

Appendix 4

Consideration of access rights

1 Land Reform (Scotland) Act 2003

Section 1 of the Act gives the public rights of access to land.

Section 6 specifies types of land over which access rights do not apply. This includes, under 6(b)(iv), *land which comprises, in relation to a house..... sufficient adjacent land to enable persons living there to have reasonable measures of privacy in that house..... and to ensure that their enjoyment of that house..... is not unreasonably disturbed.*

Section 3 set out the obligations of landowners. 3(1) specifies that: - *It is the duty of every owner of land in respect of which access rights are exercisable - (a) to use and manage the land; and (b) otherwise to conduct the ownership of it, in a way which, as respects those rights, is responsible.* And, 3(2)(a) states that: - *an owner who contravenes section 14(1) is to be taken as not using, managing or conducting the ownership of the land in a responsible way.*

Section 14(1) specifies that:- *The owner of land in respect of which access rights are exercisable shall not, for the purpose or main purpose of preventing or deterring any person entitled to exercise these rights from doing so - (b) put up any fence or wall; (e) take, or fail to take, any other action.*

2 Scottish Outdoor Access Code

The Scottish Outdoor Access Code was approved by Ministers and the Scottish Parliament. It provides guidance on access rights and responsibilities.

Paragraph 3.15 of the Scottish Outdoor Access Code states that '*sufficient adjacent land*' is defined in this Code as normally being the garden surrounding someone's house. For most houses this should be reasonably obvious on the ground: a formal garden next to the house and surrounded by a wall, hedge or fence. This advice is provided as guidance for people exercising access rights and is not definitive in determining the extent of land excluded from access rights on the grounds of reasonable privacy. It is however a relevant consideration.

3 Physical nature and use of the track

Prior to summer 2020 the track was separated from the garden of 114 Ferry Road by a continuous blockwork wall with no gaps or openings. The evidence is that it was in mixed use, being used for public passage as well as for car parking, for access to the adjacent electricity sub-station, and for maintenance access to the Council owned playing fields (the latter is believed to have only taken place on foot in recent years).

There is some unsubstantiated evidence that the route may not have been accessible to the public for a period in or around the 1980s. However, there is little doubt that the above situation of mixed use including public access has existed since the 1990s, and certainly since 2000 when public use is clearly evident from aerial photography.

Given the long-established mixed use, and the continuous boundary wall on its western side, there is no reasonable argument for the route being a driveway or part of the garden ground associated with the house.

4 Curtilage

Whilst curtilage is not in itself a determining factor when considering Section 6(1)(b)(iv) of the Act, the extent of the curtilage is relevant in considering the extent of the garden ground that can reasonably be considered as necessary for privacy of the house.

Case law has generally determined that land forming curtilage of a house must be 'attached' to that house and not separated from it by any intervening land and must form one enclosure with it. The available evidence confirms that the track was until very recently physically separated from the curtilage of the house by walls, and that this was the case for a significant period of time. Considering all relevant factors, and supported by case law, the track does not form part of the curtilage of the house.

5 Reasonable Privacy

The front garden is fully overlooked from the adjacent public road and footway and separated from it by a low wall which is identical to the one which until recently separated the garden from the track. People using the track have no more effect on the privacy of this area or of the house than people using the footway. The rear garden is afforded adequate privacy by the high wall which screens it from the track. Public use of the track does not therefore affect the reasonable privacy of the house.

6 Public use

Advice on responsible management of access rights, set out in the Scottish Outdoor Access Code, differentiates between 'well used' routes and other routes over which access rights apply. It places a higher emphasis on the need to accommodate continued public access over 'well used' routes in scenarios where there is otherwise a good land management reason for barriers such as fences or locked gates.

The evidence is that the route was used daily by a significant number of people. It was used for direct access to the playing fields, as part of a route from the Wemyss Crescent housing to Ferry Road and a local shop, as part of a route to Monifieth High School, and as part of a route from Ferry Road to destinations east of the Dighty Water including Grange Primary School and the Seven Arches Viaduct. It appears to be valued because alternative routes require detours which are less convenient, involve following busy public roads, or necessitate negotiating steeper terrain or barriers such as steps. The route was undoubtedly well use by the public.

7 Landowner's actions

The metal palisade fence at the northern end of the track is of a type that is designed to secure premises. It has clearly been erected for the purpose of preventing public access. Having concluded that access rights apply to the land and that the route was well used by the public, the landowner's action are considered to contravene both Section 14(1) of the Act and the Section 3 duty to manage land responsibly with regard to access rights.

8 Conclusion

The route is not considered to be part of the land required for the reasonable privacy of the house at 114 Ferry Road, or to fall within any of the other categories of land excluded from access rights under Section 6 of the Act. Access rights therefore apply. The route was clearly well used and valued by members of the public. It is therefore appropriate that the Council takes further steps to have barriers to access removed.