



## **Confidential Paper For Information**

**Title: Outdoor access and the Dalwhinnie Private Railway Crossing**

**Prepared by: Murray Ferguson, Director of Planning and Place, Adam Streeter-Smith Recreation and Access Manager**

### **Purpose**

1. To update the Board on the work undertaken to date in relation to outdoor access at the rail crossing and on the proposed next steps.

### **Recommendations**

2. The Board is asked to:
  - a) Note the work undertaken to date and the proposed next steps.

### **Strategic context**

3. The Park Authority is the designated local authority with powers and duties set out in the Land Reform (Scotland) Act 2003 for the management of the rights of responsible access in the National Park. CNPA has a duty 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."
4. The Highland Council has a role under the Countryside (Scotland) Act 1967 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.
5. Approximately 500m south of the Dalwhinnie Railway Station on the Inverness to Perth main line is a private level crossing that provides vehicular access for the estate, in particular lorries and larger vehicles that cannot use the underpass to the south of the village. Historically, this crossing had a side gate which has been used



by the public for a considerable number of years to access Loch Ericht, the wider community path network and nearby hills, including Munros, such as the Fara and Ben Alder.

6. Network Rail closed the “private crossing” on the 28 July 2021. It seems the decision was taken by Network Rail largely based on health and safety grounds following reports of the time taken by some pedestrians to cross the rail line.
7. The closure process was conducted over an extremely short timescale. Highland Council were the only party formally notified. The Park Authority was not notified or consulted in advance and neither were the local Community Council, nor any recreational user groups.
8. A range of stakeholders (including CNPA, the Highland Council, Community Council, Ramblers Scotland, Mountaineering Scotland and Scotways and the local estate) expressed considerable disappointment and concern about the closure of the crossing. All stakeholders observed that insufficient notice was given by Network Rail and the alternative crossing arrangements were completely inadequate and potentially unsafe. Some new signage indicating an alternative route to cross the line was installed by Network Rail but the route that involves walking along the A889 to use an underpass to the south, a journey of approximately 1.5 miles.
9. Since July 2021, the measures taken to resolve the situation have included:
  - Consultation with the Local Outdoor Access Forum in August 2021 ([Meeting - Cairngorms National Park Authority](#)). John Grierson, LOAF Convener, wrote to Network Rail on the 2 December 2021 directly expressing LOAF’s concerns about the crossing closure.
  - Direct correspondence from Park Authority Convener to Network Rail Chair and between senior staff at the park Authority and Network Rail.
  - Several meetings, convened by Network Rail and Scottish Government officials, have taken place to review alternative crossing options (including train warning arrangements, new paths adjacent to the railway, alternative crossing points, new bridges, etc.). Stakeholders generally found that Network Rail had ruled out any on-line options that would keep the crossing useable by pedestrians and that Network Rail's alternative solutions were either unworkable or impractical. There was general



dismay by the continued assertion by Network Rail that they are not funded to provide, or invest in, any of the alternatives they have identified and that some other unspecified party must do so.

- Political lobbying - both Ramblers Scotland and Scotways and the Community Council have prompted publicity and lobbied MSPs, MPs, etc. to help find a resolution.
- The charity Scotways has mounted a campaign, with support of the local community, to collect information about the historic use of crossing to help justify any future legal action that may be taken in relation to the Right of Way.
- The Park Authority has escalated the issue with Scottish Government officials with view to finding a practicable solution.

10. On the 21 December 2022 Network Rail informed all parties that they had noted continued use of the crossing and gave notice that they would be installing 1.8m high weld-mesh fencing along the line. Apparently over 1000 incidents were recorded since it had been officially closed in July 2021. This level of use illustrates the level of demand and also the lack of good alternatives. Network Rail consider people crossing the line to be trespassers; some users had carried bikes and skis across fencing and rail line and there are obvious ongoing safety concerns. The park Authority wrote again to set out the concerns about the closure of the crossing and strongly advised that no further fencing works takes place until alternative measures are put in place to help people cross the line safely. However, it is understood that this new fencing is due to be installed soon.

11. Staff are aware that public use of a number of other rail crossings are disputed in Scotland and that casework concerning the designation of core paths across rail lines has been delayed due to the complex legal and safety issues involved.

## **Implications and Next Steps**

12. The Park Authority has duties as described above. The foremost question for CNPA is whether or not access rights exist over the crossing. The CNPA has recently sought legal advice on this matter from Harper McLeod who came to the view that there may be a case to be made that access rights are exercisable over the crossing. If that is indeed the case then CNPA has a duty to uphold access rights.



13. Similarly, as described above, the Highland Council has duties with respect to Rights of Way. The Council have officially recorded a public Right of Way in the area which they consider is now directly and adversely affected. The existence of the Right of Way is disputed by Network Rail.

14. The following broad options are available to the Park Authority:

- a) **Do nothing** – The crossing will remain closed unless another party manages to have a significant effect on Network Rail. In the meantime it is likely that some users will continue to cross the rail line by climbing or passing fencing. This is potentially dangerous. There is a possibility that Network Rail may choose to escalate matters by prosecuting someone using the crossing. There is also a very small risk that the park Authority could be challenged or suffer reputational damage for not upholding access rights.
- b) **Continue to negotiate with Network Rail in partnership with the other stakeholders to either open the crossing or to invest in alternative crossing arrangements** – This approach has been used since the crossing was closed but, so far, has been ineffective. Network Rail are adamant in the face of considerable protests that they need to, and can, close the crossing and they are not resourced or responsible for providing alternative access. This option is not likely to lead to significant change in the near future.
- c) **Legal case** – The Park Authority could serve a notice under section 14(2) of the Land Reform Act requiring Network Rail to unlock the crossing and put other measures in place to ensure safety. This notice is very likely to be challenged by Network Rail, not least because there are many other crossings in Scotland and this could help set a legal precedent. There are potentially significant legal costs of this approach.

There is also the potential to take joint action in some way with The Highland Council who are responsible for Rights of Way issues or to support legal action by Highland Council if that is the stronger legal route.

15. Discussions have taken place, very recently, between the park Authority and Highland Council officers with a view to sharing information and potentially working



together to consider legal action in some form. At this stage it is too early to assess which legal case may be stronger and what the best mechanism is to proceed.

16. A partnership agreement is being drawn up to ensure we are clear about the way in which information could be shared, the assessment of the chances of success with the respective cases and the options available to each party. No ongoing commitments are being made to pursue legal action in any form. Officers will report back to the Board once fuller information is available with a recommended approach.