
Report to Council

Date of Meeting: 8th March 2012

Subject: Maintenance of Public Open Space within New Residential Development

Report by: Head of Community and Regulatory Services

1.0 Purpose

1.1. The purpose of this report is to consider how the Council deals with the adoption and maintenance of public open space within new residential development. Throughout Scotland there are different maintenance regimes in place with Local Authorities maintaining some areas and private owners and factors responsible for the maintenance of others at an additional annual cost to the affected householders. This report aims to clarify the position in Clackmannanshire such that the Council would ultimately seek to secure control of public open space maintenance in new developments where reasonably possible.

2.0 Recommendation

2.1. It is recommended that the Council agrees to :

- a) actively encourage developers and landowners to transfer new public open space to the Council for future adoption and maintenance;
- b) lead by example as a responsible land-owner by ensuring that all surplus housing development sites which the Council owns will only be sold on the basis that the Council retains ownership and responsibility for public open space maintenance thereafter ; and
- c) seek support from COSLA to have a change in primary legislation such that the adoption and maintenance of public open space may be treated consistently with the national approach to adopting and maintaining the associated public roads, footpaths and street lighting.

3.0 Considerations

Background

3.1. In the context of new residential development 'public open space' is typically defined as all the communal or public landscaped areas including play areas and woodland. However, it needs to be seen alongside other areas of 'public

space' and related infrastructure such as new road infrastructure, paths, verges and street lights.

- 3.2. In contrast to the unlegislated situation regarding Public Open Space, the Roads (Scotland) Act 1984 provides a mechanism to ensure that an adequate road system is constructed to service any development. The roads, footpaths and street lighting must be constructed to a standard satisfactory to the local authority so that they can be added to the authority's 'List of Public Roads'. To ensure that they are completed to the required standard the developer is required to provide a 'Roads Bond'. If the developer fails to complete the works satisfactorily the authority can use the 'Bond' to do so, otherwise the 'Bond' must be returned to the developer. When a new road (with its associated paths and street lights) is satisfactorily completed the local authority is required to add it to the 'List of Roads'. The maintenance of all roads on the 'List of Roads' is the responsibility of the local authority and residents of the development have no further need to contribute other than via their Council Tax. It is considered illogical that new Public Open Space is not treated in precisely the same manner.
- 3.3. Scottish Planning Policy (2010) and the adopted Clackmannanshire Local Plan require that adequate public open space and landscaping is delivered within new residential developments in order to make them attractive places to live and to ensure that the open space needs of residents are met. Historically these areas of public open space were normally adopted and maintained by Local Authorities with the developer typically paying a one-off capital contribution equal to the estimated cost of maintenance for a period of ten years. However, unlike the situation for roads, footpaths and street lights, the Council cannot legally require Local Authority adoption and it has become more common for developers to appoint a Factor to carry out the work. In so doing the public open space is typically held in private ownership and the new residents are required to pay an annual contribution towards its upkeep and the payment of any Factor. This avoids the need for the housebuilder to pay any up-front commuted sum to have the public open spaces adopted by the Council.

Existing Sites with Factor

- 3.4. In some cases the ownership of public open spaces has been transferred to the new house owners who each hold an equal share of the land. There are also sites where the ownership rests with a Residents Group or, increasingly, the ownership is transferred (potentially sold) to a private company who may then become owner (eg. Scottish Greenbelt Co. Ltd.), Factor (eg. Greenhouse Property Management Ltd.) and Landscaping Contractor (eg. MG Contracting Ltd.). In some instances (eg. Muirside, Tullibody), the landowner may sell individual housing development sites to different housebuilders, who each appoint their own Factors, while transferring the open spaces outwith housing sites to companies like Scottish Greenbelt Co. Ltd. To add to the potential confusion, the Council then becomes responsible for the adoption and maintenance of roadside verges and there can be a large number of owners and managers of public open spaces on a large housing site with an equal number of maintenance contractors. When the residents and/or community representatives raise concerns regarding a particular area of open space (eg.

Dog fouling or litter) it is assumed that this is the responsibility of the Council when in fact it is more likely to be that of the private owner/s.

- 3.5. As a consequence and in order to ensure that the maintenance on these developments was carried out to an equal standard to Council-maintained open spaces, the Council published a guidance document in 2010 entitled 'The Clackmannanshire Standard : Maintenance of Public Open Space within Residential Developments'. This clearly sets out the Council's requirements for the provision and ongoing maintenance of landscaped areas and public open space.
- 3.6. The Clackmannanshire Standard also makes provision for a 'Landscape and Open Space Bond'. When applied through a planning consent, this is a legally binding requirement which secures payment of a sum of money in event of either a) the developer not completing construction of the open space or landscaped areas or b) failing to maintain them to the agreed standard. This bond was seen as a safeguard that would enable the Council to potentially step in and either complete or maintain these open spaces if the owner/factor failed to do so in much the same way as we did with roads, footpaths, and street lights.
- 3.7. Visits to a number of these sites in the last 12 months, suggest that the formal open space areas within these developments are being maintained to the agreed Clackmannanshire Standard. As mentioned above, problems with these arrangements have tended to arise when there are multiple Factors involved, leading to confusion about each organisations' remit, and with the maintenance of natural and semi-natural areas of land.
- 3.8. It is difficult for the Council to enforce the Clackmannanshire Standard effectively where the Council is not the landowner. In those instances where individual house owners are joint owners of the landscaped areas and open spaces they have the ability to change Factors or Contractors if they are dissatisfied with their performance. However, some house owners do not understand their legal responsibility and consider the Council should carry out the task and, as in the case of their roads, paths and street lights, at no additional cost. Unlike instances where the Council owns the public open space then this is simply not possible.

Public Open Space in New Development

- 3.9. The Council cannot legally compel a developer to hand over ownership of landscaped and open space areas to the Council and pay a contribution for future maintenance. This was investigated thoroughly as part of the negotiation on the Section 75 Agreement for Forestmill* and it was considered that it was legally inappropriate to seek to remove rights contained in the Title Conditions (Scotland) Act in a Section 75 Agreement*. However, the Council can strongly recommend to developers that they transfer all 'public' spaces within new developments for adoption by the Council.

* For the Forestmill development, the Landowner/ Developer agreed to complete the relevant open space areas to the Clackmannanshire Standard and to pay for the relevant open space maintenance sum and a disposition of the land for Council adoption.

- 3.10. Developers may always prefer to transfer public open spaces into private ownership as long as there is a requirement for them to pay a commuted sum to the Council for their ongoing maintenance. As such, there is an argument that Councils should simply treat the potential adoption and maintenance of public open spaces in the same way it treats the adoption and maintenance of public roads, footpaths and street lights. In other words, there is no requirement for the developer to pay a commuted sum since the 'public' infrastructure is adopted by the Council, provided it meets the Council's standards and its future maintenance is funded from the increase in associated Council Tax revenues. While this would still not serve to compel developers to transfer public open space to Councils it is considered that it would nevertheless remove a significant obstacle in doing so.
- 3.11. Finally, in instances where the residential development land is owned by the Council there is no need to sell the public open spaces and the Council can set an example by retaining and maintaining the open spaces once they are developed to our standards.

4.0 Sustainability Implications

- 4.1. Delivering the actions identified in this Report will help to protect and maintain greenspace.

5.0 Resource Implications

5.1. Financial Details

In instances where the Council sells residential development land but retains ownership of the public open spaces it is reasonably expected that a higher capital receipt, than would otherwise be the case if the maintenance liability was transferred to private individuals, would be achieved.

Where the Council does not own the land but offers to adopt and maintain the public open spaces at no cost to the developer then the additional cost would require to be met from the additional Council Tax revenues arising from the new householders in the same way as what happens in the case of the adjoining roads, footpaths and street lights.

5.2. Staffing

There could be a staffing impact if the Council proposes to monitor and enforce the Clackmannanshire Standard more proactively. There would also be staffing implications if a larger quantity of open space needed to be maintained by the Council.

6.0 Exempt Reports

- 6.1. Is this report exempt? Yes (please detail the reasons for exemption below) No

7.0 Declarations

The recommendations contained within this report support or implement our Corporate Priorities and Council Policies.

(1) **Our Priorities 2008 - 2011** (Please double click on the check box)

- | | |
|--|-------------------------------------|
| The area has a positive image and attracts people and businesses | <input checked="" type="checkbox"/> |
| Our communities are more cohesive and inclusive | <input checked="" type="checkbox"/> |
| People are better skilled, trained and ready for learning and employment | <input type="checkbox"/> |
| Our communities are safer | <input type="checkbox"/> |
| Vulnerable people and families are supported | <input type="checkbox"/> |
| Substance misuse and its effects are reduced | <input type="checkbox"/> |
| Health is improving and health inequalities are reducing | <input type="checkbox"/> |
| The environment is protected and enhanced for all | <input checked="" type="checkbox"/> |
| The Council is effective, efficient and recognised for excellence | <input checked="" type="checkbox"/> |

(2) **Council Policies** (Please detail)

- Sustainability and Climate Change Strategy
- Local Development Plan (Under development)
- Single Outcome Agreement
- Biodiversity Action Plan 2012 - 2017

8.0 Equalities Impact

8.1 Have you undertaken the required equalities impact assessment to ensure that no groups are adversely affected by the recommendations?

Yes No

9.0 Legality

9.1 It has been confirmed that in adopting the recommendations contained in this report, the Council is acting within its legal powers.

Yes

10.0 Appendices

10.1 Please list any appendices attached to this report. If there are no appendices, please state "none".

None

11.0 Background Papers

11.1 Have you used other documents to compile your report? (All documents must be kept available by the author for public inspection for four years from the date of meeting at which the report is considered)

Yes (please list the documents below) No

The Clackmannanshire Standard: Maintenance of Public Open Space within Residential Developments.

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