

The Highland Council

Inverness and Nairn Local Access Forum – 15 December 2014

Agenda Item	4
Report No	1

Locked gate and stile at Lochloy, Nairn

Report by Stewart Eastaugh, Access Officer

Summary

The Highland Council has, over a number of years, received complaints from members of the public about a padlocked gate and stile at Lochloy that is not accessible to horse riders, people with buggies or mobility scooters. The Inverness and Nairn Local Access Forum (LAF) is asked to offer its opinion of the case.

1. Background

- 1.1 Under the Land Reform (Scotland) Act 2003, the Highland Council has a duty to uphold access rights. It is a function of the LAF to advise those consulting it on the exercise of access rights. Whilst it is preferred that access issues are resolved informally through discussion with the parties concerned, the LAF may also recommend to the Highland Council that it take action, including legal action, to address unresolved access issues.
- 1.2 In response to complaints received, the LAF in September 2006 endorsed a recommendation to pursue an action to remove the obstruction to full public access rights at a locked gate and stile at Lochloy, Nairn. That action has not been taken. That meeting of the LAF was criticised by Scottish Natural Heritage for not involving the land manager.
- 1.3 Today's discussion of the access issues at Lochloy is being held in accordance with the Council's procedures on hearings and site visits. The land manager and complainants have been given the opportunity to be involved.
- 1.4 The area in question is described as follows: Off Lochloy Road, east of Nairn, there is a gravel track leading from the public road across privately owned land to Culbin Forest which is managed by Forestry Commission Scotland – see **Appendix 1 Location Map**. The track begins at the junction with the public road where there is a gate across the track which is padlocked shut. Fenced from the road on either side there is a stile over a post and rail fence near the gate giving access to a beaten earth path which runs parallel to track for a short distance before joining the track. The track follows the north east margin of 12 hectares of rough grazing and woodland. It is fenced on the east side from fields which are used for grazing. About 340m from the public road the track meets the boundary with the National Forest Estate where there is access through an integrated, unlocked gate – see **Appendix 2 Site Map**.

1.5 Mr Andrew Coombs of Lochloy is taken to be the owner and land manager of the gate at the junction of the track with the main road, the land and track leading from the road to the National Forest Estate. However this has yet to be ascertained. It is reasonable and responsible for the LAF to be certain who the owner is, and that they have the authority to manage the land and respond to the Council's queries.

2. Do access rights apply?

2.1 The question of whether or not access rights apply is critical. An access authority has to be reasonably satisfied of the facts in order to exercise its duty. If it is claimed that access rights do not apply, it is reasonable for the LAF to require the land manager to provide evidence to support this claim. If a charge was made, prior to 31 January 2000, for use of the access by horse riders, then access rights would not apply for horse riders. Access rights would, however, still apply to other users, such as walkers, cyclists, people with buggies/mobility scooters.

2.2 Scottish Natural Heritage believes that access rights apply to the track and gate at Lochloy and is supportive of walkers, cyclists and horse riders taking responsible access there. There are no byelaws restricting horse riding or mobility scooters from access to the forest or foreshore.

2.3 The land manager maintains that access rights do not apply because horse riders have been charged for access for 90 days every year since 31st January 2000. If so this would exclude the land under Section 6(1)(f) of the Land Reform (Scotland) Act 2003 [the Act]. If access rights for horse riders do not apply to the track the land manager is entitled to exclude them from it.

2.4 The land manager variously claims to have charged horse riders for access since 1989 or 1990 and that - currently - one horse rider manages access for themselves and 5 others. That person is given a key for which they pay £300 or £400 a year.

2.5 Apart from the land manager's claims there is no evidence confirming that this or similar arrangements have been running since 1989 or 1990. The Council has repeatedly asked for some evidence, either in the form of invoices or receipts or names and addresses of those who have paid. No such evidence has been provided. A written appeal to members of the British Horse Society Scotland in the IV12 and IV36 postcodes in March/April 2013, asking if they had paid for access, generated 2 responses. Neither respondent had, although both were aware of the gate being an issue.

There is evidence that in the last 6 years a member of the public contacted the land manager's company and obtained a key from someone in Auldearn. It cost £25; the first instalment for an annual fee of £50 on condition that the gates remained locked and the key was not duplicated.

2.6 The land manager has also claimed that access rights do not apply to horse riders because the area has been set out for a particular recreational purpose

and is used as such. This is a reference to Section 6(1)(e) of the Act. The land manager claims that the track was used to access the foreshore and dunes before 1955 by the then owners and guests.

While that may have been the case it is not stated that the track was set out for that particular purpose – simply that it was used for it. Even if it were, responsible access along it would not interrupt or impede its continued use to reach the saltmarsh or foreshore.

The track now also serves as an access to Culbin Forest and is used by the Forestry Commission Scotland for forestry purposes. This is an industrial or agricultural as opposed to a recreational purpose and the claim on the basis that access rights do not exist on the basis that the track was set out for a particular recreational purpose should be dismissed.

- 2.7 A person has access rights only if they exercise them responsibly. That means not causing unreasonable interference with the rights associated with ownership, doing anything that is contrary to any byelaw, is contrary to the work of Scottish Natural Heritage or disregards the guidance in the Scottish Outdoor Access Code [the Code]. It also means acting lawfully; poaching, vandalism, littering and not clearing up after your dog are offences and conduct excluded from access rights.
- 2.6 Guidance contained in the Code relating to safe and responsible access includes: following paths and tracks where the environment is vulnerable or where there are animals in a field; and if possible to find alternative routes if there are animals (particularly young animals) in a field.
- 2.9 Responsible horse riding is summarised in Part 5 of The Code where “riding on hard surfaces, such as wide paths and tracks ... causes few problems... Take care not to alarm farm animals ... particularly if you go round a field margin. Do not go into fields where there are grazing horses or animals that might be a danger.”
- 2.10 Cattle graze the land the track passes through. The nearest alternative track to Culbin Forests tracks and foreshore is 2.5km west at Kingsteps or about 5km east near Bankhead. Forestry Commission Scotland offered to fence the track but the offer was declined.

3. Is the land manager managing their land responsibly?

- 3.1 If access rights apply to the track is it right to prevent horse riders and disabled people on mobility scooters from using it?
- 3.2 Land managers have a duty to manage their land responsibly in relation to access rights. That means not taking, or failing to take, any action for the purpose or main purpose of preventing or deterring anyone entitled to exercise their access rights. It also means following the guidance on responsible conduct in the Scottish Outdoor Access Code.

- 3.3 The guidance in the Code explains this further by saying that land managers should not physically obstruct or hinder people from exercising access rights. Locking a gate without providing an appropriate alternative for non-motorised access is considered an unreasonable obstruction. The stile is not an appropriate alternative because it stops horse riders from using the track.
- 3.4 The land manager has been asked to unlock the gate or install a self-closing side gate which was offered by the Council. He has failed to take that action. The result of failing to take that action has been to prevent horse riders from exercising their access rights.
- 3.5 Irrespective of whether access rights apply to horse riders, people with a disability who are in a vehicle which has been built or adapted for use by people with a disability enjoy access rights under Section 9(f) of the Land Reform (Scotland) Act 2003. It is the Council's view that the stile is not an appropriate alternative for people with mobility issues and a suitable alternative should be installed.
- 3.6 The Code asks that landowners, where reasonably practicable, provide gates, rather than stiles, on paths and tracks. The Council has offered to supply a self-closing side gate at no cost. Such gates are used successfully throughout the country to counter fears of gates being left open. It is practicable and reasonably easy to install such a gate here.
- 3.7 This view is at odds with that of Scottish Natural Heritage which believes that there was no requirement in the Code for existing facilities to be upgraded to suit the needs of all abilities users.

4. What actions might the Highland Council take to resolve the situation?

- 4.1 There are a number of options open to the Council including:
1. Establishing whether access rights apply:
 - establish who the owner or owners are
 - request evidence that a system for charging horse riders for access has been in operation since 31 January 2000
 - make a public appeal that people who have paid to ride there horses at Lochloy come forward
 - contact individuals known to be associated with the scheme in the past
 - establish whether or not access rights apply for disabled people in mobility scooters
 - seek a judicial determination of the existence and extent of access rights
 2. If access rights apply:
 - offer to supply and install a self-closing gate
 - serve notice on the owner to either unlock the gate or install an appropriate gate beside it
 - take other legal action that the Council feels is appropriate

3. If access rights apply to mobility scooters but not to horse riders:
 - ask that an appropriate gate is installed for disabled people in mobility scooters
 - write to horse rider complainants explaining the situation
4. If access rights do not apply to either category
 - write to all complainants explaining the situation.

5. Implications

5.1 Environment

The site is part of the Culbin Sands, Culbin Forest and Findhorn Bay Site of Special Scientific Interest. Scottish Natural Heritage acknowledges that damage is done to the saltmarsh by people and horse riders; most of which is on the western edge nearer Nairn. This damage was recorded as part of a Site Condition Monitoring programme in 2002 and 2010/2011. Scottish Natural Heritage supports the enabling and encouragement of responsible access throughout Scotland including Culbin. It considers that there are plenty of opportunities for walkers, cyclists and horse riders to enjoy responsible access at Culbin while avoiding causing damage to sensitive areas like the saltmarsh.

Environmental Health claimed to have had no complaints about flytipping or nuisance from this area.

Forestry Commission Scotland has said that horse riders do not cause them any particular issues. They do get the occasional user on soft paths but they enjoy a good relationship with the Moray Equestrian Access Group developing specific routes in partnership. Horses do not make an impression on the forest roads which handle 44 tonne vehicles. They have no objection to horse riders gaining access to any part of the National Forest Estate via any reasonable route.

It is understood that there are 10-12 horses in the area and that they would ride on this track if they had access to it. The track is hard and well-drained. It is claimed that horse riders already use the track.

Installing a self-closing side gate would not permit access to cars but it would make it easier for motorcycles to get into the forest. A gate could be adapted to exclude quad bikes but permit mobility scooters.

5.2 Resource implications

Further investigation and legal costs would be delivered through the Development and Infrastructure budget.

5.3 Legal

Police Scotland, Nairn are not concerned with accessibility. They report 2 records of reported crime in the area; the theft of 2 Forestry Commission padlocks from the gate in June 2009 and trees cut down in January 2013.

Police Scotland, Forres had received no reports about difficulties with public access to the area.

Legal action such as serving notices or applications to the Sheriff Court will have implications for Corporate Development staff time.

5.4 Equalities

An attempt is being made to make the site more accessible. In the event that an accessible gate is installed here Forestry Commission Scotland will follow suit.

5.5 Climate Change/ Carbon Clever

Improving access to this site for horse riders may mean less horse box traffic on the roads.

5.6 Risk

Legal action can be unsuccessful. This risk can be managed by thorough investigation, evidence gathering and presentation.

5.7 Gaelic

No implications

5.8 Rural Implications

There could be more horse riders on the road travelling to this access point
 There could be fewer horse riders on the road to Kingsteps and Cloddy Moss
 There could be fewer horse riders and horse boxes at Kingsteps and Cloddy Moss
 Improving access supports tourism which in turn supports the rural economy.

Recommendation

That the Inverness and Nairn Local Access Forum offer the Highland Council its opinion on this case and advise the Council on what actions it might take to resolve this access issue.

Designation: Access Officer

Date: 09 December 2014

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Background Papers:

Appendix 1 Location Map

Appendix 2 Site Map

Land Reform (Scotland) Act 2003

Scottish Outdoor Access Code

Legend

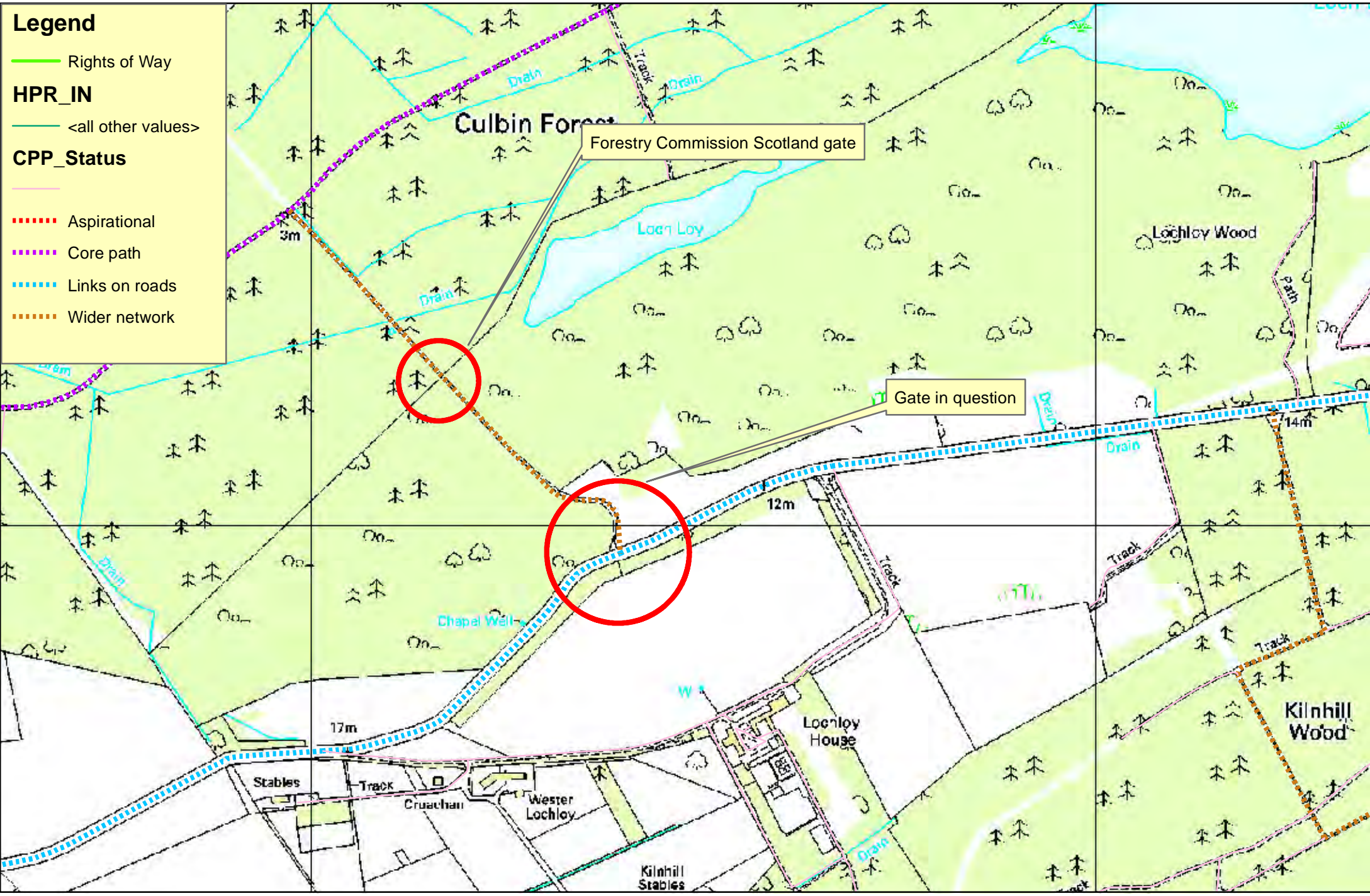
- Rights of Way
- HPR_IN**
 - <all other values>
- CPP_Status**
 - Aspirational
 - Core path
 - Links on roads
 - Wider network



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1:26,934

Map 1: Lochloy



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1:6,065

Map 2: Lochloy