



# COMMISSIONED REPORT

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**Commissioned Report No. 307**

## **Outdoor Access and the Planning System**

(ROAME No. R07 AA 609)

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## Title - Outdoor Access and the Planning System

**Commissioned Report No. 307 (ROAME No. R07 AA 609)**

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### Background

Issues relating to outdoor access have been important themes and considerations in planning for a long time. Concepts such as *permeability* and *sense of place* are keywords in master planning and important considerations in modern development management. Historically, a development's effect upon a right of way, established path or bridleway has been a material consideration in the determination of a planning application. Since Part 1 of the Land Reform (Scotland) Act 2003 came into effect, this material consideration has been expanded to include a wider right of responsible access to most land.

This study explores how access rights can and are being protected through the planning system and to what extent the Scottish Government's local authority guidance on the Land Reform Act is being implemented by planning authorities across Scotland. It also takes a forward look at what provisions are likely to be included in future development plans to protect outdoor access rights and where core path plans will sit in the context of those plans.

### Main findings

- The general right of access to most land is not commonly recognised as a material consideration in determining a planning application at the time of this study. In none of the cases that we have examined, where a final conclusion has been reached, have access rights been cited as grounds for refusal, whilst in several cases it could legitimately have been so.
- With regards to development plan preparation, it seems to be too early to tell how core paths plan will sit in the forthcoming strategic development plan and local development plan structure. In a number of cases, provision has been made to protect access rights in recent development plans.

It may be beneficial to provide further published guidance or training, specifically for planners, on the Land Reform Act and how access should be considered in planning applications.

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## **CONTENTS**

<b>1</b>	<b>INTRODUCTION</b>	<b>5</b>
<b>2</b>	<b>METHODOLOGY</b>	<b>6</b>
	2.1 Reviewing outdoor access as a material consideration	6
	2.2 Survey of Planning Authorities' handling of the Scottish Executive's suggested planning condition	6
	2.3 Inquiry review	7
	2.4 Outdoor access in the new development plans	7
	2.5 Case studies	7
<b>3</b>	<b>OUTDOOR ACCESS AS A MATERIAL CONSIDERATION</b>	<b>9</b>
	3.1 Introduction	9
	3.2 The Land Reform (Scotland) Act 2003	9
	3.3 The general position: SPP1	12
	3.4 Position in relation to the Land Reform Act and Access; SPP11	13
	3.5 Scottish Executive Guidance	13
	3.6 Development plans and policies	14
	3.7 Implication for consideration of access within planning	14
<b>4</b>	<b>SURVEY OF PLANNING AUTHORITIES' HANDLING OF THE SCOTTISH EXECUTIVE'S SUGGESTED PLANNING CONDITION</b>	<b>16</b>
	4.1 Introduction	16
	4.2 Results	16
	4.3 Discussion	21
<b>5</b>	<b>PLANNING INQUIRIES</b>	<b>23</b>
	5.1 Responses to the questionnaire	23
	5.2 Other cases identified – desk review	23
	5.3 Lowland crofting scheme	23
	5.4 Closure of pathway, Clarkston	24
	5.5 Discussion	25
<b>6</b>	<b>PLANNING POLICY</b>	<b>27</b>
	6.2 Access provision	28
	6.3 Core path plans	28
	6.4 Outdoor access strategies	29
<b>7</b>	<b>CONCLUSIONS</b>	<b>30</b>
	7.1 General lessons	30
	7.2 Advice/Guidance to SPP11	30
	7.3 Use of conditions	30
	7.4 Development plans	31
	7.5 Potential actions	31

**ANNEX A Case Studies -**

- Case Study 1- Planning brief for new housing development
- Case Study 2- Access provision at a major windfarm
- Case Study 3- Access within a new golf course development
- Case Study 4- Access within the masterplan for major new development
- Case Study 5- Development of public open space
- Case Study 6- Improvements to access within Estate grounds
- Case Study 7- Privacy issues and realigned right of way
- Case Study 8- Severance of access by fence and gate leading to Public Inquiry
- Case Study 9- Severance of access to woodland by fence erection

**ANNEX B Questionnaires**



# 1 INTRODUCTION

- 1.1.1 Issues relating to outdoor access have been important themes and considerations in planning for a long time. Concepts such as permeability and sense of place are buzzwords in master planning and important considerations in modern development management. Historically, a development's effect upon a right of way, established path or bridleway has been a material consideration in the determination of a planning application. Since Part 1 of the Land Reform (Scotland) Act 2003 (hereafter referred to as the Land Reform Act) came into effect, this material consideration has been expanded to include a wider right of responsible access to most land.
- 1.1.2 The duty to uphold these access rights falls to local authorities and National Park authorities. Because most new development occurs on land to which such rights apply, it is the responsibility of the planners to take this into account in reaching their decision on planning permission. Where access rights are compromised by interventions that would not be defined as development, or would be deemed to be permitted development, the local authority has a duty and powers to defend the public right to access land through a legal challenge.
- 1.1.3 There has been a degree of uncertainty in the past arising from planning committees and Reporters indicating their belief that the planning system is not the appropriate or correct vehicle for upholding access rights. In many cases, this has led to protracted planning decisions and legal proceedings in which the losing party is obliged to pay all costs. Where an illegitimate restriction on public access is caused specifically by a development or proposed development, the duties under the Land Reform (Scotland) Act establish the planning system is best placed to uphold these rights, just as they would a public right of way. The basis for outdoor access rights being a material consideration in determining a planning application is discussed in detail in *Section 3*.
- 1.1.4 The Land Reform Act, which came into effect in February 2005, also establishes a number of additional requirements for local authorities relating to access provision, including the preparation of a Core Path Plan and the establishment of Local Access Forums.
- 1.1.5 This study explores how access rights can and are being protected through the planning system and to what extent the Scottish Government's local authority guidance<sup>(1)</sup> on the Land Reform Act is being implemented by planning authorities and Reporters<sup>(2)</sup> across Scotland. It will also take a forward look at what provisions are likely to be included in future development plans to protect outdoor access rights and where core path plans will sit in the context of those plans.

(1) Part 1 Land Reform (Scotland) Act 2003, Guidance for Local Authorities and National Park Authorities, Scottish Executive, February 2005.

(2) Of the Scottish Executive's Enquiry Reporters Unit - now renamed the Directorate for Planning and Environmental Appeals.



## 2 METHODOLOGY

This study has focussed on how the planning system is delivering the requirement placed on local authorities by the Land Reform Act to uphold access rights and how this may progress in the future. Our approach can be split into six parts; the main components comprise:

- a review of the policy basis for outdoor access being a material consideration for planning applications and policies;
- a survey of planning authorities to review in use, their handling of the suggested planning condition contained in the Scottish Executive's guidance document (Scottish Executive, 2005)<sup>(1)</sup> ;
- a review and assessment of recent planning inquiries in which outdoor access issues have been a material consideration;
- an assessment of how outdoor access may be addressed within the forthcoming strategic and local development plans;
- case studies providing information and commentary on examples of good practice in providing or enhancing outdoor access through the planning system; and,
- general conclusions that consolidate the findings from the various elements of the study.

### 2.1 Reviewing outdoor access as a material consideration

The review of the basis for outdoor access being a material consideration in determining a planning application was undertaken as a desk study, reviewing the relevant legislation, guidance and planning policy. This is presented in *Section 3*.

### 2.2 Survey of Planning Authorities' handling of the Scottish Executive's suggested planning condition

2.2.1 The survey of planning authorities was undertaken via on-line questionnaires. Three questionnaires were developed and published to gather responses from development management, policy development and planning enforcement departments within each local authority in Scotland<sup>(2)</sup>. The initial objectives of the survey, as required by SNH, were to understand to what extent the Scottish Executive's guidance is being used in the drafting of conditions to planning permission, in what format applicants are submitting the required information, and how material considerations of access rights have been considered and reflected in approvals and enforcements.

2.2.2 Following publication of the on-line questionnaires<sup>(3)</sup> a letter was sent out to each planning authority in Scotland, addressed by name to the Head of Planning (or equivalent), describing the background to the project and asking they request that

(1) Part 1 Land Reform (Scotland) Act 2003, Guidance for Local Authorities and National Park Authorities, Scottish Executive, February 2005.

(2) A copy of the questionnaires is in Annex B.

(3) The questionnaires were published using "Grapevine" software. All responses were produced and submitted on-line.

a senior planner, within each of the three departments detailed above, complete the questionnaire. In most cases, the personnel that we hoped would complete the relevant questionnaires, usually the heads of the respective departments, had been identified and were copied into the original letter. It was expected that these people would be best placed to have an overview of relevant planning cases or issues arising in policy development.

- 2.2.3 Approximately a fortnight after the initial letter was sent out, a follow-up reminder letter and e-mail was sent to non responsive planning departments. Again, after a further fortnight, a final reminder e-mail was sent followed by a phone call to those departments that had still not responded.
- 2.2.4 Questionnaire responses were gathered on-line. An analysis and discussion of the results over the planning condition and over planning enforcement are presented in *Section 4*.
- 2.2.5 In addition to answering the objectives described above, the questionnaires were used as the main vehicle for researching the other aspects covered by the study described in the sections below.

## **2.3 Inquiry review**

The review and assessment of recent planning inquiries was undertaken as a desk based exercise to identify cases where issues of outdoor access have been material considerations in determining planning permission. In addition to internet searches for relevant cases, the development management questionnaire requested that responders identify any public inquiries within their administrative area, since 2005, in which outdoor access rights issues have been material considerations. Furthermore, in telephone and other communications with planning departments regarding case studies and follow-ups to the questionnaire survey, planners were asked if they were aware of any relevant inquiries. The review of relevant public inquiries is included in *Section 5*.

## **2.4 Outdoor access in the new development plans**

The questionnaire survey was also the main source for identifying how outdoor access may be addressed in the forthcoming local development plans and strategic development plans introduced by the Planning etc. (Scotland) Act 2006. One of the questionnaires was specifically aimed at policy planners for this purpose. Following the launch of the questionnaires on line, seventeen departments were also contacted by phone and asked how they foresaw such issues being addressed in the new development plans. The results of these enquiries and responses to the questionnaire study are presented in *Section 6*.

## **2.5 Case studies**

Case studies were identified by a number of means. The questionnaire for development management included a request for the identification of any cases that responders were aware of within their administrative area that may be of

interest. Where such cases were identified in this manner, the case officer was contacted to provide further details relating to the case. Where it appeared that the planning case would be appropriate as a project case study, further details were requested and the site in question was visited to gather further information and photos to illustrate the study. In most cases, the planning authority was also visited to gather further information from the case files and to have further discussions with the case officer.

The questionnaire responses did not identify as many suitable case studies as we had initially hoped. A number of others have been identified through:

- re-phoning all planning authorities that had still not provided a response to the development management questionnaire by 2008 and speaking to duty planners;
- internet searches; and
- liaison with access officers and SNH project manager.

Nine case studies have been produced in total and these are included in *Annex A*.

### 3 OUTDOOR ACCESS AS A MATERIAL CONSIDERATION

#### 3.1 Introduction

- 3.1.1 This section reviews and collates the policy basis for outdoor access being a material consideration in determining a planning application and in planning policies.
- 3.1.2 There is a long history of building well designed outdoor access into the policy and practice of planning, for instance within planned towns and housing developments. Outdoor access within the public realm of developments is of course very important in providing routes and spaces for functional access and for recreational access to benefit local residents and the general public.
- 3.1.3 Outdoor Access has been given a new context in Scotland since the Land Reform Act established the right of responsible access to most land. Most outdoor access issues within the planning system previously involved footpaths and rights of way, and will continue to do so, but the Land Reform Act has introduced an added dimension with the general right of access to most land and inland water, inclusive of land where no evidence of access such as paths, exists. Many new developments will have the effect of removing this public right to some extent because access rights do not apply to buildings and their legitimate curtilage or privacy zones.

#### 3.2 The Land Reform (Scotland) Act 2003

- 3.2.1 The Land Reform Act came into effect in February 2005 and establishes a statutory right for access to land and the right to cross land. It also establishes a number of additional requirements of local authorities relating to access provision, including the preparation of a Core Path Plan and the establishment of Local Access Forums.

This right to access most land and inland water extends to those accessing land:

- (a) for recreational purposes;*
- (b) for the purposes of carrying on a relevant educational activity; or*
- (c) for the purposes of carrying on, commercially or for profit, an activity which the person exercising the right could carry on otherwise than commercially or for profit.” (Part 1 Land Reform (Scotland) Act 2003)<sup>(1)</sup>*

There are some exemptions to this right, which are described in sections 6 and 7 of the Land Reform Act.

- 3.2.2 Section 13(1) of the Land Reform Act establishes the duty of local authorities to uphold access rights.

(1) Part 1 Section 1(3) Land Reform Act.

*13(1) It is the duty of the local authority to assert, protect and keep open and free from obstruction or encroachment any route, waterway or other means by which access rights may reasonably be exercised. (Part 1 Land Reform (Scotland) Act 2003)*

- 3.2.3 However, section 13(2) acknowledges that the duty of local authorities to uphold access rights should not compromise their other operations.

*13(2) A local authority is not required to do anything in pursuance of the duty imposed by subsection (1) above which would be inconsistent with the carrying on of any of the authority's other functions. (Part 1 Land Reform (Scotland) Act 2003)*

- 3.2.4 The Scottish Executive's Guidance on the Land Reform Act provides an explanation of how, where conflicts appear to arise, these functions can be accommodated.

*The establishment of access rights assists all members of the public to enjoy the countryside and to take part in informal recreation both on land and inland water. Local authorities have a key role in facilitating the exercise of access rights on the ground. The Act places an emphasis on the local management of access and imposes a specific duty on local authorities to uphold access rights. It is recognised that local authorities require sufficient powers to be able to manage access within their areas, and to fulfil this duty. The Act provides them with new powers and duties. As the new access arrangements are to ensure improved responsible access for all, local authorities are reminded of their obligations under the Disabilities Discrimination Act 1995 and ensure, where it is appropriate to do so, that facilities are in place to allow those with a disability to enjoy safe access to the outdoors.*

*Local authorities will have the main role in upholding access over all land, not just paths. The duty placed on local authorities to assert, protect, keep open and free from encroachment any route, waterway or other means by which access may be reasonably exercised is an important one, and central to the success of the new arrangements. The emphasis of the legislation on the local management of access means that dialogue and consensus building is vital. Local authorities will rely heavily on advice from their access officers on the ground and from their local access forum(s) which should provide advice based on discussions between all those affected by the new access rights. If this dialogue and consultation is done effectively it should reduce the need to go down the route of having to defend legal proceedings, as allowed for under section 13(3) of the Act.*

*Local authorities will have their own procedures by which to involve elected representatives. Often the key to dealing successfully with any problem that arises will be early intervention by the local authority. Consideration should, therefore, be given to the scope for initiatives at official level without the delay of reference to Committee to prevent minor problems escalating into major problems.*

### **Assert, protect, keep open and free from encroachment**

*Land managers have a clear duty to manage responsibly land over which access rights can be exercised. It is essential that in order for the public to exercise their access rights that land is open and free from obstructions. It is important that local authorities understand the relationship between the duties imposed by section 13 and the powers to assist them fulfil this duty provided in sections 14 and 15 of the Act.*

*Section 14 of the Act provides that owners should do nothing for the purpose of preventing or deterring the exercise of access rights. Where an owner acts in such a manner, section 14(2) provides powers to local authorities by written notice to require the owner to remedy the situation. If the owner fails to comply with the notice, section 14(3) allows the local authority itself to enter the land to undertake the remedial action and to recover the costs from the owner. Section 15 permits authorities to take similar remedial action to remove anything they feel has been erected in such a way that it is likely to cause injury to anyone exercising access rights.*

*The duty placed on local authorities by section 13 of the Act is clear. Sections 14 and 15 provide powers to assist local authorities to fulfil their duty. If a local authority fails to act to secure access under sections 14 and/or 15 then this may be a breach of their duty under section 13. Anyone who considers a local authority had not acted in accordance with this duty could seek a judicial review of the decision not to act.*

### **Impact of duties under the Act on other functions**

*The duty imposed by section 13(1) does not override a local authority's other functions. An example of this is when they are considering planning applications for development on land over which access rights are exercisable they will still be able to give consent for developments. However, where appropriate, local authorities should consider attaching a suitable planning condition to enable them to ensure reasonable continuing public access. A model planning condition is attached as an annex to this section of the guidance that local authorities may adapt for their own use.*

*The duty imposed by section 13(1) continues to apply in respect of land where the local authority is not the authority with primary responsibility for the discharge of functions under part 1 of the Act. For example, the duty would apply to a local authority considering a planning application in respect of land within a national park where the park authority would be responsible for functions such as core path planning. It is not anticipated that a national park authority would be required by section 13(1) to call in any planning application that might affect the exercise of access rights such as in the case of the Cairngorms National Park authority which does not have the full responsibilities for development control under planning legislation. It would be appropriate for these issues to be addressed in the development Control Protocol between the park authority and the neighbouring local authorities. (Scottish Executive, 2005)*

The Land Reform Act establishes a requirement for local authorities to assert, protect and keep open and free from obstruction or encroachment any route, waterway or other means by which access rights can be reasonably exercised. This provision applied equally to accessible areas in an urban setting as it does to the wider countryside. Because the Land Reform Act creates a statutory right for the general public to access most land and places the duty to uphold this right upon local authorities, where development removes this right, there is an obligation on the planning authority to take this into consideration. This would be the case if any development appears to conflict with the provisions of a piece of primary legislation, ie the legality of a development is always a material consideration. Where access rights are compromised by an intervention that does not fall within the sphere of planning, it should be dealt with via the powers provided by the Land Reform Act to commence court action.

### **3.3 The general position: SPP1**

3.3.1 The 'Scottish Planning Policy' series is issued by central government to inform planning authorities of the government's stance on the various topic specific planning issues covered by the series. They identify the government's key principles and priorities for the system.

SPP1 'The Planning System' introduces the series and includes policy relating to:

- how planning can contribute to the Executive's wider objectives;
- the main tasks for development planning and development control; and
- the Executive's expectations for an efficient and effective planning service.

3.3.2 Section 57 of SPP1 states that:

*Planning decisions should always be made on planning grounds and in the public interest. The planning system should not be used to secure objectives that are more properly achieved under other legislation. The grant of planning permission does not remove the need to seek other statutory consents nor does it imply that these consents will be forthcoming. (Scottish Executive, 2002)*

The interpretation of this has led to some confusion surrounding where the consideration of other legislation lies, leaving the consideration of access, and other related issues, to be dropped from the planning process.

3.3.3 However, where any such consideration arises as a result of development, any relevant protection or consideration is inherently most properly achieved through the system in place to control development, which is the planning system. This is borne out by the remainder of SPP1, Section 57:

*Even where legal or administrative measures outwith the planning system may exist for controlling a particular activity, this can still be a consideration to which weight is given in reaching a planning decision. If a consideration is material in planning terms, it must be taken into account in reaching a decision. For example, the planning authority should have regard to the impact*

*of a proposal on air or water quality although the regulation of emissions or discharges will fall to be dealt with other under other legislation. (Scottish Executive, 2002)*

### **3.4 Position in relation to the Land Reform Act and Access; SPP11**

- 3.4.1 SPP11: *Open Space and Physical Activity* was published in November 2007, whilst this study was being undertaken. Section 22 of SPP11: *Physical Activity and Open Space* states that:

*Access rights and core path plans **are a material consideration** in determining applications for planning consent. Local authorities have a duty to uphold access rights over most land and inland water, not just paths. Planning authorities should consider attaching appropriate conditions to ensure continuing public access. (Scottish Executive, 2007)*

- 3.4.2 Open spaces are recognised as being vital to Scotland's urban and rural communities and SPP11 highlights the Scottish Ministers' commitment to their protection. As discussed above, the Land Reform Act establishes a statutory right for the public to responsibly access most land and inland water, including land that does not necessarily have established recreational or defined access uses. The duty of local authorities to uphold this right is sited in SPP11 as being a material consideration in determining a planning application. Scottish Planning Policy (SPP) is always a material consideration in a planning application and will inform the content of future development plans.

In producing development plans, planning authorities must draw on contemporary government policy regarding development and, where appropriate, put it in a local or regional context within the forthcoming development plan. Statements of policy (SPPs and NPPGs) are not intended to provide advice. Planners are obliged to take into account policy that has been introduced since the adoption of their development plan in considering any planning application. Advice on policy is provided in the form of Planning Advice Notes (PANs); SPPs and NPPGs are always material considerations in planning determinations.

### **3.5 Scottish Executive Guidance**

- 3.5.1 Scottish Executive guidance to the Land Reform Act "*Part 1 Land Reform (Scotland) Act 2003, Guidance for Local Authorities and National Park Authorities*" was produced to accompany the Act coming into effect in February 2005 and provides explanations of the various provisions of part 1 of the Land Reform Act in the context of local authority functions. The guidance includes a suggested planning condition to enable planners to account for the removal of access rights through development where it is likely to occur:

*Prior to the commencement of works ... (if attached to a full planning permission )  
or*



*As part of the detailed application... ( if attached to an outline consent)*

*....a detailed plan of public access across the site (existing, during construction and upon completion) will be provided for the approval of the council as planning authority. This will show:*

- a) all existing paths, tracks and rights of way, and any areas currently outwith or excluded from statutory access rights\*;*
- b) any areas proposed for exclusion from statutory access rights, for reasons of privacy, disturbance or curtilage, in relation to proposed buildings or structures;*
- c) all paths and tracks proposed for construction, for use by walkers, riders, cyclists, all-abilities users, etc.*
- d) any diversions of paths - temporary or permanent - proposed for the purposes of the development.*

*\* under Part One of the Land Reform (Scotland) Act 2003. (Scottish Executive, 2005)*

- 3.5.2 This should ensure that access matters are explicit in the planning application so that they can be given explicit assessment and consideration.

### **3.6 Development plans and policies**

- 3.6.1 Sections 19 and 21 of SPP 11 provides some guidance as to where access rights and core path plans should sit in relation to the development plan:

*(19) Planning authorities and developers should seek to identify opportunities to create and enhance links between open space as an integral part of development, and open space should be included as part of the design proposals. For large land releases and regeneration areas, masterplanning can play a key role in the strategic provision of open space across wider areas and land ownerships.*

*(21) Local authority departments should work together to ensure consistency and compatibility between the open space strategy, the core paths plan, the local transport strategy and the development plan. It is likely that the core paths plan will include existing routes. It may also establish new routes in order to provide new access opportunities and to make links to existing networks and open space. The local development plan should cross-refer to the core paths plan, incorporate relevant material and set out policy protection for core and other paths such as long distance routes and rights of way. It may be appropriate to include key information on the proposals map. (Scottish Executive, 2007)*

### **3.7 Implication for consideration of access within planning**

- 3.7.1 Access rights can apply without evidence of use for outdoor access purposes (eg. paths) and go wider than the previous concerns with Rights of Way as described in 3.1.2.

3.7.2 The development management system should be used to deal with access in relation to new developments. The powers given to local authorities by the Land Reform Act to commence legal proceedings, should be used when the planning system is not involved, for example, for obstructions on agricultural land, issues of responsible behaviour, structures deemed to be permitted development, etc.

## 4 SURVEY OF PLANNING AUTHORITIES' HANDLING OF THE SCOTTISH EXECUTIVE'S SUGGESTED PLANNING CONDITION

### 4.1 Introduction

4.1.1 The initial objectives of the survey were to examine planning authorities' use of the suggested planning condition contained in the Scottish Executive's guidance document *Part 1 Land Reform (Scotland) Act 2003, Guidance for Local Authorities and National Park Authorities* (see section 3.5.1).

The survey looked to examine:

- the extent of use of this suggested planning condition in practice;
- any adjustments to the wording of the suggested planning condition which planning authorities have made in order for it to better fit with their purposes, or any alternative conditions which the authorities consider to meet the same purpose;
- the formats in which applicants have supplied the required information; and,
- the manner in which these material considerations and conditions have been considered and reflected in approved developments, or in enforcements.

4.1.2 The questionnaire surveys (see *annex B*) tailored to address these objectives were targeted at development management planners and enforcement planners separately. In the questionnaire for development management, this was expanded to include a question relating to what type of site these considerations related to in order to understand whether it was perceived only as a greenfield consideration or of relevance to brownfield sites as well. It was also felt important to ask whether access considerations related only to effects on existing paths or whether they had included the wider rights of access that apply to all land, irrespective of whether the land contains established paths and tracks.

### 4.2 Results

#### 4.2.1 *Development management questionnaire*

19 responses were received from development management planners in different local authorities. The local authorities that provided a response to this questionnaire were:

- West Dunbartonshire
- North Ayrshire Council
- Cairngorms National Park Authority
- Fife Council
- Aberdeen City Council
- Renfrewshire Council
- Loch Lomond and The Trossachs National Park Authority
- Orkney Islands Council

- Dumfries and Galloway Council
- Shetland Islands Council
- Comhairle nan Eilean Siar
- Falkirk Council
- Inverclyde Council
- Dundee City Council
- City of Edinburgh Council
- Scottish Borders Council
- East Dunbartonshire Council
- Stirling Council
- West Lothian Council

**4.2.2 Q1. Are you familiar with the guidance document: Part 1 Land Reform (Scotland) Act 2003, Guidance for Local Authorities and National Park Authorities?**

Of the 19 responding development management planners from different local authorities, five (26.3%) were aware of the guidance document <sup>(1)</sup> and 14 (73.7%) were not aware of it.

**4.2.3 Q2. Have you seen the suggested planning condition from Guidance for Local Authorities and National Park Authorities prior to now?**

The responses broadly reflected this level of awareness of the guidance document, with 4 responders (21.1%) having seen it while 15 (78.9%) had not.

**4.2.4 Q3. In your estimation, in what percentage of planning applications made in the past 12 months has the issue of access land arisen as a material consideration?**

The results are shown in the table below.

*Table 4.1 - Percentage of applications by site type*

<b>Responder</b>	<b>Greenfield</b>	<b>Brownfield</b>
1	10%	2%
2	0.5%	0.5%
3	25%	25%
4	10%	10%
5	0%	0%
6	0%	0%
7	1%	<1%
8	2%	1%
9	1%	3%
10	5%	10%
11	0%	0%
12	<1%	<1%

(1) Part 1 Land Reform (Scotland) Act 2003, Guidance for Local Authorities and National Park Authorities

Responder	Greenfield	Brownfield
13	80%	20%
14	0%	0%
15	0%	0%
16	20%	20%
17	1%	0%
18	2%	0%
19	1%	4%

Because of the huge variance in the results, any statistical consolidation of these results such as obtaining a median or mean would be meaningless. The most significant outcome of this survey may be the variance itself.

#### 4.2.5 Q4. In your experience, have these material considerations related to:

- The provision or realignment of paths or tracks to replace those severed or otherwise affected by development proposals.
- The removal, through development, of the wider rights of access that apply to all land, irrespective of whether the land contains established paths or tracks.
- None of the above

In the experience of the 14 planners that responded to this question, material considerations related:

- only to the provision or realignment of paths or tracks to replace those severed or otherwise affected by development proposals. (8 responders (42%));
- only to the removal, through development, of the wider rights of access that apply to all land, irrespective of whether the land contains established paths or tracks. (1 responder (5.5%));
- to both the provision or realignment of paths or tracks to replace those severed or otherwise affected by development proposals and the removal, through development, of the wider rights of access that apply to all land, irrespective of whether the land contains established paths or tracks. (2 responders (11%)); and
- to none of the above. (4 responders (21%)).

Four of the planners that provided partial responses to the questionnaire did not respond to this question. In combination with those that responded “none of the above” this represents 42% of questionnaire responders.

#### 4.2.6 Q5. Have the Scottish Government’s suggested planning condition or similar provisions been used in planning cases regarding the development of access land in your local authority?

All 19 responders answered this question. In 16 (84.2%) responses, the Scottish Government’s suggested planning condition or similar provisions had never been used in planning cases regarding the development of access land in their local authority. Only 3 authorities have used a similar condition.

4.2.7 **Q6. If so, have you adapted the wording of the suggested condition to suit particular considerations affecting your local authority area or a specific development?**

In two cases, the wording of the suggested condition in the Scottish Executive guidance had been changed, in one case, the wording had been used as per the guidance.

4.2.8 **Q7. If yes, please insert your alternative wording in the text box below and provide brief details of why this wording was better suited to the circumstances.**

Three responses were received to the request for alterations to the suggested wording of the condition have been adopted; the first quoted below is an explanation of an approach to dealing with access considerations rather than an alteration of the wording:

*(Where this issue arises with a detailed application we would normally try to resolve public access issues before granting permission - the suggested condition is perhaps most suited to outline applications, although we have normally used bespoke conditions specifying precisely which public access feature(s) we wanted to see retained/provided)*

*Historically the following planning condition has also been used by the Council: No works shall be undertaken which in any way impinge or obstruct alleged or vindicated rights of way on or adjacent to the application site, unless otherwise agreed in writing with the Council as Planning Authority. I do not think this wording is necessarily better and would urge use of the condition recommended by Scottish Government.*

*While the condition has not been used as such, we would expect to use it as a model and amend as suitable for the circumstances, for example, delete 'etc' as this might be seen as being imprecise and therefore failing the usual tests. The reference to 'detailed application' could also be expected to read 'reserved matters application'.*

4.2.9 **Q8. Where such conditions have been addressed by the applicant, how has the required information been presented?**

- **On the application plans**
- **In the supporting application text**
- **Only in subsequent correspondence**
- **Other, Please Specify**

Ten responders answered this:

- three responders replied “on the application Plans”
- three responders replied “on the application Plans and in the supporting text”
- Two responders replied “on the application Plans, in the supporting text and in subsequent correspondence”

- Two responders answered “Not applicable”

Nine of the planners that partially completed the questionnaire did not respond to this question.

#### 4.2.10 **Q9. Please provide an indication of whether you think the information supplied by the developer was appropriate, and of any issues arising.**

In very broad terms they can be summarised as:

- three responders felt that the information supplied was appropriate;
- in two cases, access issues are preferably resolved through negotiation before a detailed application is approved;
- in four instances, developers needed more prompting or showed reluctance; and
- three responders answered “not appropriate”.

The remaining two questions in the development Management questionnaire were intended to identify suitable public inquiries and case studies. These are presented in *Section 5* and *Annex A* respectively.

#### 4.2.11 **Planning enforcement questionnaire**

The planning enforcement questionnaire was considerably shorter, asking only two questions. 24 responses were received from 19 different local authorities. The local authorities that provided a response to this questionnaire are:

- West Lothian Council
- Falkirk
- Scottish Borders Council
- Aberdeen City Council
- Orkney Islands Council
- Clackmannanshire
- Dundee City Council
- Fife Council
- West Dunbartonshire Council
- North Ayrshire Council
- The Moray Council
- Glasgow City Council
- Angus Council
- Aberdeenshire Council
- Dumfries and Galloway Council
- Shetland islands council
- City of Edinburgh Council
- East Ayrshire Council
- East Dunbartonshire Council

#### 4.2.12 From the 24 responses, only two responded “Yes” to the question:

##### **Q1. Since 2005, have enforcement actions been taken within your administrative area because access conditions have not been met?**

In one of these instances, the condition and enforcement related specifically to a right of way. The enforcement notice also related to this and was duly complied with.

The second example was for the erection of a gate and railings that are the subject of the Ellon case study (see *Section 5*). The decision to refuse retrospective planning permission (F/APP/2005/3971) for a gate and railings was due to it contravening a policy in the Aberdeenshire Local Plan which protects against development that would have an adverse impact on public access for walking, cycling or horse riding.

An additional comment was received to this question stating that it is not appropriate for the planning system to enforce requirements more appropriately dealt with under other legislation. The commenter also cites SPP11 as “*advice, just that, not a tablet of stone*”.

### **4.3 Discussion**

- 4.3.1 It would appear that the Scottish Executive’s guidance on the Land Reform Act is not well known to planners if the quarter of responders that are familiar with it are representative of development management planners as a whole. Consequently, the awareness of the Scottish Executive’s suggested planning condition is also quite low, with slightly less than a quarter of responders having seen it. It is therefore somewhat inevitable that the use of this planning condition is very rare. Only three responders out of 19 are aware of the use of related conditions with one of these using the suggested condition word-for-word. An alternative condition used by the second responsive council relates specifically to rights of way and the responder was supportive of its being updated to reflect the new requirements of the Land Reform Act in the terms of the suggested condition. The third responder stated that they did use a similar condition but the alternative wording was not provided.
- 4.3.2 With regard to how information is provided, the most common format is on the application plans, often supported by text and sometimes by subsequent correspondence. It is likely that this usually takes the form of the diversion of existing paths as this is by far the most common consideration emerging from *Question 4*. In this respect it is a continuation of the planning considerations that predate the Land Reform Act coming into effect. Only three responders cited that there had been consideration of the wider rights of access to land.
- 4.3.3 There is a good deal of uncertainty, and even resistance, amongst practicing planners as to whether ‘planning’ is the correct mechanism for upholding these general access rights, yet there is an acceptance that when rights of way are affected, that this is a legitimate consideration and should be accounted for either



by the developer, or in reaching a decision on planning permission. The Land Reform Act has widened the scope of statutory access rights and these wider rights are of equally legitimacy as material considerations when they are illegitimately compromised by development. In order to understand what is legitimate in the context of the Land Reform Act, it would be encouraging if more development management planners made themselves familiar with the guidance that accompanies the Act. Equally, the guidance itself could be better advertised and more clearly set out the specific requirements of planning authorities.

- 4.3.4 Whether or not outdoor access rights are a material consideration in determining a planning application has been an issue of doubt that has emerged from the survey and the planning case studies presented in *Annex A*. Hopefully this is clarified by *Section 3* of this document and awareness of general rights of access as material considerations will grow as a result of the publication of SPP11, which happened whilst this study was taking place. The answers provided to *Question 3* of the questionnaire appear to be reflective of this uncertainty, with access never being cited as a material consideration in 5 cases. This high degree of variance may be due to uncertainty as to when access should be a material consideration. The results show that five respondents do not regard access to be a material consideration at all.
- 4.3.5 Eleven respondents cited that access is a material consideration in less than 10% of cases (not including those that do not cite it as a material consideration at all). This low number may be a reflection of the typical types of application that are encountered by these planners, which in many cases will legitimately not require the consideration of public access, such as housing extensions and loft alterations within the existing gardens and established curtilage of buildings.
- 4.3.6 With regard to further understanding how material considerations of access have been considered and reflected in approved developments and enforcements, not very many specific examples were identified in the responses to the questionnaire but those that were and a number of other examples have been used in the case studies that are presented in *Annex A*. The questionnaire responses from enforcement planners only uncovered two examples of actions relevant to outdoor access which may be indicative of the comparative rarity of cases where outdoor access is specifically identified as a reason for refusing retrospective planning permission.

## **5 PLANNING INQUIRIES**

### **5.1 Responses to the questionnaire**

- 5.1.1 Of the 19 questionnaire responses that were received, only two identified inquiries of relevance and one of these is undetermined at the time of publication. These were the Achentoshan Case (see case studies in *Annex A*) and the development of a 'lowland crofting' scheme at Balmuir, described below.
- 5.1.2 The Achentoshan case is for the development of an adult occupational centre and child therapy centre within the Auchentoshan estate in Clydebank, West Dunbartonshire. The council gave outline planning permission for the erection of a replacement adult occupational centre within an area of open space, designated as Green Belt in the adopted local plan. The area has been removed from the Green Belt in the finalised replacement plan. The site of the existing centre will be developed for housing once its replacement has been constructed. Objections centre on the need for this housing and the possible severance of recreational access to woodland within the estate. Although the Reporter's decision has not been delivered, there was sufficient information to emerge during the original planning process and a case study is presented in *Annex A*.

### **5.2 Other cases identified – desk review**

- 5.2.1 Another case identified is in Ellon, and is also presented as a case study 8 in *Annex A*. In this case, an appeal against the Aberdeenshire Council's refusal for retrospective planning permission to be granted for a gate and railings that exclude public access from a large section of the riverbank in central Ellon was supported by the Reporter. In this Reporter's opinion, the general rights of access established by the Land Reform Act were not legitimate material considerations and grounds for refusal.

### **5.3 Lowland crofting scheme**

- 5.3.1 This inquiry was identified in the questionnaire survey and is for the development of a 'lowland crofting' scheme at Balmuir and Kinnen Hills Farms, Bathgate. The development was originally refused planning permission by West Lothian Council. The Reporter issued his decision to refuse the appeal in November 2007. The proposed development was for the erection of 13 houses, affordable houses provided off site, and an in-principle agreement for an environmental management plan.
- 5.3.2 SNH were consulted in relation to the scheme and did not object to it in natural heritage terms. They did recommend that a number of protected species surveys be undertaken, and an environmental management plan and public access plan be submitted. Improvements to public access guaranteed through a 10 year legal agreement associated with wider environmental commitments became a promotional feature of the proposed development.

- 5.3.3 The area affected by the proposal is currently open farmland and not of degraded character where the Reporter did not believe that improvements to public access were a priority. The local community council asserted that they had poor experiences of lowland crofting schemes, where footpaths were not maintained and became unusable; there was generally a lack of adherence to conditions and a lack of enforcement. The appeal was rejected by the Reporter broadly on the grounds that it did not accord with the development plan.
- 5.3.4 Whilst this development may have made the sort of provisions for protecting outdoor access rights that the suggested condition in the Scottish Executive guidance<sup>(1)</sup> was designed to deliver, there were important grounds, unrelated to access, for its refusal; primarily relating to landscape character.

The following section describes a fourth inquiry in greater detail.

## **5.4 Closure of pathway, Clarkston**

- 5.4.1 An inquiry that was identified at the inception of this study regarded two gates that were erected to block public access to an off-street lane in Clarkston, Glasgow. In this case (P/ENA/220/9 & P/ENA/220/10), the council had refused retrospective planning permission for a gate and fence that were present before the section of fence was replaced by a second gate. One gate blocked access from the street and the other from the off-street lane.
- 5.4.2 The 2007 inquiry followed the refusal for retrospective planning permission by East Renfrewshire Council in 2005 and refusal by appeal in 2006 where it was adjudged that the development proposal would not create a safer and more secure environment for the wider community and therefore would be contrary to local plan policy.
- 5.4.3 The council's grounds for opposition to the 2007 appeal included their consideration that amenity impacts arising from the closure of the lane would detrimentally affect the wider community, rather than just benefiting the appellants, with specific respect to the general right to access most land established by the Land Reform Act and the duty for this to be upheld by local authorities. The council also argued that the lane may qualify as part of a future core paths plan (although the plan was not drafted or consulted upon at this stage), and that the lane provided access to an area of open space of established wildlife value.
- 5.4.4 The appellant's primary reason for constructing the gate was to ensure that members of the community that had apparently caused regular disturbances whilst congregating in the off-street lane were kept out. This was supported by a number of other local residents who confirmed that youths regularly gathered there and consumed alcohol, committed acts of vandalism and generally made a nuisance of themselves. In closing off the alleyway to the off-street lane, the appellants also severed access to the lane for neighbours that had legitimate reasons for needing alternative access to their back gardens.

(1) Part 1 Land Reform (Scotland) Act 2003, Guidance for Local Authorities and National Park Authorities

- 5.4.5 The Reporter recommended that planning permission be granted on the condition that the gates are publicly open between the hours of 08:00 and 20:00, seven days a week. This was opposed by the council in recognising that the Land Reform Act places a duty on councils to uphold access rights at all times.
- 5.4.6 It appears from the inspector's report that whilst she considers access rights to be a factor to be weighed in the balance in considering an application, it would not in this case be sufficient sole grounds to prevent the granting of planning permission, in other words, a material consideration. SPP11 has now clarified that such issues are material considerations.

## 5.5 Discussion

- 5.5.1 It would appear that there is a good deal of confusion amongst planners as to what constitutes a material consideration in terms of access and what the correct mechanism for upholding access rights is. In the Ellon case, general access rights were not considered to be a material consideration at all and there appeared to remain some confusion relating to the rights of general access and the protection of existing paths or tracks. In the Clarkston case above, the Reporter acknowledges the consideration of general rights of access but does not see them as sufficient grounds for refusing planning permission, especially in the light of other factors which are arguably further removed from the realm of planning.
- 5.5.2 The Clarkston case throws up some interesting challenges. It appears that if adequate policing had been undertaken within the off street lane in question, the need or argument for closure would be very weak. There are a number of issues here; positive consideration is given to the ability of the development to deliver social control but limited consideration is given to the removal of wider access rights. This raises a question regarding the interpretation of:

*“the planning system should not be used to secure objectives that are more properly achieved under separate action”<sup>(1)</sup> (Scottish Executive, 2002)*

- 5.5.3 In this case is the planning system the correct vehicle to stop anti-social behaviour? Arguably the antisocial behaviour is not caused in any way by development, whereas the preventative measures taken by the appellants directly affect access rights to the areas of land and pathways affected.
- 5.5.4 In neither the Ellon nor Clarkston case have outdoor access rights been taken truly as a material consideration in complex planning decision making by the Reporter, whilst in both cases, the local planning authority has.
- 5.5.5 The low number of identified inquiries where access rights have been a material consideration may be due to a number of reasons. It might be that very few have transpired since the Act came into effect in 2005, especially with regards to the general right of access to most land, rather than the more established consideration of rights of way. Equally, the questionnaire only asked development management planners to identify such instances and responses were received

(1) Section 57, SPP1

from only 18 planners; significantly less than the policy development and enforcement questionnaires, both of which asked far fewer questions. Nonetheless, further searching and telephone calls to planning departments and the Planning Directorate were made and no additional suitable inquiries were identified.

## 6 PLANNING POLICY

6.1.1 The 24 planning authorities who provided a response to our online policy development questionnaire are:

- Falkirk Council
- Stirling Council
- Cairngorms National Park Authority
- Aberdeen City Council
- Comhairle nan Eilean Siar (Western Isles Council)
- Moray Council
- City of Edinburgh Council
- West Lothian Council
- Clackmannanshire Council
- Fife Council
- Inverclyde Council
- Perth & Kinross
- OIC
- Dumfries & Galloway Council
- Renfrewshire Council
- Dundee City Council
- Argyll and Bute Council
- Shetland Islands Council
- East Renfrewshire
- West Dunbartonshire Council
- Angus Council
- Glasgow City Council
- East Dunbartonshire Council
- Aberdeenshire Council

6.1.2 In early December 2007, low response numbers were supplemented by follow up phone calls to policy planners in the non-responsive authorities

6.1.3 This research intends to identify how the protection of outdoor access rights, in the spirit of the Land Reform Act, will be incorporated into the forthcoming Local Development Plans and Strategic Development Plans and how core path plans and outdoor access strategies may be integrated into these development plans.

6.1.4 In response to our first question;

***Is provision being made in your forthcoming strategic development plan or local development plan for the protection of outdoor access rights in the spirit of the Land Reform (Scotland) Act 2003?***

21 of the 24 respondents to the questionnaire answered positively, although work towards the production of these plans is still at a very early stage. This was also reflected in the telephone interviews.

- 6.1.5 Our second question aimed to gather any early indications and recommendations on how the topic of outdoor access may be addressed within the forthcoming strategic and local development plans and how core path plans and outdoor access strategies may be integrated into these development plans.

## **6.2 Access provision**

- 6.2.1 Almost all respondents to the questionnaire acknowledged the need to make provision in their local plan relating to access rights and in a number of cases such provision has already been made in recently adopted and finalised plans. Approaches adopted and suggested include references in text to the rights of access, specific policy identifying that “*access rights will be material considerations in planning applications*”<sup>(1)</sup> and policies that incorporate the more detailed provisions of the Land Reform Act, such as that of the Finalised Aberdeenshire Local Plan which protects against “*development that would have an adverse impact on public access for walking, cycling or horse riding.*”

- 6.2.2 In many cases, responders were unsure as to how the protection of access rights would sit within the development plan and in the two cases where responders referred specifically to Strategic Development Plans, it was their understanding that access rights more properly sit within the remit of the Local Development Plan.

- 6.2.3 Because access rights are common throughout Scotland, clear guidance may be beneficial to ensure that appropriate and consistent policy is included in development plans across the country. Although the publication of SPP11 ensures that there is no debate over whether outdoor access is a material consideration or not, experience shows that in determining a planning application, decisions are often made almost entirely based on the provisions of the development plan. Additionally, appropriate inclusion in the development plan also informs developers who may not be familiar or up to date with all contemporary statements of planning policy.

## **6.3 Core path plans**

- 6.3.1 The respondents to the questionnaire and the telephone interviewees have a mixed expectation of where core path plans will sit in relation to the development plan. In several cases it is envisaged that it will be shown on the proposals map and sit within the plan itself, whilst in other instances there will be cross referencing between the development plan and the Core Path Plan. It would appear that in all cases it is envisaged that effects on Core Paths will be material considerations in determining a planning application.

(1) From the emerging Argyll and Bute Local Plan.

6.3.2 SPP11 provides a degree of flexibility in how Core Paths should sit within the development plan context:

*“The local development plan should cross-refer to the core paths plan, incorporate relevant material and set out policy protection for core and other paths such as long distance routes and rights of way. It may be appropriate to include key information on the proposals map.”* (Scottish Executive, 2002)

This is reflected by the various ways in which questionnaire responders have replied. It is likely that many of these responders have not come to consider the core path plan in the context of a new development plan for their own authority because core path plans are such a new requirement and at time of publication, no such plan has been adopted.

## **6.4 Outdoor access strategies**

6.4.1 In similar to general rights of access and core path plans, most responders felt that it is too early to judge how these will be incorporated into the forthcoming Local Development Plans and Strategic Development plans required under the Planning etc. (Scotland) Act 2006. However, in most cases with regards to ongoing development plan preparation, Outdoor Access Strategies are commonly cross-referred and reinforced in Local Plans and have played a role in shaping the development and core path plans.



## **7 CONCLUSIONS**

### **7.1 General lessons**

- 7.1.1 In undertaking this study, it has emerged that the general right of access to most land is not commonly recognised as a material consideration in determining a planning application at the present time. Some of the case studies and the questionnaire responses show that this is the case even when access issues have been identified as a primary reason for objection to a development and the decision maker acknowledges that the development appears to contravene the Land Reform Act. In none of the cases that we have examined, where a final conclusion has been reached, have access rights been cited as grounds for refusal, whilst in several cases it could legitimately have been so. This is unlikely to surprise many access officers and is probably instrumental to this study being undertaken.
- 7.1.2 The general lack of relevant casework since the Land Reform Act and its interpretation within SPP11 makes providing adequate and accurate case precedents at this time difficult. It is likely that as more planning cases consider outdoor access as a material consideration, more comprehensive judgements will be made.

### **7.2 Advice/Guidance to SPP11**

With the publication of SPP11, outdoor access has been identified as a material consideration in more formal terms. Up until this point, it required a certain amount of interpretation of legislation and guidance by planners to understand this, which possibly resulted in some uncertainty. This has been clarified by its explicit identification in SPP11 as a material consideration. Despite this inclusion, it may be advantageous to provide additional support to planning authorities in order to encourage the routine consideration of access rights and correct interpretation in planning applications. This could take the form of workshops at local authorities in the form of short workshops or lunchtime seminars. Notwithstanding this, the guidance that currently exists does rely on interpretation to some extent and could be improved upon in the light of SPP11, possibly within a new PAN. There could be clarification of a number of points that would possibly be of some benefit to planners, such as:

- What defines an appropriate 'privacy zone' or a 'building's curtilage'?
- How to go about assessing such areas.
- Specifically, when does the upholding of access rights fall to planners and when does it fall to the mechanisms for mounting a legal challenge under the Land Reform Act?

### **7.3 Use of conditions**

Additionally, it appears that in going through the various planning processes; ie. application or retrospective application, refusal and appeal, the developer

becomes aware that by changing the development in certain, minor ways it becomes 'permitted development' and outwith the realm of planning. It may be of some value if this was explained to the developer at the outset (if it is the case), to save the unnecessary burden on the planning system, but also to explain that even if these changes are effected, there may be a legal challenge under the Land Reform Act which could be considerably more costly.

#### **7.4 Development plans**

With regards to the development plan preparation, it seems to be too early to tell how core paths plan will sit in the strategic development plan and local development plan structure. SPP11 is not entirely prescriptive in this respect and it is likely that this is to allow flexibility where different local authorities across Scotland experience very different constraints and land use priorities. However, there may be a danger that this flexibility leads to core paths and wider rights of access being recognised very differently by different local authorities in the context of the local plan. Because many view the local plan as a one-stop-shop for planning policy, this may lead to the consideration of access issues being given more weight in one region to another, when the primary legislation intends to introduce a common right for all.

#### **7.5 Potential actions**

It would be advantageous to provide further guidance, specifically for planners, on the Land Reform Act and how access should be considered in planning applications. This could be included in a PAN in the next update to PAN 65 *PLANNING AND OPEN SPACE* (January 2003) but in the meantime may be delivered by a standalone publication, a series of workshops with local authorities or through writing an informative article for a planning journal or magazine.

## 8 REFERENCES

The Scottish Executive (2005). *Part 1 Land Reform (Scotland) Act 2003, Guidance for Local Authorities and National Park Authorities*. (Countryside and Natural Heritage Division)

Scottish Executive (2002). SPP1, *The Planning System*

Scottish Executive (2003). PAN 65 *Planning and Open Space*

Scottish Government (2007). SPP11 *Open Space and Physical Activity*

Directorate for Planning and Environmental Appeals (2006) *Enforcement Notice Appeal, Clarkston, Glasgow*

[http://www.scotland.gov.uk/Topics/Built-Environment/planning/decisions-appeals/Appeals/Details/Q/Case\\_id/2693](http://www.scotland.gov.uk/Topics/Built-Environment/planning/decisions-appeals/Appeals/Details/Q/Case_id/2693)

Directorate for Planning and Enforcement Appeals (2006) *Planning Permission Appeal, Ellon, Aberdeenshire*

[http://www.scotland.gov.uk/Topics/Built-Environment/planning/decisions-appeals/Appeals/Details/Q/Case\\_id/2804](http://www.scotland.gov.uk/Topics/Built-Environment/planning/decisions-appeals/Appeals/Details/Q/Case_id/2804)

### Legislation

Part 1, Land Reform (Scotland) Act 2003

Planning etc. (Scotland) Act 2006.



## **Annex A**

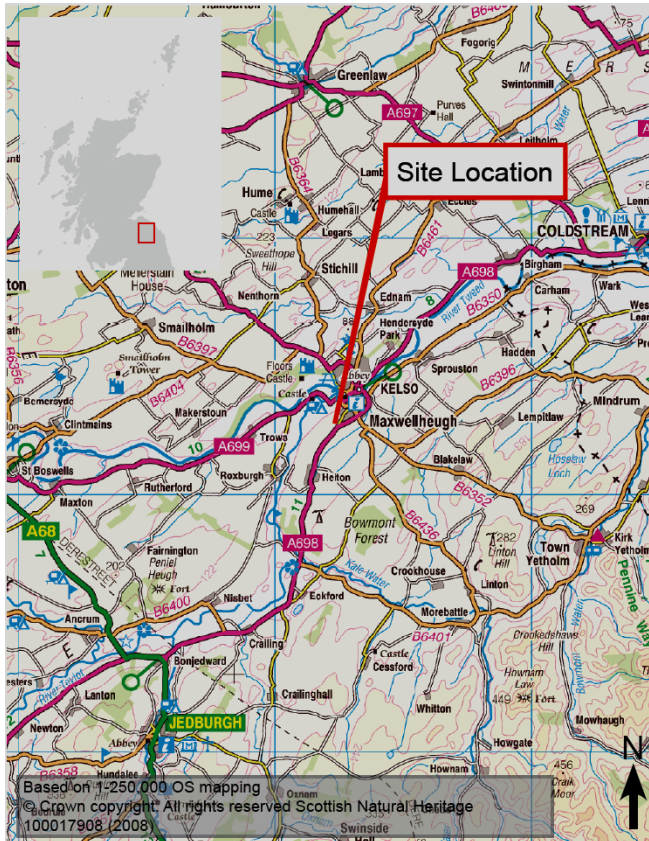
### **CASE STUDIES**

- Case Study 1- Planning brief for new housing development
- Case Study 2- Access provision at a major windfarm
- Case Study 3- Access within a new golf course development
- Case Study 4- Access within the masterplan for major new development
- Case Study 5- Development of public open space
- Case Study 6- Improvements to access within Estate grounds
- Case Study 7- Privacy issues and realigned right of way
- Case Study 8- Severance of access by fence and gate leading to Public Inquiry
- Case Study 9- Severance of access to woodland by fence erection





# Case Study 1- A Planning Brief for New Housing Development



## Wallaceneuk, Kelso

Outline application (03/01655/OUT)

### Planning Authority

Scottish Borders Council

### Development Site

Wallaceneuk (land adjacent to Jedburgh Road), Kelso. A Greenfield site, currently pasture farmland.

### Development Description

Outline application for residential development comprising of 300 units on an area of open space, the application included landscaping and associated engineering works.

## Planning History

Following the site's allocation for housing in the Finalised Local Plan, the council have provided a *Planning Brief* which includes provisions for improving access through the site. The Planning Brief details require a connection between the new development and existing paths, including one potential Core Path (Route 40) identified in the draft Scottish Borders Core Paths Plan. It is expected that

the Section 75 agreement will secure funding from the developer for the construction of public paths, which will then be maintained by the local authority upon completion.

Scottish Borders Council closely involved the council's Access Team in the production of a site specific Planning Brief. The resulting brief takes account of existing paths and potential Core Paths and promotes access to the surrounding centres, Kelso and Roxburgh, extending the existing formal path network.



Access links within the site will connect to existing paths in the area

Section one of the Planning Brief states that:

"1. (i.v) *The site shall contribute to the wider provision of **footpath links**, and provide linkages into the adjoining site through the existing woodland subject to agreement between the developer and SBC. The site shall provide appropriate **recreation facilities** within the development and suitable contributions to nearby facilities as appropriate.*" (Wallaceneuk Planning Brief, Scottish Borders Council, 2003)



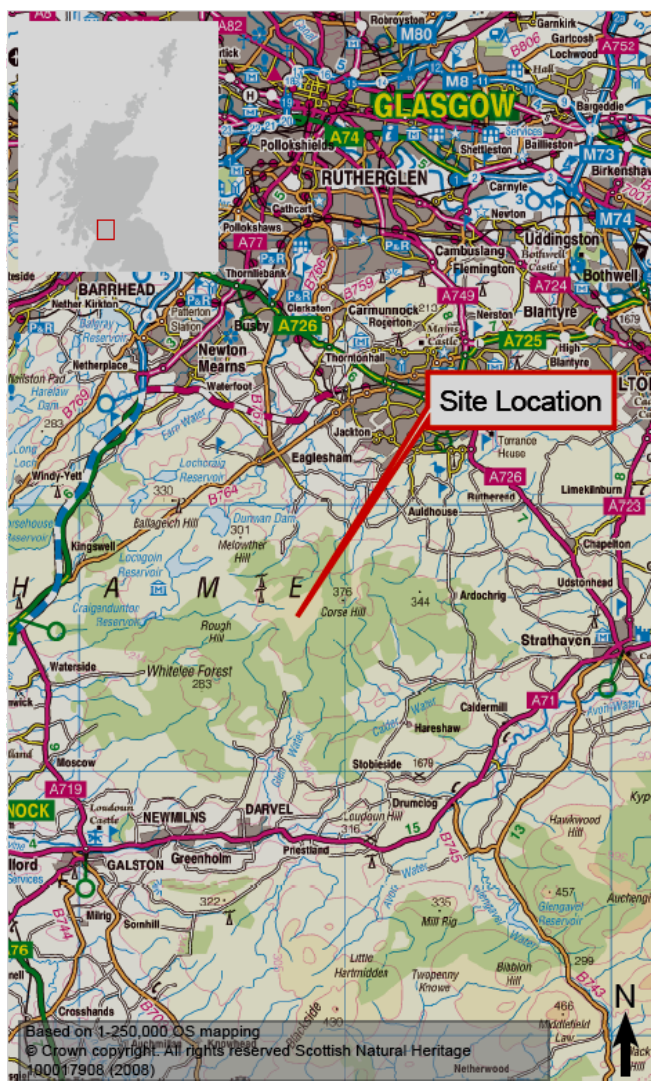


The existing path through High Wood

### Commentary

Responsible access is important in this rural location to avoid potential conflict between land users and landowners. The council is looking to promote the use of formal paths as it develops its Core Paths Plan, and to identify any areas where problems may arise, through the SEA and consultation process. Encouraging permeability through the development allows the continuing recreational use of the surrounding land and path networks, enabling the site to realise the development potential identified in the Local Plan.

# Case Study 2- Access Provision at a Major Windfarm



## Whitelee Windfarm

Planning Authority  
Scottish Ministers

### Development Site

Whitelee Windfarm lies within three local authority areas of East Renfrewshire (72 Turbines), South Lanarkshire (43 Turbines) and East Ayrshire (25 Turbines). As the windfarm has a generating capacity greater than 50 MW, the Scottish Government are the designated planning authority under the Electricity Act 1989.

### Development Description

The windfarm comprises 140 2.0 MW wind turbines, 76km of connecting tracks and an on site substation. Each turbine will be over 110 meters high. The windfarm is situated south and west of East Kilbride and sits among existing moorland and forestry across the Corse, Dumdruff and Myres Hills. It will be the largest onshore windfarm in Europe.

An Application was made to the Scottish Ministers to construct a 280 MW windfarm. East Renfrewshire received an Electricity Undertaking notification 2002/0001/EB Scottish Executive Ref: IEC/246 as required by the Electricity Act.

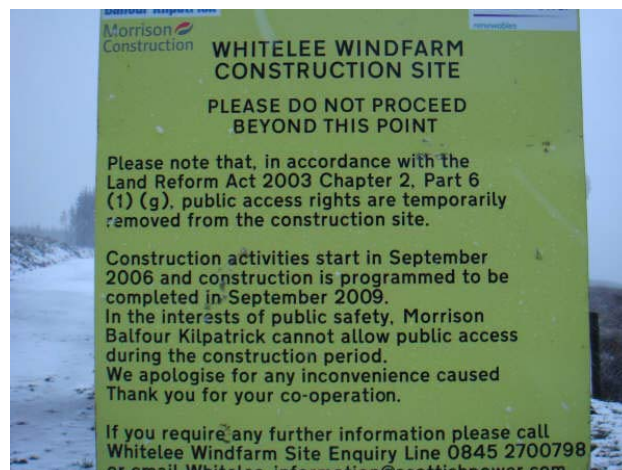
Proposals for a visitor centre have been submitted as a separate application to the relevant local planning authority (East Renfrewshire Council reference: 2006/0428/TP), outline planning permission was approved in April 2007.

### Planning History

Following the submission of an application made in 2002, CRE energy (a subsidiary of Scottish Power) received permission to construct a 280 MW windfarm at Whitelee Forest on Eaglesham Moor in April 2006. The development is approximately half way through its three year build period.

As part of the community benefit package, a Section 75 Agreement secured funding from the developer to improve access for the communities surrounding Whitelee Forest. This was established as an important issue following a consultation exercise which predates the adoption of Part 1 of the Land Reform (Scotland) Act (2003).

East Renfrewshire Council consider Eaglesham Conservation Village and Eaglesham Moor, alongside other local landmarks, to be important assets for tourism and recreation and identified the



Access is excluded from the site for the duration of construction

windfarm development as an opportunity to develop and improve access locally within the three council areas.

Scottish Power's own public consultation exercise also identified improved access provision in the Whitelee area as a popular approach to delivering community benefits.



Whitelee forest has the same access provisions at present

This initiated the production of a Path Planning Study which was submitted with the detailed application. The provisions and recommendations of this study were adopted as conditions of the development's approval.

During construction, access to the site has been temporarily removed in the interests of public safety in accordance with Section 6,(1)(g) of the Land Reform (Scotland) Act 2003.

This information is clearly signposted and is the only time during which access rights are compromised.

The Whitelee Access Planning Group (WAPG) was set up to secure and improve outdoor access during the construction and operation of the Windfarm. The WAPG consists of representatives from the relevant local planning authorities, Scottish Natural Heritage, Forestry Commission Scotland, Scottish Power and community groups. Furthermore, an Access Project Officer is to be appointed whose salary will be paid through East Renfrewshire Council, from money provided by the developer under the Section 75 Agreement. The Access Project Officer will be responsible for establishing a constitution for the WAPG, implementing their objectives and visions and delivering the community benefits package.

This work will culminate in the publication of an Access Action Plan detailing the strategy and deliverables across the three local authority's administrative areas which will mitigate construction



The view of Whitelee Windfarm from an access track to the north

and operational impacts of the windfarm on access. Each council will be required to publish its own Core Paths Plan, which shall overlap with the Whitelee Access Plan.

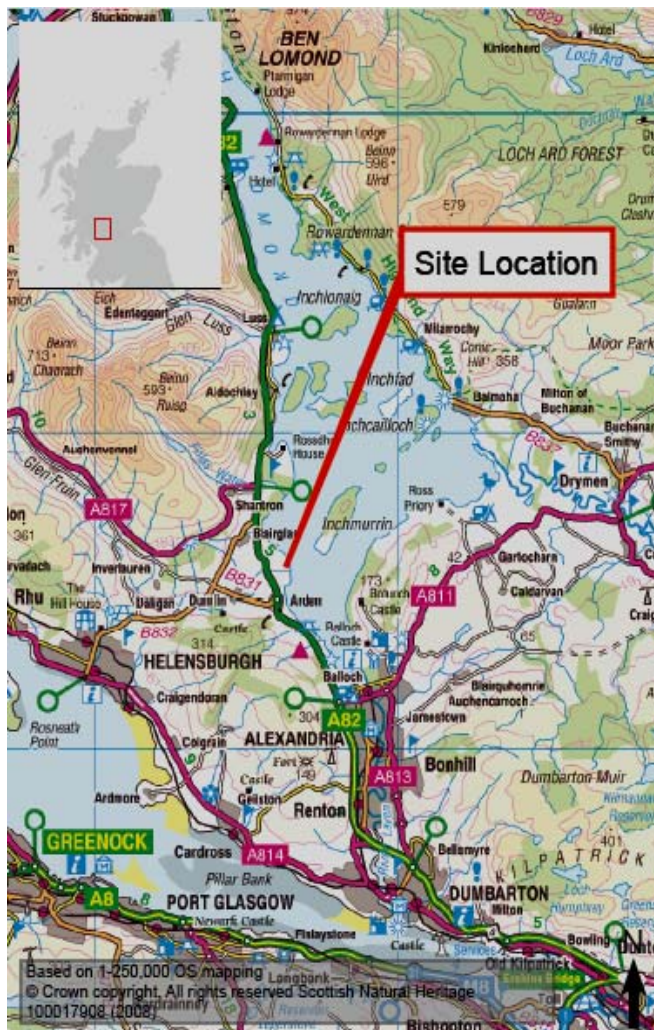
#### Commentary

The development of the largest onshore windfarm in Europe at Whitelee Forest provides an opportunity not only to enhance existing access routes but to build a network of routes which will increase opportunities to enjoy the whole area.

The local planning authorities and the Scottish Executive took this opportunity to ensure considerable access benefits such as those at Whitelee Forest are delivered on large projects through effective consultation and legal agreements. They enhanced this by going beyond simply the provision and maintenance of paths, but included extra facilities such as of changing and showering facilities to be available for public use as part of the visitor centre.

The access strategy is not restricted by administrative boundaries and provides good off-road inter-connections for the area Core Path Plans. The success of the proposals and relative popularity of the scheme is due largely to the extensive consultation undertaken with the public and stakeholders.

# Case Study 3- Access Provision at a Major Windfarm



## Carrick Golf Course, Loch Lomond

Outline Planning Application 04/03551/OUT

### Planning Authority

Loch Lomond & Trossachs National Park Authority (formerly within the jurisdiction of Argyll & Bute)

### Development Site

The development is located within 260 acres of land lying between Loch Lomond and the A82. Historically the land was used for sand and gravel extraction. These operations left their mark, creating lagoons and degrading the surrounding land. The site is also intersected by the Fruin Water which flows into Loch Lomond. Prior to development, much of the area was overgrown, unsafe and not readily accessible to the public.

### Development Description

The main elements of the development comprise:

- an 18 hole golf course, with a clubhouse and leisure complex;
- 28 holiday apartments within two mansion blocks and wings;
- a jetty for water vessels on the shore of Loch Lomond;
- 64 detached holiday lodges;
- the creation of a nature reserve incorporating a number of new lagoons; and
- the formation of a public footpath /cycle path through the site.

### Planning History

The site has been subject to several proposals since the sand and gravel operations ceased. During the 1980s a succession of applications were made for various golf course, hotel, timeshare and marina developments. In 2001 this led to outline planning permission being granted by Argyll and Bute Council for the erection of a hotel, golf course, and chalet development. This was prior to the designation of Loch Lomond & Trossachs as a National Park and the formation of the National Park Authority with its planning powers.

Shortly after the establishment of the authority, in early 2003, a detailed planning application was submitted and reported to committee in November 2003. The newly established authority had to enter into a series of negotiations in order to improve the proposal in the context of its location and the proposed land uses. These discussions involved

National Park planning officers, Scottish Natural Heritage, the Scottish Golf Environment Group and West of Scotland Archaeological Service who all worked with the developers to refine the plans.

Although the developer was initially reluctant to make provision for the path network, the planning authority persuaded them that if they did not manage public access through good routing, conflicts would arise.

The planning permission granted to the Carrick development by the National Park Authority at Midross following the detailed application was subject to a number of conditions and a legal agreement that bound the developer to deliver certain components of the scheme, in particular, adequate access provision, prior to the golf course becoming operational. The plans for dedicated

access routes were provided in the form of an Integrated Management Plan (IMP), that used GIS to identify where the various operations and proposals were likely to lead to a conflict of interests, such as between otter rest areas and dog walkers and the sites of archaeological remains and construction. This helped shape the development, allowing the dedicated access routes for walkers, cyclists and watercourse users to be strategically and sensitively located. Production and approval of the IMP was one of the conditions of consent.



Across the site access is managed to reduce conflict between users

Prior to development, the West Loch Lomond Cyclepath ran adjacent to the A82 which provided the only crossing point over the Fruin Water. The re-aligned cyclepath includes the provision of a new bridge for cyclists and walkers.

Through negotiation, the Park Authority secured the re-routing of a large stretch of the cyclepath from its previous course from Balloch alongside the busy A82, to a secluded route that follows the shoreline of Loch Lomond north from Balloch and continues on the western edge of the new nature reserve through woodland and the golf course, well away from the main road. A pending application has been submitted to the National Park Authority for another golf course to the north of the Carrick development. This application includes further integrated improvements to the cyclepath, recognising the advantages that improved access provision has brought to the Carrick.

The realigned West Loch Lomond Cyclepath, now known as the Carrick Cycle Path is also clearly signposted as a public footpath. The Carrick Cycle Path section is approximately one kilometre long and is part of a network of internal access roads, tracks and specially constructed boardwalks providing pedestrian access to the nature reserve and the shoreline where a water taxi service operates from a specially constructed pier.



Water taxi jetty, an example of the promotion of access to inland water

### Commentary

The Golf Course operators, DeVere, have embraced the open access policy and have signage throughout the scheme requests that visitors, golfers and residents respect each others' activities in the spirit of the provisions of the Land Reform Act. The outdoor access facilities and the creation of the nature reserve has been well advertised by distributing leaflets throughout the development's accommodation facilities, houses in the local area and in local visitor centres.

This open approach to access management has brought a number of benefits to the development. Conflicts are less likely to arise between golfers and



The surrounding landscape attracts many visitors to the area, the promotion of responsible access is essential for the ongoing social, economic and environmental success of the area



The cycle path continuing south from the development towards Balloch

those taking recreational access through the site because their activities are removed from each other throughout much of the popular route along the loch side. Where they come close, the signage and information given to guests encourages mutual respect for each others' activities.



The old route of the cycle path crossed the Fruin Water close to the busy main road

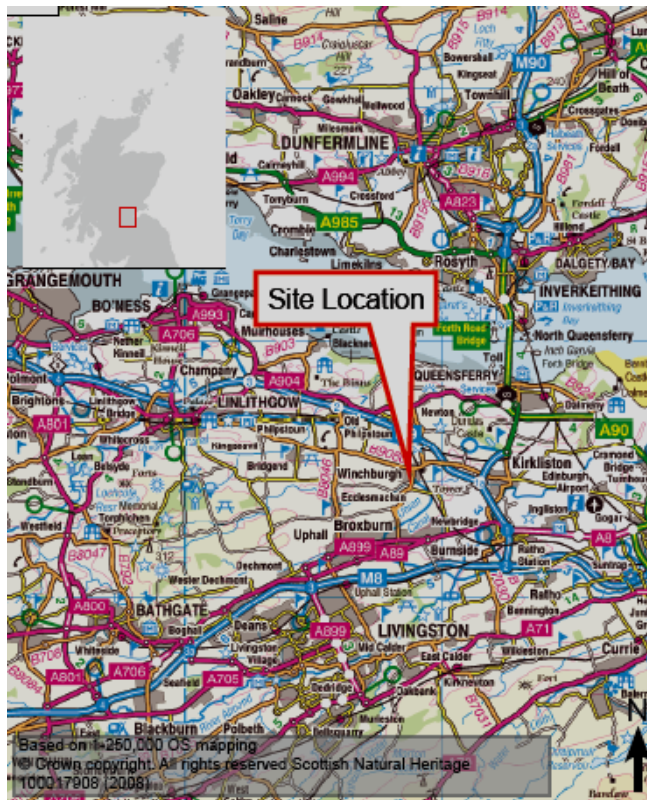


The cycle route continues north from the Carrick development. Improvements to this route are included in an application to develop a further golf course



The cycle path now follows a new route via a purpose-built bridge over the Fruin Water, remote from the main road

# Case Study 4- Access Within the Masterplan for Major New Development



## Winchburgh Masterplan

Application for outline planning consent (Ref: 1012/P/05)

**Planning Authority**  
West Lothian Council

### Development Site

An opportunity for development was identified in the Finalised Local Plan for a Core Development Area (CDA) around the village of Winchburgh. 'Winchburgh FUTURE Masterplan' (the Masterplan) sets out the proposed expansion of the village of Winchburgh (the footprint of the existing village is 69ha) with the expansion increasing the urban area by 352ha.

### Development Description

The Winchburgh Development Initiative (the applicant) produced a Masterplan which detailed, for the purposes of the outline planning application, how they propose to develop the land around Winchburgh, including the provision of 3450 new houses. The development will primarily affect existing agricultural land.

### Planning History

The proposals address some of the requirements to satisfy new housing allocation opportunities identified in the forthcoming Development Plan which also includes areas around Kirkliston, Broxburn and Winchburgh. These are referred to as core development areas in the draft Local Plan. As the plan has not yet been adopted, the application is not going to be formally considered until the time when these core development areas are part of the adopted development plan. The outcome of the Local Plan inquiry should be delivered in February 2008.

In order to illustrate the proposed growth in Winchburgh, the applicant submitted a Masterplan, accompanied by an Environmental Statement, to West Lothian Council prior to the Local Plan Inquiry.

In developing the Masterplan, close consultation was undertaken with the local planning authority, the statutory consultees and the existing community. An important inclusion on the Masterplan was the appropriate and timely provision of infrastructure, such as schools, roads, jobs, and paths to support the proposed growth. The Masterplan was nominated in the Scottish Awards for Quality in Planning 2005 Community Involvement Category for "outstanding performance and community involvement".



Aerial plan with masterplan boundary marked in red

The consultation process helped the applicant to produce a list of core objectives. One of the core objectives of the Masterplan is to prioritise movements on foot, bike, bus, and train while minimising journeys made by private vehicles. The provision of a comprehensive and inclusive path network is key to achieving this objective.

This development will exclude the public from large parcels of land which previously were accessible through the rights granted by the Land Reform Act. This will be resolved through provision of a network of paths and continued management by the applicant.

As the applicant is developing Greenfield land, they have an opportunity to plan for outdoor access and provide a-it-or purpose path system that does not simply connect the spaces left over after construction. The applicant proposes to use some paths in the new urban network as green corridors, connecting open and recreation space whilst combining ecological, landscape and access needs.

In addition to the creation of new paths for access and recreational use, the masterplan includes proposals to bring improvements to existing paths, including National Cycle Route 75 and the Union Canal tow path which are both candidate Core Paths. Discussion with the local Access Forum has led to the provision of paths acceptable for use by all user groups, including horse riders.



The union canal towpath will connect into the proposed path network

The path network will also be considered in a regional context with the effects and requirements on neighbouring landowners and nearby developments taken into account in the design of the path network; this is often a difficult exercise requiring early consultation and negotiation.

### Commentary

Connecting green space throughout Winchburgh for recreation, ecology and landscape benefit could provide a positive environment and contribute towards improving the amenity of the development for the benefit of future and existing residents, whilst mitigating the effects of developing a large area of access land.

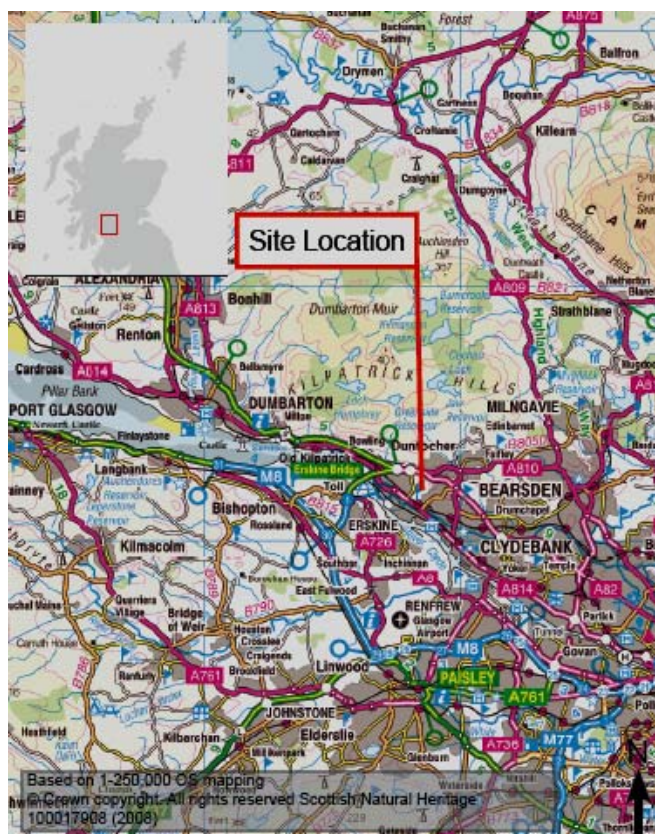
Consultation has been at the heart of the whole masterplanning process and in doing so introduced plans that are hopefully popular with existing and future residents. Access is an issue which affects many groups and individuals in the area and their aspirations and objections have been discussed with the applicant and many problems have been resolved as a result.



Existing access routes often follow field boundaries



# Case Study 5- Development of Public Open space



## Auchentoshan Estate

Outline planning application DC06/077, called in by Scottish Ministers under reference NA/WDS/002

### Planning Authority

West Dunbartonshire Council and the Scottish Executive's Inquiry Reporters Unit

### Development Site

The application affects two parcels of land within the Auchentoshan Estate which lies within an area bordered by Mountblow Rd, Great Western Rd, Ocean Field and Clydebank Golf Course, in the west of Clydebank.

### Development Description

The local planning authority recommended that the application be granted outline consent. This decision was called in by the Scottish Ministers and at time of publication, awaits final determination.

Outline application for a mixed use development comprising a new centre for adults with learning difficulties, a children's therapy centre and outline proposals for residential development.

## Planning History

The proposed development is within an area that was previously the estate of Auchentoshan House and is made up of a mixture of woodland, parkland and a number of buildings providing nurseries, schools and adult facilities for people with learning difficulties. Of the two parcels of land affected, the first relates to an existing 1960s building and its curtilage which currently houses an occupational centre for adults with learning difficulties. The second parcel of land is in the south west corner of the estate, currently occupied by open parkland which formerly included a small football pitch and is enclosed on all sides by rows of trees. Within this area, it is proposed that the existing adult centre be replaced by a smaller, more modern facility whilst a separate building is constructed as a centre providing therapy to children from all over Scotland that suffer from cerebral palsy. Upon completion of construction, the adult centre in the first parcel will be demolished and the vacant land developed for housing; the profits from the sale of this housing will contribute to the construction costs of the children's centre.

The whole of the Auchentoshan Estate is designated as part of the Green Belt in the adopted Clydebank Local Plan 2004. In the West Dunbartonshire Local



The existing adult occupational centre

Plan (Consultative Draft), the Green Belt boundaries have been reviewed and as a result much of the Auchentoshan Estate, including the two areas affected by the development, has been removed from the Green Belt.

The council received four objections to the application. The main focus for the objections centred on the need for housing on the site and reflects the large number of objections that were raised following the release of Green Belt land in the

draft local plan. These objectors also argue that the development of occupational and therapy centres can be accommodated on the site of the existing occupational centre without the need to develop the park land. However, the developer maintains that the adult centre needs to remain open until its replacement is built, requiring the replacement building to be located elsewhere.

Objectors also felt aggrieved over the loss of the area of parkland in which the centres are to be located, citing its value to local people for recreation, children’s play, sport and dog walking. This included concerns that the development would restrict access for walkers to the estate woodland. Similar issues were voiced in representations from North Kilbowie and Central Community Council.

The planning authority recommended that the development be granted outline consent subject to a number of conditions, including one that would ensure that footpaths, including existing ones, be constructed within the site to the council’s specifications and detailed agreement.

Due to the incompatibility of the proposals for housing with current Green Belt designation and the council’s own financial interest in the development where a number of objections have been received, the application was referred to the Scottish Ministers. The application has now been considered at a public local inquiry.



There are established formal and informal paths around and across the proposed sites for development



Access to the surfaced paths in the wooded area of the estate will be maintained



The area of open space in which the replacement adult centre and new childrens therapy centre are proposed

The developers, supported by West Dunbartonshire Council, maintain that public access to the woodland, which covers more than a third of the estate, will not be affected by the proposals. It is likely that when a detailed application is made for the proposals, a plan of footpaths and the curtilage or privacy zones of the centres and houses will be a requested inclusion for the application\*.

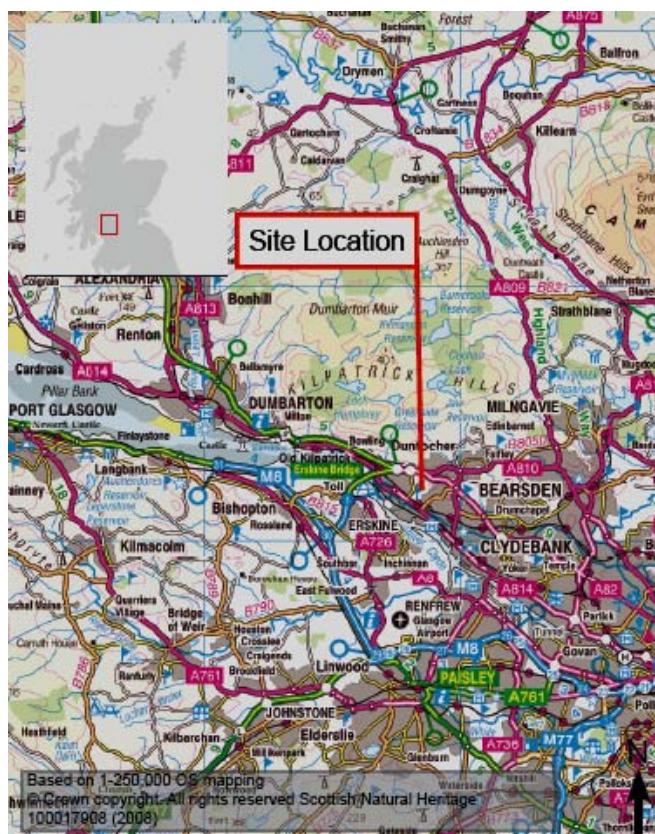
\*Personal communication with the case officer.

### Commentary

The area of parkland in which the adult and children's centres are to be built does have amenity value as an area for informal recreation at present. The construction of the adult occupational centre and the children's therapy centre will remove public access within the footprint and curtilage of the buildings themselves which is currently an area of open space valued by some local residents.

If granted consent, the developer will be required to maintain public access to the area of woodland popular with recreational walkers. A plan and specification for paths affected and created by the development will also require approval by the local authority if their original recommendations are adopted by the reporter. This will provide an opportunity for path improvements which will make access within the estate more inclusive by facilitating people that require surfaced paths.

# Case Study 5- Development of Public Open space



## Auchentoshan Estate

Outline planning application DC06/077, called in by Scottish Ministers under reference NA/WDS/002

### Planning Authority

West Dunbartonshire Council and the Scottish Executive's Inquiry Reporters Unit

### Development Site

The application affects two parcels of land within the Auchentoshan Estate which lies within an area bordered by Mountblow Rd, Great Western Rd, Ocean Field and Clydebank Golf Course, in the west of Clydebank.

### Development Description

The local planning authority recommended that the application be granted outline consent. This decision was called in by the Scottish Ministers and at time of publication, awaits final determination.

Outline application for a mixed use development comprising a new centre for adults with learning difficulties, a children's therapy centre and outline proposals for residential development.

## Planning History

The proposed development is within an area that was previously the estate of Auchentoshan House and is made up of a mixture of woodland, parkland and a number of buildings providing nurseries, schools and adult facilities for people with learning difficulties. Of the two parcels of land affected, the first relates to an existing 1960s building and its curtilage which currently houses an occupational centre for adults with learning difficulties. The second parcel of land is in the south west corner of the estate, currently occupied by open parkland which formerly included a small football pitch and is enclosed on all sides by rows of trees. Within this area, it is proposed that the existing adult centre be replaced by a smaller, more modern facility whilst a separate building is constructed as a centre providing therapy to children from all over Scotland that suffer from cerebral palsy. Upon completion of construction, the adult centre in the first parcel will be demolished and the vacant land developed for housing; the profits from the sale of this housing will contribute to the construction costs of the children's centre.

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draft local plan. These objectors also argue that the development of occupational and therapy centres can be accommodated on the site of the existing occupational centre without the need to develop the park land. However, the developer maintains that the adult centre needs to remain open until its replacement is built, requiring the replacement building to be located elsewhere.

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The planning authority recommended that the development be granted outline consent subject to a number of conditions, including one that would ensure that footpaths, including existing ones, be constructed within the site to the council’s specifications and detailed agreement.

Due to the incompatibility of the proposals for housing with current Green Belt designation and the council’s own financial interest in the development where a number of objections have been received, the application was referred to the Scottish Ministers. The application has now been considered at a public local inquiry.



There are established formal and informal paths around and across the proposed sites for development



Access to the surfaced paths in the wooded area of the estate will be maintained



The area of open space in which the replacement adult centre and new childrens therapy centre are proposed

The developers, supported by West Dunbartonshire Council, maintain that public access to the woodland, which covers more than a third of the estate, will not be affected by the proposals. It is likely that when a detailed application is made for the proposals, a plan of footpaths and the curtilage or privacy zones of the centres and houses will be a requested inclusion for the application\*.

\*Personal communication with the case officer.

### Commentary

The area of parkland in which the adult and children's centres are to be built does have amenity value as an area for informal recreation at present. The construction of the adult occupational centre and the children's therapy centre will remove public access within the footprint and curtilage of the buildings themselves which is currently an area of open space valued by some local residents.

If granted consent, the developer will be required to maintain public access to the area of woodland popular with recreational walkers. A plan and specification for paths affected and created by the development will also require approval by the local authority if their original recommendations are adopted by the reporter. This will provide an opportunity for path improvements which will make access within the estate more inclusive by facilitating people that require surfaced paths.

# Case Study 6- Improvements to Access Within Estate Grounds



## Edmondstone House

Outline Planning Application 04/03551/OUT

### Planning Authority

City of Edinburgh Council

### Development Site

The application site extends to approximately 13.72 hectares (33.90 acres) and is situated within the grounds of Edmondstone Estate, south east of Edinburgh. The Estate is bordered by Old Dalkeith Road to the south, by The Wisp to the east, by open fields to the north and by fields adjacent to the new Biomedical Research Park to the west.

### Development Description

The erection of an 80 bed private hospital with associated car parking, access, landscaping and restoration works (outline application).

### Planning History

The application for outline planning permission was received by the City of Edinburgh Council in 2004, accompanied by a planning statement and a conceptual landscape design. It was recommended that the application be granted subject to conditions, with the requirement for a number of reserved matters to be approved by the local planning authority including a plan showing access provision. These include the planning condition as recommended in the Scottish Executive Guidance. At time of publication, consent is withheld subject to section 75 agreements being finalised.

The application includes a scheme of comprehensive landscape management for the surrounding 25.2 hectare estate, allowing improved public access to areas of the Green Belt. The conceptual landscape plan submitted with the application includes planting provision as well as a network of footpaths, access points and areas of parkland. Further to this, as a reserved matter, the developer is required to have a plan approved by the local authority including details of:

- all existing paths, tracks, rights of way, and any areas currently outwith or excluded from statutory access rights;
- any diversions of paths temporary or permanent, proposed for the purposes of development.



A ruined stable block remains on the site

- any areas proposed for exclusion from statutory access rights, for reasons of privacy, disturbance or curtilage, in relation to proposed buildings or structures;
- all alternative paths and tracks proposed for use during the construction period, for use by walkers, riders, cyclists, all-abilities users, etc., including details of provision for their future maintenance; and

Within the site, access routes will impose low speeds for all vehicles and be suitable for use by cyclists. A network of footpaths will provide for woodland walks, access to the Edinburgh Royal

Infirmery and nearby Biomedical Park and a range of amenity and open spaces to the north-east of the site.

In this case the issue of access rights in outline applications is dealt with by reserved matters. Any further consideration will have to assess the retention of access rights and will require detailed information regarding how this will be delivered. The City of Edinburgh Council have established the requirement for an ‘Estate Management Strategy’ which will provide the details of access required as reserved matters, and the provision of paths throughout the site and connecting with existing networks. Further access considerations will have regard to the draft Edinburgh Core Paths Plan which is currently undergoing public consultation. A candidate Core Path runs along the southern boundary of the grounds of Edmondstone House and opportunities have been identified for future potential Core Paths through the site, integrating the core path system with the parkland. These paths also provide a link between the Edinburgh and Midlothian which will be well travelled if proposed residential and parkland developments to the north of Edmondstone House proceed. These opportunities are likely to be included in the Estate Management Strategy submitted to the City of Edinburgh Council for approval of reserved matters.

The reserved matters in the conditional approval utilised the recommended planning condition from the Scottish Executive Guidance (see Section 3.5.1 above).

This development requires sustainable access and connected communities to be promoted at this early stage by the City of Edinburgh Council. These strategic concepts are compounded by projects such as this which take account of, and provide for, public access enhancing the potential for use and enjoyments of paths highlighted in the adjacent Area Core Paths Plans.

The Estate Management Strategy provides an adequate system for implementation and maintenance of these access routes, making the most of the green surroundings and existing transport links.



New paths will link into the existing network of paths and tracks

### Commentary

The location of this site provides an opportunity for maintained access provision between new housing development to the south east of Edinburgh and the Royal Infirmary and further to the city centre. The ‘South East Wedge’ is identified in the South East Edinburgh Local Plan, Shawfair Local Plan, finalised Edinburgh City Local Plan and Edinburgh and Lothians Structure Plan and will provide a considerable amount of Edinburgh’s growth into the future.



# Case Study 7- Privacy Issues and Realigned Right of Way



## Bellwood, Aboyne, Aberdeenshire

Aberdeenshire Council reference numbers:  
APP/2006/2136  
Scottish Executive Case reference:  
PL 463

### Planning Authority

Aberdeenshire Council and the Scottish Government's Directorate for Planning and Environmental Appeals

### Development Site

Outline planning consent has been granted by Aberdeenshire Council for 15 detached houses (APP/2003/0614). The site lies to the east of the centre of Aboyne, with housing to the north and west. An established Right of Way runs adjacent to the development along its southern boundary for approximately 145 m between 'Burnside Walk' and 'Old Town Road' which is a popular route connecting the town with Bell Wood (a community woodland). It connects to the maintained path network established in the Bell community woodland.

### Development Description

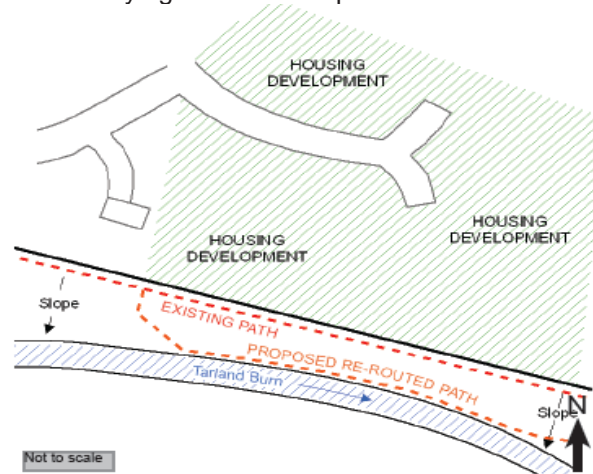
Aberdeenshire Council granted outline and detailed planning consent for 15 houses, of which 6 are overlooked from the path. A further application was made to the council for the construction of a new section of path which diverts an existing Right of Way and creates a new section of path, next to the Tarland Burn, approximately 10 m to the south (down the river bank) of the existing alignment.

## Planning History

In granting outline consent in 2003 the council made clear reference in a note to the applicant at the end of the decision notice regarding the presence of the existing Right of Way which runs adjacent to the site. It explicitly states that the approved development does not include alteration to the right of way. It also defines the scope of the approval, which does not consider the Right of Way to form a part of the approved domestic curtilage defined by the house plot boundary. Discussion concerning this Right of Way took place during this outline application stage and consideration was given to a minor diversion which would retain the path's position at the top of the slope.

In the 3 years since the outline application was granted planning permission, some of the houses

have been built and, at time of publication, others are at varying levels of completion. A new



Plan showing site and footpath

application to divert the existing Right of Way and change the use of the existing path to amenity garden ground was lodged in 2006. The applicants claim that this would maximise the amenity value of the new housing plots without severing access to the community woodland. The applicant proposed “*in the interests of security and privacy*”, to re-route the path away from the houses to a new route adjacent to the Tarland Burn, which would reconnect with the existing path beyond the houses.

The application was subsequently withdrawn, leaving issues between the Right of Way and homeowners’ privacy unresolved.

The refusal of a Path Diversion Order by the Reporter was accompanied by a recommendation that would require an amendment to the planning consent for the dwelling houses to reduce the number of plots on the site. This would provide adequate security and privacy without compromising access rights under the Land Reform Act and rights of way under the Countryside Act.



The Right of Way adjacent to housing development



The bank leading down to the Tarland Burn

This proposal was agreed in principle by the local planning authority, but could only be approved if a Path Diversion Order was granted.

*Countryside (Scotland) Act 1967, Section 35 and Schedule 3*

A Path Diversion Order is required under the Countryside (Scotland) Act 1967 (the Countryside Act), Section 35, Schedule 3, prior to any established Right of Way being diverted. Objections were lodged and not withdrawn to this proposal at Bell community woodland, so the case was referred to the Directorate for Planning and Environmental Appeals. Following a public meeting, a decision letter was sent to the applicant by the Reporter refusing to confirm the Path Diversion Order.



The new housing development



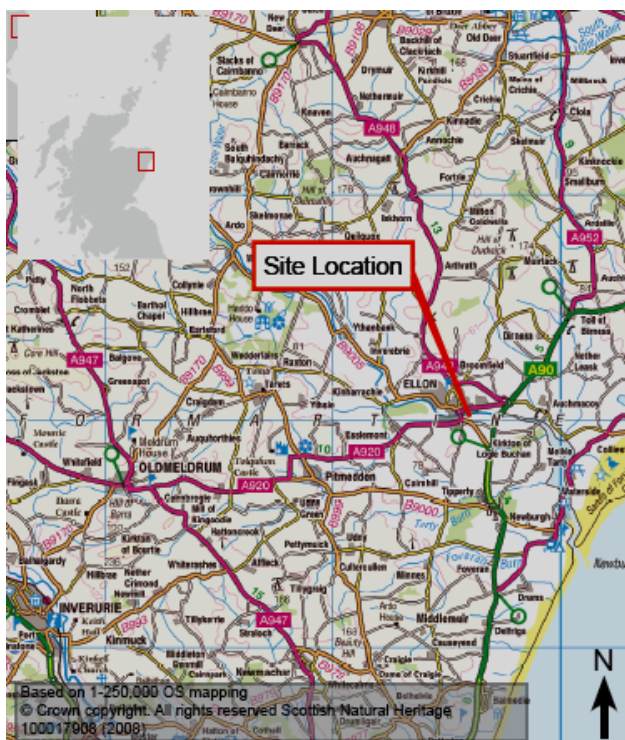
The Bell Wood

**Commentary**

The primary issue in this case is whether or not the proposed alternative route for the Right of Way is acceptable or achievable.

Having approved the outline application, the local planning authority was under pressure from the developers to allow the diversion of this Right of Way, despite its clear exclusion in the original determination. The size and orientation of the new houses creates a problem with the Right of Way which could have been avoided if the development had been re-designed and aligned when the planning authority drew attention to it.

# Case Study 8- Severance of Access by fence and Gate Leading to Public Inquiry



## West Lodge, Old Rectory Avenue, Ellon

Retrospective Planning Application  
APP/2005/3971

### Planning Authority

Aberdeenshire Council and the Scottish Executive's Inquiry Reporters Unit

### Development Site

The site lies near the commercial centre of Ellon, adjacent to the south bank of the River Ythan and immediately to the east of the Old Bridge of Ellon.

### Development Description

The application was submitted for the formation of two sections of 1.8 metre high metal railings and a 2.8 metre wide double gate adjacent to the dwellinghouse known as West Lodge. The council refused retrospective planning permission and this decision was appealed by the applicant. Consequently, final consideration was delivered by the Scottish Executive's Inquiry Reporters Unit.

### Planning History

Following the erection of a metal gate and fencing across the site entrance, without planning permission being sought, an enforcement order was issued. The resulting retrospective application (APP/2005/3971) was received by Aberdeenshire Council in 2005.

The original application was refused by Aberdeenshire Council on the grounds that:

*“The development is contrary to Policy Env\22 : Public Access of the Aberdeenshire Local Plan in that the gates and railings erected would have an*

*adverse impact on a potential public access to an area earmarked for possible future development, while an alternative access that is no less attractive and safe and convenient has not been provided.”*

Policy Env\22\* protects against development that would have an adverse impact on public access for walking, cycling or horse riding and was included to uphold the duty placed upon local authorities by the Land Reform Act through the planning system.

The decision to refuse planning permission was informed by the Local Access Officer's consultation response, which clearly concluded that the principles of the Land Reform Act were enveloped in the Finalised Aberdeenshire Local Plan Policy ENV22 and therefore were not separable and should be upheld in this case. The Land Reform Act was referred to throughout the process as a material consideration.

### The Planning Appeal

The refusal of Planning Application APP/2005/3971 was appealed by the applicant to the Scottish Executive and was overturned by a Reporter from the Inquiry Reporters Unit. The Reporter justified his decision, concluding that the development



conformed to all Development Plan policies and that there were no material considerations which justified withholding the approval of planning permission.



Gate and railings from the north bank of the River Ythan

His conclusions were based upon the premise there was no established path across the site and no signs of access; he confirmed that an alternative point of access exists adjacent to the site.

With specific regard to the Land Reform Act the Reporter did not consider it to be a material consideration in determining this application, stating:

*“the issue of public access rights under the LRSA is ultimately one for the courts, rather than the planning system, to determine.”*

### Commentary

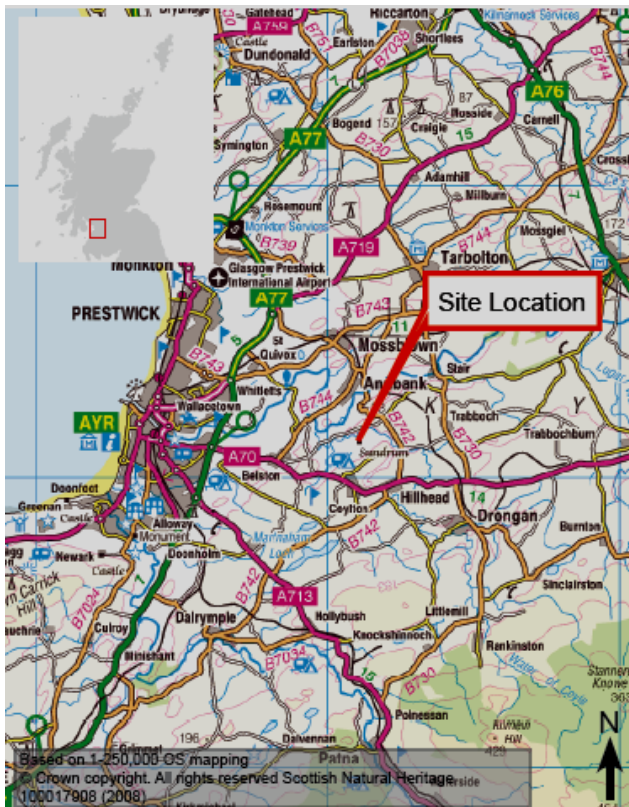
Aberdeenshire Council concluded that the erection of a gate and railings at West Lodge, Ellon was in conflict with the Local Plan and the Land Reform Act. The decision to refuse a retrospective application for planning permission reflected this.

The publication of Scottish Planning Policy 11: Open Space and Physical Activity (SPP11) in 2007 now explicitly lays out the requirement for Access Rights under the Land Reform Act to be material considerations in any relevant planning decision.



View across the affected land from the old bridge over the River Ythan

# Case Study 9- Severance of Access to Woodland by Fence Erection



## Sundrum Castle

Retrospective Planning Application  
06/01794/COU

Planning Authority  
South Ayrshire Council

### Development Site

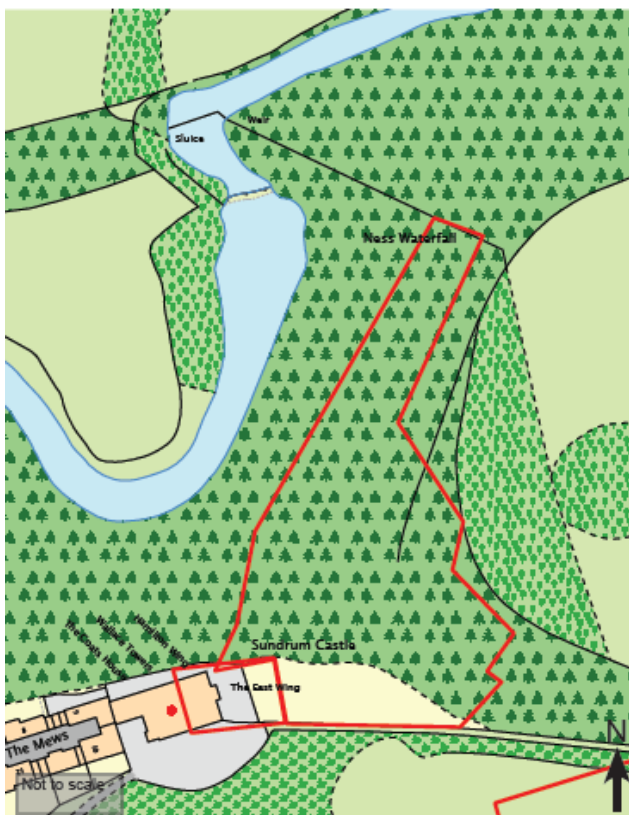
The development is located 0.5km from Ayr. See site plan and aerial photographs below

### Development Description

Change of use of estate ground to form garden ground by erection of a boundary fence.



Aerial view showing the site boundary marked in red



Plan illustrating the site marked in red and surrounding context

### Planning History

Retrospective planning permission was sought for the erection of a boundary fence and the change of use from estate ground to garden ground (18/12/2006). The boundary fence is a one metre high post and rail fence with two gates constructed at the north and south of the site for private use. The fence encloses a large area of mature woodland that has hitherto been popular with local residents who frequently walk through the woods to a waterfall that is just beyond the area enclosed by the fence\*.

Thirteen letters of objection to the application were received from the residents of neighbouring properties (many of whom are members of the Sundrum Castle Resident's Association) which

\*This is the basis for the 13 objections to the development

included three representations to the effect that the application obstructs a legal right of access specifically established under the Land Reform (Scotland) Act 2003. All of the objectors raised as their primary concern, the restrictions brought upon recreational access by the enclosure of the large area of woodland as private grounds.

The landowner provided a realigned route to the waterfall, around the enclosed area, which was initially felt to be unsatisfactory by the objectors; following field boundaries and ditches for much of its length. This was subsequently re-routed and surfaced and the objectors have indicated that they are satisfied with the alternative provision which provides a route through the fence, allowing access through much of the area originally enclosed.



The path continues north beyond the enclosed area of woodland, down to the Nell Waterfall



Sundrum Castle in South Ayrshire

In October 2007, the Regulatory Panel refused planning permission for the retrospective application on the basis that it does not conform to the policies of the development plan\*\*, particularly those that protect the integrity of a Rural Protection Area and Scenic Area in which the development is located. They did not cite access restrictions as grounds for refusal.

The enclosed area extends for some distance into the woodland behind the castle, from no area in which are views into the castle possible. It is apparent therefore that this is not required to protect the privacy of the castle and, due to the provisions of the Land Reform Act, could not be justified. The realigned route, passing through this boundary fence, provides access through approximately half of the area originally enclosed.



From the north of the fenced area looking south at the original route through the woodland. The public were originally denied use of this path, prompting complaints to the council. This path has subsequently been re-instated for part of its route

\*\*Ayrshire Joint Structure Plan 1999 and the South Ayrshire Local Plan 2007

### Commentary

Arguably, due to the long established nature of the path, it would qualify as a legitimate right of way. However, grounds for refusal did not include this or the restriction of wider access rights established by the Land Reform (Scotland) Act 2003 because of the uncertainty as to whether these rights were legitimate material considerations.

Access rights have been material considerations since the Land Reform Act came into force in 2005 and this has now been confirmed in SPP11 *Open Space and Physical Activity*. In addition to the grounds for refusal cited by the Regulatory Panel, the restrictions to access rights established under the Land Reform Act could have been material considerations and therefore, legitimate additional grounds for the refusal of planning permission. Had erection of the boundary fence been deemed permitted development, it would be the duty of the council to consider public access rights outwith the realm of planning.

However, since the land owner has realigned the alternative route to the Ness Waterfall, access through much of the area originally enclosed by the fence is possible once again.



The path was diverted along the right hand side of this boundary fence but the fence has subsequently been opened up at this point to provide a more suitable alignment within a section of the fenced-off area

Annex B

## Questionnaires







## Outdoor Access and the Planning System - Planning Enforcement

Thank you for taking the time to complete this questionnaire. If you encounter any problems in completing the questions or have any queries relating to the study, please contact Richard Fisher (richard.fisher@erm.com) or Colin Maciver (colin.maciver@erm.com) for assistance.

*Suggested Planning Condition from Part 1 Land Reform (Scotland) Act 2003, Guidance for Local Authorities and National Park Authorities:*

Prior to the commencement of works ... (if attached to a full planning permission)

or

As part of the detailed application... (if attached to an outline consent)

...a detailed plan of public access across the site (existing, during construction and upon completion) will be provided for the approval of the council as planning authority. This will show:

- a) all existing paths, tracks and rights of way, and any areas currently outwith or excluded from statutory access rights\*;
- b) any areas proposed for exclusion from statutory access rights, for reasons of privacy, disturbance or curtilage, in relation to proposed buildings or structures;
- c) all paths and tracks proposed for construction, for use by walkers, riders, cyclists, all-abilities users, etc.
- d) any diversions of paths - temporary or permanent - proposed for the purposes of the development.

*under Part One of the Land Reform (Scotland) Act 2003*

**YOU ARE IN "PREVIEW MODE". YOUR ANSWERS WILL NOT BE SAVED!**

### Participant Information

Local Authority\*

Planning Department\*

Name

- 1 Since 2005, have enforcement actions been taken within your administrative area because access conditions have not been met?**

- 2 If so, please provide brief details of the development and why the enforcement action was taken, including the wording of the condition that was not met (if appropriate) in the box below.**



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## Outdoor Access and the Planning System - Development Control

Thank you for taking the time to complete this questionnaire. If you encounter any problems in completing the questions or have any queries relating to the study, please contact Richard Fisher (richard.fisher@erm.com) or Colin Maciver (colin.maciver@erm.com) for assistance.

Suggested Planning Condition from *Part 1 Land Reform (Scotland) Act 2003, Guidance for Local Authorities and National Park Authorities*:

Prior to the commencement of works ... (if attached to a full planning permission)

or

As part of the detailed application...(if attached to an outline consent)

...a detailed plan of public access across the site (existing, during construction and upon completion) will be provided for the approval of the council as planning authority. This will show:

- all existing paths, tracks and rights of way, and any areas currently outwith or excluded from statutory access rights\*;
  - any areas proposed for exclusion from statutory access rights, for reasons of privacy, disturbance or curtilage, in relation to proposed buildings or structures;
  - all paths and tracks proposed for construction, for use by walkers, riders, cyclists, all-abilities users, etc.
  - any diversions of paths - temporary or permanent - proposed for the purposes of the development.
- under Part One of the *Land Reform (Scotland) Act 2003*

**YOU ARE IN "PREVIEW MODE". YOUR ANSWERS WILL NOT BE SAVED!**

### Participant Information

Local Authority\*

Planning Department\*

Name

- 1 Are you familiar with the guidance document: *Part 1 Land Reform (Scotland) Act 2003, Guidance for Local Authorities and National Park Authorities*?

Yes  No

- 2 Have you seen the suggested planning condition from *Guidance for Local Authorities and National Park Authorities* prior to now?

Yes  No

- 3 In your estimation, in what percentage of planning applications made in the past 12 months has the issue of access land arisen as a material consideration?

On greenfield sites (%)

On brownfield sites (%)

- 4 In your experience, have these material considerations related to:

The provision or realignment of paths or tracks to replace those severed or otherwise affected by development proposals.

The removal, through development, of the wider rights of access that apply to all land, irrespective of whether the land contains established paths or tracks.

None of the above

- 5 Have the Scottish Government's suggested planning condition or similar provisions been used in planning cases regarding the development of access land in your local authority?

Yes  No

- 6 If so, have you adapted the wording of the suggested condition to suit particular considerations affecting your local authority area or a specific development ?

Yes  No

- 7 If yes, please insert your alternative wording in the text box below and provide brief details of why this wording was better suited to the circumstances.

- 8 Where such conditions have been addressed by the applicant, how has the required information been presented?

On the application plans

In the supporting application text

Only in subsequent correspondence

Other, Please Specify

- 9 Please provide an indication of whether you think the information supplied by the developer was appropriate, and of any issues arising.

- 10 As part of this study we will be producing a number of short case studies. If you are aware of any developments in your local authority area where rights of access have been a key planning consideration, or significant benefits for access have arisen, please provide some brief details below.

11 Are you aware of any public inquiries, since 2005, in which outdoor access rights issues have been material considerations? If so, please provide brief details of the application and the issues that were raised.





## Outdoor Access and the Planning System - Policy Development

Thank you for taking the time to complete this questionnaire. If you encounter any problems in completing the questions or have any queries relating to the study, please contact Richard Fisher (richard.fisher@erm.com) or Colin Maciver (colin.maciver@erm.com) for assistance.

**YOU ARE IN "PREVIEW MODE". YOUR ANSWERS WILL NOT BE SAVED!**

### Participant Information

Local Authority*	<input type="text"/>
Planning Department*	<input type="text"/>
Name	<input type="text"/>

- 1 Is provision being made in your forthcoming strategic development plan or local development plan [1] for the protection of outdoor access rights in the spirit of the Land Reform (Scotland) Act 2003?

[1] As required under the Planning etc. (Scotland) Act 2006

<input type="checkbox"/> Yes	<input type="checkbox"/> No
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- 2 As part of this study, we aim to gather any early indications and recommendations on how the topic of outdoor access may be addressed within the forthcoming strategic and local development plans [1]. We would be particularly interested in how core path plans and outdoor access strategies may be integrated into these development plans. Please provide any information or recommendations that you can in this regard below.

[1] As required under the Planning, etc (Scotland) Act 2006

