

FINDERNE COMMUNITY COUNCIL

FAO: **Mr J Grant,
Head of Development Services,
The Moray Council
PO Box 6760
Elgin
Moray
IV30 9BX**

19th September 2016

Dear Mr Grant

Complaint regarding the handling by The Moray Council of the erection of a security fence around Blervie House, Rafford

I write in my role as Chairperson on Funderne Community Council (FCC) regarding the handling by The Moray Council (TMC) of an issue of significant concern to a number of residents of Rafford. At the June meeting of the Funderne Community Council the issue was raised regarding the erection of a barbed wire fence by the owner of Blervie House (Mr Graham Thompson) and the restrictions of access it had caused.

The issue had three aspects

1. The blocking of vehicle access between Moor of Granary and Woodside cottages and between the Old Steading (Lower Rafford) and Skene Meadows.
2. The restriction of access to walkers in Rafford woods resulting from the erection of a 7-strand barbed wire fence across a number of historical paths.
3. The absence of a planning application for the erection of a 7-strand barbed wire fence immediately adjacent to the B9010 road and the resulting lack of duty of care, and safety implications for pedestrians and cyclists.

Whilst this dispute had been ongoing for some significant time before it was raised at the meeting this was the first time that the newly established community council had had the opportunity to become involved. As a community council we are eager to work closely with TMC to both resolve issues that arise in the Funderne area and to help develop a strong sense of community. The issue of the fence erection around Blervie House was undoubtedly complex from a legal perspective, highly contentious and emotionally charged. It was the view of the members of the FCC that our role was to try to take the emotion out of the situation and find some degree of compromise that would settle things down. With this in mind separate meetings were held with the owner of Blervie House and with Ken Kennedy and Ian Douglas of TMC.

At the meeting with Mr Thompson he made his position clear that he had met with representatives of TMC and as far as he was concerned the issue was closed. Some requests for a compromise on access into the Rafford woods and the fence adjacent to the B9010 were refused, again on the basis that the issue had already been resolved with TMC.

FINDERNE COMMUNITY COUNCIL

The meeting with Mr Kennedy and Mr Douglas centred on the issue of the Land Reform (Scotland) Act 2016 (LRA) and the restriction of access to the Rafford Woods and surrounding area, but all three aspects of the issue noted above were discussed.

1. It was accepted that the LRA does not cover vehicle access and therefore TMC could do nothing in relation to the blocking of the tracks between Moor of Granary and Woodside cottages and between the Old Steading (Lower Rafford) and Skene Meadows.
2. The LRA states....

14. Prohibition signs, obstructions, dangerous impediments etc.

The owner of land in respect of which access rights are exercisable shall not, for the purpose or for the main purpose of preventing or deterring any person entitled to exercise these rights from doing so-

- a) Put up any sign or notice;*
- b) Put up any fence or wall, or plant, grow or permit to grow any hedge, tree or other vegetation;*
- c) Position or leave at large any animal;*
- d) Carry out any agricultural or other operation on the land; or*
- e) Take, or fail to take, any other action*

Where the local authority consider that anything has been done in contravention of subsection (1) above they may, by written notice served on the owner of the land, require that such remedial action is specified in the notice be taken by the owner of the land within such reasonable time as is so specified.

The only permitted exception to clause 14 is where access is restricted to an area of “**sufficient adjacent land**” (SAL) around a residence which delineates an area of privacy for the owner of the property. The Access Officer (Ian Douglas) for TMC was very clear in the meeting that the fence, as erected, did not constitute the boundary of a SAL and that access inside the fence was still lawful as long as the Scottish Outdoor Access Code was adhered to. The fact that access is now restricted by a 7 strand barbed wire fence, and a newly installed padlocked gate, was glossed over with the advice that anyone wishing to enter the area could “climb over the gate”.

This is the first aspect of our complaint on the process of handling this case

TMC have been requested by members of the public to seek a “Counsel’s opinion” on whether the LRA has been breached. TMC have effectively said that the LRA has been breached but the requirement for enforcement is discretionary because the LRA (clause 14) states a local authority “may” take action rather than “will” take action. The legal costs, and perceived probability of success, of a court case have been cited as the reason for not taking enforcement action. This position by TMC is dependent upon a judgement as to the degree of “breach” of the LRA and we challenge whether there is the requisite expertise within TMC to make this judgement. The amount of case law on which to draw is extremely thin, with the “Gloag v Perth” and “Snowee v Stirling” being the only similar situations so far tested in the courts. Given the highly contentious nature of this issue in the community we believe that TMC should have seriously considered the call for an opinion from a Counsel with the necessary expertise in the field.

FINDERNE COMMUNITY COUNCIL

Notwithstanding a decision on seeking legal advice, the FCC have asked TMC to instruct the land owner to either remove the padlock from the newly installed gate or provide a suitable pedestrian access gate. Simply advising people to climb over a gate, which has clearly been installed to restrict access, is both irresponsible and an abdication of responsibility by TMC.

3. Mr Kennedy explained that the issues relating to the fence along the B9010 fell into the Planning and Transport areas of TMC and that he was unable to comment on them. In a subsequent email he advised that...

“Here’s the reply from the Roads Section

The location of the new fence is on the line of the original fence and no nearer to the carriageway. With regard to the materials, whilst we may not like what has been used the materials are for fencing and have been used for that purpose. The concrete posts are no different to posts used adjacent to the carriageway for high security areas like an airfield and the type of fence wire used is not something we would comment on as there is a large proportion of rural roads with barbed wire whether it be one or multiple wires.

In summary, this is not something the Moray Council would approach the landowner to discuss as a Road Safety issue.

If you need further information from a Roads point of view perhaps you could contact Nicola Moss (Transportation Manager) nicola.moss@moray.gov.uk

Here’s the reply from Planning

After investigation the Planning Enforcement Section has advised that the erection of barbed wire fence is not a breach of planning control. In other words the fence does not need planning permission.

If you need further information from a Planning point of view perhaps you could contact Beverly Smith beverly.smith@moray.gov.uk”

We wrote to Ms Moss challenging the assertion that the fence erected along the B9010 was typical of that used on “a large proportion of rural roads” as we have been unable to find, or be shown, another example of a 7-strand barbed wire fence erected less than 0.5m from a narrow carriageway road. We do not dispute that barbed wire is commonly used in agricultural settings but the Roads (Scotland) Act does not give a blanket exemption to its use. The law calls for the hazards and risks associated with barbed wire to be looked at on a case by case basis and gives the local authority the powers to refuse its use where appropriate.

We also wrote to Ms Smith challenging the assertion that “the fence does not need planning permission”. The planning regulations state that planning approval is required for any fence greater than 1m in height which fronts onto a public highway. The fence in question is 1.2m in height and does, therefore, require planning approval – a fact confirmed by Mr Thompson in the meeting I had with him when he stated that “a planning officer had said that normally a planning application was required but the fence was acceptable so none would be asked for”. The task of responding to our challenge was delegated to Harry Gordon who advised us that a transportation and planning assessment had been carried out and had deemed the fence acceptable in both planning and road safety terms.

We wrote again to Mr Gordon asking for a detailed explanation of what criteria were used in the assessment to determine the acceptability. Unfortunately no explanation was offered other than a reiteration that the fence was “acceptable” in planning terms.

FINDERNE COMMUNITY COUNCIL

This is the second aspect of our complaint on the process of handling this case

The FCC simply requested that TMC instruct the land owner to replace the barbed wire strands with plain wire. We did not call for expensive retrospective planning applications or legal processes but sought to find a straight forward compromise which we could put to the affected residents of Rafford. This request was refused by TMC on the grounds that the fence, as installed, was acceptable.

“Acceptability” is the output of a process, it is not a process in itself. It gives no explanation as to why a 1.2m, 7 stranded barbed wire fence, erected <0.5m from a narrow public highway is appropriate.

Had a planning application been required, members of the general public, and the FCC, would have had the opportunity to make representation about the suitability of the fence. Furthermore, once a decision had been taken on the application a “Report of Handling” would have been issued explaining TMC’s decision. Whether we had liked the decision or not there would have been a clear and open process which had determined the decision.

The handling of this case by TMC has denied input to the process by the public and failed to give any procedural justification for acceptance of the fence as installed.

It is with regret that the FCC submit this letter of complaint. As mentioned earlier, it is hoped that we can work closely with TMC to find resolutions to problems and opportunities for community development. In this particular case we are far from agreement with TMC’s current position on the matter and request a formal review of the case.

Yours sincerely

For and on behalf of the Finderne Community Council

Brian Higgs

Chairperson

Email contact: findernecc@gmail.com