

Cairngorms Local Outdoor Access Forum

MINUTES OF THE TWENTIETH MEETING Cairngorm Mountain, nr Glenmore, Aviemore

Tuesday 5 May 2009

Summary of Action points arising from meeting

API: FP to write thank you letters to outgoing Forum members

AP2: CNPA to supply AVCC with copy of letter to Ledingham Chalmers and response from them on the question of the funicular and access rights

AP3: CNPA to prepare a short paper on the Tuley case for the August meeting

Forum members in attendance

| | |
|----------------|--------------------|
| Juliet Allam | John Grierson |
| Simon Blackett | Bob Kinnaird |
| Nic Bullivant | Debbie Greene |
| Hebe Carus | Malcolm Macintyre |
| Paul Corrigan | Catriona Rowan |
| Andrew Dunn | Roger Searle |
| Jo Durno | Richard Wallace |
| | Jeremy Usher-Smith |

Others in attendance:

Murray Ferguson, CNPA

Bob Grant, CNPA

Fran Potheary, CNPA

Adam Streeter-Smith, CNPA

Joyce Lyle, Association of Cairngorms Communities

Keith Marshall, Macaulay Institute

Katrina Brown, Macaulay Institute

George Hogg, SNH

Fiona McNally, Paths for all Partnership

Item 1 – Welcome

1. Paul Corrigan opened the meeting and asked the Forum members to introduce themselves. He welcomed members of the public in attendance: Ian Whitaker from Cairngorm Mountain Ltd; Dr Keith Marshall and Dr Katrina Brown from the Macaulay Institute and speaker George Hogg of SNH. He thanked Nic Bullivant for his input to the afternoon site visits; and also thanked Fred Gordon, Jo Durno and Bell Macaulay for their input over the past few years. He welcomed Joyce Lyle - now replacing Bell MacAulay - and Jeremy Usher-Smith

API: FP to write thank you letters to outgoing Forum members

Item 2 – Apologies

2. Apologies were received from Peter Holden, Fred Gordon, Dave Craig, Rachel Bromby, Paddy Wright and Thomas MacDonnell

Item 3 - Minutes of the last meeting

3. The minutes were agreed subject to some typographic and factual changes as outlined below:

Item 4 – the Scotways Hill Tracks covers tracks in the Cairngorms, not rights of way in the whole of Scotland

Item 10 – delete “we”, line 6

Item 12 – replace “that” with “the”, line 1

Item 20 – replace “as” with “was”, line 1

Item 23 – make clear that this paragraph relates to CPP

Item 4 - Matters arising not otherwise appearing on the agenda

4. The meeting were informed that the Draft Core Paths Plan had been submitted to the Minister in March. A newsletter has been circulated and it is hoped that there will be forthcoming communication from the Scottish Government shortly regarding arrangements for the local inquiry.
5. A query was raised about what the next steps would be regarding the issue of capercaillie and recreational disturbance. BG informed the meeting that once the CNPA have developed draft guidance, it will be brought back to the Forum, probably in August. He also pointed to the recent work CNPA have done with some land managers to develop signage on the specific issues of dogs.

Item 5 – Cairngorms Funicular and the exercise of access rights

Background – Paul Corrigan

6. Paul opened this item by reminding people that this item required the Forum to give advice on the legality and extent of access rights in relation to the funicular, NOT to advise on the rights and wrongs of the Visitor Management Plan. He noted that a number of people, including himself, had an actual or perceived interest in the outcome of this discussion. Advice had been received from the Park Authority’s Head of Corporate Services over how such interest should be declared and whether it was appropriate for those with an interest to contribute to the discussions. Advice received indicated that the role of the Forum was advisory and therefore there was no requirement for members to absent themselves from the debate. However, it was considered good practice for everyone who had such an interest to declare it before the discussion started to enable other members to fully understand their position on the matter. Advice had also been taken on the chairing of the item. Paul Corrigan confirmed that he was comfortable with chairing the discussion and asked if all Forum members were content with this arrangement. This was duly accepted.

7. The following people declared an interest in this agenda item – Paul Corrigan as an employee of Cairngorm Mountain Ltd., Debbie Greene, employee of SNH who is a co-signatory to the agreement underpinning the Visitor Management Plan, Nic Bullivant as the Senior Ranger operating over the HIE estate whose organisation was also a co-signatory to the agreement, Richard Wallace from FCS who were signatories to the Visitor Management Plan; Bob Kinnaird as an employee of SportScotland who had a general policy on open access and John Grierson as the Chair of Aviemore and Vicinity Community Council who raised the issue being discussed.

George Hogg – SNH Area Manager, East Highland

8. George presented a short talk on planning, Natura and the network of agreements surrounding the funicular. Planning permission was granted in 1997 and SNH were involved in the implementation of the planning permission. The Cairngorm Mountain ski area is adjacent to a Natura site. He advised the meeting that Natura comprises a suite of sites designated under two European directives (Birds and Habitats Directives) which represent Europe's contribution to a global approach to biodiversity. This was given effect in the UK under the Conservation (Natural Habitats and c.) Regulations 1994 as amended. Projects that might impact on a Natura site are subject to three tests.

- Is the project essential to the management of the site?
- Is the project likely to have a significant effect?
- Can it be ascertained that there won't be an adverse impact on the integrity of the site?

9. If the answer to the final test is “no”, then the competent authority can only permit it to happen if it is satisfied that there is an overriding public interest. SNH's role is as an advisor on the three tests but it would not be involved in judging whether there was an overriding public interest. In the case of the funicular, The Highland Council (THC) was the planning authority and also the competent authority; they were required to consult with SNH and have regard to SNH's advice. It was agreed that the funicular was **not** essential to the management of the Natura site and that it **was** likely to have a significant effect on the site. However it was thought that if the visitor management arrangements, commonly referred to as the “closed system”, were to be put in place, there would not be an adverse impact on the integrity of the site. Thus a framework of agreements were put in place to secure visitor management arrangements and ensure the facility would be “managed in a way that would not affect the integrity of the site”. A legal agreement was signed by SNH, THC, Highlands and Islands Enterprise, CM Ltd and the Bank of Scotland and planning conditions imposed on the development.
10. George pointed out that the agreements were not intended to be static – it had always been intended that they could change. Examples of changes over the past few years were access to the Ptarmigan and the selling of downward tickets for walkers; and the promotion of the Windy Ridge trail. These changes were initially done, and in some cases still are, on a trial basis.

11. At the time of construction a baseline survey was carried out which built up a picture of the hill, how it was used and the state of the natural heritage. A Detailed Monitoring Scheme (DMS) is in place and an annual monitoring programme is used to assess whether the agreement is meeting its stated purpose of protecting the site. Over the past 7-8 years, the DMS indicates that the VMP is meeting its purpose in that deterioration of the site has been avoided and the response of some of the habitats has been positive.
12. SNH and the THC can jointly decide to change the arrangements to improve how the agreement meets its purpose, and CML can approach the two agencies with requests for any change. If CML make any such request it is for SNH and THC acting jointly to approve or reject.

Bob Grant, Senior Outdoor Access Officer, CNPA

13. Bob informed the meeting that there has been a steady trickle of correspondence to the CNPA since the Authority was established, asking or complaining about visitor management arrangements at Cairngorm. A frequent issue raised was, how it can be correct that access rights do not seem to apply to the ground adjacent to the top station of the funicular for people who have taken the train up? The Park Authority's view is that access rights do not apply to the funicular itself and buildings at either end of it because of exceptions in Section 6 of the Land Reform (Scotland) Act 2003. And, once someone buys a ticket for the train, they are bound by the conditions of carriage pertaining to the railway and these compel the people who have travelled up on the train to come back down on it unless they are engaged in snowsports. Meanwhile access rights do apply to all of the land immediately adjacent to the funicular, and everyone wishing to access that land can do so at any time, as long as they do not use the funicular to help them get there.
14. BG informed the meeting that CNPA had sought legal advice on the matter. This advice confirmed CNPA's interpretation. The legal advice has been shared with complainants.
15. BG also said that some complainants had asked why the CNPA did not take the matter to the Sherriff for further determination, as they seemed to have done with the AHR case in relation to the fence near Tesco's in Aviemore. BG stated that in the Aviemore case, the CNPA had come to the conclusion, after taking advice from the Forum, that access rights did apply and that the fence was an obstruction. A Section 14 Notice had been served on the land manager and it was their appeal that resulted in the matters being discussed in front of a Sherriff. In the case of the funicular, CNPA's view was that access rights were not being obstructed. Given this, there seemed little point in going through the expense of initiating a legal process. Other parties could do so if they wished.
16. In discussion a number of members said that the issues, based on the description given by officers, seemed pretty clear cut and the current arrangements were satisfactory. Some members noted that beyond that it was difficult to see what locus there was for the Forum and what further advice they could give.

17. The AVCC were asked whether they had considered taking their own legal advice but it was indicated that they had not, due to expense. The AVCC have an interest in clearing up the dubiety of whether access rights apply, and requested to see what question was asked of the legal team. BG agreed that he could forward the question asked to AVCC.
18. It was asked whether the CNPA has sought a second opinion by, for example , approaching Queen's Counsel for advice. BG indicated that the CNP had not done so to date but could do so. The point was also made that if changes were to be made to the VMP that might impact negatively on the protected European sites, then that would raise considerably more legal complications and challenges.
19. The question was asked whether there is a growing view that the arrangement is not sufficient in the public view. In response, the Forum were informed that part of the monitoring scheme involved a visitor survey and that only a small percentage of those questioned annually were uncomfortable with the arrangement. It was acknowledged that there were sceptics early on but that has settled down; there still remains a lobby interested in obtaining free access from the top station and there probably always will be. GH indicated that 70-80% of visitors had knowledge of why access restrictions are in place and that 80-90% agreed with the restrictions, having understood those reasons. 60% -70% of people said would take access from the top station if it were available. There was a view that public education was an essential part of making the Visitor Management Plan work, as to some extent the system relies on self control. It was asked if it was unlawful to leave the building, and it was suggested that it would be a breach of the law of contract, but not a criminal matter. The numbers of people doing so were extremely low.
20. It was asked whether there could be a trial period of greater access from stop station which could then be reviewed if it was not working. The Forum were reminded that discussion of this was outwith the remit of the Forum but that the relevant context for this is the agreement and it would need to be agreed by the bodies directly involved.
21. There was a short discussion about winter access into the ski area, and the signs asking people not to go outside the ski area. It was pointed out that the purchase of ski area tickets gives access to the (patrolled) ski area, not the European site beyond. The signs have never been the matter of access complaints to the CNPA, probably because downhill skiers and snow boarders well understand the limitations and boundaries of ski area access.
22. The aims of the Park Authority were referred to and in particular the need to give greater weight to the first aim of the Park (conservation and enhancement of the natural and cultural heritage) over the other aims in the event of a conflict.
- 23. To the three questions posed in the paper, the conclusions reached were:**
 - **The Forum did not consider that access rights applied to people when they are at the top station and wish to access the adjacent**

land. However, access rights do apply to people who access the land around the buildings and railway if they do not use the funicular to get there. These rights are not obstructed.

- The Forum advised that the Park Authority make available to the AVCC the question asked of Ledingham Chalmers and the response received. They suggested to the AVCC that the legal questions in relation to access rights had been satisfactorily addressed and that future discussion about potential changes to the Visitor Management Plan should be undertaken directly with Cairngorm Mountain Ltd, SNH and the other signatories. The Community Council were, however, also advised to clarify what they are trying to achieve, and to be aware that any changes that resulted in deterioration to the European protected site *could* result in the visitor management system being tightened up.
- The Forum advised that they were generally content with the advice that CNPA had received from lawyers but that the Park Authority could consider seeking further legal advice if need be.

AP2: CNPA to supply AVCC with copy of letter to Ledingham Chalmers and response from them on the question of the funicular and access rights.

Item 6 - Outdoor Access Casework

24. FP introduced the paper and advised the Forum that a large number of cases (circa 10) had been reported in the late March /early April time. Fortunately most of those had already been resolved due to timely intervention and Adam Streeter-Smith's increased involvement in access cases.
25. The Forum was updated about the recent flurry of media interest in Abergeldie, reported somewhat erroneously in one paper as "Queens' neighbour embroiled in row over access". CNPA had not stimulated the press interest and was disappointed that the journalist concerned had misrepresented through selective quotation what staff had said on the matter. The Forum was advised that a letter had recently gone to John Gordon, explaining the background to the newspaper articles and offering a self-closing deer gate as a pilot for managing access. As at the meeting date, a response was awaited.
26. It was pointed out by SNH that the geographic area surrounding Case 28 was no longer a National Nature Reserve.

Item 7 – Membership and recruitment

27. FP introduced the paper and gave a brief update as to where the Forum stood in regard to current and future membership requirements. It was acknowledged that there had been a great deal of change over the past year or two and likely that further changes would be afoot at the next round of recruitment next year.

It was agreed that recruitment for the outstanding community post vacated by Fred Gordon would be deferred until next year to ensure that it could be part of a wider and more cost-effective advertising campaign.

Item 8 – Update on Path leaflets and templates and path signage

28. AQSS introduced this item and gave a verbal update to the Forum. He mentioned the two community workshops that were forthcoming in Boat of Garten and Braemar to look at ideas for the path leaflet template and reminded the Forum that their attendance would be welcome. The signage guidance is bearing fruit with the new sign format now in use on the Old Logging Way and the Gynack Bridge. Recent progress had been made in discussions with Crown Estates agreeing to implement the format in their new signs. Further work is underway on NNR's and with ScotWays, in encouraging partner buy-in.

Item 9 – Update from the Participatory Video Project

29. Dr Keith Marshall gave feedback to the Forum on the PVP project, saying that useful film footage had been obtained at the Dogs Day Out event in February. The team were intending to come back and speak to more individual members about dogs in the countryside and that some early progress had been made with editing.

30. A short discussion ensued on the pros and cons of techniques for dealing with dog waste, and associated public education messages. The question of consistency of message and the appropriateness and merits of “flick and stick” campaigns was aired.

Item 10 AOB

31. Cairngorms Outdoor Access Trust – Peter Ord, factor of Balmoral Estates (due to retire at end of May) has been appointed the new Chair of COAT.

32. Legal Cases – Aviemore Highland Resort “Tesco Fence” – this has been appealed to the Sherriff Principal on two counts and a decision is awaited.

33. Tuley vs. The Highland Council – this recent appeal to the Court of Session found in favour of the appellant, Tuley. The case concerned horse access on the Black Isle where locked gates had been installed to expressly prevent horse access, and the potential for resultant damage. The 3 High Court judges agreed that it was likely that damage would be caused if unfettered horse access were allowed and concluded that the Tuley decision to erect gates stemmed from their purpose in preventing damage, rather than for the purposes of deterring access. It was also significant that the advice of the Tuley's soil scientist as expert witness had not been contested by the Council at the earlier Sherriff's hearing. It was not yet known whether The Highland Council would be appealing the decision.

34. There was some discussion about the corollary of this case, and possible precedents that it might set, to other access issues with which the Park Authority is dealing. It was agreed that a short paper would be brought to the Forum in August.

AP3: CNPA to prepare a short paper on the Tuley case for the August meeting

35. FP advised the meeting that she would be on a career break from October 1st for six months, and that Adam Streeter-Smith would be taking over responsibility for the Forum.

Item 11 – Date of next meeting

36. The date of the next meeting will be on Tuesday 18th August 2009 in Tomintoul, the exact venue to be decided.

Cairngorms National Park Authority
May 2009