

The Land Reform (Scotland) Act 2003

What Wind Farm Developers need to know about Land Access Rights and Responsibilities

The 2003 Act came into force on 9 February 2005 and establishes a statutory right of access to land and inland waters. Wind farm developers, as occupiers of land (whether under an option agreement or a lease or other agreement) but also as individuals entitled to the same access rights, should be aware of the following:-

Who is entitled to these access rights? - Anyone. But they must exercise these rights responsibly. The outdoors is not risk-free and it is expected that people exercising their access rights must take responsibility for their own actions. Children should be supervised at all times.

What can access rights be exercised for?

- **recreational purposes** – e.g. bird watching and active pursuits such as walking and climbing.
- **educational activities** – concerned with furthering a person's understanding of natural or cultural heritage.
- **crossing land and water** - going onto, passing over and then leaving land or inland water for the purpose of getting from one place to another.
- **some commercial purposes** - where the activities are the same as those that could be carried out by the general public for educational or recreational purposes or for crossing land. For example, a canoe instructor with a party of canoeists is carrying on a commercial activity but the activity, canoeing, could be carried out by anyone else exercising access rights.

Can access rights be exercised in order to carry out surveys? Only if the surveys are for a recreational or educational purpose. The surveys carried out for wind farms are for commercial purposes.

Activities excluded from access rights.

- Being on/crossing land in breach of a court order
- Being on/crossing land for purpose of committing an offence
- Hunting/shooting/fishing - these activities require the permission of the landowner
- Having a dog or other animal not under proper control
- Being on/crossing land for the purpose of taking something away for profit - this would also be theft and/or criminal damage.
- Motorised activities including scrambling or speedboat racing - these activities still require the landowner's permission. Normal vehicular access can however still be taken over established vehicular rights of way.

Where can access rights be exercised?

- Most land and inland water in Scotland, including hills, mountains, moorland, woods and forests, grassland, fields containing livestock, margins of fields in which crops are growing, paths and tracks, bridges, tunnels, rivers, riverbanks, lochs, canals and reservoirs, beaches, the coast, most urban parks, country parks and other open spaces including golf courses (but only for access and not across greens and not so as to interfere with play).
- Over public rights of way, even where the route crosses land excluded from access (see below).
- Access rights can also be exercised over or under land or water - such as in the air or in caves or under water.

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Where can access rights not be exercised?

- Land on which there are houses (and other places providing shelter or privacy), and associated land*
- Land on which there is a non-residential building, structure or other works, plant or fixed machinery
- Land which forms the curtilage** (enclosure) of a non-residential building
- Land which forms a compound or other enclosure containing any structure, works, plant or fixed machinery.

* It is not necessarily obvious what "associated land" is, but it is defined in the 2003 Act as "sufficient adjacent land to enable those living there to have a reasonable measure of privacy and to ensure that their enjoyment of that place is not unreasonably disturbed". The extent of this land depends on the location and characteristics of the house or other place providing shelter. This is not particularly easy to judge and you should seek professional advice if you are in any doubt.

**It is usually possible to tell what is the curtilage of a building is by the presence of a wall, fence or other physical boundary. If no such boundary is present, the person exercising the access right is to also exercise their judgement.

- Land on which crops have been sown or are growing (the margins of such land can be accessed, see above)
- Areas where building, civil engineering or demolition work is underway.
- Land where consented development is being carried out.
- Land where access is prohibited under any other legislation. Normally for safety or public security reasons.

When can access rights be exercised?- Any time of the day or night. Common sense applies. Access rights cannot be exercised over land that has been temporarily exempted from access rights by the local authority.

How must access rights be exercised?- Access rights must be exercised lawfully, reasonably and above all responsibly.

This is not easy to define but responsible access is presumed if (1) the right is exercised so not to cause unreasonable interference with the rights (access/ownership/occupation or any other rights) of any other person. Any other person includes the owner, tenant or someone with a right of way or even a public right of way; (2) proper account is taken of the interests of others and of the features of the land; (3) access is taken having regard to the Scottish Outdoor Access Code. The Scottish Outdoor Access Code is available to download from: <http://www.snh.org.uk>.

What about the Land Owner? How must they act?- Owners must also act responsibly regarding the land over which access rights are exercisable. The owner means also, where the owner is not in possession of the land, the person entitled to possession – the tenant. The prime requirement is not to impede access (e.g. put up signs/barbed wire), or to imply that access rights don't exist.

Duty of care?- A Duty of Care is owed to a visitor to land by the person who has the right and the means (e.g. control) of taking steps to protect a visitor either by the removal of the source of danger or by forbidding entry to certain premises. This could be the owner or occupier of the land, such as the tenant, or possibly a contractor or sub-contractor. Previously, the prevention of access may have prevented persons being injured by dangers on land. Now, there is a chance that increased numbers of people exercising rights of access may lead to the increased likelihood of injury to persons or property. Our advice is to (1) review any sources of danger on land (2) review insurance cover (3) take extra care in relation to carrying out any operations that may be hazardous. (e.g. timber felling).

Remember:

- Cooperation is more productive than confrontation – provide a defined route and ask the land visitor to use it.
- Manage access by taking it into account when planning a development and work with the local authority on this.
- The "Right to Roam" has always existed. It may be that it has had some publicity recently, but it is not necessarily more likely that people will now head to the hills in their hundreds.

If you require advice on a specific point please contact :-

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