

## Scottish Parliament Region: South of Scotland

### Case 200502399: South Ayrshire Council

#### Summary of Investigation

##### **Category**

Local government: Rights of Way

##### **Overview**

The complainant (Mr C) raised a number of concerns about the way South Ayrshire Council (the Council) tried to extinguish the equestrian rights of way over a pathway where such rights existed and where the landowner had placed barriers to prevent horses from using the pathway.

##### **Specific complaints and conclusions**

The complaints which have been investigated are that the Council:

- (a) failed to maintain the right of way as per their responsibilities under the Countryside (Scotland) Act 1967 (*upheld*);
- (b) delayed in seeking an Extinguishment Order in respect of the right of way (*upheld*); and
- (c) failed to pass the matter to the Scottish Executive<sup>1</sup> for determination within a reasonable timescale (*upheld*).

##### **Redress and recommendations**

The Ombudsman recommends that the Council:

- (i) take prompt action to ensure that it complies with its statutory obligations under the Countryside (Scotland) Act 1967 in relation to the pathway; and
- (ii) introduce a robust procedure to ensure that it administers its responsibilities under the Countryside (Scotland) Act 1967 and the Land Reform (Scotland) Act 2003 within acceptable timescales.

The Council have accepted the recommendations and will act on them accordingly.

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<sup>1</sup> On 3 September 2007 Scottish Ministers formally adopted the title Scottish Government to replace the term Scottish Executive. The latter term is used in this report as it applied at the time of the events to which the report relates.

## **Main Investigation Report**

### **Introduction**

1. In February 1999 a local Councillor with South Ayrshire Council (the Council) raised concerns about the safety of horse-riders using a popular public pathway. As a result of this the Council contacted the main equestrian user to ask that she refrains from using the pathway for horse-riding. This individual advised the Council that she had been using the path for more than 20 years and that she had a right to continue to do so.

2. After a number of complaints from members of the public, and with the agreement of the Council, the main equestrian user and the Community Council an independent organisation, the Scottish Rights of Way and Access Society (Scotways), undertook a survey of the historic use of the pathway to establish whether there existed a public right of way for equestrian users. The results of Scotways survey indicated that an equestrian right of way did exist.

3. In December 2000/January 2001 a local landowner installed 'kissing gates' on part of the pathway preventing horse-riders from using the pathway. After further consideration and a public consultation exercise, the Council decided to pursue a Public Path Extinguishment Order under the terms of the Countryside (Scotland) Act 1967. When objections to the Extinguishment Order were received the Council sought further advice and decided against pursuing this option. Instead, the Planning Committee authorised the Depute Chief executive to investigate the option of promoting bye-laws to regulate public access to the path in the interests of the preservation of public order and safety. To date the Council have not implemented such byelaws nor have they removed the 'kissing gates'.

4. On 19 October 2005 a member of the public (Mr C) wrote to the Council's Chief Executive to express his concerns about the time taken to progress. This letter was acknowledged on 25 October 2005 by the Chief Executive who advised that a response would be issued in due course. However, as he had received no response by 28 November 2005, Mr C asked that we carry out an investigation into his concerns. The Council did respond to his letter on 24 February 2006.

5. The complaints from Mr C which I have investigated are that the Council:

- (a) failed to maintain the right of way as per their responsibilities under the Countryside (Scotland) Act 1967;
- (b) delayed in seeking an Extinguishment Order in respect of the right of way;  
and
- (c) failed to pass the matter to the Scottish Executive for determination within a reasonable timescale.

### **Investigation**

6. I have reviewed the correspondence provided by Mr C. I have obtained from the Council the complaints correspondence and background documentation in respect of the pathway and have sought comment on the issues raised. I have reviewed the background guidance and legislation in respect of countryside access and rights of way.

7. I have set out, for each of the three main headings of Mr C's complaint, my findings of fact. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C and the Council were given an opportunity to comment on a draft of this report.

### *Background*

8. In February 1999 a local Councillor expressed concern about horses being exercised on a popular local pathway. The pathway was situated on private ground. The path was an undisputed public right of way for pedestrians. As a result of the local Councillor's concern, a letter was issued by the Council's Director of Development, Safety and Regulation to the main equestrian user requesting that she either cease using the pathway or provide evidence to show that in addition to being a right of way for pedestrians, the pathway was also an equestrian right of way. She in turn responded by advising that she had ridden horses on the path for more than 20 years (the prescriptive period for rights of way).

9. In early 2000 letters of complaint about the equestrian use of the pathway were received by the Council from the local MP, the local Councillor and the local 'Old Folks' Association. Additionally a petition containing 180 signatories was received from local residents and local Community Councils.

10. In April 2000 Scotways, an independent charitable company whose primary objective is to safeguard rights of way in Scotland for the benefit of the public, agreed to assist the Council in the resolution of the dispute by

undertaking an investigation into equestrian usage on the route by issuing a standard 'Evidence of Users' questionnaire to known users. The main parties in dispute agreed to accept Scotways' role as intermediary.

11. The local Community Councils' office bearers were appraised of the progress of the investigation by officers of the Council's Planning service and representatives of Scotways at a meeting in August 2000. At that meeting the local Community Councils' representatives acknowledged that the pathway had been used for equestrian purposes for many years. They did, however, comment that the intensity of usage had increased in the previous two years.

12. In response to concerns expressed by the local Councillor, the Community Council and members of the public, the Council's Health and Safety Adviser along with Planning officers inspected the route in October 2000 with a view to determining its suitability for shared use and identifying measures the Council could take to reduce conflict and minimise risk.

13. The results of the Scotways investigation were communicated to the Council in November 2000. Copies of the report, together with the completed questionnaires were sent to the local Councillor and the local Community Councils. The evidence gathered by Scotways during the course of their investigations suggested that there was a pattern of use of the path by horse-riders consistent with the existence of an equestrian right of way. Despite the findings of the Scotways report, the local MP, the local MSP, the local Councillor, the local Community Councils and many local residents were opposed to the equestrian use of the pathway and many disputed Scotways' methodology.

14. In December 2000/January 2001 one of the owners of the land over which the pathway traverses erected 'kissing gates' across both the northern and southern ends of the pathway thereby precluding equestrian use. The 'kissing gates' would only allow access to pedestrians and cyclists. From March 2001 to August 2001 the issue received a lesser priority due to the foot and mouth outbreak. However, the issue arose again shortly afterwards at which point it was considered by Council Officers prudent to defer the submission of a report to the Planning Committee on this issue until consideration of the feasibility of constructing a parallel bridle path on adjoining land. It soon became clear that landowners would not readily agree to sell land for the purpose of a bridle path

and local residents had reservations about public funds being spent on such a scheme. As a result, this option was not pursued.

15. In August 2002 a report was produced by the Director of Development, Safety and Regulation for presentation to the Planning Committee on 3 September 2002. This summarised the history of the issue and detailed options for progressing the matter. The report asked the Planning Committee to consider the options and provide guidance as to how it wishes the dispute to be brought to a conclusion.

16. When the Planning Committee reconvened on 17 September 2002 it agreed that a full public consultation be carried out prior to the determination of the dispute and that the matter be reported back to the Planning Committee following the completion of the consultation process.

17. The purpose of the consultation was to elicit public opinion on whether the route should be open for multiple use (including equestrian use). The consultation exercise took place in a local community centre on 6 November 2002. At this, a clear and significant majority of those surveyed were opposed to multiple use even if improvements were made to ease any problems of equestrian and pedestrian conflict.

18. A report with 2 appendices was prepared by the Director of Development, Safety and Regulation in June 2003 for presentation to the Planning Committee. The report explained the main outcomes of the public consultation exercise carried out in November 2002, detailed subsequent considerations and recommended a course of action. Appendix 1 set out the detailed history of, and background to, the conflict over the path, together with options for consideration by the Committee, whilst Appendix 2 detailed the results of the public consultation exercise.

19. Appendix 1 details the options available to the Planning Committee. These were detailed as:

*'a. Do nothing*

Given the level of local concern and emotion generated by the issue of equestrian use of the path, the health and safety implications, the Council's statutory duty to assert and protect the rights of way and the fact that the Council is the occupier of the land traversed by the path under the relevant grounds maintenance contract, taking no action does not appear

to be a tenable option. Furthermore, if the Council opted to do nothing further to resolve the dispute, it could find itself the subject of a further complaint of maladministration to the Commissioner for Local Administration in Scotland or an action in the Sheriff Court.

*b. Close the Route to Horse-riders*

The Council could conclude, on the basis of the available evidence, that there is no equestrian right of way over the pathway. In that event, it could simply elect to allow the existing kissing gates to remain in place or it could erect new barriers, thereby physically preventing horses from using the path. Such a decision on the part of the Council could be subject to challenge by the Scottish Rights of Way and Access Society or members of the equestrian lobby, either by way of a judicial review or an action for declarator in the Sheriff Court.

Alternatively, the Council could recognise the equestrian right to use the 'pathway', but decide that the path is unsuitable for shared use by pedestrians and horse-riders, for health and safety, or other reasons. In that case, in addition to employing physical means of excluding horses from the route, a formal legal procedure would have to be followed to extinguish any equestrian right of passage over it. This procedure would be likely to attract irreconcilable objections from the equestrian lobby, thereby necessitating the holding of a local enquiry or hearing.

The Council's Health and Safety Adviser inspected the route in the company of officials from the Planning Service in October 2000, with a view to determining its suitability or otherwise for shared use and identifying possible measures the Council could take to minimise the risk/conflict between walkers and horse-riders. In her subsequent report, she expresses the view that preventing horse-riders from using the route could have adverse health and safety implications. Horse-riders could be forced to increase their use of public roads, where statistical evidence suggests the risk of road traffic accidents involving horses is far greater than the risk of injury to pedestrians posed by shared use of the 'pathway'.

*c. Allow Shared Use of the Path to Continue*

Planning officials, in conjunction with the Health and Safety Adviser, have identified various physical and user management measures – surface improvements, passing places, signage and preferred access times for

specific categorise of user - which could be effected to facilitate the continuation of multiple use of the 'pathway'. At a very rough estimate, such works could cost around £2,500 and could be funded from the Planning service's 2003/04 Capital Programme allocation for the South Ayrshire Paths Partnership or its project maintenance revenue budget. The permission of the owner of the solum of the path may be required for any physical improvements. The primary equestrian user of the 'pathway' could be approached for a contribution to the cost of works and the subsequent maintenance of the path.

*d. Alternative Route Options*

As stated in 3.9 above, given the unwillingness of neighbouring landowners to cede control to the Council of any adjoining land, the formation of a separate, dedicated bridle path, parallel to the 'pathway', is not an acceptable compromise solution to the dispute.'

20. The recommendation made to the Planning Committee by the Director of Development, Safety and Regulation in Report 1 was as follows:

'Having assessed the evidence gathered on equestrian use of the route, the results of the public consultation exercise, the responses of consultees and all other material considerations, I recommend that the Committee (a) accepts that an equestrian right of way has been established over the 'pathway'; (b) requests the landowner to remove the gates erected across it; (c) agrees to implement appropriate physical and user management measures to facilitate shared use of the path, subject to the agreement of the landowner, if necessary, and (d) reviews after 1 year the impact of equestrian use of the path, having particular regard to factors such as public safety, surface condition and maintenance.'

21. This report was first considered by the Planning Committee on 10 June 2003 which continued consideration pending a site visit. It was then considered by a Special Planning Committee on 19 August 2003. However, at the Special Planning Committee it was decided that 'while evidence indicated that an equestrian right of way had been established over the 'pathway', given the extent of local health and safety concerns about its suitability for shared use by pedestrians and horse-riders, the route should be closed off formally to horse-riders by the making of an Extinguishment Order under the Countryside (Scotland) Act 1967'. On 9 March 2005 the Council made the Extinguishment

Order. A number of objections from members of the public to the Extinguishment Order were received by the Council.

22. Officers at this stage decided that the Extinguishment Order should be reconsidered in light of the issues raised by objectors and also in respect of the provisions of the Land Reform (Scotland) Act 2003 which had come into effect on 9 February 2005. They planned to do so before referring the Extinguishment Order to Scottish Ministers in compliance with the Countryside (Scotland) Act 1967.

23. A report was then submitted to members only on 6 December 2005 by the Depute Chief Executive and Director of Development, Safety and Regulation advising on progress in respect of the Extinguishment Order and recommending a proposed course of action with regard to public access to the 'pathway' in light of what the Council believed were its statutory responsibilities under the Land Reform (Scotland) Act 2003.

24. This report was presented to the Planning Committee on 24 January 2006 who decided to agree:

'(a) that in the circumstances, the Depute Chief Executive and Director of Development, Safety and regulation take no further action to promote the Public Path Extinguishment Order;

(b) to authorise the Depute Chief Executive and Director of Development, Safety and Regulation to investigate the option of promoting byelaws under the Land Reform (Scotland) Act 2003 Section 12 and the Countryside (Scotland) Act 1967 section 54, to regulate public access to the 'pathway', in the interests of the preservation of public order and safety and to report back to Committee at a future date on the outcome of the investigation; and

(c) that the Depute Chief Executive and Director of Development, Safety and Regulation write to all members to clarify current Council procedures in relation to local members addressing Council Committees of which they are not a member.'

25. The Council is currently examining the possible promotion of byelaws to regulate public access to the 'pathway'.





**(a) The Council failed to maintain the right of way as per their responsibilities under the Countryside (Scotland) Act 1967**

26. The Countryside (Scotland) Act 1967 was established to 'make provision for the better enjoyment of the Scottish countryside'. In Section 46 of the Countryside (Scotland) Act 1967 it also details a councils responsibilities in respect of ensuring that paths remain free from obstruction. Section 46 details that:

'46. – (1) It shall be the duty of a local planning authority to assert, protect and keep open and free from obstruction or encroachment any public right of way which is wholly or partly within their area, and they may for these purposes institute and defend legal proceedings and generally take such steps as they may deem expedient.'

27. As detailed above, concerns about the safety of pedestrians on part of this pathway were originally expressed in February 1999 by a local Councillor. Following a survey carried out by Scotways, it was agreed that the pathway was a public right of way for equestrian as well as pedestrian use. In December 2000/January 2001 one of the owners of the land erected 'kissing gates' blocking equestrian access. To date the Council has not taken action against the landowner for the removal of these 'kissing gates'.

*(a) Conclusion*

28. It is clear from the evidence provided by both parties that the Council have failed to adhere to their responsibilities under the Countryside (Scotland) Act 1967.

29. The Council's Planning Committee accepted that an equestrian right of way exists. As a result of the concerns over health and safety issues they have not enforced this right because the landowner erected gates across the path and the Council has not sought to have them removed.

30. The concerns of a number of local residents, organisations and elected members about potential health and safety issues in respect of shared use have been examined by the Council. Their own Health and Safety Adviser has concluded that with some physical alterations to the pathways such as the addition of passing places, potential conflicts and health and safety risks can be minimised. Indeed, it was pointed out that there may be a greater risk to the health and safety of users if equestrian use was restricted as horses would then have to increase their use of the public roads.

31. I appreciate that the Council have consulted with local residents who are concerned about the safety of shared access and that they have found this to be a difficult issue to address. However, as a result of their failure to assert the right of access for equestrian users, I uphold this aspect of the complaint.

*(a) Recommendation*

32. The Ombudsman recommends that the Council take prompt action to ensure that it complies with its statutory obligations under the Countryside (Scotland) Act 1967 in relation to the pathway.

**(b) The Council delayed in seeking an Extinguishment Order in respect of the right of way**

33. In June 2003 a report was prepared by the Director of Development, Safety and Regulation and presented to the Planning Committee on 19 August 2003. This recommended that the Planning Committee agree to:

- (a) accept the equestrian right of way has been established over the pathway;
- (b) request that the landowner agree to remove the gates erected over the pathway; and
- (c) agree to implement appropriate physical management and use management measures to facilitate shared use of the pathway, having particular regard to public safety, surface condition and maintenance.
- (d) Reviews after 1 year the impact of equestrian use of the path, having particular regard to factors such as public safety, surface conditions and maintenance.

34. The Planning Committee on a vote of five to four voted to accept that an equestrian right of way existed, they also decided, because of their concerns about the health and safety of the public, to seek to have that formal right extinguished by seeking an Extinguishment Order under the Countryside (Scotland) Act 1967. The Council considered that it would be inconsistent of the Council to request that the gates obstructing the pathway for equestrian use be removed whilst they were pursuing an Extinguishment Order.

35. The Council made the Extinguishment Order on 9 March 2005. Notices intimating the Extinguishment Order were placed at either end of the path on 8 March 2005, published in two local newspapers on 9 March 2005 and 11 March 2005 and served on various parties by letter on 8 March 2005.

*(b) Conclusion*

36. As mentioned previously, the pathway was blocked for equestrian users by the landowner in December 2000/January 2001. It was 2003 before the Council made a decision on proceeding with an Extinguishment Order. This Extinguishment Order was not prepared until 9 March 2005 and on 24 January 2006 the Council decided not to proceed with the Extinguishment Order, but to try and regulate the right of access by another means. It appears that this right of access still exists.

37. As there was a delay of five years between the blocking of access by the landowner and the decision by the Planning Committee not to pursue the Extinguishment Order, I uphold this aspect of the complaint.

*(b) Recommendation*

38. The Ombudsman recommends that the Council introduce a robust procedure to ensure that it administers its responsibilities under the Countryside (Scotland) Act 1967 and the Land Reform (Scotland) Act 2003 within acceptable timescales.

**(c) The Council failed to pass the matter to the Scottish Executive for determination within a reasonable timescale**

39. In response to the notices intimating the Council's Extinguishment Order, 15 objections to the proposed Extinguishment Order were lodged with the Council. A number of these objections challenged the legal competence of the Extinguishment Order on various grounds and some of whom challenged the Extinguishment Order on the basis that seeking to close the pathway to horse-riders was in breach of the Council's statutory responsibilities to assert and protect rights under the Land Reform (Scotland) Act 2003.

40. If objections or representations are made to a council following the council giving notice of an Extinguishment Order, these objections and representations must be resolved if the council wishes to confirm the order without reference to Scottish Ministers. If they are not, and the case is referred to Scottish Ministers, they must cause a local public enquiry or hearing be held. Scottish Ministers should only confirm a Public Path Extinguishment Order if they are satisfied that it is expedient to do so having regard to issues such as public use and the effect of closure.

41. Council officers at this stage concluded that it was necessary and prudent, prior to referring the matter to Scottish Ministers, to reconsider the competence of the Extinguishment Order in light of the issues raised by objectors and also in respect of the provisions of the Land Reform (Scotland) Act 2003 which had come into effect on 9 February 2005.

42. A report was produced which was considered by the Planning Committee at its meeting of 24 January 2006. On the basis of the report, including legal advice received by the Planning Committee, the Planning Committee decided to take no further action to promote the Extinguishment Order. The Committee also decided to authorise the investigation of bye-laws to regulate public access to the path.

43. The initial decision to pursue a Public Path Extinguishment Order was taken on 19 August 2003. The Council made the Extinguishment Order on 9 March 2005 and a decision was taken not to pursue the Extinguishment Order on 24 January 2006.

44. In addition to the concern raised by Mr C about the delay in passing the matter to the Scottish Executive, he was also concerned that the Councils failure to pursue the Extinguishment Order process meant that they would not have a right to the matter being determined, once and for all, by Scottish Ministers. Rather the decision by the Council to consider the option of byelaws, without in the meantime taking action to clear the obstruction in the right of way, is likely to mean that the issue continues to be unresolved for some time.

*(c) Conclusion*

45. It is clear that the failure to progress an Extinguishment Order has meant that a possible right to have the matter determined once and for all by the Scottish Ministers was lost. As a result, the dispute remains outstanding. The Council in this case have removed the right to have the case determined by Scottish Ministers, as a result of this, I uphold the complaint.

*(c) Recommendation*

46. The Ombudsman has no further recommendations to make on this point.

47. The Council have accepted the recommendations and will act on them accordingly. The Ombudsman asks that the Council notify her when the recommendations have been implemented.

**Explanation of abbreviations used**

The Council	South Ayrshire Council
Scotways	The Scottish Rights of Way and Access Society
Mr C	The complainant
Appendix 1	Report on the history of the conflict over the pathway
Appendix 2	Results of the public consultation survey of November 2002

**List of legislation and policies considered**

Section 46 of the Countryside (Scotland) Act 1967

Section 34 of the Countryside (Scotland) Act 1967

Section 54 of the Countryside (Scotland) Act 1967

Section 12 of the Land Reform (Scotland) Act 2003