

Huntlaw and Muirfield Farm access rights byelaw

Submission from Ramblers Scotland

Introduction

1. Ramblers Scotland believes that there are grounds to object to the proposed byelaw as outlined below. However, we do not do so from the point of view of believing the development is objectionable per se from an access point of view. Rather, we take the view that, given the significance of the development and the nature of the case being made, articulating these plausible grounds for objection is an important part of the scrutiny to be conducted by Scottish Ministers. And we also believe that there is a route through potential objections which would provide greater and clearer net benefit for outdoor access. This would make the circumstances here as exceptional as they are claimed to be and so reduce the risk that the proposal here might set a benchmark which leads to more substantial loss of access rights on other sites. If that route can be followed then we would be inclined to view the grounds for objection as sufficiently addressed.

The byelaw proposal

2. The byelaw is sought for the "main site" of 214ha within the overall development site of 405ha. Within the main site, a large part would not be subject to access rights in any case as a result of proximity to guests' lodges and other buildings. In very broad terms, the area in question is at the east of the main site allocated for nature walks and outdoor activities. We estimate that this is around a quarter of the total site. The remaining three quarters would either still have access rights (the western half) or be in the areas where access rights would not apply in any case.

Byelaw law and guidance

3. The byelaw proposal is made under section 12 of the Land Reform (Scotland) Act 2003. The most relevant part is set out below

Section 12 Byelaws in relation to land over which access rights are exercisable

(1) The local authority may, in relation to land in respect of which access rights are exercisable, make byelaws—

(a) making provision further or supplementary to that made—

(i) by sections 2 and 9 and under section 4 above as to the responsible exercise of access rights; and

(ii) by section 3(2) and under section 4 above as to the responsible use, management and conduct of the ownership of the land;

(b) specifying land for the purposes of section 6(j) above;

(c) providing for—

(i) the preservation of public order and safety;

(ii) the prevention of damage;

(iii) the prevention of nuisance or danger;

(iv) the conservation or enhancement of natural or cultural heritage.

As we outline below, the use of section 12 to exclude access (as opposed to regulate certain activities) is relatively novel. In the supporting statement Scottish Borders Council (SBC) argues that it has broad power to implement a byelaw through 12(1)(b) without regard to 12(1)(c) saying *"It is submitted that the nature and scale of the Development... constitute an exceptional case which justifies the exclusion of access rights from the Main Site. The proposed byelaws are therefore justified on that basis and may be made in terms of section 12(1)(b) of the 2003 Act, which does not specify any specific grounds, as well as section 12(1)(c)."*

Given how novel is the use of section 12 to exclude access rights it is helpful to look at 2005 guidance to access authorities issued by Scottish Ministers. While it is recognised that the guidance itself has no statutory status it is reasonable to assume that ministers will have regard to their own guidance in coming to a decision on the byelaw.

With regard to section 12 the guidance says

"Byelaws may exclude land from access rights. It is expected that any such exclusion would be part of wider management arrangements for an area.

"It is important here to emphasise the difference between the powers under section 11 and those here in section 12. Section 11 allows local authorities to exclude particular areas of land from access rights. The byelaw-making powers are more applicable to the management or restriction of certain activities for specific purposes set out in this section rather than excluding the land itself from access rights. Where land is to be excluded by byelaws, this should be part of a wider management scheme."

Since the guidance on section 12 references section 11 it is useful to reflect on what it says with regard to section 11, especially since, by contrast to section 12, section 11 orders are relatively routinely used by access authorities.

"Section 11 of the Act enables local authorities, whether on applications from third parties or on their own initiative, by order, to exempt a particular area of land and/or inland water from access rights. It is likely that the main use of these powers will be to exclude land from access rights for short periods of time in connection with admission charging for an event. However, it is recognised that there may be occasions where

longer term exclusions will be required. Issues relating to safety or security are other reasons why local authorities may consider it appropriate to exempt areas of land from access rights are in the interests of safety or security.

"Longer exclusions again could relate to entry charges for an event lasting several days or to a permanent visitor attraction."

The guidance therefore points to the use of section 12 for exclusion of access rights but also suggests that exclusion is more commonly expected to be through section 11 and that such exclusion can be on a longer-term basis.

The case for the byelaw

4. The case for the byelaw set out by SBC in the supporting statement is as follows

4.1 The Development constitutes an exceptional case;

4.2 The Development will deliver significant economic benefits to the area (as well as regionally and nationally);

4.3 CP requires reasonable certainty on the exclusion of access rights from the Main Site (as defined at paragraph 3.5) before committing to the substantial investment required to deliver the Development;

4.4 The byelaws are required for 3 main reasons: the preservation of public order and safety; the prevention of damage; the prevention of nuisance or danger.

4.5 The making of the byelaws will have limited impact due to existing low levels of access activity across the Main Site, and appropriate mitigation is proposed.

4.6 Alternatives have been considered and reasonably rejected.

Taking each in turn

4.1 We believe that it is possible to make an exceptional case for this site but this case has been asserted and not currently demonstrated and therefore forms a weak basis for confirming the byelaw. Below, in section 7, we offer some thoughts as to how exceptionality can be strengthened.

4.2 We accept that the economic impact is a significant and legitimate consideration for the planning decision but we do not understand that this is part of the separate process for determining byelaws within the terms of section 12.

4.3 Within the context of Centerparcs operating model we acknowledge this case; however there are other ways of managing access than through a byelaw.

4.4 We do not see anything within the terms 12(1)(c)(i-iii) that is different from how a range of other sites in Scotland operate without the need for a byelaw. The issues of

safety, damage and nuisance are far from unique to this site or proposed development. The supporting statement is not persuasive in this case.

4.5 We agree that the site is of modest access amenity at present but believe that the new site, if approved, would in itself create new demand and opportunities for access on and near the site, So the application should go beyond mitigation and provide net benefit for outdoor access in a way which would enhance the exceptional case being made. See further section 7 below.

4.6 We don't agree that there are no alternatives. A section 11 order could be used on a rolling basis as set out in the guidance. In the supporting statement, SBC argues that *"exemption orders endure for a maximum period of two years. CP requires the exercise of access rights to be prohibited from the Main Site on a long term basis. The Development will require an investment by CP of hundreds of millions of pounds. CP therefore requires reasonable certainty on this matter before committing to that investment. An exemption order which requires to be renewed every two years will not provide sufficient certainty."* This is a matter of judgement; it is not a matter of fact that there are no alternatives.

The development proposal

5. As a matter of principle, we do not take issue with part of the development site being fenced and recreational access restricted for the purposes of the development. We acknowledge that the site is relatively lightly used for public access at the moment and that there is opportunity for net benefit for public access. So Ramblers Scotland's comments are about the proposed byelaw to regulate access on the development site; not about the planning application. We do not object to the planning application and therefore made no submission. However, some of the observations on the byelaw do have an impact on the planning decision process, especially as regards conditioning, if SBC is minded to grant consent (see section 7 below)¹.

An exceptional case?

6. In coming to our view we have looked at how exceptional the case is. As above, we do not believe the case made in the supporting statement is compelling. There are a number of caravan or holiday parks which would equally market themselves as a safe, family friendly locations but who have not sought a byelaw to ban access. Over the last 20 years, since the Land Reform (Scotland) Act 2003 was commenced, we understand that a number of possible uses of S12 byelaws in a similar way to the proposal here

¹ The deadline for submission for comments on the byelaw came after the SBC planning papers were published recommending approval but before the SBC committee meeting on 8 December where the decision on the planning application will be taken.

have been considered but, with one exception², none have been taken forward. This suggests that the bar for a byelaw excluding access is relatively high, especially since the sanction for breach of the byelaw is a criminal offence, which would require to be enforced by SBC as the access authority.

Flipped round, if the bar for agreeing a byelaw in this instance is not high, then there is a risk of other existing sites drawing the analogy and seeking restrictions in a way which would have more significant impact on access and amenity - the cutting off of a way to a beach, for example, or access to a woodland or riverside walk.

7. So, as it stands, we believe that there are grounds for objection. The exceptionality is asserted rather than evidenced. However, we consider that there is a pathway towards making the byelaw proposal acceptable based on the quality of the access and recreational amenity gain, as follows:

7.1 That the open access area of 191ha is made genuinely open access - at the moment Centerparcs appears to want to make it accessible on the basis of people sticking to the footpaths and the driveway. It is not clear to us how that would be achieved or be legitimate in any case³.

7.2 The commitment to public accessible multi-user footpaths and picnic areas in the open area is welcome. The Access Management Strategy in the Design and Access statement shows how the new paths link to the existing core paths/rights of way, which is also welcome. The more this area is enhanced for public enjoyment the greater the case for exceptionality - for example, enhanced nature restoration, interpretation boards, wildlife viewing areas. This would also make the approach more attractive to guests and to prospective guests.

7.3 In the travel plan submitted as part of the main planning application there is reference to the development contributing towards improving the quality of the adjacent core paths / public rights of way which are currently in a poor condition. We would follow the lead of our Scotways colleagues in what that might mean in practice: but could, for example, include drainage, surfacing, signage and a link path. Our local

² The only other example of the use of section 12 in this way - the Crawick Multiverse in Nithsdale - is about a tenth of the size, accepts, as we understand it, informal access out of hours and has a clear statutory reason for exemption: being cultural heritage in terms of 12.1.c.iv

³ The Planning Statement says "Center Parcs also wishes to manage the exercise of access rights within the Open Area by restricting any such exercise to the signposted paths and the proposed driveway which will pass through the Open Area up to the boundary of the Main Site". However, in the paper for Planning Committee for 8 December it says... "This request would restrict access to the village only...but would continue to allow unrestricted access to the west of the site where a multi-user footpath network with picnic tables, viewpoints and additional car parking spaces would be created, all of which will enhance access opportunities." The use of the word "unrestricted" here accords with our understanding but is at odds with the planning statement. This needs to be clarified.

Ramblers group has also prepared a detailed set of suggestions which we strongly urge SBC to follow as part of the suggested site paths plan ⁴.

This would include Right of Way BE158 which we understand to be outside the perimeter fence and therefore outside the scope of the byelaw. The planning report for 8 December references “This will also cover arrangements for Right of Way BE158 which is within the site boundary” which we think is unhelpful and should be clarified.

7.4 Finally, with regard to active travel, the planning application asserts Centerparcs’ commitment to walking, wheeling and cycling within the site and to supporting staff who want to access the site by active travel. However, that assertion would be stronger were there a safe and attractive active travel link to the nearest large settlement. It is recognised that this is outlined as an aspiration by both CP and SBC but there is scope for a more concrete commitment.

If the development were able to deliver on the above enhancements - and crucially, if SBC made them conditions of any planning consent⁵ - then we believe that the case would have a much stronger claim to having made an exceptional effort to counter any access loss with a much larger access amenity gain. That would create an important marker for any other landowner who might see the development on this site as a new benchmark to restrict access to public detriment.

⁴ The chair of our local Ramblers group has written to SBC in some detail highlighting some specific opportunities to enhance the local path network and link it to new paths within the open access area. These matters could and should be dealt with a part of the Paths Plan which, at the time of writing is one of the recommended conditions of planning consent.

⁵ In the paper for planning committee for 8 December two conditions are recommended for access matters. Both seem reasonable and could include the recommendations we make above.

37. Prior to completion of development and occupation of the holiday village, a detailed path planning study, covering non-vehicular access, long term management and details of responsibility for maintenance of all paths and woodland areas within the application site is submitted to and approved in writing by the Planning Authority. Thereafter, the development shall be operated in accordance with the approved plan unless otherwise agreed in writing by the planning authority. **Reason:** To ensure there is a long-term management plan in place for the ongoing maintenance of all existing and proposed access paths and to ensure responsible outdoor access is maintained.

38. Prior to the holiday village hereby approved becoming operational, a detailed scheme of signage and information for residents, visitors and land managers in relation to rights of access, responsible outdoor access and wildlife legislation is made available on existing and proposed access paths for written approval by the Planning Authority. Thereafter, the approved signage shall be installed before the development is operational unless otherwise agreed in writing by the Planning Authority. **Reason:** To ensure adequate signage is made available on existing and proposed access paths and to ensure responsible outdoor access is maintained.

Consideration for Ministers

8. With regard to the consideration by Scottish Ministers, the guidance sets out the criteria which will be taken into account.

- The byelaws are intra vires with the Act and that the consultation process set out in section 12 of the Act has been carried out fully;
- That they do not duplicate or conflict with the general law, existing byelaws or any local Act, or common law;
- That the nuisance they address merits criminal sanctions, that the byelaws and penalties are fair and reasonable and that they will be enforced;
- That they directly address a genuine and specific local problem.

It is not clear to us that access on this site merits criminal sanction⁶; nor is it clear what is the specific nature of the local problem that has been demonstrated.

9. It could be argued that there is a better fit between the circumstances at the site and the use of section 11 powers.

The guidance for section 11 says “in considering whether to confirm any order the Scottish Ministers will wish to be satisfied that: -

- Where a charge is to be levied for admission that the charge is necessary to the viability of the visitor attraction and the loss of public access can be justified in terms of other benefits to the local community.
- Adequate consideration has been given to the demand for access in the area affected by the proposed order;
- Consideration has been given to the provision of alternative routes;
- The local authority has provided the Scottish Ministers with copies of all objections or representations received on the proposed orders and that the authority can justify proceeding with the proposed order in light of any objection or representation;
- The local authority has undertaken the consultation requirements set out in section 11 of the Act on the proposed order prior to submitting it for confirmation;
- The purpose and effect of the order is clearly defined and is proportionate to the issue it seeks to address.”

⁶ This could also be argued in the case of the Crawick Multiverse. However, if, as we understand, local access continues outside of main visitor hours then the question of actual use of that sanction is less clear-cut.

In summary

10.1 Ramblers Scotland does not have an in-principle objection to changes in access in the main site as set out in the proposal. However, in its current form, we believe that there are plausible grounds for objection which deserve the full scrutiny of Scottish Ministers.

10.2 In its current form there is a risk that, if approved as it is, then the proposed arrangements it will be seen as a benchmark which other sites may seek to emulate with greater negative impact on outdoor access and recreational amenity.

10.3 So we have set out reasonable further changes which could be made to the open access area, adjacent paths (including the proposals made by the chair of our local Ramblers group) and active travel connectivity which would enhance the net impact on access and amenity and strengthen the claim to be exceptional.

10.4 The recommendations in 10.3 apply whichever mechanism is used but we believe that there is at least a case that a section 11 order on a rolling basis would be more proportionate and better aligned with policy and guidance than a byelaw. A section 11 order would not preclude use of section 12 at a later stage.

We believe there is a potential win-win-win for Centerparcs, SBC and people enjoying access (both local residents and visitors). The improvements we propose are very modest in the scale of the development and would result in genuine enhancement to the site and the immediate area. It would also move the discussion from being one where development and access are seen as being at odds to one where development is framed as contributing to gains for access and public recreation.

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