

TCP/11/16(217)

**Planning Application 12/00555/FLL – Erection of a fence at
Bloomfield, Newburgh, Cupar, KY14 6EY**

**PAPERS SUBMITTED
BY THE
APPLICANT**

NOTICE OF REVIEW

UNDER SECTION 43A(8) OF THE TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997 (AS AMENDED) IN
RESPECT OF DECISIONS ON LOCAL DEVELOPMENTS

THE TOWN AND COUNTRY PLANNING (SCHEMES OF DELEGATION AND LOCAL REVIEW PROCEDURE)
(SCOTLAND) REGULATIONS 2008

THE TOWN AND COUNTRY PLANNING (APPEALS) (SCOTLAND) REGULATIONS 2008

IMPORTANT: Please read and follow the guidance notes provided when completing this form.
Failure to supply all the relevant information could invalidate your notice of review.

Use BLOCK CAPITALS if completing in manuscript

Applicant(s)

Name **MR & MRS. NISBET**

Address **Bloomfield
by NEWBURGH
CUPAR**

Postcode **FIFE KY14 6EY**

Contact Telephone 1 **[REDACTED]**

Contact Telephone 2 **[REDACTED]**

Fax No **[REDACTED]**

E-mail* **[REDACTED]**

Agent (if any)

Name **MR I. McCULLY**

Address **LEGACY LAND LTD
GLENHALL
BELLWOOD PARK**

Postcode **PERTH PH2 7AJ**

Contact Telephone 1 **07876-782-880**

Contact Telephone 2 **[REDACTED]**

Fax No **[REDACTED]**

E-mail* **[REDACTED]**

Mark this box to confirm all contact should be
through this representative: ☐

* Do you agree to correspondence regarding your review being sent by e-mail?

Yes ☐ No ☒

Planning authority

PERTH and KINROSS COUNCIL

Planning authority's application reference number

12/00555/FLL

Site address

Bloomfield, by NEWBURGH, CUPAR, FIFE KY14 6EY

Description of proposed
development

**ERECTOR of a wooden security and privacy fence
across our garden (in Perthshire) to separate the Pedestrian
Right of Way from the rest of our garden. Height will not exceed 1.4m**

Date of application
registration

27 MARCH 2012

Date of decision (if any)

24 AUGUST 2012

Note. This notice must be served on the planning authority within three months of the date of the decision
notice or from the date of expiry of the period allowed for determining the application.

Nature of application

1. Application for planning permission (including householder application) ☒
2. Application for planning permission in principle ☐
3. Further application (including development that has not yet commenced and where a time limit has been imposed; renewal of planning permission; and/or modification, variation or removal of a planning condition) ☐
4. Application for approval of matters specified in conditions ☐

Reasons for seeking review

1. Refusal of application by appointed officer ☒
2. Failure by appointed officer to determine the application within the period allowed for determination of the application ☒
3. Conditions imposed on consent by appointed officer ☐

Review procedure

The Local Review Body will decide on the procedure to be used to determine your review and may at any time during the review process require that further information or representations be made to enable them to determine the review. Further information may be required by one or a combination of procedures, such as: written submissions; the holding of one or more hearing sessions and/or inspecting the land which is the subject of the review case.

Please indicate what procedure (or combination of procedures) you think is most appropriate for the handling of your review. You may tick more than one box if you wish the review to be conducted by a combination of procedures.

1. Further written submissions ☐
2. One or more hearing sessions ☒
3. Site inspection ☒
4. Assessment of review documents only, with no further procedure ☐

If you have marked box 1 or 2, please explain here which of the matters (as set out in your statement below) you believe ought to be subject of that procedure, and why you consider further submissions or a hearing are necessary:

See attached Note 1

Site inspection

In the event that the Local Review Body decides to inspect the review site, in your opinion:

- | | Yes | No |
|--|-------------------------------------|-------------------------------------|
| 1. Can the site be viewed entirely from public land? | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| 2. Is it possible for the site to be accessed safely, and without barriers to entry? | <input checked="" type="checkbox"/> | <input type="checkbox"/> |

If there are reasons why you think the Local Review Body would be unable to undertake an unaccompanied site inspection, please explain here:

See attached Note 2

Statement

You must state, in full, why you are seeking a review on your application. Your statement must set out all matters you consider require to be taken into account in determining your review. Note: you may not have a further opportunity to add to your statement of review at a later date. It is therefore essential that you submit with your notice of review, all necessary information and evidence that you rely on and wish the Local Review Body to consider as part of your review.

If the Local Review Body issues a notice requesting further information from any other person or body, you will have a period of 14 days in which to comment on any additional matter which has been raised by that person or body.

State here the reasons for your notice of review and all matters you wish to raise. If necessary, this can be continued or provided in full in a separate document. You may also submit additional documentation with this form.

See attached Note 3

Have you raised any matters which were not before the appointed officer at the time the determination on your application was made?

Yes

☐

No

☒

If yes, you should explain in the box below, why you are raising new material, why it was not raised with the appointed officer before your application was determined and why you consider it should now be considered in your review.

See attached Note 3 b

List of documents and evidence

Please provide a list of all supporting documents, materials and evidence which you wish to submit with your notice of review and intend to rely on in support of your review.

See attached Note p 2 + 3

Note. The planning authority will make a copy of the notice of review, the review documents and any notice of the procedure of the review available for inspection at an office of the planning authority until such time as the review is determined. It may also be available on the planning authority website.

Checklist

Please mark the appropriate boxes to confirm you have provided all supporting documents and evidence relevant to your review:

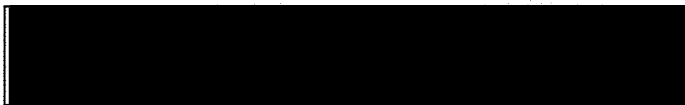
- ☒ Full completion of all parts of this form
- ☒ Statement of your reasons for requiring a review
- ☒ All documents, materials and evidence which you intend to rely on (e.g. plans and drawings or other documents) which are now the subject of this review.

Note. Where the review relates to a further application e.g. renewal of planning permission or modification, variation or removal of a planning condition or where it relates to an application for approval of matters specified in conditions, it is advisable to provide the application reference number, approved plans and decision notice from that earlier consent.

Declaration

I the applicant/agent [delete as appropriate] hereby serve notice on the planning authority to review the application as set out on this form and in the supporting documents.

Signed



Date

12. November 2012

NOTICE OF REVIEW (and Notes)

NOTES AND COMMENTS ON DELEGATED REPORT OF HANDLING

1. Review Procedure
p2 Box : The Appointed Officer has based his opinion and Report on dubious or wrong information - see marked passages on attached copy of report "Summary of Issues raised by Objectors"

2. Site Inspection
p2 - lower small box : We are having privacy and security problems and require prior notification of any site inspections

3. Statement
p3 large box : See attached annotated copy of original Report. I am unable to write out comments or prepare full notes as I have limitations in expressing myself and in writing due to physical and mental difficulties following chemotherapy treatment, injury to my lower back and stroke in old age. We are both in our mid 80s.

We base our whole case on the Sheriff, Court (Cupar) decision of 1997.

The Pedestrian only Right of Way was never clearly defined except as a point to point route along its length from Carpow Estate gates on the A913 to its termination at Whinnybank Cottage east of Hinselwell Farm in Fife.

No specific width was ever mentioned, as only a Foot-path was asked for

4. page 3 small box : This issue has, over the years since 1997, become very involved

especially as it latterly involved two local authorities.

The site is an isolated rural site. There are no neighbours nearer than a mile - than only 3 farms. The nearest domestic household is on the A913 - also over a mile away.

No body can overlook the Bloomfield site or its approaches - it is surrounded by thousands of acres of grade 3 agricultural land & permanent pasture, all hill land and behind that Pitmedden Forest

The Planning Officers visit was unannounced and quite short. He spoke only to Mrs. Nisbet as I was ill and unable to walk

List of Documents & Evidence : The Report ignores a joint Minute
Page 4 of a meeting of all parties which was convened by our Solicitor at Bloomfield on 13th December 2011

at which the defined footpath proposal was fully discussed and agreed. A Planning Application would be lodged. Mr Stubb (Access Officer, Park Council) was asked to submit a diagram delineating the agreed route to the Nisbets showing the agreed route.

It is worth noting that the Scottish Government Reporters investigation proposed core path routes in both Fife and Perth had earlier inspected the route and had urged all parties to settle the dispute amicably.

The adverse decision now reached by Perth & Kinross Council completely removes all our ownership rights of privacy
 20

and peaceful enjoyment of our domestic property. The issue and current situation has put an enormous strain on both of us and re-inforces the heavy burden of depleted value of this small site caused by the establishment of the pedestrian right of way through it.

Memorandum of Agreement

Reached at Bloomfield, Newburgh at meeting amongst Mr. and Mrs. Robert H.M. Nisbet (Mr. and Mrs. Nisbet), their solicitor Alastair H. Anderson (AHA), Amanda Walker, Solicitor, Fife Council (AW), Mr. David Stubbs, Access Officer, Perth & Kinross Council (DS) and Alison Irvine, Access Officer, Fife Council (AI).

1. It was agreed that all parties would work together to resolve the difficulties that Mr. and Mrs. Nisbet had been experiencing with use of the Right of Way through Bloomfield by endeavouring to create an "access corridor" along the northern boundary of Bloomfield.
2. Mr. and Mrs. Nisbet hoped for a corridor five feet in width but it was agreed that the probable width would be six feet including fencing.
3. Based on input from DS it was accepted that use of the Countryside Act provisions for encroaching on and restricting a Right of Way were unlikely to be successful and were likely to cause delay and wasted expense. Therefore the best option was for Mr. and Mrs. Nisbet to lodge a Planning Application. This is required to move or restrict a route of the Right of Way. Simply because a Planning Application is necessary for that purpose, it was agreed that the application could and therefore should include an application for the erection of suitable fencing along the south boundary of the corridor. Mr. and Mrs. Nisbet would be responsible for the cost and pursuit of this application.

X 4. DS undertook to provide appropriate plans to be attached to the Application showing the corridor and giving appropriate dimensions and all other required detail. It was agreed that assuming this detail could itself be agreed, DS and AI would both actively support the application.

5. ~~It was agreed that AI would approach appropriately, the Baird Family for agreement that the northern line of the corridor will follow the existing stob and wire fencing, which they hopefully will agree in writing from the northern boundary not only of Mr. and Mrs. Nisbet's property but also of the Access Roadway to Bloomfield. This was particularly important near the eastern gate where foundations for the pathway would require to be laid especially outwith Mr. and Mrs. Nisbet's property and this would entail the removal of some of the redundant wall stones. (Mr. and Mrs. Nisbet thought at that point that the boundary with the Bairds property was between the fence and the wall.) If at all possible she is to avoid the subject of the Bairds' possible right of access over Bloomfield which is largely by a different route from the corridor. The question of whether or not that right of access exists will be a matter between Mr. and Mrs. Nisbet and the Baird Family.~~

6. It was agreed if at all possible the existing ^{entr} gate location would remain. It was accepted that at least the gate post which would probably be used as the entrance to the corridor would have to be strengthened. No matter what happens it is accepted that the width of the Nisbet's gate would be no less than ten foot six thereby allowing nine inch clearance on either side to the largest vehicle which supplies the Nisbet's and is nine feet wide. If it proved absolutely impossible to use the existing gate site Mr. and Mrs. Nisbet agreed that the site could be moved a foot or two into their ground.

7. It was agreed that no gates would be required at either end of the corridor. The type of fencing to the south end of the corridor is to be agreed. Mr. and Mrs. Nisbet will bring forward a proposal of fence type as soon as may be. It is likely to be of a palisade type construction with a coping piece of timber along the top. It should be robust.
8. DS is to approach a Trust which provides some funding for access routes to determine what funding might be available both for the foundations of the route and the fencing etc.
9. It is agreed that once the route has been created it will be laid out in grass and Mr. and Mrs. Nisbet undertook to maintain the grass.

It was agreed that AHA would prepare the present Memorandum for approval by all parties and that all parties would work together to progress the project as rapidly as was possible.



Anderson Beaton Lamond

SOLICITORS & NOTARIES

Mr. & Mrs. R.H.M. Nisbet,
Bloomfield,
Lochmill Road,
Newburgh,
Fife.
KY14 6EY

Our Ref: A/BC/NIS1.1
Your Ref:

14th June, 2012

Dear Mr. and Mrs. Nisbet,

Thank you for handing in the copy of the letter from Mr. Beveridge. I have spoken to him on the telephone. I have also spoken to David Stubbs. I undertook to write to Mr. Beveridge telling him about the meeting and the planning application. This I have now done and I attach a copy of my letter, the terms of which I trust you approve.

Do you want me to draft a letter in support of the legal aspects of your application?

With kind regards,
Yours sincerely,

Alastair H. Anderson
aha@abl-law.co.uk

Saturday 16 June: At approximately 2.15 pm. we noticed a man coming into the garden from the west. He walked slowly eastwards intently scanning the gates and the white plastic markers/stakes indicating the approximate line of the demarcation fence we have proposed. He was particularly interested in the extreme east end where the gate was moved back into the garden & the footpath has to be shown up on the boundary with the Baines land. We did not approach him! R.

Bordeaux House, 31 Kinnoull Street, Perth PH1 5EN (LP-7 Perth) (DX PE 5)
Telephone: 01738 639999 Fax: 01738 630063 Email: info@abl-law.co.uk Web: www.abl-law.co.uk
Partners: Alastair H. Anderson, Lydia M. Fotheringham, Iain W. Lamond, Lizzie M. McFadzean, Peter J. Stewart.
Associate: Jennifer I. Douglas

Alasdair M. Beveridge Esq.,
Assistant Planning Officer (South),
Perth & Kinross Council,
Pullar House,
35 Kinnoull Street,
Perth.
PH1 5GD

Our Ref: A/BC/NIS1.1
Your Ref: 12/00555/FLL

14th June, 2012

COPY

Dear Mr. Beveridge,

Bloomfield, by Newburgh, Cupar, KY14 6EY.

As discussed and agreed in our telephone conversation of 7th June I attach a copy of the Memorandum of Agreement which I drew following the meeting at Bloomfield on 13th December last. I also attach a copy of the letter I received commenting on that Minute on 8th March, 2012.

Mr. Stubbs even offered to and indeed did draw the plan for the Nisbets. This was agreed so that there would be no confusion that the Nisbets were in any way restricting the agreed route.

I have the feeling that because of the very public clamour which has arisen, there may be some back pedalling taking place.

As far as I and my clients were concerned at the time, it was agreed that a resolution of the difficulties would be secured if the right of way were fenced off so that there was no possibility of those using the right of way straying into the Nisbets' garden. Clearly it was thought by all attending that a five to six foot corridor was sufficient since the right of way is pedestrian.

The right of way is totally unrelated to any right of access which might be claimed by the neighbouring farmer, Mr. Baird who would require to vindicate his right of access, if it exists, himself.

If you wish me to write at some length on questions of title and the Baird right of access I will happily do so.

Yours sincerely,

Alastair H. Anderson
aha@abl-law.co.uk

REPORT OF HANDLING
DELEGATED REPORT

Ref No	12/00555/FLL
Ward No	N8- Kinross-shire

PROPOSAL: Erection of a fence

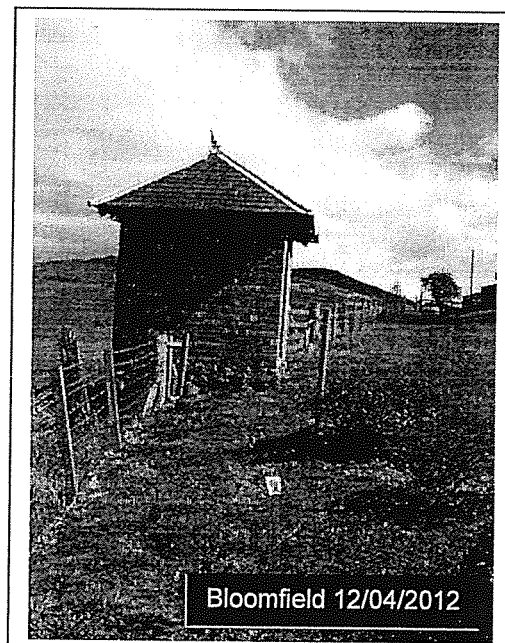
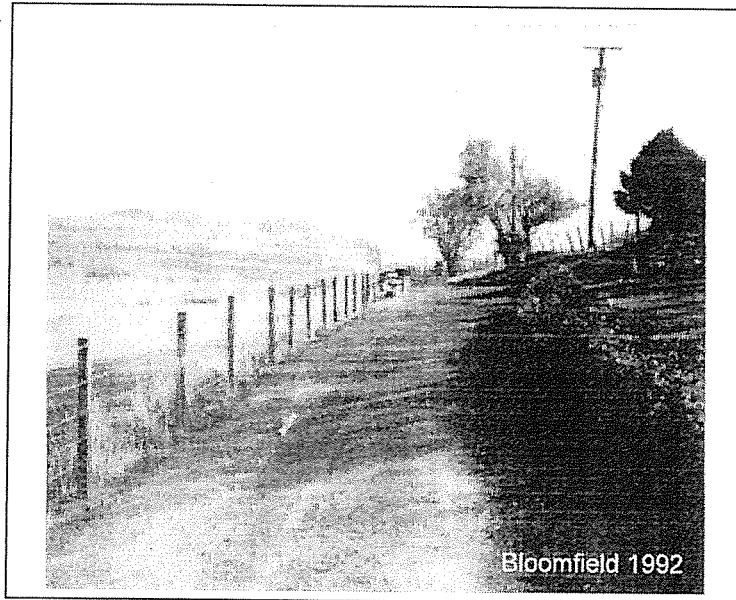
LOCATION: Bloomfield, Newburgh, CUPAR, KY14 6EN.

APPLICANT: Mr & Mrs Nisbet

RECOMMENDATION: REFUSE

SITE INSPECTION: 12 April 2012

*See attached
Note p 3.*



See Notes
p 2

The proposed development would have an adverse impact on the function of the route and on local amenity and would unreasonably affect public access. I am not convinced that the plans submitted adequately address this or make suitable alternative provision as required by Policy CF2 in the Proposed Local Development Plan January 2012.

Whilst the applicant has ticked the box to indicate that the proposed development will not change public paths, public rights of way or affect any public rights of access, I am of the view that it will.

The proposed fence would be erected on top of the existing right of way. It would have the effect of narrowing down and diverting the Right of Way, with that part which is not included within the newly fenced boundary being subsumed into the garden ground for Bloomfield. I am of the view that the application should have included a change of use (public right of way to private garden ground) as requested 23 May 2012. Separately, if this proposal was granted, an application would be required to secure a diversion order made under Section 208 of the Town and Country Planning (Scotland) Act 1997 in respect of the alterations to the Right of Way/Core Path.

The applicants wish to erect a fence to better delineate the Right of Way and in order to safeguard their own privacy and security in the dwelling house and garden. The desire for improved privacy in what has proved to be a difficult situation is acknowledged, however, if erected in the position proposed, the new fence would have the effect of narrowing down and diverting the Right of Way. Case law strongly suggests that anything which restricts the unobstructed use of a public right of way must be justified. It is not stated why the fence should be erected in its proposed position rather than along the line of the former hedge i.e. along the edge of the existing, vindicated Right of Way and at a higher level. The interdict granted against the applicants prevents impeding the Right of Way including by the erection or placing of a fence other than already exists. It has not been justified why a new fence should be erected along a line that would narrow down the vindicated and historical Right of Way.

As indicated on the plans, the fence would narrow the Right of Way down from c.4-7 metres wide to c.1.5-1.8 metres wide and divert it from its existing route. This would affect the enjoyment of the route particularly as the proposed route has a pronounced cross fall towards the adjacent field. The path has a grass surface which would be subject to additional wear and tear and which would be more difficult to maintain at a reduced width. The Right of Way is a pedestrian right of way. In addition, the route is part of a core path which covers other users. The proposed fence would have a significant adverse affect on other users including bicyclists and horse riders.

Further, the erection of the proposed fence would have a significant detrimental impact on the visual and recreational amenity of people using the Right of Way with the utilisation of a fence more in keeping with suburbia rather than rural Perthshire. This is an elevated site. The proposed fence would be visible both close by and further away, including from the A93 Abernethy to Newburgh Road.

A913

In summary, I object to the planning application as I do not consider that the applicants have fully justified the need for the fence on the proposed line and thus have not justified the diversion and significant narrowing of the vindicated Right of Way/Core Path. Further, I am concerned also about the effects on the route as both

8

The Town and Country Planning (Scotland) Act 1997 Section 207/8, a planning authority may by order authorise the stopping up of or diversion of any footpath if they are satisfied that it is necessary to do so in order to enable the development to be carried out.

SITE HISTORY - none.

CONSULTATIONS/COMMENTS

Scottish Water	No objections.
Fife Council Access Officer	No objection – supports the principle of a fence.
Transport Planning	No objections.
Perth and Kinross Access Officer	Object.

TARGET DATE: 27 May 2012

REPRESENTATIONS RECEIVED:

Number Received: 20

Summary of issues raised by objectors:

- See Notes*
p. 4
- 1 The proposal narrows the Right of Way;
 - 2 The Right of Way dates back to medieval times;
 - 3 The Right of Way has been vindicated;
 - 4 It is a Fife and Perth and Kinross Council Core Path Plan;
 - 5 The applicants removed the old fencing and hedge;
 - 6 If new fencing is to be erected it should follow the southern line of the old fencing and hedge;
 - 7 If fencing is to be replaced it should be as directed by Sheriff Johnston in her judgement in the breach of interdict case in November 2009;
 - 8 The proposed Right of Way will severely impact on access to the route for disabled ramblers in motorised wheelchairs, bicyclists and horse riders;
 - 9 If the proposal is granted it would be unlawful;
 - 10 If the proposal is granted it would be in the middle of farm access;
 - 11 Current interdict stating that the gates should be removed, yet after Fife Council removed the gates the applicants replaced them;
 - 12 Land ownership;
 - 13 Held in the National Archives of Scotland in the Register of Sasines there is a plan, made on 28 June 1996, which has been accepted and signed by the applicants, accompanying their a non domino application. From the measurements taken by the objector, the dimensions of the Right of Way are 6.2 metres at its eastern end, 11.43 at its western end, 78.4 metres along the southern fence/hedge and 76.5 metres along the northern fence;
 - 14 The dimensions of the above Right of Way are necessary to permit use by neighbouring farmers;
 - 15 The applicants aggrandise their holding of land;
 - 16 By reducing the width of the Right of Way it will aggravate the ground stability;
 - 17 Rather than the fence providing a means to demarcate the Right of Way as the applicants suggest rather it will obstruct and divide.

- 2 The proposal is contrary to Policy CF2 of the Proposed Local Development Plan as the development proposal would have an adverse impact upon the route as a Right of Way and as a Core Path as the route would be narrowed significantly and would adversely affect a wide range of users.

N/A

Justification

The proposal is not in accordance with the Development Plan and there are no material reasons which justify departing from the Development Plan.

FURTHER NOTES / COMMENTS ON DELEGATED REPORT

pg 2 : Site Description and Background : Trouble began in 1968 with the local farmer (Bairst of Ninewells) who insisted on using a route through our garden to his western fields which he had acquired in 1965. We had Bloomfield only from late 1966. We were unaware of this track till we returned from long employment abroad in late 1968. Attempts to reach agreement on this new field access failed. At this stage Mr. Gavin Bairst recruited support from residents of Banklands in Newburgh to start a Right of Way claim and continued harassment culminating in the Cupar Court action before Sheriff Brechin in October 1995 and concluded in May 1996

Page 2 : PROPOSAL : This is substantially correct. The point to stress is that the proposed fence will create an open unimpeded clearly demarcated footpath which is presently indicated only by two official signs at each side of Bloomfield put up by Fife Council.

pg 2: Assessment : The P & K Access Officer had previously been in full agreement, with us and all other parties involved, in the dimensions and location of the proposed fence / open footpath. He even supplied a plan indicating the line & location of the fence. No specific advice was given.

page 3. ASSESSMENT :

para 1. The existing route is not open - it is

physically heavily overgrown beyond our garden westward and would require much work to make it passable. That is not our responsibility but the Council's or the landowner.

Our proposal facilitates public pedestrian passage

pg 3: para 3: The fence will be within the declared RoW — no diversion is needed. We have already secured the agreement of all other parties to the proposal.
This objection is a technicality.

pg 3: para 4: The proposed fence has no detrimental effect on the existing RoW. It accommodates it and gives us some better privacy and security by channelling the passing pedestrians to a clear route designated by sign posts put up by Fife Council. The position of the fence has been agreed with both local authorities. The RoW was vindicated in 1997 — before that there was no right of way — only an overgrown unused farm track of Wester Clunie farm.

b3: paras 5 } We disagree with this view entirely and must stress this
6 } was stipulated in the Court Decision / Declarator to be a
7 } pedestrian only route and it will not affect users in any adverse way.

and was confirmed by Perth Court and our Perth solicitor (who effected our purchase in 1966) at a series of hearings in the early 1970s.

- 16) Unsteady ground is created by the termination of the northern
17) boundary dry-stane dykes half way along our northern boundary.
Mr Stubbs agreed to see if this could be stabilized by his
Department getting Funding. Further work will improve, not
aggravate, ground stability. The proposed Fence will definitely
demarcate the Row.
-

Notes on Photographs on page 1 of Delegated Report

These 2 photographs show the situation + changes in our garden ~~and~~
initially in 1972-73 to accommodate our farming neighbours — the
Bairds only.

The hedge was planted in 1972. The Azalia bed (photo 2) ~~was~~
created initially in 1974 and is still not satisfactory!

The Bairds no longer seek to use this field access to ~~the~~ the
fields (acquired in 1964-65 and for years have used ~~also~~
access through Ninewells Farm.

The whole matter of Bloomfield's extent was settled by our ~~law~~
between 1972 and 1973 by Perth Court.

This track is purely an old access track and has ~~nothing~~ ~~to~~
do with the Row.

COMMENT ON SUMMARY OF ISSUES MADE BY OBJECTORS

- page 5

1. Rubbish - this will not happen
2. This is unimprovable - mere hearsay.
3. Agreed
4. See the Scottish Govt Reporters on your Files: They advocate that this issue of passage through the Nisbets garden be settled amicably.
5. This was related to settlement of the lengthy dispute with the Beards. The hedge was totally in our garden. It also became too high for us to maintain. It has nothing to do with the RoW. which we all to the north side of our garden.
6. This would take up even more of our garden - Opposed.
7. Sheriff Johnston knew nothing about the site and its history. She never visited the site and based her opinion on local gossip and a photograph from GOOGLE.
8. It is solely a pedestrian route. Other users will have to be diverted away from our garden.
9. No comment. Nobody has ever held this opinion before.
10. None of the land concerned affects farm access.
11. Gate (preferably openable) are permitted on RoW. Ours are on our Driveway, not the RoW and we were given permission to erect them by Fife Council.
12. We are owners of the whole of our site of 0.495 acres.
13. We were advised by our Cupar solicitors to take out this title. It is legal and has been registered in both Counties - Fife and Perth & Kinross. We don't know who took these measurements, nor when but see the note on the attached letter from our present solicitor.
14. There is no farm access through our garden - only on land already part of the RoW on other people's farms neighbouring our site.
15. See 13 above. The extent of our site was determined by previous owners of Bloomfield use of the ground from the 30's and up to 1941.

REPORT OF HANDLING

DELEGATED REPORT

Ref No	12/00555/FLL
Ward No	N8- Kinross-shire

PROPOSAL: Erection of a fence

LOCATION: Bloomfield, Newburgh, CUPAR, KY14 6EN.

APPLICANT: Mr & Mrs Nisbet

RECOMMENDATION: REFUSE

SITE INSPECTION: 12 April 2012



OFFICER'S REPORT:

Site description and background:-

The proposal relates to a rural dwelling house, Bloomfield which overlooks the River Tay from an elevated position, and lies on the border between Newburgh, Fife and Abernethy, Perth and Kinross.

A Public Pedestrian Right of Way runs below the dwelling house, Bloomfield. The Right of Way crosses the Perth/ Fife boundary and is now a core path in the Core Paths Plans for both authorities. The dwelling house, Bloomfield is within Fife Council area but this part of the Right of Way is within the Perth and Kinross Council area. The applicants have disputed the status of the route since the 1980's, however, following court action by Fife Council, it was vindicated in Cupar Sheriff Court at Sheriff and Sheriff Principal level, and later upheld in the Court of Session. An Interdict was obtained against the applicants preventing them from "interfering with any member of the public in the lawful use and enjoyment of said right of way or from impeding the same in any way by the erection or placing of any fence, wall or obstruction other than already exists on any part of the right of way". There has also been breach of interdict proceedings.

The proposal is:-

Erection of a fence constituted by:

- a 1.100m high heavy duty palisade type vertical spaced boarding mounted on 3 horizontal cross rails, between vertical square posts of appropriate size (no larger than .075 to .100m) spaced at 1.800 to 2.400m apart (depending on ground conditions) set in concrete;
- on top of the lower section will be .300m high trellis fixed to the top board and/or horizontal runner or spar as appropriate;
- the fence would create an open corridor 1.524 to 1.829m (5 to 6 feet) wide and approximately 80m in length with open access being created at both ends by moving the existing gate at the east end westwards some 1.829m (6 feet).

Assessment

Sections 25 and 37(2) of the Town and Country Planning (Scotland) Act 1997 require that planning decisions be made in accordance with the development plan unless material considerations indicate otherwise. The adopted development plans that are applicable to this area are the TAYplan Strategic Development Plan 2012-2032 and the Perth Area Local Plan 1995 *Incorporating Alterations No1* Housing Land 2000.

The determining issues in this case are whether:-

- The proposal complies with Development Plan policy;
- There are any other material considerations.

There are no issues of strategic relevance raised in this application.

The application, 12/00555/FLL, follows initial discussion between the applicants and access officers from both Fife and Perth and Kinross Councils and the application, as it stands, raises issues in terms of public access. The advice given to the applicant, by the access officers, was not followed.

The proposed development would have an adverse impact on the function of the route and on local amenity and would unreasonably affect public access. I am not convinced that the plans submitted adequately address this or make suitable alternative provision as required by Policy CF2 in the Proposed Local Development Plan January 2012.

Whilst the applicant has ticked the box to indicate that the proposed development will not change public paths, public rights of way or affect any public rights of access, I am of the view that it will.

The proposed fence would be erected on top of the existing right of way. It would have the effect of narrowing down and diverting the Right of Way, with that part which is not included within the newly fenced boundary being subsumed into the garden ground for Bloomfield. I am of the view that the application should have included a change of use (public right of way to private garden ground) as requested 23 May 2012. Separately, if this proposal was granted, an application would be required to secure a diversion order made under Section 208 of the Town and Country Planning (Scotland) Act 1997 in respect of the alterations to the Right of Way/Core Path.

The applicants wish to erect a fence to better delineate the Right of Way and in order to safeguard their own privacy and security in the dwelling house and garden. The desire for improved privacy in what has proved to be a difficult situation is acknowledged, however, if erected in the position proposed, the new fence would have the effect of narrowing down and diverting the Right of Way. Case law strongly suggests that anything which restricts the unobstructed use of a public right of way must be justified. It is not stated why the fence should be erected in its proposed position rather than along the line of the former hedge i.e. along the edge of the existing, vindicated Right of Way and at a higher level. The interdict granted against the applicants prevents impeding the Right of Way including by the erection or placing of a fence other than already exists. It has not been justified why a new fence should be erected along a line that would narrow down the vindicated and historical Right of Way.

As indicated on the plans, the fence would narrow the Right of Way down from c.4-7 metres wide to c.1.5-1.8 metres wide and divert it from its existing route. This would affect the enjoyment of the route particularly as the proposed route has a pronounced cross fall towards the adjacent field. The path has a grass surface which would be subject to additional wear and tear and which would be more difficult to maintain at a reduced width. The Right of Way is a pedestrian right of way. In addition, the route is part of a core path which covers other users. The proposed fence would have a significant adverse affect on other users including bicyclists and horse riders.

Further, the erection of the proposed fence would have a significant detrimental impact on the visual and recreational amenity of people using the Right of Way with the utilisation of a fence more in keeping with suburbia rather than rural Perthshire. This is an elevated site. The proposed fence would be visible both close by and further away, including from the A93 Abernethy to Newburgh Road.

In summary, I object to the planning application as I do not consider that the applicants have fully justified the need for the fence on the proposed line and thus have not justified the diversion and significant narrowing of the vindicated Right of Way/Core Path. Further, I am concerned also about the effects on the route as both

a Right of Way and Core Path and to public access along it for a wide range of users. The design of the fenced is also out of keeping for rural Perthshire.

DEVELOPMENT PLAN

Taking cognisance of the relevant local plan policies, I consider that the proposal contravenes policies within Perth Area Local Plan 1995 *Incorporating Alterations No1* Housing Land 2000 and Proposed Local Development Plan January 2012.

Perth Area Local Plan 1995 *Incorporating Alterations No1* Housing Land 2000

Landward Area/ Background Policies/General Policies

POLICY 1: Developments in the landward area, as shown in Proposals Map A on land which is not identified for a specific policy, proposal or opportunity will generally be restricted to agriculture, forestry or recreational and tourism projects and operational developments including telecommunications development for which a countryside location is essential. Developments will also be judged against the following criteria:-

- > *The site should have a good landscape framework within which the development can be set and, if necessary, screened completely.*
- > *In the case of built development the scale, form, colour and design of development should accord with the existing pattern of building.*

Policy CF2: Public Access

Development proposals that would have an adverse impact upon any (proposed) core path, asserted right of way or other well used route, or that would otherwise unreasonably affect public access rights will be refused, unless those impacts are adequately addressed in the plans and suitable alternative provision is made.

Members will be aware that on the 30 January 2012 the Proposed Plan was Published. The adopted Local Plan will eventually be replaced by the Proposed Local Development Plan. The Council's Development Plan Scheme sets out the timescale and stages leading up to adoption. Currently undergoing a period of representation, the Proposed Local Development Plan may be modified and will be subject to examination prior to adoption. This means that it is not expected that the Council will be in a position to adopt the Local Development Plan before December 2014. It is therefore a material consideration in the determination of this application.

Under the LDP the site is located within the Perth Landward Area.

OTHER POLICIES

The Countryside (Scotland) Act 1967 places a duty on the Council as Planning Authority to "assert, protect and keep open and free from obstruction or encroachment any public right of way which is wholly or partly within their area . . . "

Scottish Planning Policy, 2010 also makes clear that access rights are a material consideration in Planning. The section on Open Space & Physical Activity states at paragraph 150:

"Planning authorities should consider access issues and should protect core and other important routes and access rights when preparing development plans and making decisions on planning applications".

The Town and Country Planning (Scotland) Act 1997 Section 207/8, a planning authority may by order authorise the stopping up of or diversion of any footpath if they are satisfied that it is necessary to do so in order to enable the development to be carried out.

SITE HISTORY - none.

CONSULTATIONS/COMMENTS

Scottish Water	No objections.
Fife Council Access Officer	No objection – supports the principle of a fence.
Transport Planning	No objections.
Perth and Kinross Access Officer	Object.

TARGET DATE: 27 May 2012

REPRESENTATIONS RECEIVED:

Number Received: 20

Summary of issues raised by objectors:

- 1 The proposal narrows the Right of Way;
- 2 The Right of Way dates back to medieval times;
- 3 The Right of Way has been vindicated;
- 4 It is a Fife and Perth and Kinross Council Core Path Plan;
- 5 The applicants removed the old fencing and hedge;
- 6 If new fencing is to be erected it should follow the southern line of the old fencing and hedge;
- 7 If fencing is to be replaced it should be as directed by Sheriff Johnston in her judgement in the breach of interdict case in November 2009;
- 8 The proposed Right of Way will severely impact on access to the route for disabled ramblers in motorised wheelchairs, bicyclists and horse riders;
- 9 If the proposal is granted it would be unlawful;
- 10 If the proposal is granted it would be in the middle of farm access;
- 11 Current interdict stating that the gates should be removed, yet after Fife Council removed the gates the applicants replaced them;
- 12 Land ownership;
- 13 Held in the National Archives of Scotland in the Register of Sasines there is a plan, made on 28 June 1996, which has been accepted and signed by the applicants, accompanying their a non domino application. From the measurements taken by the objector, the dimensions of the Right of Way are 6.2 metres at its eastern end, 11.43 at its western end, 78.4 metres along the southern fence/hedge and 76.5 metres along the northern fence;
- 14 The dimensions of the above Right of Way are necessary to permit use by neighbouring farmers;
- 15 The applicants aggrandise their holding of land;
- 16 By reducing the width of the Right of Way it will aggravate the ground stability;
- 17 Rather than the fence providing a means to demarcate the Right of Way as the applicants suggest rather it will obstruct and divide.

Response to issues raised by objectors:

- 1 Dealt with in the assessment;
- 2 Dealt with in the assessment;
- 3 Dealt with in the assessment;
- 4 Dealt with in the assessment;
- 5 Dealt with in the assessment;
- 6 Dealt with in the assessment;
- 7 Dealt with in the assessment;
- 8 Dealt with in the assessment;
- 9 Not a material planning matter;
- 10 Not a material planning matter;
- 11 Dealt with in the assessment;
- 12 Not a material planning matter;
- 13 Dealt with in the assessment;
- 14 Not a material planning matter;
- 15 Not a material planning matter;
- 16 Dealt with in the assessment;
- 17 Dealt with in the assessment.

Additional Statements Received:

Environment Statement – not required.

Screening Opinion – not required.

Environmental Impact Assessment– not required.

Appropriate Assessment– not required.

Design Statement or Design and Access Statement – not required.

Report on Impact or Potential Impact e.g. Flood Risk Assessment – not required.

Legal Agreement Required:

Summary of terms – not required.

Direction by Scottish Ministers – not required.

Reasons:-

- 1 The proposal is contrary to Policy 1 of the Perth Area Local Plan 1995 *Incorporating Alterations No1* Housing Land 2000 as developments will also be judged against the following criteria:-
 - > *The site should have a good landscape framework within which the development can be set and, if necessary, screened completely*
 - > *In the case of built development the scale, form, colour and design of development should accord with the existing pattern of building*

the proposed fence by reason of its design would be a dominant, overbearing feature on the landscape.

- 2 The proposal is contrary to Policy CF2 of the Proposed Local Development Plan as the development proposal would have an adverse impact upon the route as a Right of Way and as a Core Path as the route would be narrowed significantly and would adversely affect a wide range of users.

Justification

The proposal is not in accordance with the Development Plan and there are no material reasons which justify departing from the Development Plan.

<p>TCP/11/16(217) Planning Application 12/00555/FLL – Erection of a fence at Bloomfield, Newburgh, Cupar, KY14 6EY</p>
--

PLANNING DECISION NOTICE

REPORT OF HANDLING *(included in applicant's submission, see pages 31-34)*

REFERENCE DOCUMENTS

PERTH AND KINROSS COUNCIL

Mr And Mrs Nisbet
Bloomfield
By Newburgh
Cupar
Fife
KY14 6EY

Pullar House
35 Kinnoull Street
PERTH
PH1 5GD

Date 24th August 2012

TOWN AND COUNTRY PLANNING (SCOTLAND) ACT

Application Number: **12/00555/FLL**

I am directed by the Planning Authority under the Town and Country Planning (Scotland) Acts currently in force, to refuse your application registered on 27th March 2012 for permission for **Erection of a fence Bloomfield Newburgh Cupar KY14 6EN** for the reasons undernoted.

Development Quality Manager

Reasons for Refusal

1. The proposal is contrary to Policy 1 of the Perth Area Local Plan 1995 Incorporating Alterations No1 Housing Land 2000 as developments will also be judged against the following criteria:-
 - > The site should have a good landscape framework within which the development can be set and, if necessary, screened completely
 - > In the case of built development the scale, form, colour and design of development should accord with the existing pattern of building

the proposed fence by reason of its design would be a dominant, overbearing feature on the landscape.

2. The proposal is contrary to Policy CF2 of the Proposed Local Development Plan as the development proposal would have an adverse impact upon the route as a Right of Way and as a Core Path as the route would be narrowed significantly and would adversely affect a wide range of users.

Justification

The proposal is not in accordance with the Development Plan and there are no material reasons which justify departing from the Development Plan

Notes

The plans relating to this decision are listed below and are displayed on Perth and Kinross Council's website at www.pkc.gov.uk "Online Planning Applications" page

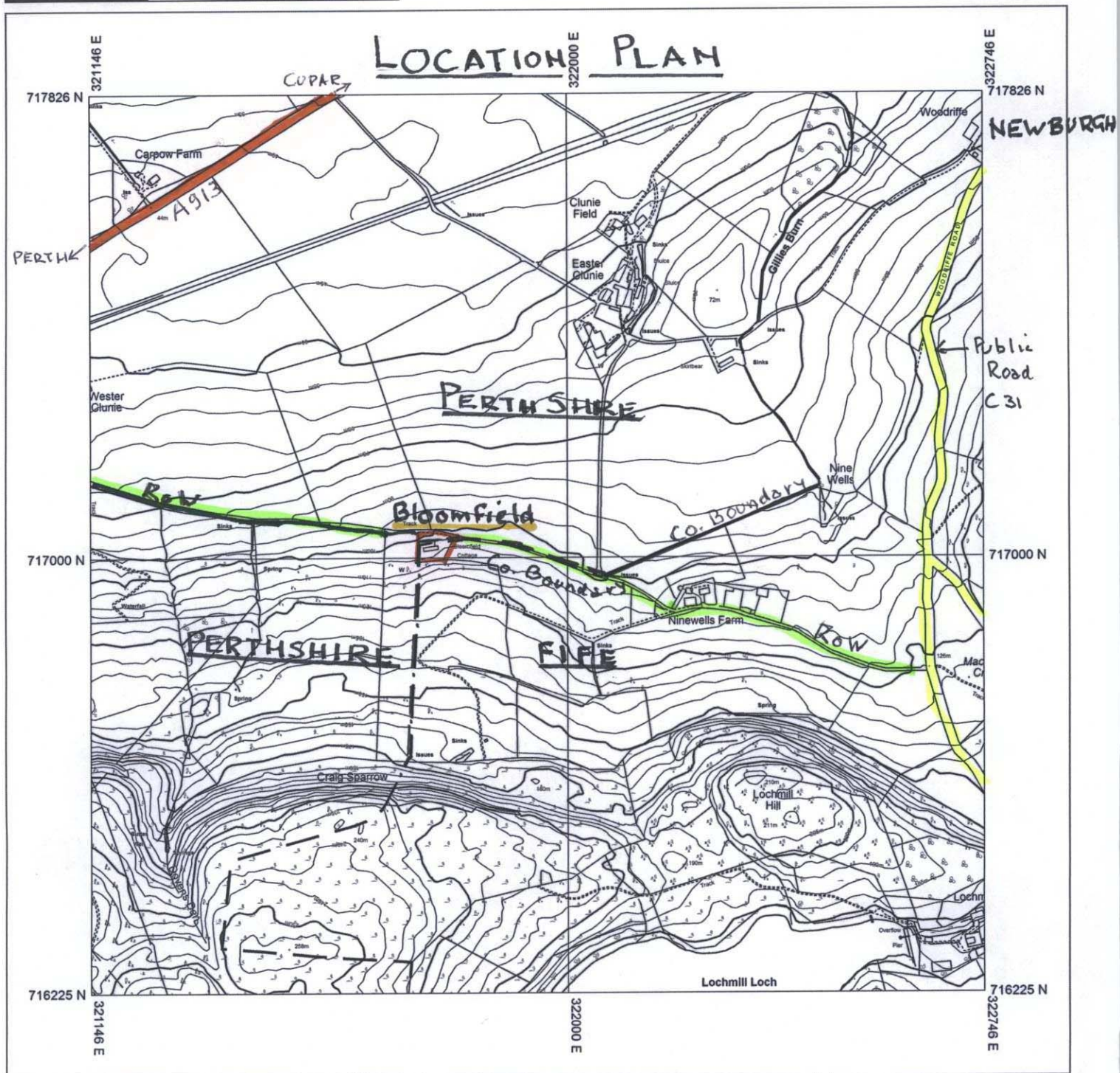
Plan Reference

12/00555/1

12/00555/2

12/00555/3

12/00555/4



PERTH AND KINROSS COUNCIL

DRAWING REF: 12/00555/1

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The representation of features as lines is no evidence of a property boundary.

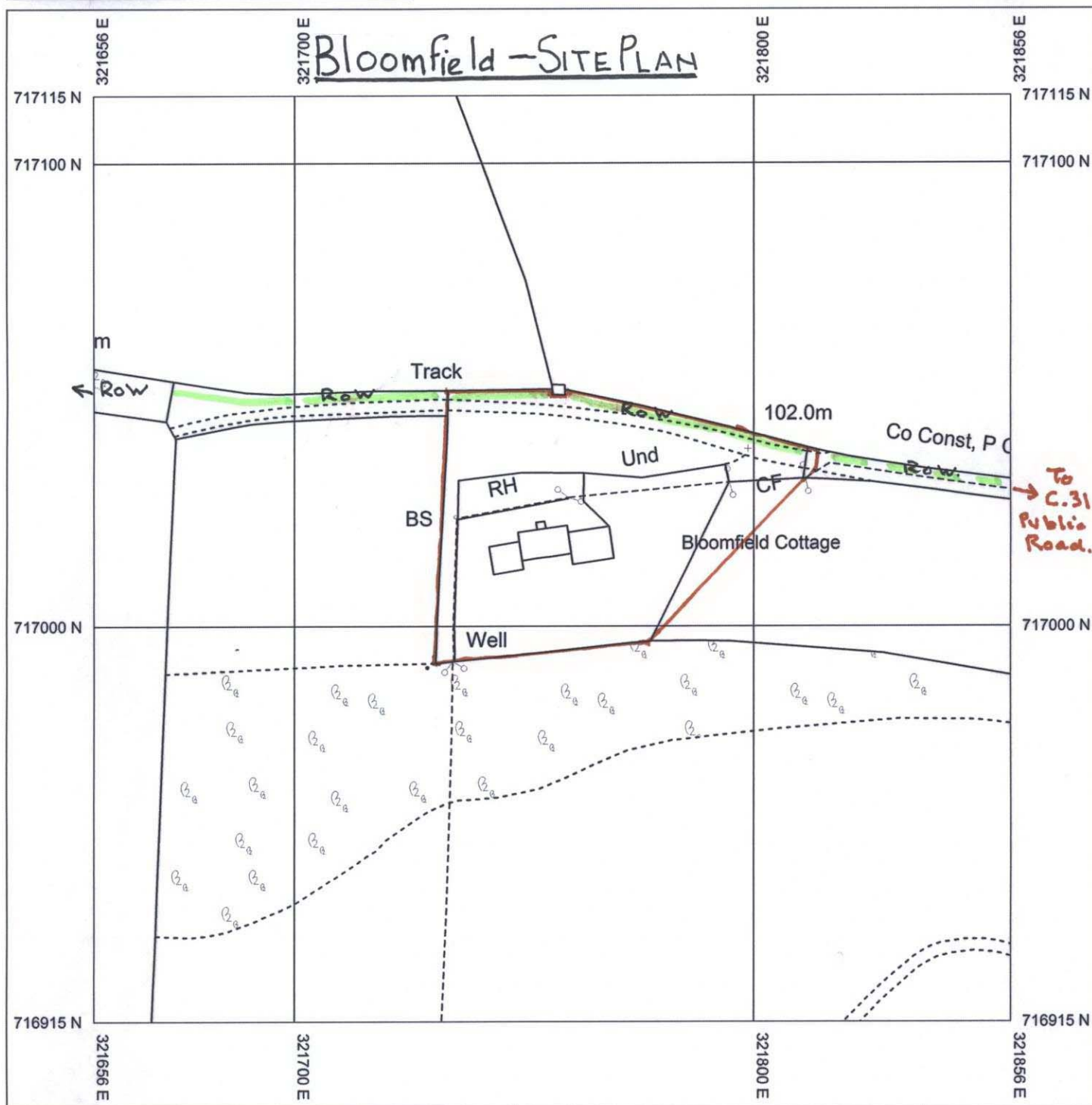


Scale 1:10000

Supplied By: **Danscot Perth**

Serial number: 001032723

Plot Centre Coordinates: 321946, 717025



PERTH AND KINROSS COUNCIL

DRAWING REF: 12/00555/2

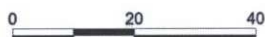
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The representation of a road, track or path is no
evidence of a right of way.

The representation of features as lines is no evidence
of a property boundary.



Scale 1:1250

Supplied By: **Danscot Perth**

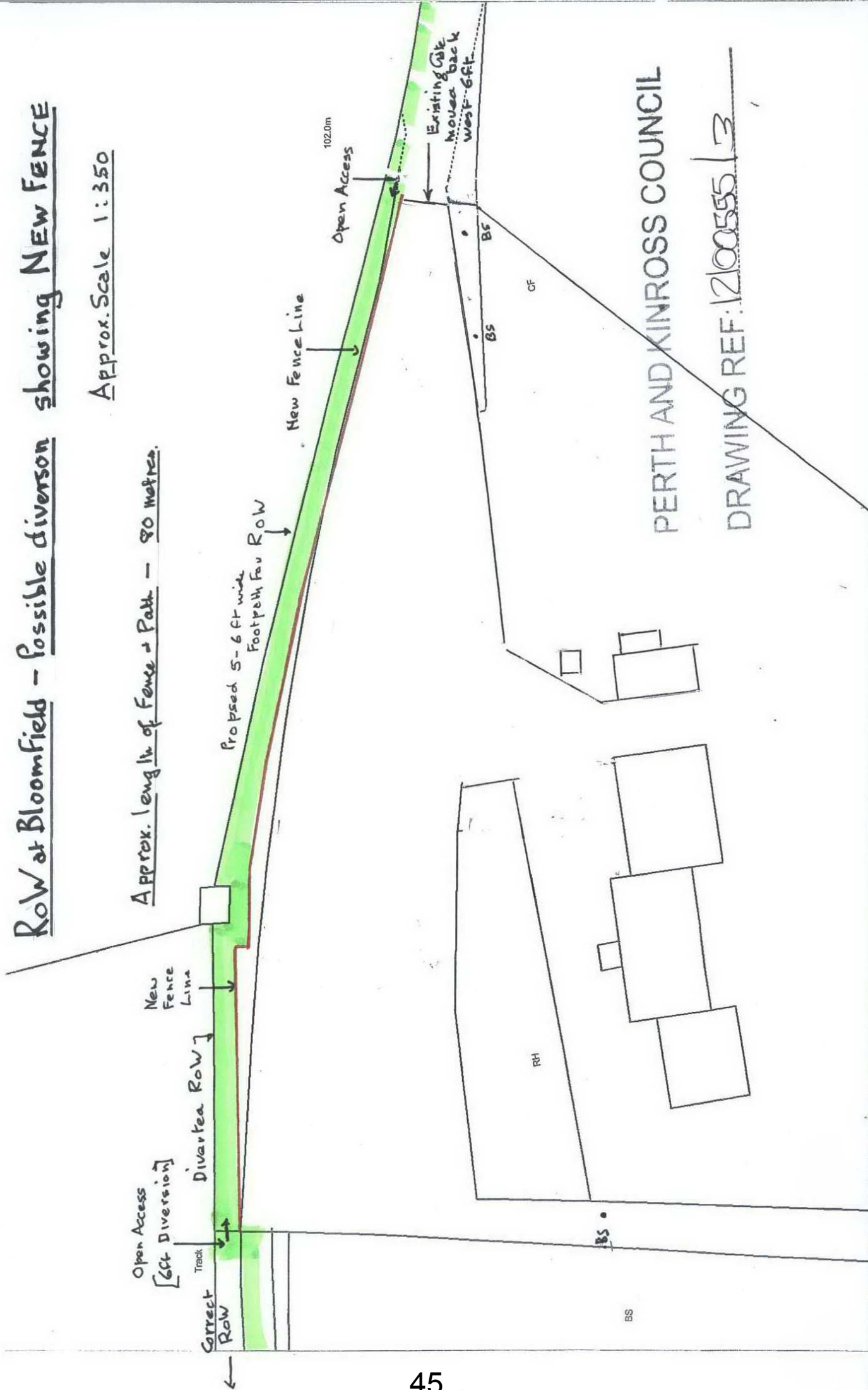
Serial number: 001032721

Plot Centre Coordinates: 321756, 717015

RoW at Bloomfield - possible diversion showing NEW FENCE

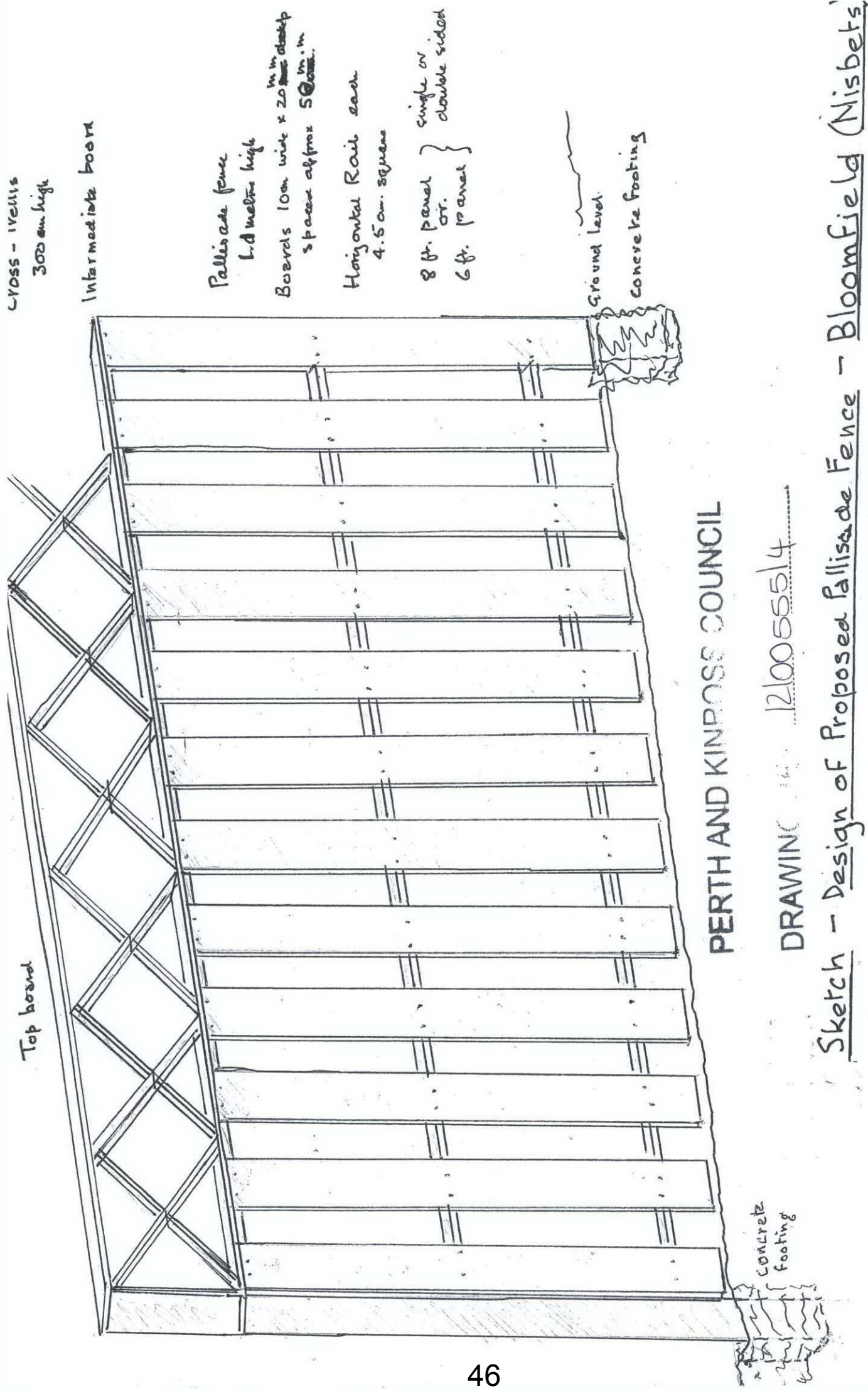
Approx. Scale 1:350

Approx. length of Fence + Path - 80 metres.



PERTH AND KINROSS COUNCIL

DRAWING REF: 1200555 / 3



TCP/11/16(217)**Planning Application 12/00555/FLL – Erection of a fence at
Bloomfield, Newburgh, Cupar, KY14 6EY**

REPRESENTATIONS

- Objection from Mrs G Thomson, dated 4 April 2012
- Objection from 6a High Street, Newburgh, dated 5 April 2012
- Objection from Mr J Aitken, dated 5 April 2012
- Objection from Miss A Spence, dated 5 April 2012
- Objection from Miss C Hobster, dated 5 April 2012
- Objection from Mr P McNeill, dated 5 April 2012
- Objection from Mrs K Low, dated 5 April 2012
- Objection from Mr M Allan, dated 5 April 2012
- Objection from 5 Mason Street, Newburgh, dated 6 April 2012
- Objection from Ms M Smith, dated 6 April 2012
- Objection from Mrs E McCracken, dated 8 April 2012
- Objection from Mrs B Baird, dated 8 April 2012
- Objection from Mrs R Mitchinson, dated 8 April 2012
- Objection from Mr D Kattenhorn, dated 8 April 2012
- Objection from Mr A Valentine, dated 9 April 2012
- Objection from Ms P Ritchie, dated 10 April 2012
- Objection from Mrs A Anderson, dated 15 April 2012
- Objection from Mrs J Brown, dated 17 April 2012
- Representation from Senior Access Officer, Fife Council, dated 27 April 2012
- Representation from Parks Development Manager, dated 29 May 2012
- Objection from Perth & District Ramblers

- Representation from Mr S Valentine, dated 28 November 2012
- Agent's response to representation, dated 20 December 2012

Mrs Gayle Thomson (Objects)

Comment submitted date: Wed 04 Apr 2012

This proposal narrows the right of way of a heritage path.

5th April 2012

ENTERED IN COMPUTER

RECEIVED

10 APR 2012

11 APR 2012

6A High St
Newburgh

Fire

KY14 6AQ

To The Planning Dept.

I wish to object to the application
12/00555/FLL Bloomfield Newburgh

This is a old cart road + right of
way that locals have fought through the
courts to keep clear. It covers a defined
route and width from Gowney Brae to
Macduffs Cross. I believe the applicants
want it for privacy so why did they
take down the fence/hedge off the line
at garden.

Yours sincerely

Mr James Aitken (Objects)

Comment submitted date: Thu 05 Apr 2012

This road does not belong to this house , it is a right of way which dates back to medieval days . Since this couple bought this property they have removed the fence , and incorporated the road into part of their garden , quite easy to see , either side there is an unmade but hard standing track , and they have erected a gate and grassed over the track , old drove road . There has been many disputes on this contention which this couple always lose and I would contend that this application is unlawful

Miss Ashley Spence (Objects)

Comment submitted date: Thu 05 Apr 2012

This fence will restrict access to a Right of Way!

Miss Chris Hobster (Objects)

Comment submitted date: Thu 05 Apr 2012

Objection lodged 4.4.12 but not appeared on the list - con'fd by your office today - hence 2nd input.

I strongly object to the erection of the fence on the proposed line and to the narrowing of the historic, vindicated right of way and heritage path. This is also an approved core path on the P&K and Fife Council Plans. The applicants have continually gone out of their way to make the use of this right of way by all users as awkward as they can. I was the subject of an assault as were other people walking with me. The applicants took down the old fencing and hedge and if any fence is to go back up it should be along that original line as directed by the Sheriff at the last of many court hearings taken to protect this route.

Whilst understanding that a right of way may, in certain circumstances be changed in width or route, this right of way should not be one of them. It has huge historic importance to the local community and to the vast number of walkers of all ages who visit the area to use this particular route. It is signed as a Heritage Path. Gates that were taken down by Fife Council were put back up the applicants showing once again their total disregard for the court ruling. Under no circumstances should they have approval to go ahead with their plan to erect the fence and narrow the route as they propose.

The right of way should not be narrowed as proposed - it is an old cart road and should always retain that image.

Mr Paul McNeill (Objects)

Comment submitted date: Thu 05 Apr 2012

I object on the grounds that this 'fence' impedes upon a recognised Heritage track, narrowing its original width well beyond acceptable limits.

I also believe this is a deliberate attempt by the applicant to intentionally restrict access to the general public which is unacceptable.

Mrs Kathleen Low (Objects)

Comment submitted date: Thu 05 Apr 2012

I strongly object to the site of this fence after 2 lengthy Court Case's over 15 years which over 30 people took part. Where they ruled that the width of this Cart Road should not be changed or have gates put on it. The applicants removed a fence & gate on the original line which blocked their view of this Vindicated Right of Way.

This is also a Heritage Path, Core Path over land I do not believe is owned by the applicant. There is also a field entrance which is used by the people of Newburgh for the Ricing of the Marches over the boundry route.

Mr Morris Allan (Objects)

Comment submitted date: Thu 05 Apr 2012

This fence is taking away approximately 60% of an Ancient Roman Road Right of Way which is protected by Heritage Scotland. There was a long legal battle to confirm this right of way. Removing 60% of the access route would impact greatly on the Right of Way and severely impact on access to the route for disabled walkers. Part of Newburghs heritage is keeping ancient traditions alive for future generations one of those traditions is the "Riding of the Marches". part of the route is along this Right of Way and reducing the size would impact greatly on the whole safety of the march.

I strongly object to this plan.

RECEIVED

11 APR 2012

6-4-2012

5 MASON STREET

NEWBURGH

FIFE KY14 6EA

REF No 12/00.555/FLL

SUBJECT. FN150 BLOOMFIELD.

PLANNING APPLICATION.

FOR PLANNING DEPT.

PERTH & KINROSS COUNCIL.

DEAR SIRS

I STRONGLY OBJECT
TO THIS APPLICATION AS
THIS IS DROVER ROAD & RIGHT OF
WAY ALSO PART OF THE NEWBURGH
RIDEING OF THE MARCHES

YOURS FAITHFULLY

ENTERED

11 APR 2012

Ms Marlyn Smith (Objects)

Comment submitted date: Fri 06 Apr 2012

My strong objection to this application is that to erect the fence on the line proposed would significantly change the nature of access for all users but especially for those less able than others. This is a vindicated right of way and has also been approved as a core path in both Perth and Fife which means that multi use should be easily accessible for all. The application is not unlawful but approval should not be granted to erect any fence that would reduce by a considerable width, the overall width of the right of way and core path. Any fence that is erected should be put on the line of the original fence and hedge that these applicants chose to remove some years ago.

Erection of a fence on the proposed line would change the whole feel of this route which is an old cart road. Has any thought been given to how users, and within that, I include multi users, would actually be able to pass each other if this right of way were narrowed as proposed at this point.

As a regular user of this right of way, having to endure endless problems with gates across the route at Bloomfield, I strongly object to this application.

Mrs Eva McCracken (Objects)

Comment submitted date: Sun 08 Apr 2012

Improved access to the countryside is important to me and my fellow wheelchair users. If the Bloomfield Core Path and Right of Way is to be altered then this must be to improve the access for all and conform to multiuse standards: barrier free with a width min. of 6 feet; surface stable and firm; no camber; no gates.

I believe that moving the fence further north, as requested in this application, would be disadvantageous to those dependent on wheels for mobility. I therefore object to this application

Mrs Barbara Baird (Objects)

Comment submitted date: Sun 08 Apr 2012

Mr Nisbett's proposed fence is situated in the middle of our farm access to our ground and this was established as an unrestricted access for our business through the courts some years ago and agreed by both ourselves and Mr Nisbett. I find it incredulous that the Nisbetts would now apply to fence this area. We as D A Baird and Sons would have no objections to a similar type of fence being erected approximately 20 feet to the south of the proposed fence or on the line of the original fence/hedge which had stood for many years. This would allow them all the privacy they require. We would be happy to meet Mr Beveridge to discuss the matter.

Signed

Gavin S Baird

for D A Baird and Sons

Mrs Rae Mitchinson (Objects)

Comment submitted date: Sun 08 Apr 2012

I strongly object to the application to have the path narrowed, it is a recognised right of way, core path and heritage path. After several court appearances it was agreed that a fence be erected but the width of the path should remain as it is.

Mr David Kattenhorn (Objects)

Comment submitted date: Sun 08 Apr 2012

This application states 'No' on the application to the question 'Are you proposing any changes to public paths, public rights of way or affecting any public rights of access.' Yet there is a vindicated right of way here for a 'road' continuing 'to be a public right of way'. Both PKC and the applicants' plans clearly show the track of this road. The applicants' plan now shows the right of way running for most of its length outwith the boundaries of that track.

I would also note that part of the proposed route is currently a planted border. There is no mention of this being made good, but even if it were made a planning condition it may be worth considering that in 2009 when the applicants were found in breach of a court order ordering them not to obstruct the right of way; reporting of the action noted that 'Sheriff Johnston commented that Mr Nisbet's evidence 'illustrated an ongoing determination to thwart the order of the court''. I am advised by Alison Irvine, Senior Access Officer at Fife Council that there is a current interdict stating that the gates on the route should be removed, yet after the council removed the gates the applicants replaced them. Therefore it may be reasonable to suppose that planning conditions may prove difficult to enforce.

Others have noted that there was a fence and hedge defining the south of the track when the right of way was vindicated and during subsequent appeals. This would have given the necessary privacy and security mentioned in the application. Only after the route was vindicated was this fence removed by the applicants. Now, some years and further court action later, the proposal is to reinstate the fence, but increasing the size of the garden and moving and reducing the width of the right of way. I accept that it is possible to apply to move or even encroach on a right of way but I feel that in this application the character of the right of way is at stake and the justification for the change can be dealt with in a manner which does not impinge on the existing track.

I would therefore object to the siting of the fence as proposed. I would however support an amendment to the application which sited the fence where one historically existed.

Mr Alexander Valentine (Objects)

Comment submitted date: Mon 09 Apr 2012

PLANNING APPLICATION 12/00555/FLL BY RESIDENTS OF BLOOMFIELD BY NEWBURGH

OBJECTION by Mr Alexander C H Valentine

Whilst particularly keen to see the erection of a fence to define the original southern edge of this vindicated right of way, I object in the strongest terms to this application as it stands, on the following grounds.

1. The site plan submitted with the application shows Bloomfield ground as including that over which the right of way runs. This situation, in my view, is not correct as the attempt by the residents of Bloomfield (hereafter referred to as the Nisbets) to obtain ownership of the solum of the right of way (mentioned in the title deeds of Wester Clunie farm owned by Mr Lawrie) using ?a non domino? procedure does not succeed since, according to the terms of a judgement in 2005 by Lord Menzies in another case in the Outer House, no transfer of land resulted - one cannot convey land from oneself to oneself, nor contract with oneself.

2. An examination of the Register of Sasines undertaken during preparations for one of the many court actions involving the activities of the Nisbets revealed that they had accepted and signed as acceptable a plan accompanying their ?a non domino? application. This plan, made on 28th June 1996, is held in the National Archives of Scotland. From notes taken at the time of dimensions shown on the plan, I can confirm that the width of the right of way at its eastern end was 6.2 metres, at its western end (where a field access had also to be accommodated) it was 11.43 metres. The overall length through Bloomfield was given along the southern fence/hedge as 78.4 metres and along the northern fence as 76.5 metres.

I stress that the Nisbets signed the plan as accepting these dimensions. Why are they now seeking to reduce them ?


3. Any fence to be erected, therefore, should be along the line of the southern hedge and fence line which is clearly visible in a number of photographs taken over a period of years and in the possession of ScotWays. The fence should not obstruct the right of way.

4. The above dimensions are those necessary, as I understand matters, to permit the use of the route for agricultural purposes by the neighbouring farmers, an activity whose terms were agreed in a legal document by the various parties many years ago but, I understand, breached by the Nisbets on a number of occasions. Similarly, the perpetual interdict confirmed by the Court of Session has been and, to some extent, remains breached specifically with regard to difficult gates and misleading notices, despite further action before Sheriff Johnson at Cupar in 2009. It would appear possible to return to the Court seeking determination of the correct dimensions, if necessary to confirm those mentioned in (2) above: Sheriff Johnston was not asked to rule on this aspect of the case.

5. Moreover, use of the route as a pedestrian right of way includes a statutory right for use by wheelchair users while the pushing of bicycles is not specifically forbidden by law and both these activities would benefit from retaining the former dimensions.

6. Finally, it is a matter of regret that the record indicates the activities of the Nisbets on what is a vindicated right of way (and not, therefore, subject to further challenge), a Heritage Route and a Core Path have supported the view that their desire has been to stop users from proceeding about their lawful occasions, as indicated in the penultimate paragraph of Sheriff Johnston?s judgement. Additionally, they appear to have been consistent in seeking to aggrandize their holding of land. This current application while legitimate in seeking approval for the erection of a fence also illustrates the latter wish to extend their land by erecting it other than along the agreed southern boundary of the right of way. The application, as it stands, should be refused.

Patricia Ritchie
63 St Michael's Drive
CUPAR, Fife
KY15 5BP



10th April 2012

Development Management
The Environment Service
Perth & Kinross Council
Pullar House
35 Kinnoull Street
PERTH PH1 5GD

Dear Sirs

Planning application **Ref No: 12/00555/FLL**

I write on behalf of St Andrews & North East Fife Ramblers Group to object to the proposal contained in the above Planning Application.

The proposed path is a diversion from the Right of Way (Scotways FN150), which is the track shown on the map running to the south of it which accompanies the application. The path planned is outwith the ancient existing Right of Way which is a route used since at least the 16th century and much earlier in tradition.

At the court case some two years ago and an earlier one some years previously, Fife Council obtained an interdict to prevent the owners from obstructing access, and in the later case two years ago the Sheriff stated that she would prefer the route to be reinstated to the situation before the first case, when there was a hedge to the south of the track dividing it from the garden of the owners. They have since uprooted the hedge and incorporated the track into their garden with new gates at both ends to terminate the track at their garden. Fife Council recently removed the gates. Any fence should be on the south side of the track shown on the map accompanying the planning application, thus separating the Right of Way (the track) from the garden ground.

Yours faithfully

Pat Ritchie
Convenor
St Andrews & North East Fife Ramblers Group

Mrs Alison Anderson (Objects)

Comment submitted date: Sun 15 Apr 2012

I object to this planning application (ref 12/00555/FLL) in my capacity as a keen walker and horse rider.

My grounds for objecting are:

1. I am concerned at the applicants' ambiguity in their statement that the fenced off right-of-way is "proposed 5-6ft wide". In view of Mr and Mrs Nisbet's history regarding this r-o-w (of which I am sure PKC officers are aware), I would suggest this description of the proposed width and the scale shown on the the location/design drawings accompanying the planning application are too vague and could be subject to 'interpretation' by the applicants. This Heritage Path must be safeguarded for the future for walkers, cyclists, horse riders and the disabled.

2. Mr and Mrs Nisbet state: "The actual construction (of the fence) will be determined by the contractor." Surely the planning authority should be the body to determine the construction of this controversial fence.

Mrs Janet Brown (Objects)

Comment submitted date: Tue 17 Apr 2012

I strongly object to this fence being erected and the right of way altered. If these people wanted privacy, why did they take down the original fence? Hereitage and court decisions should be heeded.

From: Alison Irvine
Sent: 27 April 2012 11:46
To: Development Management - Generic Email Account
Subject: Erection of a fence Bloomfield Newburgh Cupar KY14 6EN for Mr And Mrs Nisbet
Ref: 12/00555/FLL

Planning Application Ref: 12/00555/FLL

Firstly, the planning application relates to a section of this public right of way which is entirely in Perth and Kinross area, but Fife Council has had a strong involvement in the legal process to protect and vindicate the right of way and wishes to make a comment on the current planning application. In addition, under section 46 of the Countryside (Scotland) Act 1967 Fife Council has a duty to assert, protect and keep open and free from obstruction or encroachment any public right of way which is wholly or partly within their area, and they may for these purposes institute and defend legal proceedings and generally take such steps as they may deem expedient. This gives Fife Council the remit to take a position on this planning application.

Owners and managers of land on which there is a public right of way are entitled to ask for changes to the path for management reasons provided that the users of the path are not inconvenienced.

The proposal to erect a fence would help to manage public access on the vindicated public right of way, which is also a core path in both Fife's and Perth & Kinross's core paths plan. The separation of non-motorised public use of the path from the garden is to everyone's advantage.

Fife Council supports the principle of a fence to distinguish between the garden ground and the public right of way at Bloomfield. In relation to the issue of exactly where the fence should be erected and the width of path left for the public, the Reporter in Fife Council's core paths plan public local inquiry stated that:

"It would clearly be in the interests of all parties to have the path properly delineated and fenced off from the rest of the garden."It is not for me to judge whether a fence in the position marked on the ground would obstruct the right of way; nor whether the space left would be adequate for a core path, as the land involved lies outwith the area of the Fife core paths plan, but I do think that both councils should closely co-operate to try to bring a degree of resolution to this longstanding issue in discussion with Mr. and Mrs. Nisbet; and that such discussion should take place in a spirit of compromise and flexibility."

The Reporter in the Perth & Kinross Inquiry echoed these sentiments noting "I agree with the Reporter's findings in relation to this route in the Fife Core Paths Plan Inquiry that it would be in the interests of all parties to have the path properly delineated and fenced off from the rest of the garden. The access authority has committed to coordinate the management of the right of

way with Fife Council and to agree measures to secure the objectors' privacy."

Given this guidance from the Reporters it is felt to be in the public interest to draw this matter to a conclusion and that Fife Council therefore supports a fence to allow multi-use of the public right of way and core path, separate from the garden ground.

It is essential that section 208 of the Planning Act should be used in this instance to formally divert the public right of way from the full width of the line indicated by Sheriff Johnston in her judgement in the breach of interdict case in 2009, to a line to the north of the proposed fenceline. Without use of a diversion order the public might still be able to walk in the garden, defeating the aims of the proposed fence.

Alison Irvine
Senior Access Officer - Fife Council
Bankhead House
211 Tantallon Avenue
Pitteuchar
Glenrothes
Fife
KY7 4QA

Memorandum

To	Alasdair Beveridge	From	Andy Clegg Parks Development Manager
Your ref	12/00555/FLL	Our ref	cc40/6 & ABNY/6
Date	29/05/2012	Tel No	01738 475340

The Environment Service

Pullar House, 35 Kinnoull Street, Perth PH1 5GD

Dear Alasdair

Thank you for consulting me on this. The application, 12/00555/FLL follows some initial discussion between the Applicants and Access Officers from both Fife and Perth & Kinross Council and whilst I have some sympathy for what they are trying to achieve, the application, as it stands, raises serious issues in terms of public access.

A Public Pedestrian Right of Way runs through Bloomfield. The status of the route was disputed by the Applicants since the 1980s, but following court action by Fife Council, it was vindicated in Cupar Sheriff Court at Sheriff and Sheriff Principal level, and later upheld in the Court of Session. An Interdict was obtained against the Applicants preventing them from "interfering with any member of the public in the lawful use and enjoyment of said right of way or from impeding the same in any way by the erection or placing of any fence, wall or obstruction other than already exists on any part of the right of way". The Right of Way crosses the Perth ~ Fife boundary and is now a core path in the Core Paths Plan for both authorities. The house, Bloomfield is within Fife Council area but this part of the Right of Way is in Perth and Kinross Council's area.

Whilst the Applicant has ticked the box to indicate that the proposed development will not change public paths, public rights of way or affect any public rights of access, it is clear to me that it will. The proposed fence would be erected on top of the existing right of way. It would have the effect of narrowing down and diverting the Right of Way with the remainder not included within the newly fenced boundary being subsumed into the garden ground for Bloomfield. It is possible that the application should include a change of use (public right of way to garden ground). A diversion order made under s.207/8 of the Town and Country Planning (Scotland) Act 1997 would also be required in respect of the alterations to the Right of Way/Core Path.

I understand that the Applicants wish to erect a fence to better delineate the Right of Way and in order to safeguard their own privacy and security in the house and garden. This is legitimate but it would have the effect of narrowing down and diverting the Right of Way. There is little or no justification for this within the application. Case law strongly suggests that anything which restricts the unobstructed use of a public right of way must be justified. It is not stated why the fence should be erected in its proposed position rather than along the line of the former hedge ie along the edge of the existing, vindicated Right of Way. Why must the Right of Way be diverted and narrowed from its present line? It is also not clear to what extent the proposed fence would address their privacy/security issues.

As indicated on the plans, the fence would narrow the Right of Way down from c.4-7 metres wide to c.1.5-1.8 metres wide and divert it from its existing route. This would affect the enjoyment of the route particularly as the proposed route has a pronounced crossfall towards the adjacent field. The path has a grass surface which would be subject to additional wear and tear and which would be more difficult to maintain at a reduced width.

In Planning terms there are a number of considerations:

The Countryside (Scotland) Act 1967 places a duty on the Council as Planning Authority to “assert, protect and keep open and free from obstruction or encroachment any public right of way which is wholly or partly within their area . . . “

Scottish Planning Policy, 2010 also makes clear that access rights are a material consideration in Planning. The section on Open Space & Physical Activity states at paragraph 150:

“Planning authorities should consider access issues and should protect core and other important routes and access rights when preparing development plans and making decisions on planning applications”.

In a recent appeal case (PPA/250/2103), the Reporter referred to this in the case of a fence encroaching on a Right of Way at Walkerton Cottage, Strathenny Mill, Leslie, Fife. The Council refused planning consent and the Reporter upheld the decision on appeal. It should be noted that that fence was higher and that path was narrower than what is being proposed here.

There is no directly relevant policy in the Perth Area Local Plan which was adopted back in 1995. However, the Proposed Local Development Plan includes the following.

Policy CF2: Public Access

Development proposals that would have an adverse impact upon any (proposed) core path, asserted right of way or other well used route, or that would otherwise unreasonably affect public access rights will be refused, unless those impacts are adequately addressed in the plans and suitable alternative provision is made.

In this case it could be argued that the proposed development will have an adverse impact and unreasonably affect public access. I am not convinced that the plans submitted adequately address this or make suitable alternative provision.

In summary, I wish to object to the planning application as I do not consider that the Applicants have fully justified the need for the fence on the proposed line and thus have not justified the diversion and significant narrowing of the vindicated Right of Way. I remain concerned about the effects on the Right of Way/Core Path and to public access along it.

I also note there are no scale drawings. I am not therefore not clear about the overall width of diverted Right of Way. The height of the proposed fence is also open to doubt. Whilst the fence is said to be 1.4m high, there is also a trellis of 0.3m. It is not clear if the trellis is part of the 1.4m height or in addition to, ie a total of 1.7m.

If consent is to be considered, please contact me as I would wish to discuss conditions to address the overall width of the diverted right of way between fences, the future maintenance of the right of way (there is planting on the proposed diverted Right of Way)

and the need for a diversion order to be made, advertised and confirmed before any works affecting the Right of Way are undertaken.

If consent is to be granted, an informative should also be included advising of the need for a diversion order.

Please contact Dave Stubbs, Access Officer, on Ext 75347 if you wish to discuss matters.

Planning Application 12/00555/FLL

Erection of a fence at Bloomfield, Newburgh

Dear Sirs

Please accept the following observations as an objection by Ramblers Scotland to the above application.

The application form contains the information that no changes are proposed to any public paths or rights of way, yet this is entirely inconsistent with the statement in the applicants' supporting letter which reads "*the application is backed by a requested minor deviation of a public pedestrian right of way*".

It has been clearly established by means of legal proceedings in recent years that it is the track which appears on the site plan that carries the right of way. That has now been obliterated where it is within the garden, the latter having been extended across the site of the track following the removal of the original boundary hedge. Nonetheless, the erection of a fence in the position proposed would have the consequence of obstructing the right of way where it enters and exits the garden.

As far as we are aware, there is no power available to the Council to authorise a deviation or diversion of a right of way merely by virtue of granting planning permission. This would require the publication, following consultation, of an order under the terms of Section 207 of the Town and Country Planning (Scotland) Act 1997, which provide for circumstances in which the Planning Authority is satisfied that this is necessary in order to enable the development to be carried out.

It is, consequently, clear that, although it would be perfectly possible to receive planning permission to build the fence in the position requested, it would remain unlawful to do so because of the resulting obstruction of the right of way. The experience of past events convinces us that the applicants would, if given planning permission, proceed to implement it without having any concern for the obstructions that would result.

We therefore trust that the Council will avoid the likelihood of such an outcome by refusing permission. We would not, of course, object to the erection of a fence on the original, historic, boundary line. Such a step would indeed be welcomed.

I would be grateful if you could acknowledge receipt of this communication and would be pleased to know whether this application will be decided by a Council committee or by officers acting with delegated authority.

Yours faithfully

John Andrews

Footpaths and Access Officer, Perth & District Ramblers

1 Maxtone Court, Luncarty, Perth PH1 3FF



CHX Planning Local Review Body - Generic Email Account

From: Sandy Valentine [REDACTED]
Sent: 28 November 2012 11:13
To: CHX Planning Local Review Body - Generic Email Account
Subject: Planning Application Ref. 12/00555/FLL : Erection of a fence at Bloomfield, Newburgh, Cupar KY14 6EY - Mr and Mrs Nisbet.

FROM : Mr A C H Valentine
 9 Armadale Crescent
 Balbeggie Perth PH2 6EP

FAO : Ms Gillian A Taylor
Clerk to Perth and Kinross Local Review Body
 28 November 2012

Dear Ms Taylor ,
Planning Application Ref. 12/00555/FLL : Erection of a fence at Bloomfield, Newburgh, Cupar KY14 6EY - Mr and Mrs Nisbet.

I refer to your recent communication of 16th November and thank you for the opportunity to comment in relation to this appeal while remaining of the opinion that the application was correctly rejected by the Council and fully supporting the process by which this decision was reached.

It is extremely regrettable that the Nisbets continue to ignore the interdict and that they have compounded the offence by re-erecting gates which had been removed by the local authority in Fife. These actions tend to reinforce the impression that the Nisbets will continue to do whatever they wish to do irrespective of any legal decisions to the contrary and it would appear necessary for effective action to be taken by the local authorities and/or the Courts to achieve a resolution of this long-running problem.

I have studied the documents provided online and note that the Nisbets continue to interpret decisions and statements in a way contrary to those of experts while not hesitating to malign those whose decisions do not support the Nisbets' interpretation of events e.g. "Sheriff Johnstone (sic) based her opinion on local gossip". As I have now been retired for over 4 years and a number of meetings have taken place involving discussions at which neither I nor, to the best of my knowledge, any representative of The Scottish Rights of Way and Access Society (recognised by the Courts from the time of the 1847 Glen Tilt case as having a right to represent the public interest) has been privy, it is perhaps more appropriate that I take advantage of this opportunity to "cut to the quick" without detailed comment on all the documents, although I could do so, particularly with regard to the Nisbets' "Comment on Summary of Issues" where a number of questionable statements are made.

They removed a demarcating fence and hedge with a view to aggrandising their garden but, more recently, have regretted the loss of privacy arising from their earlier action. What is required, in my view, is the clear demarcation of the width of the original right of way, already accepted on a plan signed as correct by the Nisbets, despite their denial at note 13. This to be achieved by the erection of a suitable, aesthetically acceptable fence or wall along the southern edge of the right of way/northern edge of their genuine garden for the distance throughout the length of their property, effectively along the line of the boundary fence/hedge/wall removed by them in their attempts to extend their garden over the right of way. If they desire further screening, this can be achieved by suitable planting within their true garden - mature garden stock is available and can be acquired.

Such a clear boundary marker should be constructed and charged to the Nisbets, since they unilaterally removed the original. This would be welcomed, public comment has encouraged me to believe, by all users of the public right of way since users prefer to enjoy their walks and not be subject to intimidation in any form, a fact which Sheriff Breslin explicitly indicated by the choice of words used in his interdict. I note the Nisbets are opposed (their comment 6) to the re-creation of a boundary fence along the original line as “this would take up even more of our garden”. This definition of “our garden” appears to arise from their use of the procedure used by them to aggrandise their site using the a non domino process which they claim is legal but on which Lord Menzies has expressed contrary views: views which, to the best of my knowledge, have not been challenged.

Yours sincerely

Alexander C H Valentine

20th December 2012

Perth and Kinross Local Review Body
Perth and Kinross Council
2 High Street
PERTH
PH1 5PH

legacy
land ltd

Property Developers &
Development Consultants

Dear Sir

Local Review. Reference: 12/000555/FLL Erection of fence at Bloomfield. Newburgh, Cupar, KY14 6EY - Mr and Mrs R. Nisbet

I refer to your letter of 10th December enclosing the representation by Mr Valentine and following further consideration by my client, I now respond on their behalf as follows.

Before considering the detail it is important to establish that the planning application under review relates to the erection of a timber fence which will provide a more secure boundary to private property and define much more clearly an existing right of way. Any previous legal dispute relative to the right of way is not a material consideration in considering the planning application, particularly as the proposal will reinforce the status of the footpath.

Regarding the first point made by Mr Valentine, my clients are well aware of the interdict and the proposed development is a means of ensuring it is not compromised.

The application addresses the issue of the gate and will ensure that a clearly defined and uninterrupted footpath will exist in perpetuity, along the northern boundary of Bloomfield. The reference to previous legal issues is not a material consideration.

My clients are in agreement with Mr Valentine relative to paragraph 4 of his representation. The width of the right of way has never been clearly defined and on occasions appears to have been confused with a right of access which exists relative to Bloomfield. The proposed line of the fence will serve the dual purpose of clearly defining the right of way and securing the northern boundary of Bloomfield.

Finally, my clients propose to erect the new fence and relocate the gate at their own expense. The proposal for which planning permission is sought improves accessibility and security and will ensure the proper use and protection of the right of way.

Yours sincerely,



Ian S McCully BSc(Hons) MRICS MRTPI

