

CAIRNGORMS NATIONAL PARK AUTHORITY

**Title: REPORT ON BOUNDARY FENCING AT THE
HIGHBURNSIDE DEVELOPMENT, AVIEMORE**

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PURPOSE

This report is to inform Members of the background of the issue surrounding the boundary treatments at the Tulloch Homes development at Highburnside, Aviemore and recommend the way forward in terms of existing enforcement issues and future boundary treatments at this site.

BACKGROUND

1. The Highland Council granted outline planning permission (03/00322/OUTBS) in June 2004. Following the application 05/177/CP and granting approval of reserved matters by CNPA in February 2006, a further application for granting of reserved matters (07/024/CP) was determined by CNPA in July 2007. The site was sold by Aviemore Highland Development soon after this determination to Tulloch Homes Ltd.
2. Condition 9 of the Decision Notice of the 07/024/CP application was as follows:

Front garden areas shall be maintained in an open plan format in perpetuity. Prior to the commencement of development details of all boundary treatments on the side and rear boundaries of individual plots shall be submitted for the agreement of the Cairngorms National Park Authority acting as Planning Authority.

Reason: In the interests of orderly development and visual amenity.
3. The CNPA planning case officer subsequently agreed with Tulloch Homes Ltd that the outside boundary treatment would be a 900mm post, wire and mesh fence. The internal boundary fencing between the houses would be an 800mm high timber fence made up of two horizontal bars spaced accordingly.
4. It was agreed that there was to be no fencing forward of the front elevation of the houses and the front garden area was to be kept as an open format. A plan showing the layout of the plots is attached as Appendix I- more detailed plans will be in the presentation at the Planning Committee.
5. A request from Tulloch Homes Ltd in January 2010 seeking permission for a laurel hedge along the North and East side of Plot 69 (first phase) was granted. Tulloch

Homes Ltd had made the resident aware of the condition and the hedge was for privacy because of an adjacent footpath.

6. A further request came in from Tulloch Homes Ltd in June 2011 for a 1.8m high timber fence to be erected around Plot 25 on the South and East side of the plot facing the A9 and also adjacent to a proposed footpath. This fence was to be temporary until a hedge could grow up and provide privacy for the house owner. This request was refused by the CNPA case officer as it would be inconsistent with the agreed treatment. However an offer was made that the CNPA could provide advice on appropriate boundary landscaping to prospective purchasers in providing further privacy.
7. The Householder Permitted Development Rights (HPDR) were not withdrawn by condition at the time of the determination of the applications – 05/177/CP and 07/024/CP.
8. Following protracted negotiations between Tulloch Homes Ltd and the CNPA, an application was submitted this year – 2013/0150/DET. This application was determined and granted approval on 19th July 2013 by the CNPA Planning Committee and was for 1.8m high timber fencing along the East and South boundaries of Plots 11-15.

MONITORING & ENFORCEMENT

9. Following a complaint from a Board Member about the erection of timber fencing which could be seen from the A9, the Monitoring & Enforcement Officer (MEO) visited the site in September 2012 – Plots 25 and 26 - and was told by the fence contractor that the fence was temporary and had been erected for health and safety reasons because of the proximity of a footpath.
10. The CNPA case officer was on site November 2012 and took photos of further fencing and the MEO visited the site in December 2012 and spoke to the owners of Plot 4, 25 and 26 - one will note that this was the plot that Tulloch Homes Ltd had previously sought a wooden fence and was refused by the case officer. The MEO also spoke to the Tulloch Homes Ltd site manager.
11. Two of the householders had contacted the Highland Council planning office at Kingussie and been advised that under HPDR they were able to erect a fence to a maximum height of 2m. Unfortunately, no check was made on the conditions of the planning permission.
12. The owner of Plot 4 said that Tulloch Homes Ltd sales staff had offered monies towards the erection of the 1.8m high wooden fence when he was buying his house and the site manager had introduced him to the fencing contractor. The MEO has subsequently discovered that this owner's fencing is not actually unauthorised and comes under HPDR because of his boundary ownership.
13. The owners said that Tulloch Homes Ltd had erected the approved fencing on Plot 25 but **not** on Plots 26 and 4 before the householders erected wooden fencing.

14. Following a meeting with Tulloch Homes in December 2012, an email outlining the CNPA's concerns was sent to Tulloch Homes Ltd. This correspondence pointed out that in Phase 2, there were at least 7 houses that had now got some unauthorised 1.8m high wooden fencing. It was also noted that 900mm high timber fencing had been erected down to the pavement at the front of a number of houses but not enclosing the garden along the pavement and that the show house in Phase 2 had 900mm timber fencing enclosing the front garden.
15. Following this email, Tulloch Homes Ltd responded by saying that they would include information in the reservation pack from the sales staff about the condition in the planning permission and the need to consult with the CNPA about any changes regarding fencing or decking and the show house fencing was temporary.
16. The MEO visited the site in January 2013 and took a number of photographs of Phase 1 and 2 and some of Phase 3 and these will be shown at the meeting. These will show a number of further breaches of the condition throughout the development with wooden fencing of varying heights but with a high degree of uniformity of materials used.
17. The MEO delivered a letter to a number of householders outlining the need to discuss the unauthorised fencing issues and meetings were held with 3 further owners.
18. Some of the householders were prepared to apply for a retrospective planning application to the CNPA, but others were adamant that it should be the responsibility of Tulloch Homes Ltd to make an application.
19. The householder at Plot 14 with particular circumstances made a planning application for a 1.8m high fence, but as that was one of the houses within Tulloch Homes Ltd's application, the application was withdrawn. This plot also has an adjacent footpath running along the side of it.
20. Between January and April 2013, the MEO and the CNPA case officer negotiated with Tulloch Homes Ltd on a way forward on newly built houses. Tulloch Homes Ltd agreed to make an application for 1.8m timber fencing around 5 properties – Plots 11-15 in Phase 3 and they also agreed to further new landscaping to ameliorate the unauthorised fencing as seen from the A9.
21. Following the July planning meeting, the MEO has met with the owner of Plot 18 who has requested advice about a higher fence than the 900mm post and wire fence at the rear of her property facing the woodland. The issue of the rear garden fences along the woodland is discussed later in the paper.

PLANNING ISSUES

22. There are a number of factors which underpin the planning issues regarding the fencing at Highburnside and the way forward in relation to possible enforcement action of the planning condition.
- The Householder Permitted Development Rights were not removed by condition at the determination of either application - 05/177/CP or 07/024/CP.
 - The recent approval of the application for timber fencing at Plots 11-15.
 - There are approximately 22 sites at Highburnside with varying degrees of unauthorised fencing.
 - A clearly desired need for safe containment of pets and children and maintaining privacy in the rear gardens by the current residents and future new house owners.
 - The need to maintain a degree of continuity in design of the fencing.
 - The likelihood of successful enforcement action against the breaches of Condition 9.

KEY QUESTIONS:

- 23.
- Is the Committee content with the timber fencing template throughout the development as approved in July for Plots 11-15?
 - Would the timber fence approach be appropriate for the rear gardens that face onto the woodland?
 - How does the CNPA try to ensure that a consistent approach is taken forward throughout the development?
 - How does the CNPA encourage Tulloch Homes Ltd to advise and implement a consistent approach to fencing?
 - Should the CNPA pursue enforcement action against the present residents for the current breaches of the planning permission relating to application 07/024/CP?

APPRAISAL:

24. The appraisal, discussion and determination of the recent application for timber fencing at Plots 11-15 was predicated on a number of important factors.
25. The HPDR, that are available to the house-holders, permits them to erect any fence without any prior permission up to 2m high within the rear and usually side curtilage of their house. (Class 3E of the T&C Planning (General Permitted Development) (Scotland) Amendment Order 2011). They are also permitted under Class 3A of the Order to erect garden buildings covering up to 50% of their rear and (usually) side garden area to stated maximum heights and with no restrictions on design, materials or colours.

26. The impact of the original condition and the approval of a 900mm post and wire boundary treatment has not satisfied the house owners' desire for security and privacy in their rear gardens and consequently 1.8m high timber fencing has been erected in most cases. The assessment of the situation in the recent planning paper made a clear case for recommending that this type of fence is able to accommodate the desires of the home owners and bring a consistency to the design and appearance of the fencing on the site. It is further accepted that additional landscaping to ameliorate the appearance of the bare wood fencing was also necessary.
27. Ideally, the CNPA would like to maintain this type of fencing as approved on Plots 11-15 but no conditions can be retrospectively placed on the development. Therefore the CNPA needs to encourage Tulloch Homes Ltd to agree to dispensing guidance as to what the preferred design of fencing would be and this is already being partly addressed by making potential purchasers aware through reservation packs. Currently, that pack advises the purchasers to contact the CNPA prior to commencing any further fencing beyond the post and wire treatment. There is an opportunity for Tulloch Homes Ltd at the outset of purchasing interest to be clear what the preferred design of fencing would be on the development.
28. Tulloch Homes Ltd have started the construction of the drainage and formation of the kick-pitch running parallel to the A9. Top soil has been mounded on the A9 side of the pitch forming a protection to the pitch but also providing a natural screen which covers about 70% of the stretch of the A9 where there are no trees and discreetly negates the ability to see the unauthorised fencing whilst still seeing most of the houses. There has been considerable planting and replanting between this mounding and the A9 which is now growing vigourously and will form further screening of the Highburnside development.
29. There is the issue of the post and wire fencing that surrounds the outer boundary of the development along the woodland on the North and West boundaries of Phase 2 and 3 and the West and South boundaries of Phase 4. The 900mm post and wire boundary is intact along these parts of Phase 2 and 3 and has not, as yet, been changed by further fencing.
30. A house owner at Plot 16 in Phase 3 has two huskies and wishes to keep them in the back garden rather than in a confined kennel and she is seeking to higher the rear fence. The MEO has suggested that whilst she has HPDR to do what she wishes, he has suggested 900mm wire stock fence on top of the post and wire fence which will allow the woodland to be seen 'through' the wire and not create a solid barrier but still confine the dogs. The owner is happy to proceed with this suggestion.
31. Does the Committee find this suggestion acceptable for the CNPA to advise future house owners who may wish to do the same? This is pertinent because Phase 4 has only just commenced and Tulloch Homes Ltd have said that they are not prepared to make an application to erect any 1.8m timber fencing on that part of the development. There will be few concerns about privacy and overlooking at the rear of properties where they back onto woodland and the proposal for heightening with a wire fence could be acceptable if that was the guidance from the CNPA and Tulloch Homes Ltd. There may be issues of privacy on Plots 32, 33, 42 and 43 from

the side of the rear gardens as the footpath to the woods goes between these four plots and holly and beech hedging is approved on these boundaries.

32. The question surrounding the pursuit of enforcement action against a considerable number of residents who have unwittingly breached a condition of the planning permission is a difficult one.
33. The general approach to enforcement, as per the Scottish Government Circular 10/2009 Planning Enforcement, says that the CNPA as the relevant planning authority has a general discretion to take enforcement action against any breach of planning control if they consider such action would be expedient having regard to the development plan and any other material considerations.
34. Whilst breaches of planning should be taken seriously and a planning authority should be seen to be taking necessary enforcement action, it should be borne in mind that there needs to be a satisfactory, lasting and cost-effective remedy to a breach. There appears to be good justification for not pursuing enforcement action because of the HPDR legislation which permits these fences if the fence is moved a few millimetres off the boundary into the house garden. There has also been a consistency of materials used throughout the development albeit of differing heights and the intervention of the MEO has managed to contain further fencing until this issue is resolved.
35. If the CNPA were to issue Enforcement Notices, the house owner would have a right of appeal against an Enforcement Notice and recent experience demonstrates that the appeal is likely to be successful because of the HPDR which the householders enjoy at this site. The recent experience is a decision by a DPEA Reporter, in an appeal against a CNPA Enforcement Notice on another site, taking the view that PDR legislation cannot be overruled by a planning condition. All of the residents at Highburnside have HPDR to erect any fencing that they like up to a height of 2m within their rear and side property and not forward of the front elevation where facing a road, when the fence must not be higher than 1m.
36. Taking all these points into account, the CNPA can justify a decision not to pursue enforcement action against existing breaches of a condition of planning permission at Highburnside because it would not be in the public interest to do so.
37. Finally, the experience gained from the Highburnside development demonstrates the importance of establishing the detail of matters such as boundary treatments from the outset, ensuring that planning conditions cover all eventualities where this is a critical issues, and, crucially, that developers must make the terms of planning permission absolutely clear to potential purchaser before they proceed.

RECOMMENDATION:

38. That Members of the Planning Committee support a recommendation to take no enforcement action against the householders regarding the unauthorised boundary treatments which are in breach of Condition 9 of the Application 07/024/CP.

39. That Members of the Planning Committee further support a policy of guidance for current and future house owners that requires the timber fencing to be between 900mms and 1.8m in height, vertically attached and not stained or painted. Where the rear fence backs onto the woodland, the guidance will be for a 900mm wire stock fence to be placed on top of the existing 900mm post and rail fencing for a 1.8m high wire fence. This would apply to Plots 16 – 24 and Plots 29, 31 – 42.

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