

Examples of Good Practice: Case Studies

Case Study 1:

Loch Leven Phosphate Protocol with Scottish Natural Heritage (SNH) and Scottish Environment Protection Agency (SEPA) and Associated Breach of Legal Agreement

Context and Protocol

- 1.1 Loch Leven is the largest naturally nutrient-rich freshwater loch in lowland Scotland and is internationally important for its wintering and breeding wildfowl. Over the last 150 years, Loch Leven has been degraded by the addition of nutrients such as phosphorus and nitrogen entering the loch from manmade sources. This has caused problems with water quality and resulted in a negative impact on the conservation, economic, recreational and social interests of the loch and local area. Extensive media attention covered the nutrient problem in June 1992 as Loch Leven was visibly blighted by a serious algal bloom resulting in the temporary closure of the fishery. The event, known locally as 'Scum Saturday', was estimated to have cost the local community more than £1M in lost revenue and led to questions in parliament.
- 1.2 The use of the planning system to improve the ecological recovery of the Loch stems back to the 1999 Loch Leven Catchment Management Plan (CPM). The CPM included recommendations associated with built development that were then translated, through the planning process, into the 2004 Kinross Area Local Plan. This required developments with a new private waste water discharge within the loch catchment to contribute, through mitigation, to a 125% net reduction in the amount of phosphorus entering the loch. Since 2004, this mitigation was secured by a planning obligation/legal agreement.
- 1.3 While the use of legal agreements discharged the competent authority's duty under the Habitats Directive to avoid "the deterioration of natural habitats and the habitats of species" associated with the loch, it resulted in the preparation of expensive and time consuming planning obligations.
- 1.4 A revised planning procedure was appraised and agreed with Scottish Natural Heritage (SNH) and Scottish Environment Protection Agency (SEPA) at liaison meetings and came into effect in August 2013. This liaison meeting platform allowed the use of planning conditions to deliver phosphorus mitigation to be explored rather than using legal agreements. This allows applications to be assessed faster and enables the decision notice to be released without the burden and expense of securing phosphorus mitigation via legal agreements. This reduces risk in the development process and allows development on site to proceed quickly.

- 1.5 The improved procedure associated with Loch Leven Phosphorus Mitigation Procedures has previously been recognised at the Scottish Planning Awards and the National Planning Awards. However, the main outcome is to ensure the recovery of the loch.
- 1.6 The Centre for Ecology & Hydrology (CEH), who has led the Loch Leven monitoring programme for 25 years, has confirmed:

"The enormous improvements in water quality at Loch Leven over the last 25 years have provided a better habitat for wildlife and increased its amenity value. The loch is now a world leading example of the benefits to nature and communities of using scientific evidence to inform restoration and management decisions.

With tangible improvements to the loch, SNH and partners (including PKC) submitted the project to the Natura 2000 awards. While the Loch Leven project didn't win, to be short-listed from 75 entries to the final 25 entries, and invited to attend the Awards ceremony in Brussels, was a major achievement in itself.

The need to ensure not only the signing up to legal agreements but their subsequent implementation is essential if the planning system is to secure the benefits of the agreed Procedures. This has, on occasion, resulted in enforcement interest. One such case is illustrated here."

Associated Breach of Legal Agreement

- 1.7 In August 2016, our Development Monitoring Officer was contacted by SEPA relating to a private wastewater treatment facility serving 14 properties that had frequently failed to meet consented limits licenced under CAR since installation in 2002. Once obtaining sufficient evidence through Planning history, Building Standards, and CAR Licence, an enforcement case was opened in February 2017.
- 1.8 The affected residents were notified of our concerns and that a legal agreement secured under section 75 of the Town & Country Planning (Scotland) Act 1997 as amended was in place and had undertaken to provide a bond of £50,000 to maintain a private Wastewater Treatment Plant (WwTP) until such time as it was adopted by the Water Authority. At the time East of Scotland Water Authority was in transition to Scottish Water. The policy on adoption of private systems by the statutory undertaker was changed at this time and the Water Authority was no longer adopting private systems and as such the bond had never been returned to the developer and was still in place. A Residents Association (RA) was formed to liaise with the planning authority/ SEPA and deal with the breach of Section 75 obligations.

- 1.9 The Council, as planning authority, instructed the Legal Services to retrieve the bond to facilitate replacement WwTP and deliver the required planning and licence mitigation for the development. Between the development being completed and our pending enforcement action, the developer had passed away. Holders of the bond, Lloyds Banking Group, were at first reluctant to release the bond but through persistent contact the bond was released in April 2017.
- 1.10 The Council obtained three quotes to remove the failing WwTP, replace with new and reinstate the affected resident's garden ground in line with PKC procurement processes. As all quotes exceeded the value of the bond the RA was given voice on the acceptable quote as the residual costs would be shared between the affected properties. A quote of £53,500 was accepted, the contractor appointed and a date agreed for the works to be carried out. In January 2018, the final payment was made to the contractor exhausting the bond and discharging the obligation under section 75 of the act.
- 1.11 Without the need for any formal enforcement proceedings we, through negotiation and determination, secured the release of a bond, secured under section 75, on a 15 year old development, which had almost exclusively failed to meet its requirement under CAR since implementation. The WwTP has exceeded compliance requirements since remedy in January 2018 and the RA is now the licence holder under CAR and has taken full responsibility for their WwTP.

Case Study 2:

Proportionality within Enforcement – Rumbling Bridge, Kinross (July 2017-March 2018)

- 2.1 In July 2017, concerns were raised with the planning enforcement team that a holiday chalet at a chalet and caravan site was being rebuilt without planning permission. Our task was to investigate an alleged breach of planning control and to take appropriate action in the public interest, taking into account any planning harm and the Enforcement Charter.
- 2.2 An initial search of our records showed that there was no planning history and no building warrants for the site. An enforcement officer visited the site and noted that a new chalet was being erected at the site. He also noted that the site appeared to be a well-established recreational/holiday site, with a range of huts, chalets and caravans of various ages. Many of the huts and chalets had been altered and extended over time. The landowners believed that the site had been used as a recreational hutting site for a lengthy period, and the initial tenants had been soldiers returning from the Second World War.
- 2.3 The enforcement officer visited the site for a second time, accompanied by an environmental health officer, who was assessing whether a caravan site licence was required for the site. These officers were concerned about the possible lack of fire safety measures at the site and passed these concerns to the Scottish Fire and Rescue Service.

- 2.4 Some of the tenants became aware of the enforcement investigations and became concerned that they may have had to stop using the site or remove their chalets and caravans. The Council concluded that no further enforcement action would be taken on anything that currently existed at the site (including the new chalet), given that the site was well-established, was not causing significant planning harm and no complaints had previously been raised about the site. The Council wrote to all of the tenants to advise them of this position, whilst also highlighting that any future works may require planning permission.
- 2.5 The person who raised the initial concerns was unhappy with the Council's decision and submitted a formal complaint to the Council. When Council did not uphold the complaint, the complainant contacted the Scottish Public Services Ombudsman (SPSO). In March 2018, following a review of the Council's information about the case, the SPSO decided not to take the complaint further, and highlighted that "*enforcement powers are discretionary*" and "*the council appear to have acted within their discretion.*"
- 2.6 The Council used its discretionary power not to take further action and consider that this was proportionate in the circumstances described above. We took into account the historic use of the site and the desire of the tenants to keep using the site for their occasional recreational use.
- 2.7 The enforcement officer ensured Environmental Health & Building Standards officers were aware of the concerns, and forwarded concerns to the Scottish Fire and Rescue Service. The Council was pleased to note that the SPSO supported their decision.

Case Study 3:

Proportionality within Enforcement – Springfield Road/Whinfield Drive, Kinross (July 2011-June 2017)

- 3.1 In 2015, a planning application was submitted for the change of use of landscaped open space to garden ground and the erection of a fence. The area of open space provided a pleasant entrance to a residential street. Fifteen letters of objection were received, including one from Kinross Community Council. The application was refused, and the Local Review Body (LRB) later dismissed the review and upheld the refusal.
- 3.2 In July 2016, concerns were raised with Councillors and an enforcement officer that a fence was being erected around the open space, contrary to the refusal of the application. The complainant raised concerns about the loss of the area of greenspace, and said that the area had been a pleasant well-tended area and he would be annoyed if it was allowed to fall into disrepair.

- 3.3 The Council were of the opinion that the erection of the fence facilitated an unauthorised change of use of the land from landscaped open space to enclosed private garden ground. The Council tried to negotiate a resolution with the landowner; however, he refused to remove the fence or restore the open space voluntarily. In October 2016, the Council served an enforcement notice that required the fence to be removed and the unauthorised change of use of the land to cease. The notice also prevented any form of boundary, including a hedge, being erected around the land in the future.
- 3.4 The owner appealed the notice to the Planning and Environmental Appeals Division of the Scottish Government. During the appeal, a member of the public highlighted the concerns of the local community about the loss of greenspace to the DPEA. The Reporter upheld the requirements of the enforcement notice.
- 3.5 The landowner failed to comply with the enforcement notice within the required timescales. In May 2017, the Council served a Fixed Penalty Notice (FPN). In June 2017, the fence was removed and the open space was restored, to the benefit of the local community and the appearance of the street.
- 3.6 A range of enforcement measures (including informal negotiation and formal notices) resulted in the restoration in an area of open space, to the benefit of the local community.
- 3.7 Policies RD1 and PM1A of the Perth and Kinross Local Development Plan 2014 seek to retain small areas of public open space where they are of amenity value in order to preserve existing residential amenity and to respect the character and amenity of the place. The unauthorised change of use reduced the welcoming feeling of the street scene, diminished the established identity of the area and reduced the quality of life for visitors and surrounding residents, all of which are contrary to Planning Advice Note 77, Scottish Planning policy 2014, Designing Places, Designing Streets and Creating Places. The enforcement action upheld the provisions of these documents.

Case Study 4: High Hedges (Scotland) Act 2013

- 4.1 The [High Hedges \(Scotland\) Act 2013](#) came into force on 1 April 2014 and to date Perth & Kinross Council have received 23 High Hedge Notice applications and, like most councils, decided to utilise staff within the local planning authority to process the applications.
- 4.2 Two planning enforcement officers currently deal with high hedge enquiries and the processing of applications, and they have found, like most Scottish authorities, aspects of the legislation lacking clarity and ambiguous, but have been committed to assessing applications received consistently within the local authority area.

- 4.3 The Local Government and Communities Committee undertook a review of the legislation, and as part of this review, Scottish authorities were consulted. As a consequence of their submissions, an officer from Perth and Kinross Council was invited to attend the Scottish Parliament to give evidence, and did so on 10 May 2017. The Council considers that in contributing to the review it played a part in influencing improvements to the legislation, for the benefit of Scottish local authorities. The Scottish Government published their response on 26 October 2017, highlighting seven recommendations.
- 4.4 Following on from the review and the Government's response, a consultation has been issued by the Scottish Government to all authorities in respect of the post scrutiny process. It is hoped that all authorities will take the opportunity to feed into this process with a view to shaping future legislation for high hedges which will hopefully result in a more consistent approach, with additional clarity for all and perhaps more effective powers.