

ANGUS COUNCIL

PLANNING AND TRANSPORT POLICY COMMITTEE

24 AUGUST 2000

**SUBJECT: INVESTIGATION OF CLAIMED PUBLIC RIGHT OF WAY
KIRKTON OF AIRLIE TO HERDHILLMUIR VIA EGNO MOSS**

**JOINT REPORT BY DIRECTOR OF PLANNING AND TRANSPORT AND DIRECTOR OF
LAW AND ADMINISTRATION**

Abstract: This report advises upon the conclusion of investigations into the claimed public right of way between Kirkton of Airlie and Herdhillmuir via Egno Moss.

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 these 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.

2 INTRODUCTION

- 2.1 Complaints were received from members of the public that a claimed public right of way between Kirkton of Airlie and Herdhillmuir via Egno Moss had been obstructed. In accordance with the Council's duty to protect and keep clear and free from obstruction public rights of way in terms of Section 46(1) of the Countryside (Scotland) Act 1967, these complaints were investigated.

3 DESCRIPTION

- 3.1 The route is shown marked A-F on the attached Ordnance Survey Plan. It follows a well defined line which runs east to west as follows:-

From the public road leading from the A926 in the south to the B951 at Egno Moss marked A on the plan.

First one encounters a padlocked metal gate marked B on the plan which is the obstruction complained about in the original complaint regarding this alleged right of way. The gate runs across a farm track which is approximately 3.5 to four metres wide and partly gravelled. Shortly after passing the cairn on the left-hand side the roads slightly widens and then continues in an almost straight line across Egno Moss. The road is clearly visible and is what appears to be an old cattle drive. The road here is approximately four to five metres wide and remains can be seen of drainage ditches to either side of the path followed by earth mounds on either side of the path. It would appear that when the road was originally created the earth removed to create the ditches was piled up on the far side of the ditches to form a continuous wall rather than used to heighten the surface of the road. Along the track are several gates and one cattle raik. All other gates (C, D & E) apart from the first

one (B) which is padlocked can be opened quite easily and are not locked. They are either tied or shut by a mechanism of removable metal pins securing locks.

For the first half of the path there are trees which appear to be at least 100 years old on either side of the track which would indicate that the track is indeed a old road that has been in existence for at least as long as the trees. The trees clearly line the road rather than being planted in an arbitrary fashion.

After crossing Egno Moss the track is crossed by another track marked C on the plan leading down eventually to Kinalty in the south east. At that point the track curves round and then continues along a fence. The fence runs alongside the track all the way to the turn off to Cantermill. At this part which lies between two gates that can be opened the track becomes somewhat overgrown but it is clearly evident that even where gorse bushes have grown into the track that the original was still four metres wide and shows the same features as before, namely ditches and earth mounds to either side. After passing the turn off to Tannin Mill marked point D on the plan the track then continues through fields, passes another gate that can be opened and eventually turns into a wide track and farm track leading to Grange of Airlie. Within the last mile and a half the first 2/3 of a mile are lined by a stone wall but the road is still roughly three to four metres wide and eventually turns into a well travelled farm track which is clearly used by tractors. The end point is the public road at Grange of Airlie marked F on the plan.

When accessing the alleged right of way from the western end there are no obstacles to access and all gates which cross the path can be opened without any unusual effort. The only obstruction blocking access is from the eastern end at the gate marked B which is padlocked.

4 SUMMARY OF INVESTIGATIONS

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

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

4.2 One Public Place to Another Public Place

The Director of Roads has confirmed that the roads at either end of the alleged right of way are public roads and therefore public places. The road running from Airlie to Kirkton of Airlie from which the farm track branches off on the westmost side of the alleged right of way is an adopted road. So is the road leading from the B951 to the A926 on the eastern edge of alleged right of way from which the farm track branches off in a westerly direction.

4.3 **More or Less Defined Route**

This test is satisfied as the route is reasonably well defined as intimated in Section 3 above. An article in the Courier from 1982 written by Colin Gibson narrates that the track is an old drove road which was used to bring cattle from Glen Shee and Glen Isla to the lowlands and cattle markets. It went by the Cairns of Airlie to Egno Moss and Kirriemuir and then on towards Brechin.

It is clear from the layout of the road which on average is between three and four metres wide that it has been in existence for a long time and was a well planned and laid out route with drainage ditches on either side.

4.4 **Used by the Public Openly and Without Permission (Use as of Right)**

Evidence by questionnaires was received from forty relevant witnesses who spoke to their use as members of the public. Of those forty, all of them specify the type of use as being use on foot. Two witnesses speak of having used the track also for bicycle journeys. Of the forty witnesses, 10 claim that they have continuously used the path for over 20 years on a weekly basis, four claim that they have used the path for over 20 years on a monthly basis. 18 people claimed that they have used the path for foot journeys on a weekly basis, however, for less than 20 years. Five people claim that for less than 20 years they have used the track on a monthly basis. Witnesses indicated that they had used the route in 1997 and since the gate was padlocked in 1996 this would indicate that use continued even after the gate was padlocked. A lot of witnesses described how they would either crawl under the fence or climb the gate in order to continue on their way.

Five witnesses indicate either that this is an old drove road or that they consider this to be clearly a public right of way. One simply indicates that he/she has been stopped using the path by the gamekeeper and three further witness have been told by the gamekeeper to keep their dogs on leads and to stay to the path when using it. None of the witnesses have asked permission of the proprietor to use the road. Some witnesses indicate that they feel the reason the gate is padlocked is to keep motorcycles from using the path.

4.5 **Without Substantial or Judicial Interruption for more than 20 Years**

A total of 14 witness out of 40 claimed that they have used the route for more than 20 years. 23 witnesses have used the route for less than 20 years. There is no record of any previous court action concerning the state of this public right of way. The gate has been padlocked since 1996 but this does not seem to have stopped anybody apart from two elderly people from using the path. There is no substantial period of disuse.

5 **NATURE OF PUBLIC RIGHT OF WAY**

5.1 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.

5.2 The amount of use required to create a public right of access depends on the location and the density of population for the area in question. As this is a footpath linking very small settlements, it would appear that 27 witnesses stating they are using the route on a weekly basis and continue to do so even though the gate is shut would indicate a frequency of use which would be consistent with use as of right. As

there are only two witnesses indicating that they have used bicycles the use would really only apply to pedestrian access.

6 PROPOSAL

- 6.1 From the evidence submitted, we are of the opinion that a public right of way for pedestrian use has been established over this route. Assertion of the status of the route is therefore recommended.
- 6.2 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.
- 6.3 Although a full title search has not yet been carried out, it is understood that investigations into ownership of the solum of the route itself have been inconclusive and it is presumed, therefore, that either solum of the route is technically in the ownership of the Crown or is in the ownership of the proprietors who own land adjacent to the route (hence intimation being made to such adjacent landowners).
- 6.4 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 a 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.
- 6.5 Following assertion, therefore, the director of Planning & 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. In this particular case, the landowner would be required to remove the padlock at Point B.

7 FINANCIAL IMPLICATIONS

- 7.1 There are no financial implications 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 6.5 above.

8 CONSULTATION

- 8.1 The Chief Executive, the Director of Law & Administration, the Director of Finance, and the Director of Roads have been consulted in the preparation of this report.

9 CONCLUSION

- 9.1 This route is a reasonably popular local walk 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.

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.

AA/SJR/KW
7 August 2000

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