

CAIRNGORMS LOCAL OUTDOOR ACCESS FORUM

Title: Cairngorm Mountain Railway and the upholding of access rights

Prepared by: Bob Grant, Senior Outdoor Access Officer

Purpose

The Aviemore and Vicinity Community Council have sought the advice of the Forum on the legality of the “closed system” which operates from the Ptarmigan Building on Cairngorm. This paper provides background information on how the closed system came about and highlights the specific role the Forum has in providing advice on matters having to do with the exercise of access rights.

Advice Sought

- Does the Forum consider access rights apply for those who travel to the Ptarmigan on the funicular, when they are at the top station and wish to access the adjacent land? What advice does the Forum wish to give to Aviemore and Vicinity Community Council regarding this matter?
- Is the Forum content with the advice that CNPA has received from lawyers or is there any further work that could be done to assist CNPA in this matter?

Background

1. The funicular opened in December 2001. The closed system was introduced to allow the operation of the funicular railway while at the same time ensuring the continued protection of the designated fragile ecosystem on the Cairngorm plateau, a protection that is a duty flowing from European Directives, and a condition attached to European Development Fund grant.
2. The planning application, submitted in 1994 drew an objection from SNH on the grounds that the increased visitor numbers on the plateau would pose a threat to the Cairngorms candidate Special Area of Conservation (SAC) and Special Protection Area (SPA). These are European designations under European Directives for safeguarding habitats and species.
3. To address these concerns a Visitor Management Plan was drawn up along with a Section 50 agreement. The VMP and the Section 50 Agreement became a legally binding agreement as part of the planning consent. As a consequence of both the VMP and Section 50 agreement being in place SNH was able to withdraw its objection. The primary aim of the VMP is *“to protect the integrity of the adjacent areas which have been designated or protected under the European Habitats and Birds Directives from the potential*

impact on non skiing visitors as a direct consequence of the funicular development.”
Construction work commenced in August 1999.

4. An important aspect of the VMP is the monitoring programme which focuses on visitor numbers and behaviour, and those key features for which the Cairngorms are of special interest.
5. There is scope for the VMP to be reviewed and, in this regard, the Detailed Monitoring Scheme provides information for the signatories to the Agreement¹ on how effectively current arrangements are working in ensuring protection of the designated areas. There have been two modifications to the VMP since it came into effect. It is now possible to purchase a one-way funicular ticket for descent and the Windy Ridge path is now being promoted as an alternative route to the top of the mountain.

The closed system

6. The current arrangements are summarised as follows:
 - Egress from the Ptarmigan building for funicular passengers is only permitted for skiers and ski spectators during the ski season;
 - Egress from the ski area into the European sites is not permitted for any visitors to the Ptarmigan using the funicular;
 - A walkers' entrance allows access to the facilities in the Ptarmigan building and they can purchase a ticket to take the funicular down.

Land Reform (Scotland) Act 2003 and the closed system

7. The Land Reform (Scotland) Act came into effect in February 2005 and provides a general right of access to most land and inland water provide it is exercised responsibly. The Act does however exclude some land from access rights.
8. The Cairngorms National Park Authority (CNPA) have received a number of requests from members of the public since the Act came into effect seeking clarification on why access can be restricted from the Ptarmigan building for those who have travelled on the funicular as they believe such restrictions are not compliant with the access legislation. A recent such request has come from the Aviemore and Vicinity Community Council and there request is shown in Annex I to this paper. In order to address these concerns CNPA sought legal advice on interpretation of the Land Reform Act and its interplay with the VMP and section 50 agreement.
9. The advice received is that the mountain railway and associated buildings is land over which access rights are not exercisable. This advice has been shared with respondents. For example, Section 6 of the Act provides for the exclusion of ground which is prohibited, excluded or restricted through another Act. In this case the relevant Act is a Planning Act (see paragraph 10 below). The facility therefore does not comprise land to which access rights apply. People have no statutory right to use the funicular railway and can only do so if they choose to buy a ticket. If they do so, they are then bound by the terms and conditions set down by CairnGorm Mountain

¹ The Highland /Council, Scottish Natural Heritage, Highlands and Islands Enterprise, The Cairngorm Chairlift Company Ltd. and the Bank of Scotland.

Ltd. Amongst other things, these conditions restrict egress from the Ptarmigan building, other than at defined times of year, for certain specific purposes and within a specified area. Therefore, as access rights don't apply, the Cairngorms National Park Authority has no locus to uphold such rights.

Planning and the closed system

10. Access restrictions from the Ptarmigan are also covered in the planning condition. Specifically, a section 50 Agreement was entered into by The Highland Council, Scottish Natural Heritage, Highlands & Islands Enterprise, the Cairngorm Chairlift Company Limited and the Governor and Company of the Bank of Scotland under section 50 of the Town and Country Planning (Scotland) Act 1972 and section 49A of the Countryside (Scotland) Act 1967. The operation of the funicular railway, including the arrangements for visitor management, is controlled through planning conditions and also by this Agreement. Although section 50 of the 1972 Act was repealed after the Agreement was executed, this does not mean the Agreement is invalid. The obligations in the Agreement in relation to the operation of the funicular railway consequently remain in effect. Therefore on the basis of arguments put forward to date, there is no incompatibility of the closed system and Land Reform Legislation.

Role of the Forum and CNPA

11. In developing advice to both Aviemore and Vicinity Community Council and CNPA, it is worthwhile clarifying the respective roles of the Forum and CNPA. The setting up of the Cairngorms Local Outdoor Access Forum was a duty that fell on CNPA as part of the Land Reform Act. The Forum has specific functions and these are:

- (a) *To advise the Park Authority and any other person or body consulting the Forum on matters to do with the exercise of access rights, the existence and delineation of rights of way or the drawing up and adoption of a plan for a system of core paths;*
- (b) *To offer and where the offer is accepted to give assistance to the parties to any dispute about –*
 - (i) *The exercise of access rights;*
 - (ii) *The existence and delineation of rights of way;*
 - (iii) *The drawing up and adoption of the plan referred to in paragraph 9a) above; or*
 - (iv) *The use of core paths;**towards the resolution of the dispute.*

12. The CNPA has a duty under section 13 of the Land Reform Act to uphold access rights. In exercising this duty CNPA can seek the advice of the Forum and has done so on number of occasions. The Forum is **not** a decision making body but the advice received can assist the CNPA in any future decision.
13. The Forum's advice on the closed system, to both Aviemore and Vicinity Community Council and CNPA, must therefore relate to the exercise of access rights as detailed in the Land Reform Scotland Act. Matters to do with planning are beyond the scope of the Forum.

Advice sought

14. In light of the information provided above, does the Forum consider access rights apply for those who travel to the Ptarmigan on the funicular, when they are at the top

station and wish to access the adjacent land. What advice does the Forum wish to give to Aviemore and Vicinity Community Council regarding this matter?

15. Is the Forum content with the advice that CNPA has received from lawyers or is there any further work that could be done to assist CNPA in this matter?

Bob Grant, Senior Outdoor Access Officer
24 April 2009
e-mail: bobgrant@cairngorms.co.uk