

ANGUS COUNCIL

PLANNING AND TRANSPORT POLICY COMMITTEE -

20 APRIL 1999

INVESTIGATION OF CLAIMED PUBLIC RIGHT OF WAY - BALRUDDERY ROAD TO COUPAR
ANGUS ROAD (A923) VIA PIPERDAM

REPORT BY DIRECTOR OF LAW AND ADMINISTRATION

ABSTRACT

This Report advises upon the conclusion of investigations into the claimed public right of way between Balruddery Road and the Coupar Angus Road via Piperdam.

1. RECOMMENDATION

It is recommended that the Committee;

- (i) notes the outcome of investigations undertaken in connection with the claimed status of this route and the conclusions flowing from those investigations; and
- (ii) agrees to assert the existence of this route as shown on the annexed plan as a public right of way for pedestrians and as a bridleway

2. DESCRIPTION

- 2.1 The route is as shown marked "ABCD" on the attached extract ordnance survey plan.
- 2.2 The route follows a well defined line throughout with boundaries varying between farm fences and dykes; the route is generally bounded on both sides.
- 2.3 The surface condition of the route varies over its length with the northern end of the track being in good condition becoming more muddy around point B and reverting to a farm track condition from point C onwards to point D.
- 2.4 The route is substantially blocked for vehicular traffic at point C by large boulders. Felled trees have also been present on the route to the south of point C, again blocking the route for vehicular traffic and making passage difficult for horses and bicycles. Gates are present at point D which occasionally have been locked. There is also a sign at point D stating "North Binns, Private".

3. SUMMARY OF INVESTIGATIONS

- 3.1 The route clearly has some historical status being shown on County road maps dating back to 1794. The route is reputed to be a former Drovers' road but the Director of Roads' records do not disclose any evidence that the road was previously maintained as a public road or any records of any formal stopping-up of the route. The route was recorded by the former City of Dundee District Council as a claimed public right of way. However, it should be noted that such historical evidence is only relevant in the context of whether use by the public is consistent with use as of right and does not, of itself, constitute the existence of the relevant route as a public right of way. Creation of a public right of way requires evidence of use by the public for the prescriptive period as per the tests outlined below.

3.2 The legal tests which must be satisfied for the creation of a public right of way are as follows:

- The route must run from one public place to another public place.
- The track must follow a more or less defined route.
- The track must have been used openly by members of the public otherwise than with the permission, express or implied, of the land owner.
- The route must have been so used without substantial or judicial interruption for a period of 20 years or more ending on or after 25 July 1976 (40 years ending before that date).

3.3 **One public place to another public place**

This test is satisfied here. The Director of Roads has confirmed that the 2 roads at points A and D are on the list of public roads.

3.4 **More or less defined route**

Again, this test is satisfied as the route (as explained above) is reasonably well defined and is generally bounded throughout.

3.5 **Use by the public openly and without permission (use as of right)**

Evidence by way of questionnaires and supplementary questionnaires was received from 30 relevant witnesses who spoke to their use as members of the public (as opposed to use for private access or the like). Also excluded were witnesses who were not able to advise in sufficient detail as to the nature and extent of their use.

Of those 30 witnesses, 7 used the route weekly or more frequently; 16 used the route less than once a week but more often than once a month and 7 used the route less frequently than once a month but nonetheless regularly.

In all cases, none of the witnesses sought or obtained the permission of any land owners to walk the route. In my opinion, the use by the public of this route is consistent use as of right.

3.6 **Without substantial or judicial interruption for more than 20 years**

14 witnesses spoke to having personal knowledge of using the route for more than 20 years up to the present day, with the remaining witnesses speaking to having personal knowledge of use of between 5 and 10 years up to the present day.

Almost all the witnesses spoke to having observed boulders and/or trees blocking the route at or around point C (as referred to above) for the past 4 years but that such blockage only prevented vehicular use (the nature of the evidence regarding user is described more fully below). For the purposes of the present assessment, all witnesses spoke to having used the route on a continuous journey from end to end without turning back. No record of any previous court action concerning the status of this public right of way has come to light. In my opinion, therefore, use of this route has taken place for the prescriptive period without substantial or judicial interruption.

4. **NATURE OF PUBLIC RIGHT OF WAY**

4.1 Use of a public right of way for in excess of the relevant prescriptive period not only constitutes the right but also constitutes the extent of the right as so possessed.

- 4.2 In this case, all the witnesses speak to having walked the route at one time or another. By far the majority of the use has been pedestrian and it is therefore reasonably clear that such public right of way as exists is for pedestrian usage. There is also some evidence of use by bicycles for a substantial period, although probably short of the 20 year prescriptive period (approximately 10 witnesses). Although authorities are conflicting, case law suggests that bicycle use can be subsumed within pedestrian use as it is a muscle-powered conveyance. I am therefore of the opinion that the right to use the route by bicycle is likely also to have been established (as part of pedestrian user).
- 4.3 There is also a reasonable quantity and quality of evidence of the route having been used for equestrian purposes for in excess of the prescriptive period (at least 10 witnesses). Again, therefore, I am of the opinion that use of the route as a bridleway has also been established.
- 4.4 Although there is some evidence of use of the route for vehicular purposes as well, that evidence is now somewhat historic, albeit that the blockages have only been in place for the past 4 years. However, it is also clear that the route has been in poor condition for vehicular traffic for substantially in excess of that period and much of the evidence regarding vehicular use is associated with either access to/from properties on or near the route and/or for farm purposes (i.e. not used by the public as such for vehicular purposes). I am therefore of the opinion that a public right of vehicular use has not been established from the evidence submitted thus far.

5. PROPOSAL

- 5.1 From the evidence submitted, I am of the opinion that a public right of way for pedestrian (including cycle) and equestrian use has been established over this route. Assertion of the status of the route is therefore recommended.
- 5.2 If members approve the recommendation of this report and authorise assertion of the route as a public right of way, intimation of assertion will be given to all the witnesses and to the known land owners of lands on either side of the route.
- 5.3 Although a full search has not been carried out (due to the cost) it is understood that investigations into ownership of the solum of the route itself have been inconclusive and it is presumed, therefore, that the route either has no legal owner or is in the of the ownership of the proprietors who own land adjacent to the route (hence intimation being made to such adjacent landowners).
- 5.4 As members will be aware, assertion of the route by the Council as a public right of way does not have any binding legal effect as far as landowners and the general public are concerned - ultimately as the law stands, vindication of the public right of way is a matter for the Courts. However, assertion by the Council amounts to formal recognition by the Council of the route's status and brings into play the Council's duty to protect and keep clear and free from obstruction the public right of way in terms of Section 46(1) of the Countryside (Scotland) Act 1967 as well as the Council's discretionary powers over the route, including powers of maintenance.
- 5.5 Following assertion, therefore, the Director of Planning and Transport will consider what proposals, if any, he has in respect of fulfilling the Council's duty and exercising its powers in relation to the route. Such proposals may involve works and may have financial implications for the Council but would form the subject of a separate Report to this Committee.

6. FINANCIAL IMPLICATIONS

There are no financial implication arising as a direct result of this Report but consideration may require to be given in the future to carrying out works over the route as referred to as paragraph 5.5 above.

7. CONSULTATION

The Chief Executive, the Director of Finance, the Director of Roads and the Director of Planning and Transport have been consulted in the preparation of this Report.

8. CONCLUSION

This route is a reasonably popular local walk and bridleway of some historic standing and merits some protection. Assertion of the route as a public right of way is a first step in that process.

Catherine A Coull
Director of Law and Administration

NOTE: No background papers, as defined by Section 50D of the Local Government (Scotland) Act 1973 (other than any containing confidential or exempt information) were relied on to any material extent in preparing the above Report.