Community Woodland Lease between Aberdeenshire Council and Greenbelt Group
A Legal Opinion For Which No Liability Is Accepted

1. **General**

This is a commercial lease between Aberdeenshire Council ("the Landlords") and the Greenbelt Group of Companies ("the Tenants"). It commenced on 29 June 2001 (cl. 1.1; Testing Clause), will subsist for 99 years (cl. 2.1) and involves payment of £1 per year by way of rent (cl. 1.1).

The lease exists over "the Subjects", as these are described in clause 1.1 and outlined in red [not visible in the black and white copy supplied] on the "Title Plan". It is to be noted that the "Plan" is "demonstrative and not taxative" (cl. 1.1): in the context, this means that the Plan is for information only (i.e. it delineates the actual area of ground over which the lease exists) and is not otherwise to be relied on – which is perhaps just as well given that it is simply a copy of a plan of 1997 submitted by or on behalf of R.B. Farquhar Homes in connection with another – even if tangentially related – matter.

2. **Purpose of Lease**

Under clause 2.1, the Landlords let the Subjects to the Tenants "under reservation of the Public Access Rights and subject to the terms of clause 9.3 below." (Unfortunately, there is no clause 9.3; it may be that a reference to "3.3" was intended here – that being at least plausible; but in formal documents such as this which are drawn up professionally, it is difficult to justify resort to speculation in order to make sense of the text: in any event, a reference to "3.9" is an equally plausible substitution for the non-existent "9.3".)

Apart from possession of the Subjects, the Tenants are to have the ownership of all timber "cultivated upon the Subjects and felled or otherwise harvested in connection with the Permitted Use" – save that they must not "clear fell the Subjects" without prior written consent (cl. 2.3). Such ownership seems to be the main benefit accruing to the Tenants under the lease. In terms of clause 3.6, however, the Subjects are to be used by the Tenants only for the purposes of that "Permitted Use" – although the Tenants may propose modifications of that "Use" for consideration by the Landlords.

As the "Permitted Use" is at the heart also of the Tenants obligation of Maintenance (cl. 3.3), it is necessary to examine the definition of "Permitted Use" in Clause 1: it means "all uses of the Subjects necessary or appropriate *in the reasonable opinion of the Tenants* in connection with the establishment, maintenance and management of a commercial community woodland with the Public Access Rights, and the siting on the Subjects from time to time of any works of art or craft in terms of clause 3.5.3 hereof" [emphasis added]. It would seem that this definition relates primarily to the woodland activities to be carried out by the Tenants on the Subjects – which activities must be carried out with due respect to the existence of "Public Access Rights" (i.e. without, generally, intent to impede such Rights) and to the Landlords' requirement that works of art be permitted to be placed from time to time on the Subjects (see cl. 3.5.3 [but cf. what is said about that clause at 5. **Conclusion**, below]) – i.e. without intentional obstruction of efforts by the Scottish Sculpture Workshop to place such works on the Subjects.

It seems to me that the community woodland project is the dominant purpose of the lease, and that "Public Access Rights" are burdens on the use of the Subjects permitted to the Tenants. As "Public Access Rights" are, however, defined in the lease, it is necessary to examine the definition of these "Rights" in clause 1.1 – for such elucidation of these (vis a vis the question posed) as can be found there.

3. **Public Access Rights**

These are stated to be "unrestricted pedestrian access to and egress from the Subjects to members of the general public over the designated footpaths within the Subjects and unrestricted vehicular and pedestrian access to, egress from and use of the designated car park within the Subjects save in each case where operations on the Subjects exclude such access for reasons of public safety." (It might be noted that the "unrestricted" access is in fact restricted, or purportedly restricted, to "designated footpaths": cf. access rights created by statute – under the Land Reform (Scotland) Act 2003.)

Neither "designated footpaths" nor "designated car park" is defined or explained; the text of the lease does not link these expressions to anything on the Plan: it is difficult, therefore, to be certain what is meant by them here – bearing in mind the date and limited purpose of the Plan, as also the key to that Plan (which makes plain that the footpaths – and the hedges and trees – marked on it are "Proposed" rather than existing). At this point, it might be noted that the Interpretation Clause (cl. 1) includes "the Planning Consents", and narrates that that expression means "the Planning Permission issued by the Planning Authority [i.e. Aberdeenshire Council: cl.1.1] under Reference No. 97/1116/01 on 8 July 1998 in respect of inter alia [i.e. amongst others] the Subjects." It may be that that Planning Permission is, or was intended to be, incorporated in the lease – or that the Tenants are simply bound by it under general planning law; but the expression "the Planning Consents" does not appear anywhere in the lease other than in the Interpretation Clause itself. (Nevertheless, since headings are to be ignored for the purposes of interpretation [see Cl. 1.1 – preamble], the stated Planning Permission ought to be examined for its terms and its possible relevance to duties incumbent on the Tenants.)

Assuming that the reserved "Public Access Rights" are fully understandable – perhaps a rash assumption, since (e.g.) the detail with which access rights to the car park are narrated (access, egress *and use* – emphasis added) is not reflected in those relating to pedestrian access to the Subjects – what are the Tenants' obligations in respect of them? The lease, of course, contains a section entitled "Tenant's Operating Obligations" which must now be considered.

4. **Tenant's [sic] Operating Obligations**

These occupy section 3 of the lease. The most relevant of the Tenants' obligations are perhaps the following:

(3.2) Statutory Requirements, under which the Tenants must comply with all obligations imposed by (inter alia) Acts of Parliament, Statutory Instruments and bye-laws; such obligations must include these flowing from Part 1 of the Law Reform (Scotland) Act 2003 (on which – see below).

(3.3) Maintenance, which reads: "The Tenants shall accept the Subjects as fit for the purpose of the Permitted Use [i.e., in my opinion, for the growing and harvesting of trees as a community woodland] and the Tenants will at their own cost and expense throughout the duration of this Lease maintain and manage the same [i.e. the Subjects] for the purposes [note the sudden and unexplained appearance of the plural] of the Permitted Use in the terms of the Management Operations [an expression not explained, let alone defined] in accordance with the generally accepted principles from time to time prevailing of sound silvicultural practice save to the extent that it is no longer appropriate so to maintain or manage same due to any change in the Permitted Use authorised pursuant to Clause 3.6 of this Lease."

It will be noted that there is no express obligation to maintain footpaths – whether designated or not: that being so, it would have to be argued (if that was thought desirable) that there was such an obligation by necessary implication – no mean task, given the general vagueness of the terms of the lease; it would then have to be shown that the Tenants were failing to comply with that obligation – by reference to some external standard of compliance; and, finally, it would be necessary to lay the arguments and evidence before Aberdeenshire Council, and for the Council to be satisfied on both counts – since only that Council can take effective action against the Tenants for implement of the Tenants' obligations in terms of the lease – see clauses 1.1 ["Resumption", etc.], 3.11, 6.1(a) read with 6.2, 9 and 10).

By way of contrast, clause 3.4 imposes a specific obligation on the Tenants to keep and maintain (throughout the currency of the lease) "any walls or fences which are erected by the Tenants on the boundaries of the Subjects in good repair, order and condition to the reasonable satisfaction of the Landlords." It seems to me that, if a similar obligation had been desired by the Landlords in relation to footpaths, it would have been easy to insert it at this point in the lease: that, however, is simply not the case.

5. **Conclusion**

The preliminary conclusion seems to be that "Public Access Rights" are to be suffered passively by the Tenants – as they must also suffer passively the siting of works of art and craft by the Scottish Sculpture Workshop [see cl. 3.5.3 – in which, I think, the word "Landlords" in line 2 might possibly have read "Tenants", given the position of 3.5.3 in the lease (under the title: "Tenant's Operating Obligations") and the terms of 3.5.1 and 3.5.2 to which cl. 3.5.3 refers].

If the above is a correct interpretation, then the obligations of the Tenants vis a vis the footpaths would be little higher than this: not to impede public access by deliberate means. The lease, however, predates the rights established under the Land Reform (Scotland) Act 2003, and given practical effect under the provisions of the Scottish Outdoor Access Code: the newer statutory rights may, therefore, impose more onerous conditions than those flowing from the lease, or at least give rise to standards which owners (including tenants) of land must now comply with vis a vis public access rights – whatever the lease may or may not state.

6. **Postscript - The Land Reform (Scotland) Act 2003 (asp 2)**

The above titled enactment of the Scottish Parliament introduced (in section 1) access rights, available to everyone, in respect of almost all land in Scotland. [It should be noted, however, that "land" for these purposes does <u>not</u> include ground where "crops have been sown or are

growing" (section 6(1)(i)) and that "crops" originally included "plants ... cultivated for ... forestry ... purposes" (section 7(10)) – which would have excluded any places where trees were growing! This has now been amended, however, so that land used "wholly or mainly – (i) as woodland or an orchard, or (ii) for the growing of trees" is subject to access rights (although not "land used wholly for the cultivation of tree seedlings in beds"): see The Land Reform (Scotland) Act 2003 (Modification) Order 2005 (SSI 2005/65).]

Such access rights must be exercised "responsibly" (section 2(1)) – an important criterion in determining "responsible exercise" being compliance with the "access code" (section 2(2)(b)(i)).

The 2003 Act (see section 3) also places obligations on "every owner of land in respect of which access rights are exercisable". (An "owner of land" includes the Greenbelt Group of Companies, since they are in possession of Aberdeenshire Council's land under the lease considered at 1. to 5. above – see section 32) Such an owner must use and manage land in a way which is responsible relative to access rights: responsible use and management will be assumed if the owner "does not cause unreasonable interference with the access rights of any person exercising or seeking to exercise them" (section 3(2)). In particular (see section 14(1)), an owner must not "for the purpose or for the main purpose of preventing or deterring any person entitled to exercise [access rights] from doing so - ... (b) put up any fence or wall, or plant, grow or permit to grow any hedge, tree or other vegetation ... or (e) take of fail to take, any other action." Should an owner contravene the foregoing requirement, enforcement is to be carried out by a local authority – which ultimately may take such remedial action as it deems necessary, and that at the expense of the owner (see section 14(2)-(5)). Once again, an important element in determining whether an owner has acted "responsibly" in relation to access rights is the extent to which such an owner has complied with the relevant guidance for owners of land included in the "access code". (The access code means the Scottish Outdoor Access Code – available as a download from the web site of Scottish Natural Heritage.)

It may be seen, from the very short summary in the foregoing paragraph, that obligations upon owners of land subject to access rights are far more detailed and clear under the 2003 Act (and access code) than they are under the lease between Aberdeenshire Council and the Greenbelt Group of Companies – a distinct advantage, it may be thought (although not perhaps for the reason that those statutory obligations are of the "regular path-maintenance" sort that Kemnay Community Council might have hoped for).

6a. **Section 5(3) of the 2003 Act**

But it is not entirely clear to me that the 2003 Act provisions will apply to the Subjects of that lease: section 5(3) of the Act must be considered, i.e. –

> "The existence or exercise of access rights does not diminish or displace any other rights (whether public or private) of entry, way, passage or access."

It is uncertain what this means in relation to the lease's "Public Access Rights" Possibly it means that the rights of access under the lease are the sole measure of those rights as also of the Greenbelt Group of Companies corresponding obligations – which are thus unaffected by the provisions of the 2003 Act and the access code. Alternatively, it may mean that existing rights (such as those created under the lease) will continue to exist, but will do so subject to

the provisions of the 2003 Act and the access code – at least where those provisions are not inconsistent with the original terms of the lease.

Section 5(3) would seem to provide something of an obstacle, therefore, to the worth of further consideration of the 2003 Act and the access code relative to the obligations of the Greenbelt Group of Companies in relation to paths over the Subjects of the lease.

6b. **Additional**

It is for consideration whether, in a bid to clarify matters, Aberdeenshire Council might be invited to provide an opinion on (a) whether "access rights" under Chapter 1 of the Land Reform (Scotland) Act 2003 (asp 2) are applicable to the Subjects of the 2001 lease between that Council and the Greenbelt Croup of Companies; and (b) whether any path passing through those Subjects has actually been designated as a "core path" (since under section 19 of the Act, "the local authority may do anything which they consider appropriate for the purposes of – (a) maintaining a core path; (b) keeping a core path free from obstruction or encroachment; (c) providing the public with directions to, or with an indication of the extent of, a core path").

At the end of the day, however, it seems that irrespective whether the lease is looked to or the statutory provisions, passive non-interference with access rights is the general principle informing what might be expected of an owner of land (including a tenant in possession) in relation to access rights: requiring anything beyond that sort of principle would perhaps have been (and be) seen as an unreasonable burden on the ownership of land.