

INVERNESS AND NAIRN LOCAL ACCESS FORUM

ACCESS CASE REPORT

Agenda Item	3
Report No	

Cannich claimed public right of way

Report by Access Officer to Inverness and Nairn Local Access Forum

SUMMARY

It is claimed that a path in Cannich is a public right of way. Following a site visit advice is sought from the Forum about what further action is required to establish whether or not the path is a public right of way.

1. Introduction

- 1.1 A claim has been made that a beaten earth path between the unclassified road along Glen Cannich and the unclassified road along Strathglass.
- 1.2 Under Section 25 of the Land Reform (Scotland) Act 2003 a local access forum functions include "to advise the local authority on matters having to do with ...the existence and delineation of rights of way...". Having received claims that this is a public right of way and carried out some research the Council's access officer is seeking advice on what else might be done to establish whether or not this path is a public right of way.
- 1.3 A public right of way must:
 - Run from one public place to another
 - Follow a more or less defined line
 - Have been used openly and peaceably by members of the public otherwise than with the permission, express or implied, of the landowner
 - Been used this way without substantial and effective interruption for a period of 20 years or more

2. Actions

- 2.1 June 2012 a member of the public contacted the access officer claiming that this path was a public right of way.
- 2.2 The access officer contacted the community council. The feeling was that "the Public Right of Way (be) retained or actively endorsed."
- 2.3 2 types of questionnaire were sent to the initial enquirer for completion and

distribution. One was a lengthy form based on one in Appendix 1 of Public Access to the Countryside – A Guide to the Law, Practice and Procedure in Scotland by Jeremy Rowan-Robinson et al and published by Scottish Natural Heritage and the Convention of Scottish Local Authorities. It included a map on which respondents were to indicate the route they used. A more concise form created by the Highland Council also offered a format for recording evidence of use. No map accompanied that form.

2.4 In total 10 forms were returned. Of these:

- 5 forms suggested that the route satisfied the criteria required of a public right of way
- 2 of the 5 had been filled in by couples. Generally they are filled out by individuals to provide an objective, personal history of the route and to avoid prompting. Both suggested that the route satisfied the criteria required of a right of way.
- 7 were of the concise form
- 3 were the full form

2.5 Registers of Scotland were asked about the ownership of the land. No response has been received yet.

2.6 A search was carried out of the Council's access files to see if there had been a previous claim or issue at the site. Nothing was found.

2.7 A search was done of the site's planning history. Planning consent for a house and garage on this site was granted in April 2006. Plans for that house show no allowance for this claimed right of way. A stretch of roadside path is secured via a condition that does not serve the claimed path's purpose. An objection was raised but made no mention of a public right of way. There was no response from the access officer. In September 2009 the plans were approved by Building Standards.

2.8 Internal legal advice has been sought. No response has been received yet.

3. Recommendations

3.1 Members might like to consider Appendix 1: Officer Questions. These offer a range of questions someone could ask themselves if they wanted to establish whether or not a path was a public right of way or not.

3.2 Access to the Outdoors in Scotland – A Summary of relevant court decisions, Scotways, 2010 may also prove useful. It can be found on the internet here [Downloads](#)

REQUEST

The Inverness and Nairn Local Access Forum is asked to consider the report and advise the access officer on:

1. What further action or investigation is required by the forum to allow it to consider whether the route is a public right of way or not?
2. How that information might be presented to the Forum

Signature:

Designation: Access Officer

Date: 02 September 2013

Author: Stewart Eastaugh

Ref:

Background Papers: Appendix 1- Officer Questions

Appendix 1

A public right of way?

The more common way a path can become a right of way is that if it is used by the public in a certain way for more than 20 years. Here a right of way must:

- Join one public place to another
- Follow a more or less defined route
- Have been used by the public
- Openly and peaceably
- For a continuous period of 20 years ... without judicial challenge

Does the route run from one public place to another?	
Does it follow a more or less defined route?	
Has it been used openly and peaceably as of right [i.e. without the express or implied permission of the owner]? Is use of the route is generally over its whole length? Is it of a degree and quality as might be expected of a path in this position? Recreational use is a valid reason for its use Has use by the public been uncontested and for which they have not and do not seek permission or feel that they walk there with the owner's tolerance or acquiescence.	
Has it been used without substantial and effective interruption for the last 20 years or more? Is this with "resolution and consistency"? Is this substantial and effective?	

Whether or not the route is a right of way rests on these questions	
<p>Closure[s]</p> <p>Was the person that barred or prevented access acting with the authority of the owners?</p> <p>Can that be proven?</p> <p>Were they entitled to?</p> <p>What were the precise reasons for the closures?</p> <p>How often has the route been barred or access prevented and for how long?</p>	
Resolution	The purpose of the closure could be addressed here.
Consistency	
<p>Substantial</p> <p>Have the periods of closure for this reason been substantial?</p> <p>What has the longest period been, how often and for how long are the interruptions every year?</p> <p>A brief interruption may not be fatal.¹</p>	
<p>Effective</p> <p>Any action which is taken by the proprietor which effectively closes the route for a period and which is accepted by users will interrupt the prescriptive period i.e. the 20 years continuous use.</p> <p>Was this action effective?</p> <p>Have people objected to these actions in the past?</p>	

¹ Access Rights and Rights of Way, A Guide to the Law in Scotland, Prof R R M Paisley, Scottish Rights of Way and Access Society 2006

<p>Were they the route's ordinary users?</p> <p>Have people continued to use the route despite the obstruction[s]?</p> <p>Does it matter if the route was obstructed at times when people did not want to use it?</p>	
<p>Continuous²</p> <p>This does not mean that it has to have been used constantly but only so often as, having regard to the nature of the route..., is consistent with public use as of right³</p> <p>e.g. if the route crosses rivers that occasionally flood during which time the path[s] are not used might be expected.</p>	
<p>Has the route been acknowledged as a right of way by the landowner by deed?</p>	
<p>Is the route adopted as a footpath or road by the roads authority?</p>	

² Scottish Rights of Way and Recreation Society Ltd v. Macpherson 1887 & 1888

³ Access Rights and Rights of Way, A Guide to the Law in Scotland, Prof R R M Paisley, Scottish Rights of Way and Access Society 2006