



School Closure
Review Panels

**DECISIONS AND REASONS
BY
THE SCHOOL CLOSURE REVIEW PANEL**

PANEL MEMBERS: LESLEY WARD (CHAIR), HELEN MCGHEE, JUSTIN WILLEY

with reference to

PERTH AND KINROSS COUNCIL'S PROPOSAL TO CLOSE ABERNYTE PRIMARY SCHOOL

DECISION FOLLOWING A REVIEW BY THE SCHOOL CLOSURE REVIEW PANEL IN TERMS OF SECTION 17B and 17C OF THE SCHOOLS (CONSULTATION) (SCOTLAND) ACT 2010

28 July 2020

Decision

- 1. The School Closure Review Panel refuses consent to Perth and Kinross Council's proposal in respect of the closure of Abernyte Primary School.**

Background

2. This review and decision by the Schools Closure Review Panel (the "Panel" hereafter) relates to the decision by Perth and Kinross Council (the "Council") to close Abernyte Primary School (the "school"). The Panel is constituted under section 17A of the Schools (Consultation) (Scotland) Act 2010 (as amended by the Children and Young People (Scotland) Act 2014), (the "Act"). The Council is the education authority, as defined in section 135(1) of the Education (Scotland) Act 1980, for the purposes of the Act.

3. The school is a rural school as defined by section 14 of the Act. The additional requirements for closure proposals of rural schools are set out in sections 11A to 13 of the Act. These provisions contain, among other things, a presumption against a rural school closure, preliminary requirements in relation to rural school closure proposals and additional consultation requirements where closure of a rural school is being proposed.

Circumstances leading to the closure proposal

4. In 2015 the Council published a document entitled *Building Ambition: The Council's Transformation Strategy 2015-2020 and Organisational Development Framework*. One of the 39 reviews planned was a review of the school estate as follows:

Securing the future of the school estate - Modernising the school estate by making efficiencies and more effective use of all existing resources.

5. On 24 August 2016 the Lifelong Learning Committee of the Council approved a review of the school estate based on suitability and occupancy rate. It was agreed that every school in the school estate should be rated 'A' or 'B' for condition and suitability. It was also agreed that schools should have an occupancy rate of greater than 60 per cent of capacity and ideally between 80 and 100 per cent. Each school in the Council was to be assessed against those principles. Against the principles approved, the school was assessed as overall condition 'B' and overall suitability 'A'. Based on a roll of 8 the occupancy was noted as between 12 and 19 per cent. It was one of 10 schools selected for "an options appraisal to be developed to consider the under occupancy".

6. Between June 2017 and December 2017 the Council held a series of drop-in meetings and conducted an online survey and questionnaire.

7. On 21 March 2018 the Lifelong Learning Committee was presented with an initial options appraisal (the "Initial Options Appraisal") for the school with four options:

- Do nothing
- Mothballing
- Catchment change
- Closure

The committee agreed to proceed with further assessment of the option to change the catchment area of the school.

Timings of the consultation and subsequent stages

8. On 22 August 2018 the Lifelong Learning Committee was presented with the updated options appraisal (the "Options Appraisal") and agreed to commence consultation on the closure of the school. The Council published the Proposal Paper on 29 October 2018 as required by the Act and the statutory consultation began on that date and ran until 14 December 2018. On 14 March 2019, the Council issued a Consultation Notice, in response to representations received, and a further period of consultation finished on 27 March 2019.

9. The Consultation Report was published on 18 April 2019. On 22 May 2019, the Lifelong Learning Committee formally decided to proceed with the closure. The Council informed Scottish Ministers of its decision on 27 May 2019.

Call-In

10. The Scottish Ministers issued their Call-In Notice to the Council on 16 July 2019. The notice set out three grounds for call-in, which are reproduced in full as Appendix 2 to this document. In summary: the first related to financial information; the second to previous actions the Council took to address the falling pupil rolls and the third to community impact.

Timing of the review

11. The Panel was constituted by the Convenor of the School Closure Review Panels on 23 July 2019. The Panel's decision was initially due on 9 September 2019. The Panel gave notice on the 26 August 2019 that it would require further time for the review, as allowed by the Act, and the new deadline was 12 November 2019. However, on 27 August 2019, an interim suspension was granted by the Court of Session. This prevented the review from proceeding pending the outcome of an application for

judicial review by the Council against Scottish Ministers (*Perth and Kinross Council -v- Scottish Ministers 2020 CSOH 41* – the “Judicial Review”). The decision of Lady Wise dismissing the petition was issued on 7 May 2020. The review by the Panel recommenced on 29 May 2020 and under section 17C(6) of the Act, the new deadline for the completion of the review is 14 August 2020. In issuing the decision today, the Panel has complied with that timescale.

Changes to the school closure timings

12. The Council proposed closing the school on 1 July 2020. On 21 May 2020, the Council wrote to the Panel to advise that, regardless of the outcome of this review, the proposed closure would be postponed until 1 July 2021.

Review by the School Closure Review Panel

13. Under section 17C(1) of the Act, following its review of the closure proposal, the Panel may refuse to consent to the proposal; refuse to consent to the proposal and remit it to the education authority for a fresh decision as to implementation; grant consent subject to conditions; or grant consent unconditionally. The Panel is mindful that, in terms of section 17C(4) of the Act, it may refuse to consent to the proposal under subsection (1)(a) or (b) of section 17C only if the Panel finds either or both of the following:

(a) that the education authority has failed in a significant regard to comply with the requirements imposed on it by (or under) the 2010 Act so far as they are relevant in relation to the proposal,

(b) that the authority has failed to take proper account of a material consideration relevant to its decision to implement the proposal.

14. The Panel considered the documents referred to in Appendix 1 attached to this decision, including the contribution of the Abernyste Parent Council (the “Parent Council”). The Parent Council has been tenacious in its pursuit of the interests of the school and its pupils and its thorough and detailed response has been of assistance to the Panel.

15. The Panel had regard to the Statutory Guidance in terms of section 19 of the Act. The current Statutory Guidance was issued by Scottish Ministers in May 2015 and takes account of the amendments to the Act made in 2014. This version is referred to hereafter as the Statutory Guidance.

16. In its review the Panel considered both aspects of section 17B(1) of the Act. The starting point was to consider the three call-in grounds.

Call-in ground one: Financial information

17. Section 4(2A) of the Act provides:

Where a proposal paper relates to a closure proposal, it must also contain information about the financial implications of the proposal.

The Statutory Guidance makes several references to financial information and accuracy of information provided, in particular paragraph 13 begins:

It is essential that authorities seek and achieve high standards both in the information that underpins school consultations and in the consultation documents that are published. These will be examined closely by communities, school staff and parents, and errors in details can easily undermine confidence in a proposal.

Paragraph 53 goes on to say:

There is a new requirement that all proposal papers for school closures published from 1 August 2014 must include information about the financial implications of the proposal (section 4(2A) of the 2010 Act). The purpose of this requirement is that information on all likely financial implications should be provided in a clear, complete and consistent form for all school closure proposals, rigorously evidencing any financial argument that is deployed.

18. Three sets of financial information were provided in the Proposal Paper: information about future capital costs (referred to in the first ground of call-in), information about potential savings in running costs, and information regarding changes in Grant Aided Expenditure (GAE).

Section 4.12 of the Proposal Paper says:

The approximate cost to upgrade the property is £333,090 for building fabric, mechanical and electrical works which include ventilation, fire alarm systems, heating and hot water pipework, insulation and building fabric improvements. These works are not required immediately but in the medium term which is 2-5 years.

19. This figure of £333,090 is then repeated in sections 6.1.3, 6.3.8, 6.4.4 and 14.3 of the Proposal Paper, either as a cost that will be incurred if the school remains open, or as a saving if the school is closed. The Proposal Paper also refers to the Options Appraisal. This document also mentions the £333,090 figure multiple times and includes the additional information that the works included in the Capital Expenditure figure were identified by a desktop Mechanical and Electrical survey undertaken in November 2017.

20. On 14 March 2019, the Council issued a Consultation Notice in terms of section 5 of the Act, in response to representations made during the consultation period, including those that related to financial information. Part 5 of that notice included the statement that:

The Council has determined that there is no inaccuracy in the Council's cost savings for Abernyte Primary School. The Council accepts that more detailed information regarding how the cost savings were calculated could have been helpful for those reading the proposal paper.

21. Appendix 1 of the Consultation Notice gave additional information regarding all three areas of financial information included in the Proposal Paper – GAE, revenue savings and future capital costs. This Appendix 1 repeated the statement that the works included in the figure of £333,090 were required “in the medium term which is 2-5 years” but then broke the figure down into 5 categories, and gave a list of works under each category. The categories and totals given were:

- Priority 1 items (required immediately) – [none]
- Priority 2 – Essential work required within 2 years Approximate costs - £183,621
- Priority 3 – Desirable work required within 3-5 years Approximate costs - £51,598
- Priority 4 – Long term work required outwith 5 years Approximate costs - £89,906
- Works outwith Mechanical and Electrical items Approximate costs - £7,965

22. Priority 2 items included “Replace heating pipework to recently replaced boiler”. One of the four items listed in Priority 3 was “Fit solar PV for hot water service to supplement boiler” and the single item in Priority 4 was “Supplement existing boiler with solar PV for hot water services to reduce oil consumption”.

23. In the Consultation Report the Council reiterated its position regarding the accuracy of the financial information provided. The Consultation Report reproduced the Consultation Notice as its response to the concerns expressed by consultees (in writing and at public meetings) and Education Scotland, as to the accuracy, transparency and completeness of the financial information provided in the Proposal Paper.

24. In their call-in letter, Scottish Ministers expressed concern both regarding the level of estimated future refurbishment costs, and the apparent discrepancy between the capital costs required in 2-5 years of £333,090 quoted in the Proposal Paper and the £243,184 - £251,149 (depending on where the non-Mechanical and Electrical items are placed) detailed in the Consultation Notice.

25. In order to better understand the origin of the estimated figures and to attempt to resolve the question of the apparent duplication of the Solar PV item listed in both Priority 3 and Priority 4, the Panel wrote to the Council in August 2019 requesting additional information. Following a delay occasioned by the judicial review proceedings, the Council replied to the Panel in June 2020. In this reply the Council included a detailed breakdown of the costs and an explanation of the methodology used. The Council also included the statement:

‘Supplement existing boiler with solar PV for hot water services to reduce oil consumption’ was an error although the costs are correct and should instead read ‘replacement of boiler plant and installation of renewable heat source.’

26. It is clear to the Panel that there remain unexplained confusions and unanswered questions regarding the future capital costs. The Consultation Notice issued by the Council claimed that “*there is no inaccuracy in the Council’s cost saving for Abernyte Primary School*”, yet the notice contradicts itself regarding the timing of the required and desirable items of expenditure, and contains an error regarding the nature of the expenditure of almost £90,000. Furthermore, an additional question is raised by the new description given to the Panel (not included in information seen by consultees or Elected Members) of that expenditure as being for the future replacement of the boiler, when the Priority 2 list refers to the “*recently replaced boiler*”.

27. The Panel considers that the Council has failed to comply with its statutory obligations with regards to the financial implications of the proposal. Further, the Panel is not satisfied that the Council had proper regard to the Statutory Guidance’s requirement for financial information to be presented in a clear, complete and consistent form and rigorously evidenced. Additionally, the Panel considers that the Council has failed to properly carry out its duties to respond to allegations of omission and inaccuracy under section 5 of the Act in that the Consultation Notice issued contains a significant inaccuracy, according to the information given to the Panel by the Council.

28. However, the Act requires that the Panel not only considers whether an education authority has failed in a duty imposed by the Act, but also whether any failure is in “a significant regard”. Following representations from consultees, the Council acknowledged that the original information provided in the Consultation Paper was inadequate, while denying inaccuracies. The additional information provided to consultees (in the Consultation Notice) and later to Elected Members (in the Consultation Report), introduced a new distinction between required and desirable works, contradicted itself and introduced a new error regarding a substantial proportion of the envisaged expenditure figure. The Proposal Paper, and the Options Appraisal on which it relied, had both repeated the full figure as being required within 2-5 years. It is the view of the Panel that these errors and omissions significantly damaged the ability of consultees and Elected Members to understand and potentially question the originally presented capital costs of retaining the school.

29. In the Consultation Report (paragraph 8.1 and 8.2) the Council states that neither financial savings nor building condition or suitability were material factors in the proposal. The same point was made on behalf of the Council during the Judicial Review proceedings. The Panel, however, takes the view that this does not prevent the errors in the financial information from being significant. In her Opinion (paragraph 35) Lady Wise writes:

The provision of inaccurate information would certainly suggest that there may be a failure to comply with that [section 4(2A) of the Act] requirement. The education authority produces documents on which councillors must be able to rely in reaching a decision on a closure proposal.

The Panel believes this also applies to consultees. The Council has stated that the purpose of the closure proposal was to address the low occupancy of the school by virtue of a low and unsustainable school roll (discussed in more detail in paragraph 34 below). If the financial implications of low occupancy were not part of the Council's considerations in formulating the proposal, one would have expected to have seen at least some consideration given to the alternative proposal made by at least one consultee (Abernyte Community Interest Company) to address the issue of occupancy by the reallocation of some of the excess capacity (i.e. space) to other use. However, this approach was not considered (or mentioned) in the Consultation Report.

30. The Panel does not accept the argument that failings in the financial information provided are rendered insignificant by Council's identification of low occupancy as the reason for the proposal. The logical conclusion of such reasoning would be that only information relating directly to the stated reason for closure need be accurate.

31. The Act requires the financial implications of the closure to be contained in school closure proposals. The Act also makes provision for challenges and corrections to that information. The Statutory Guidance places considerable emphasis on the need for rigour in the presentation of financial and other information. In her Opinion (paragraph 48) in *Comhairle nan Eilean Siar v The Scottish Ministers*, Lady Smith agreed with the description of the purpose of the Act as "to provide for a clear transparent and genuine consultation process". Given this setting, the Panel believes that the failures that it has identified must be regarded as significant.

32. Given its finding in this matter, the Panel has not considered it necessary to investigate further the concern raised by Ministers in the call-in notice regarding the level of expenditure to a school with a 'B' condition rating.

Call in ground two: Previous actions taken to address falling pupil rolls.

33. The second ground for call-in related to the previous actions the Council has taken to address the falling school roll. Section 13 of the Act sets out additional consultation requirements which apply to any closure proposal relating to a rural school. Section 13(2) (a)-(c) of the Act provides:

(2) The proposal paper must additionally-

(a) explain the reasons for the proposal,

(b) describe what (if any) steps the authority took to address those reasons before formulating the proposal,

(c) if the authority did not take such steps, explain why it did not do so,

34. In carrying out our review the Panel looked firstly at what the Proposal Paper said about the reasons for the proposal. In Section 1, headed “Reasons for Formulating the Proposal”, various points are made which relate to actions the Council has taken and data on pupil numbers. Paragraph 1.5 appears to be a statement of the reasons for the proposal, specifically:

These circumstances result in a diminished and unsustainable school pupil population for Abernyte Primary School. There is no foreseeable prospect of an increased, stable pupil population. The provision of primary education within Abernyte needs to be considered in the context of the needs of the pupils and the local community both now and in the future.

35. The Panel has concluded that for the purposes of the Act, the reasons for the proposal are as set out in paragraph 1.5 of the Proposal Paper. The Council does not set out in the Proposal Paper what it considers a sustainable roll to be, or how a sustainable roll could be achieved. It does not give reasons as to why the school roll is falling.

36. The Panel went on to seek to identify the steps the Council took to address the reasons for the proposal. The Panel found the reasoning of Lady Wise in the Judicial Review at paragraph 36 to be helpful in clarifying when, procedurally, the Council should fulfil its obligations in terms of section 13 of the Act. The words of Lady Wise are worth repeating at some length:

In the Proposal Paper, the local authority must, after explaining the reasons for the closure proposal, provide retrospective information about what steps it took to address those reasons (here principally falling school roll) “before formulating the proposal”, a clear reference to a period prior to even considering that closure might be an option. These additional requirements for rural schools flow naturally from the procedural presumption against rural school closure introduced by section 11A. The starting point for a local authority must be to address a falling school roll in a way that avoids the spectre of closure. Only if the problem can’t be addressed, and the local authority can explain why that was, can it properly move to the next stage. Identification of alternatives is not synonymous with addressing a problem and is part of the later stage. Conducting a review of a catchment area is not tantamount to addressing a failing school roll problem; making alteration to a catchment area would be different and could well constitute an attempt to address the issue.

37. The Proposal Paper does not describe the steps the Council took to address the reasons for the proposal before formulating the proposal. Furthermore, the Proposal Paper does not explain why the Council did not take such steps. The Proposal Paper refers to the Options Appraisal and has a link to it in the body of the paper. Given the importance of the information in the Options Appraisal it is perhaps surprising that the Council chose not to incorporate it into the Proposal Paper. However, the interested and informed reader could seek out the Options Appraisal and identify the steps the Council took as set out within it. The Panel has proceeded with the review by reading across the Proposal Paper to include the Options Appraisal. Assuming that the Council could potentially comply with the requirements of section 13 of the Act by giving the link to the Options Appraisal, rather than narrating in the body of the Proposal Paper, the Panel looked carefully at the Options Appraisal.

38. The Initial Options Appraisal, introduced in March 2018, had four options, one of which was closure of the school. The final Options Appraisal presented to the Council Lifelong Learning Committee in August 2018 had the same four options and at that stage, closure was the preferred option. The Options Appraisal does not describe the steps the Council took to address the reasons for the proposal before its formulation. Furthermore, the Options Appraisal does not explain why the Council did not take such steps.

39. To comply with its statutory obligations the Council is required to describe the steps it took to address the reasons for the proposal before formulating the proposal, or if it did not take any steps, say why. The Panel therefore sought to ascertain when the proposal was formulated.

40. The Panel looked carefully at the timeline. The chain of events which led to the four options of the Options Appraisal started in November 2016. At the meeting in November 2016, the Lifelong Learning Committee agreed to develop an options appraisal for the school owing to the under occupancy of the school. The four options of the Initial Options Appraisal were presented to the Lifelong Learning Committee in March 2018.

41. The Panel wrote to the Council on 11 June 2020 as follows:

We note that the Lifelong Learning Committee of the council at the meeting on 2 November 2016 agreed to develop an options appraisal for Abernyte Primary to consider under occupancy. Appendix 1 of the documentation attached to report 18/243 gives details of 'community engagement' which was carried out. We note that an on line survey took place in December 2017. On 21 March 2018 the council agreed to carry out further assessment in connection with extension of the catchment area. Did the council take any other steps in connection with the catchment of the school or in connection with the school roll between 2 November 2016 and 21 March 2018?

42. The Council responded to the Panel's letter by setting out a timeline of events between 2 November 2016 and 22 August 2018 when the updated Options Appraisal was presented, and it was agreed to consult on the school closure. The Panel had already noted from its review of the information before it, that between 2016 and 2018 the Council were engaging with the local community by a series of drop-in sessions, a survey and questionnaire. This timeline disclosed that meetings with stakeholders began in June 2017 when a meeting with the Headteacher took place to "explain the options appraisal process". It was clear from the terms of the Initial Options Appraisal that the four options were discussed at the community engagements sessions which took place in 2017. The Panel concluded that the proposal was formulated by the Council around June 2017 or possibly earlier. Applying Lady Wise's reasoning, the Panel's conclusion was that it was looking for the steps the Council had taken to address the reasons for the proposal before June 2017, when closure was one of the four options. In any event, the Council itself characterises this engagement in 2017 as "pre consultation" in the Proposal Paper. To use the wording of Lady Wise, the "spectre of closure" was already hanging over the school from June 2017 onwards, at the latest.

43. Having identified that the proposal was formulated around June 2017, and having noted that in August 2016 the Council decided to undertake a review of the school estate, the Panel proceeded to look at the period between 2012 and June 2017, with a particular emphasis in the period between June 2014 (when the meeting took place between the Council and the Parent Council) and August 2016 (when the review of the school estate was decided). Having already identified that the Proposal Paper and the Options Appraisal did not comply with the requirements of section 13 of the Act, the Panel looked at the available documents to ascertain whether the Council took any steps to address the reasons for the proposal which it had not narrated in the Proposal Paper or the Options Appraisal. In other words, was there a failure to describe the steps taken, rather than a failure to take the steps? Or, alternatively, had the Council taken no steps to address the falling school roll and failed to explain why?

44. The Parent Council had raised the falling school roll with the Council on several occasions between 2012 and November 2014. The Council was therefore aware of the concerns surrounding the falling

school roll from at least 2012 onwards. Indeed, in the Initial Options Appraisal the Council states that the school roll had been falling since 2011. The Panel concluded that the reasons for the proposal were therefore identified by the Council from around 2011 onwards.

45. On 14 February 2012, the chair of the school Parent Council wrote to the Council. In essence, this letter was asking the Council to change the existing catchment area to address the falling school roll and anomalies in the catchment which, it states, has led to some children living close to the school having to travel a longer distance to attend Inchtyre school. This letter marks the start of considerable efforts on the part of the Parent Council to address the falling school roll and in particular to avoid the school reducing from two teachers to one. The convenor of the Lifelong Learning Committee replied on 15 March 2012, stating that the Council planned to review the school catchment areas over the whole authority, but individual catchment areas would not be reviewed in isolation. The letter also stated, *"I can confirm that there are no plans at this present moment in time to review the catchment area of Abernyte Primary School"*.

46. On 16 November 2013, the new chair of the Parent Council wrote a letter to the Council expressing concern about the long-term future of the school and making various suggestions which might lead to an increase in the school roll. The Council replied on 3 December 2013, stating that its position remained unchanged since its letter of 15 March 2012 and enclosing a copy of that letter for the chair. In April 2014, the Council decided to change the school from a two-teacher school to a one-teacher school with effect from August 2014. On 2 April 2014, the chair of the Parent Council contacted the Council for the third time stating that *"As a parent council we are still hopeful that we can find ways to increase the school roll"* and detailing various initiatives the Parent Council had introduced to try to assist. As a result of this third letter, a joint meeting between Council executives and the Parent Council took place on 4 June 2014. The objective of that meeting as noted in the minutes, was to discuss the school roll at Abernyte Primary and obtain clarity on Council policies and plans.

47. The Panel wrote to the Council on 8 June 2020 to seek further information and to ascertain whether there were any reports in connection with the catchment or roll of the school, of which the Panel were unaware, between 5 June 2014 and 24 August 2016. The Council responded on 11 June 2020 and confirmed that no other reports had been prepared regarding the catchment or school roll for that period. The Council also stated in its reply:

Head teachers have been encouraged to take active steps to promote their school within the community and do what they can to encourage parents to send their child to their local school and this is often the most effective proactive step the Council can take to help sustain school rolls.

48. The Parent Council was proactive in raising its concerns about the school roll with the Council, between 2012 and 2014, but to no effect. The Panel found nothing in either the Proposal Paper or the Options Appraisal which described the steps the Council took to address the reasons for the proposal between 2012 and June 2017 (when the proposal was formulated). Further, looking at the available documents, and in particular the Proposal Paper and the Options Appraisal, and having clarified matters with the Council to ensure it had not missed anything, it appears to the Panel that the Council did not in fact take any steps to address the falling school roll between 2012 and 2017. The Act does not set out that a Council must take steps to address the reasons for the closure proposal. What section 13 of Act requires is that that a Council describes the steps, if any, it has taken to address the reason for the proposal. If it did not take any steps, it is required by section 13 to explain why it did not take any steps. In this instance, the Council did not take any steps to address the reasons for the proposal (i.e. the falling school roll) nor did it explain why it did not do so.

49. The Panel considers that the Council has failed in its statutory obligations to comply with the additional consultation requirements of sections 13(2)(b) and (c) of the Act. However, the Act requires that the Panel not only consider whether an education authority has failed in a duty imposed by the Act, but also whether any failure is in a “significant regard” in terms of section 17B(1)(a) of the Act. In the decision of Sheriff Tierney in the case *Highland Council -v- School Closure Review Panel 2016 S.L.T. (Sh Ct) 207* “failure in a significant regard” was held to mean “in an important way”. The Panel considers that the failure in this instance is a failure of some considerable importance as the falling school roll is the main reason for the closure proposal. The Council was clearly aware of the falling school roll in 2011. It failed to take any steps to address the issue despite the persistence of the Parent Council.

50. The Panel was mindful of the presumption against the closure of rural schools and in particular section 11A of the Act which provides that an authority may not decide to close a rural school unless it has complied with the requirements of sections 12, 12A and 13 of the Act. The presumption against closure is a rebuttable presumption which can only be rebutted by proper compliance with the preliminary and additional consultation requirements. The Panel considers that the procedural requirements were not followed.

The Panel has therefore concluded in relation to call-in ground two, that the Council failed in a significant regard to comply with the requirements imposed on it under the Act.

Call in ground three: Community impact.

51. The third ground for the call-in related to the community impact of the school closure. As the school is a rural school, section 12 of the Act provides that the Council must have “special regard” to the likely effect on the local community in consequence of the proposal, if implemented. The effect on the community is to be assessed (in particular) by reference to the sustainability of the community and the availability of a school’s premises and its other facilities for use by the community in terms of section 12(4) of the Act.

52. The Panel considered the meaning of “special regard”. In the case of *Highland Council -v- School Closure Review Panel 2016 S.L.T. (Sh Ct) 207* “special regard” was interpreted as having its normal meaning, namely, a greater or closer consideration than is usual. Sheriff Tierney went on to state that “special regard” involves a “conscious directing of the mind to the obligations” and that this is something that has to be approached with “vigour” or “rigour”. Paragraph 67 of the Statutory Guidance states:

Section 12 requires an authority to carry out a thorough consideration of why it wishes to close a rural school prior to consulting on a closure proposal.

The time for the Council to have “special regard” to the community impact is therefore before the proposal is published.

53. The Proposal Paper should therefore set out what the Council did to comply with this provision. Section 10 of the Proposal Paper addresses the rural school provisions of section 12 of the Act but information regarding the sustainability of the community is also contained in section 6. It states that “the school is described by the community as a wider valuable resource to the community”. The Council goes on to suggest that the local church in the village of Abernyte could be used as an alternative venue. It states: “It is not considered that closure of the school would have a negative impact on the sustainability of the community” (6.4.6) and concludes “The evidence indicates there will be little effect on the community if the school were to close” (10.7). The evidence the Council used to draw that conclusion is not however contained in the Proposal Paper. It is the view of the Panel that the

conclusion that closure of the school would not have a negative impact to the community is no more than a bald assertion that is unsupported by any evidence. To acknowledge that the school is considered a valuable resource by the community and then to state that closure of the school would not have a negative impact on the sustainability is in the view of the Panel, an extreme position to take. If the Council had properly addressed its mind to effect of the loss of the school it might have, for example, discussed (with supporting evidence) how the negative impact would be outweighed by benefits, or how the negative impact could be of short duration and how it could be mitigated. To simply say that there will be no significant negative impact, without evidence to that effect, is in the view of the Panel, neither accurate nor giving the matter “special regard”.

54. There is also a lack of clarity regarding the Council’s intentions for the school site. The Annex to the report to the Lifelong Learning Committee on 22 May 2019 (report 19/153) that presented the results of the consultation process to the committee and requested approval to proceed with the closure, includes under Resource Implications:

2.4 It is envisaged that the existing Abernyte Primary School would be declared surplus to the requirements of Perth and Kinross Council. This would minimise the financial risks associated with vacant buildings.

2.5 A capital receipt would be forthcoming if the building was sold or income could be generated through a lease.

The Proposal Paper raises the possibility (amongst others) of an unspecified community use (paragraph 10.11)

Closure of the school would provide opportunities for the building to be used for the benefit of the community, either for business or residential use, or for community use if a suitable plan was identified.

Paragraph 52 of the Statutory Guidance states:

The Proposal Paper should also be clear on the authority’s plans for the future use of any school building and associated facilities that will be released by the proposal. It is reasonable for communities to be concerned whether a school building would have another public purpose, be available for the community, sold or might remain vacant for a significant period, and authorities should provide as much certainty and transparency as possible.

The Panel does not consider that simply mentioning the potential for an unspecified community use “if a suitable plan was identified” while also raising the matter of potential capital receipts to the Council, can be described as being “clear on the authority’s plans for the future use of any school building”.

55. In the Panel’s view the failure of the Council to give more clarity to its plans for the school when it closes is a failure to have regard to the Statutory Guidance and in turn, a failure to have “special regard” to the likely impact of the closure on the community.

The issue with the field

56. In its Consultation Notice of 14 March 2019, the Council acknowledges that it made an error in the Proposal Paper in relation to ownership of the field adjacent to the school, which is used by the school. It had been pointed out in consultation responses that the playing field is owned by a private individual who permits the school to use the field. The Council states that the material point for the Proposal Paper was that the field was not owned by the Council, and this being the case, it decided not to take

any further action regarding the error. The Council states “*the Council does not consider that this error relates to a material consideration relevant to the Council’s decision as to implementation of the proposal*”. The Council then re-states in paragraph 8.12 of the Consultation Report that the field:

is not within the control of the council, it does not form part of the school site and there is no certainty over access for the school, as access is dependent on the will of the owner of the land.

57. The Panel found it curious that the Council used the vehicle of the section 5 Consultation Notice (which is to address inaccuracies or errors) to acknowledge that it had made an error with the field but concluded that it was not a material consideration. It is the view of the Panel however, that the material point is not who owns the field but whether the loss of the school will in turn lead to the loss of the use of the field by the community. If the Council was giving “special regard” to the availability of the school premises and facilities it seems logical and reasonable for the Council to find out who owns the field and what their view is on the community making use of the field if the school was to close. If the Council was giving “*closer than usual consideration*” then the Council could be expected to make further inquiries when the error was identified.

58. Further, the Council states in its Consultation Notice that the field is “*not part of the Abernyte Primary site*”. If the Council was giving this matter “special regard”, the Panel considers that the Council should give some analysis of the history, the apparent fact that the school have used the field for many years with the owner’s consent and that presumably the Council has been cutting the grass and maintaining it. To say it does not form part of the school premises is perhaps correct in strict legal terms regarding the title to the property, but the apparent fact that the closure of the school may lead to the loss of the field is, in the view of the Panel, something that the Council should have looked into if it was having “special regard”.

The use of the school building by the school community

59. Many of those who responded to the Proposal Paper raised the issue of how the Council characterised the “use of the school building by the local community” in terms of section 12(4) of the Act. In the Proposal Paper, the Council states that the school is used by the wine club and the heritage club. Those responding to the Proposal Paper made the point that the school is a place for the community and generations of pupils, parents and grandparents to meet. In its Consultation Notice, the Council states that it does not consider that it has made any omission in the Proposal Paper by failing to make reference to these events. As the Council states in its Consultation Notice:

The council is aware of some events held by the school as part of the delivery of the curriculum. As these are not events arranged by / led by the community, the Council does not consider that there was any omission by not making reference to these as community events.

60. The Panel considers that the Council has used an overly narrow interpretation of “*use by the community*” in section 12(4) of the Act. As a result, the Council has failed to properly assess the likely effect on the local community. The Council, as noted above, states in the Proposal Paper that there will be little effect on the community if the school was to close but in the view of the Panel, the Council has not properly assessed the impact nor has the Council had “special regard” to the rural school factors. It has not directed its mind to its obligations and approached this with the requisite degree of vigour.

The church as an alternative to the school

61. The final issue relating to the loss of the school to the community is the church as being a suitable alternative. The Council refers to the church being available to the community, both in the Proposal Paper and in the Options Appraisal. In the Consultation Notice the Council states that the suitability of the church was questioned by some who responded to the Proposal Paper. It reiterates its view that there is no inaccuracy in the Proposal Paper as the church is available to the community. It does, however, acknowledge in the Consultation Report that:

given the size of the church, larger community events may not be able to meet there.

In its response to the Proposal Paper the Parent Council states that the church has no disabled toilets, no kitchen, no outdoor space and limited circulation space.

62. As already noted, the additional rural school requirements of section 12(4) of the Act and the requirement to have “special regard” to the community impact apply at the point of the proposal being made. The Proposal Paper contains no analysis or assessment of what type of community activity the church may be suitable for. If it has no outside space and very little inside space and no kitchen, it is difficult to understand what “smaller” community events it may be suitable for. According to some of the responses to the Consultation Paper, the school has hosted whist drives, coffee mornings, charity evenings, the wine club, Abernyte Festival and so on. In the view of the Panel, if the Council had “special regard” to rural school factors and the effect on the community of the school was to close, it would have had a closer look at the suitability and availability of the church and how it compared with the school as a venue for events.

63. In the Panel’s view, the Council has failed to have “special regard” to the likely effect on the local community if the school was to close in respect of the field, the use of the school and in relation to the church as an alternative venue. Additionally, the Panel believes that the Council has been insufficiently clear about its future plans for the school buildings and site. In the view of the Panel, the failure cannot be characterised as anything other than a significant one. The loss of the school and the impact this will have on the community has not been properly assessed. If the Council had special regard to the rural school factors, it would have made inquiries about the field and the church and would have quantified what events would be lost to the community if the school was to close. The Panel therefore concluded in relation to the third call-in ground, that the Council failed in a significant regard to comply with the requirements imposed on it under the Act, so far as they are relevant in relation to the proposal.

Review of section 17B(1)(b) of the Act - failure to take account of a material consideration

64. The call-in was only made in respect of section 17(2)(a). However, the Panel is required to review the Council decision in relation to both sections 17B(1)(a) and 17B(1)(b), as the Council may also have failed to take account of a material consideration relevant to its decision to implement its proposal.

65. After consideration of the three grounds for the call-in, the Panel considered the school closure more widely and reflected on the two matters within its remit. The Panel’s decision is that the significant failure is in respect of section 17B(1)(a) only. In the Panel’s view this failure is so significant, and as a result the information before it is so lacking, it is impossible for it to conclude on the available evidence, whether the Council may also have failed to take into account a material consideration.

Conclusion

66. Following a thorough review of the information contained in all of the documents received from the Scottish Ministers, together with the additional documentation provided by the Council in response to the requests made by the School Closure Review Panel, the Panel has carried out a review of the proposal in terms of section 17B of the Schools (Consultation) (Scotland) Act 2010 (as amended).

67. The Panel's conclusion is that there has been a statutory failure in terms of section 17C(4)(a) of the Act and that the Council has failed in a significant regard to comply with the requirements imposed on it by (or under) the Act so far as they are relevant in relation to the proposal.

68. The Panel has considered each of the grounds for call-in in turn and provided its reasons. The Panel considers that each of the three failures is significant on its own. Taken together, in the Panel's view there has been a comprehensive failure of process. The Panel has considered carefully whether the Council properly addressed the considerations it must address and has concluded that it has not.

69. The Panel then considered whether it was possible to direct the Council back to a certain stage in the process or whether to allow the proposal to be implemented but with conditions. The Panel did not see any way in which the imposition of conditions could address the failures identified in the consultation process. For the process to be fair and transparent, all the necessary information must be put in front of the consultees, and in due course, the elected councillors making the decision.

70. Given that significant failures identified by the Panel concerned several matters that should have been addressed in the preparation of the proposal, the Panel consider that a possible remedy might have been to direct the Council back to the beginning of the process and begin again with a new Proposal Paper. However, the Panel believes that such a determination would frustrate one of the purposes of the Act. In section 4.5, at paragraph 145, the Statutory Guidance states how the restriction on repeated consultations is intended to provide a period of stability for communities. This change, introduced in 2014, followed the report of the Commission of the Delivery of Rural Education, referred to in paragraph 1 of the Statutory Guidance, which recommended (Recommendation 31) the introduction of the five-year moratorium. It is the view of the Panel that to direct the complete re-running of the consultation from the point of publication of a new proposal paper would simply constitute a repeated consultation.

71. The School Closure Review Panel concludes that Perth and Kinross Council has failed in a significant regard to comply with the requirements imposed on it in terms of that Act in so far as they are relevant in relation to the proposal in terms of s17C(4)(a) of the Act. The School Closure Review Panel refuses consent to Perth and Kinross Council's proposal in respect of the closure of Abernyte Primary School.



Lesley Ward

Chair of the School Closure Review Panel

Appendix 1

1. The Panel were provided with the following copy documents by Scottish Ministers: -

- i. Letter from the Learning Directorate, Workforce, Infrastructure and Reform Division of the Scottish Government to Sheena Devlin Executive Director of Education and Children's Services at the Council dated 16 July 2019, calling-in the decision.
- ii. Letter to Convenor from the Learning Directorate, Workforce, Infrastructure and Reform Division of the Scottish Government to the convenor of the School Closure Review Panel dated 16 July 2019.
- iii. Website notices by the Council regarding Abernyte Primary School.
- iv. Report to the Lifelong Learning Committee of the Council dated 22 May 2019.
- v. Consultation Report dated 18 April 2019.
- vi. Report to the Lifelong Learning Committee of the Council dated 24 August 2016.
- vii. Report to the Lifelong Learning Committee of the Council dated 2 November 2016.
- viii. Report to the Lifelong Learning Committee of the Council dated 22 August 2018, 'the Options Appraisal'.
- ix. Proposal Paper
- x. Public notice.
- xi. Slides of public meeting on 12 November 2018.
- xii. Minutes of public meeting on 12 November 2019.
- xiii. Slides of public meeting on 14 November 2018.
- xiv. Minutes of public meeting on 14 November 2019.
- xv. All written representations made by stakeholders requesting call-in dated 5-10 June 2019.
- xvi. The Abernyte Parent Council request for a call-in dated 10 June 2019 with enclosures including:
 - (a) Abernyte Parent Council response to the proposal paper dated 14 December 2018.
 - (b) Transcript of meeting of the Lifelong Learning Committee dated 22 May 2019.
 - (c) Letter from Abernyte Parent Council to convenor of the Lifelong Learning Committee dated 14 February 2012.
 - (d) Letter from Convenor of the Lifelong Learning Committee to Abernyte Parent Council dated 15 March 2012.
 - (e) Letter from Abernyte Parent Council to Director of Education dated 16 November 2013.
 - (f) Letter from Director of Education to Abernyte Parent Council dated 3 December 2013.
 - (g) Letter from Abernyte Parent Council to Director of Education dated 2 April 2014.
 - (h) Minutes of meeting between Abernyte Parent Council and various representatives of Perth and Kinross Council dated 5 June 2014.

2. The following copy documents were produced to the Panel by the Council following three requests from the Panel for further information dated 8 August 2019, 14 August 2019 and 8 June 2020:

- (i) Report to the Lifelong Learning Committee of the Council dated 21 March 2018.
- (ii) Online survey to parents dated 7 December 2017.
- (iii) Report to the Lifelong Learning Committee dated 9 March 2016
- (iv) Report by the Chief Executive- the Council's Transformation Strategy dated 1 July 2015
- (v) Letters to the School Closure Review Panel by Perth and Kinross Council dated 25 and 28 May 2020.
- (vi) Response to the School Closure Review Panel by Perth and Kinross Council dated 2 June 2020.
- (vii) Timeline of steps taken by Perth and Kinross Council from 2 November 2016 until 22 August 2018.
- (viii) Response to the School Closure Review Panel by Perth and Kinross Council dated 11 June 2020.

Appendix 2

Call in notice Under Section 15(3) of the Schools (Consultation) (Scotland) Act 2010

Perth and Kinross Council – Decision to Abernyte Primary School

Financial Information

The Scottish Ministers have concerns about Perth and Kinross Council's assessment of the financial savings that would result from the closure of Abernyte and that these savings have been overstated.

The Scottish Ministers are also concerned about the high refurbishment costs for a school with a "B" condition rating. In the council's final report, it provided a detailed breakdown and rationale for the £330k refurbishment costs, however, in our view these costs appear to be high for a school with a "B" condition rating and are also stated to be "outwith five years" and therefore should not be included in costs the Council says are required in the next 2-5 years.

After careful consideration, the Scottish Ministers have concluded that further investigation is merited into the Council's assessment of the future capital costs the Council would incur if Abernyte were to remain open. There may be a failure with reference to section 17(2)(a) of the 2010 Act – that is, that Perth and Kinross Council may have failed in a significant regard to comply with the requirements imposed on it by or under this Act so far as they are relevant in relation to the closure proposal, in that the financial information the Council provided in terms of section 4(2A) of the 2010 Act appears to have been inaccurate.

Previous actions taken to address falling school rolls.

The Scottish Ministers note that the Council has failed to describe in their report the actions they have taken in the past to address the reasons for closure and the reasons for not taking any steps, or to explain why it did not take any such steps (as required by section 13(2)(b) and (c) of the 2010 Act, respectively). In addition, the Scottish Ministers are concerned by representations they have received which contend that the Council has not taken the appropriate steps to address these issues despite evidence of letters from the local community to the Council about their concerns dating back to 2012. The Council's reports also appear to focus primarily on the pre-consultation activity undertaken by the Council in the run up to formally consulting on closure and do not appear to describe explicitly the previous action the Council has taken, not why they did not take steps to address the problems identified.

After careful consideration, the Scottish Ministers have concluded that further investigation is merited into the efforts the Council has made to describe what steps it took to address the reasons for the closure which is a requirement under section 13(2)(b) of the 2010 Act. There may be a failure with reference to section 17(2)(a) of the 2010 Act – that is that Perth and Kinross Council failed in a

significant regard to comply with the requirements imposed on it by or under this Act so far as they are relevant in relation to the closure proposal. Given the centrality of the unsustainably low pupil roll to the Council's proposal, such a failure would be considered to be a failure in a significant regard.

Community impact.

The Scottish Ministers note that the 2010 Act requires that the local authority consider the impact on the community's future sustainability, availability of the school's premises and facilities for use of the community. There appears to have been significant distance between the local community and the local authority on the impact Abernyste's closure will have on the community and, in the case of ownership of the playing field, a lack of knowledge on the part of the Council of the local position. This casts significant doubt as to whether the Council has had 'special regard' to the likely effects of the proposed closure on the local community, as they are required to under section 12(2) and 3(b) of the 2010 Act.

The Scottish Ministers consider that the Council appears to have underestimated the level of community use currently and restricted its interpretation of that to non-school related groups. The Council also relies on the use of the local Church as an alternative venue, which based on the information provided by respondents appears a doubtful alternative.

After careful consideration, the Scottish Ministers have concluded that further investigation is merited into the Council's assessment of the impact of the proposal (if implemented) on the local community. There may have been a failure with reference to section 17(2)(a) of the 2010 Act, that is, that Perth and Kinross Council failed in a significant regard to comply with the requirements imposed on it by or under this Act so far as they are relevant in relation to the closure proposal, in that they may have failed to have special regard to the factors for proposals for rural school closures in terms of section 12(2) and (3) of the 2010 Act. It appears that the potential failure would be a failure in a significant regard, as the enhanced protections for rural schools provided for in the 2010 Act require the Council to have 'special regard' to the rural school factors.