house. The planning application is therefore in retrospect.

- 8.5 Site inspection shows that the fence crosses over the right of way, thus making it impossible to use one side of it – it has effectively been brought into the garden of the owner. Whilst inspection shows that it is still possible to walk along the length of the right of way, it is more difficult to do this. During the site visit, a boat on a trailer was parked on the right of way between the fence and the house to the south. Whilst walking along the right of way was made even more difficult due to the temporary parking of the trailer with boat, it could still be undertaken as it was not a permanent restriction to the right of way – unlike the fence. The fence is a material obstruction to the right of way – unlike the trailer with boat.
- 8.6 The fence needs planning permission. However, in my view, the fence, despite its well constructed, maintained and tidy appearance, is not appropriate in the specific location in which it has been erected and at the finished height (2m), particularly along the frontage at Chapel Hill. A relocated fence preserving the original width of the right of way is considered to be more appropriate and would be within the terms of reference of the common law rights of way references detailed above. The fence facing onto Chapel Hill is currently in line with the building line and does provide amenity screening from the street.
- 8.7 The proposal does not preserve or enhance the character or appearance of the Portmahomack Conservation Area. It does not therefore accord with Highland Structure Plan policies G2 or BC5 as it would have a significantly detrimental impact on community residential amenity and on the character and setting of the Conservation Area. Furthermore, the proposal would, if approved, set an undesirable precedent making it difficult to resist similar developments within the Conservation Area in the future.
- 8.8 Members will also note that the proposal does not maintain the established public right of way and actually restricts its use. The applicant is not entitled permanently to restrict the width of the public right of way, even where the reduced width is sufficient to allow of pedestrian passage. If the proposal were given planning permission, then this would directly contradict the duty which the Planning Authority has to uphold access rights under the Land Reform (Scotland) Act 2003. Any approval would compound the difficulty in upholding the access rights over this ground.
- 8.9 **Other Considerations – not material**
- None
- 8.10 **Matters to be secured by Section 75 Agreement**
- None

9. CONCLUSION

- 9.1 I consider that the application for the fence as erected should be refused. However in principle, and subject to planning permission being granted, I would have no objection to the fence being repositioned, at its present height of 2 metres except along the Chapel Hill frontage where 1.4 metres would be more appropriate, provided the right of way is maintained in full.

10. RECOMMENDATION

10.1 Action required before decision issued n

Notification to Scottish Ministers n

Notification to Historic Scotland n

Conclusion of Section 75 Agreement n

Revocation of previous permission n

Subject to the above, it is recommended the application be **Refused** for the following reasons:

1. The proposal does not preserve or enhance the character or appearance of the Portmahomack Conservation Area as required under section 64 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, as it does not maintain the established right of way.
 2. The proposal does not accord with Highland Structure Plan policies G2 or BC5 as it would have a significantly detrimental impact on community residential amenity and on the character and setting of the Portmahomack Conservation Area.
 3. The proposal is considered to have a significantly adverse and detrimental impact on the duty which the Planning Authority has under the Land Reform (Scotland) Act 2003 to uphold access rights over the public right of way to the detriment of users of the right of way. Any approval would compound the difficulty in upholding the access rights over this ground.
 4. The proposal if approved would set an undesirable precedent making it difficult to restrict similar developments within the Portmahomack Conservation Area in the future.
- 10.2 In the event that Committee is minded to refuse the application then I would seek **powers to take enforcement action** under the Town and Country Planning (Scotland) Act 1997 to secure removal of the fence.

Signature: Allan J Todd
Designation: Area Planning & Building Standards Manager Caithness Sutherland
and Easter Ross
Author: Bob Robertson
Background Papers: Documents referred to in report and in case file.
Relevant Plans: Plan 1 – Location / Site Plan



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 Erection of fence at Anandonin, 8 Chapel Hill, Portmahomack.

Mr A Mackay
 Anandonin
 8 Chapel Hill
 Portmahomack