

## Legal Framework

### 1. General

- 1.1. Footpaths, bridleways, restricted byways and byways open to all traffic, often referred to as public rights of way, are public highways. A highway is a way over which the public have a right to pass and re-pass. Not all highways are maintainable at public expense, nor is there any need for a way to have been 'adopted' before it is either a highway or a highway maintainable at public expense.
- 1.2. While topographical features may be attributed to, or provide evidence of, the existence of a public highway, the public right itself is not a physical entity, it is the right to pass and re-pass over (usually) private land.
- 1.3. Once a highway has come into being, no amount of non-user can result in the right ceasing to exist. The legal principle of 'once a highway, always a highway' applies.<sup>1</sup> Such rights, except in very limited circumstances, can only be changed by way of certain legal proceedings.
- 1.4. The **National Parks and Access to the Countryside Act 1949** placed a duty on all surveying authorities in England and Wales (such as Somerset County Council) to produce a Definitive Map and Statement, indicating and describing public rights of way within their areas. The resulting documents are conclusive of what they show but not of what they omit.
- 1.5. The 1949 Act also required surveying authorities to keep their Definitive Map and Statement under periodic review. However, with the passing of the **Wildlife and Countryside Act 1981** the requirement for periodic reviews was abandoned. Instead, section 53(2)(b) of the 1981 Act provides that the surveying authority must keep the Definitive Map and Statement under continuous review and must make such modifications as appear to them to be requisite in the light of certain specified events.
- 1.6. Those events are set out in section 53(3) of the 1981 Act. The following are of particular relevance:
  - Section 53(3)(b) states the Map and Statement should be modified on "the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path".
  - Section 53(3)(c)(i) states the Map and Statement should be modified where the surveying authority discover evidence which, when considered alongside

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<sup>1</sup> *Harvey v Truro Rural District Council* (1903) 2 Ch 638, 644 and *Dawes v Hawkins* (1860) 8 CB (NS) 848, 858; 141 ER 1399, 1403

all other available evidence, shows “that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path a restricted byway or, subject to section 54A, a byway open to all traffic”.

- Section 53(3)(c)(ii) states the Map and Statement should be modified where the surveying authority discover evidence which, when considered alongside all other available evidence, shows “that a highway shown on the map and statement as a highway of a particular description ought to be shown as a highway of a different description”.
- Section 53(3)(c)(iii) states the Map and Statement should be modified where the surveying authority discover evidence which, when considered alongside all other available evidence, shows “that there is no public right of way over the land shown in the map and statement as a highway of any description, or any other particulars in the map and statement require modification”.

- 1.7. Section 53(5) enables any person to apply to the surveying authority for an order to be made modifying the Definitive Map and Statement in respect of the events listed above. On receipt of such an application the surveying authority is under a duty to investigate and to determine whether the Definitive Map and Statement require modifying. It is under these provisions that applications to modify the definitive map are made.
- 1.8. Section 32 of the **Highways Act 1980** states that a Court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence and shall give weight thereto as the Court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled and the custody in which it has been kept and from which it is produced.
- 1.9. The standard of proof to be applied in determining whether an order should be made to change the Definitive Map depends on whether it is proposed to add a new route to the Map, to change the recorded status of a route, or to delete from the record a route that currently appears on the Definitive Map.
- 1.10. Where the route of a claimed right of way is not already shown on the Definitive Map and Statement (i.e. orders made under section 53(3)(c)(i) of the **Wildlife and Countryside Act 1981** to add an unrecorded route) the Council is required to consider two questions in determining whether an order should be made to modify the Definitive Map. Firstly, does the evidence produced by the claimant together with all the other evidence available show that the right of way

subsists? Alternatively, does that evidence show that the right of way is reasonably alleged to subsist?

- 1.11. The evidence required to satisfy the second question is less than that required to satisfy the first. In *R. v Secretary of State for the Environment Ex p. Bagshaw and Norton*, Owen J explained the difference between the two questions as follows:

To answer either question must involve some evaluation of the evidence and a judgment upon that evidence. For the first of those possibilities to be answered in the affirmative, it will be necessary to show that on a balance of probabilities the right does exist. For the second possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.<sup>2</sup>

- 1.12. Owen J. provided an example of how this might work in relation to a user based claim where there is conflicting evidence as to the existence of a right of way:

Whether an allegation is reasonable or not will, no doubt, depend on a number of circumstances [...]. However, if the evidence from witnesses as to user is conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it would seem to me to be reasonable to allege such a right. I say this because it may be reasonable to reject the evidence on the one side when it is only on paper, and the reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.<sup>3</sup>

- 1.13. The standard of proof to be applied in relation to all other types of order made under section 53(3)(c) (e.g. applications to upgrade, downgrade or delete a right of way) is the balance of probabilities test. This test is based on the premise that, having carefully considered the available evidence, the existence (or in the case of some orders under section 53(3)(c)(iii), non-existence) of a particular right of way is determined to be more likely than not.

- 1.14. The differences in the tests to be applied to the evidence exist only in relation to the first stage of the order making process. Such an order can only be confirmed (the second stage of the process) when the evidence meets the balance of probabilities test. This is the case even where the order was made on the lower reasonably alleged test. Only once an order is confirmed are the Definitive Map and Statement updated.

- 1.15. The purpose of section 53 of the **Wildlife and Countryside Act 1981** is to record rights which already exist and to delete those which do not. This section of the act does not create or extinguish rights of way but allows for the legal record to be updated so that it accurately records what already exists. Therefore,

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<sup>2</sup> *R v. SSE ex p. Bagshaw and Norton* [1994] 402 QBD 68 P & CR 402.

<sup>3</sup> *Ibid.*

practical considerations such as suitability, security and the wishes of adjacent landowners cannot be considered under the legislation unless it can be shown that these factors affected the coming into existence, or otherwise, of public rights.

- 1.16. Section 66 and 67 of the **Natural Environment and Rural Communities Act 2006 (NERC)**, extinguished rights for mechanically propelled vehicles (MPVs) over routes that were recorded on the Definitive Map as footpaths, bridleways or restricted byways and over any routes that were not recorded on the Definitive Map. Without further qualification this would have extinguished public vehicular rights over most of the existing highway network. To prevent this NERC included a number of exceptions to the general extinguishment provision. Some of the key exceptions can be summarised as follows:
- Section 67(2)(a) excepts ways that have been lawfully used more by motor vehicles than by other users, e.g. walkers, cyclists, horse riders and horse-drawn vehicles, in the five years preceding commencement. The intention here is to except highways that are part of the “ordinary road network”.
  - Section 67(2)(b) excepts ways that are recorded on the “list of streets” as being maintainable at public expense and are not recorded on the Definitive Map and Statement as rights of way. This is to exempt roads that do not have clear motor vehicular rights by virtue of official classification but are generally regarded as being part of the “ordinary road network”.
  - Section 67(2)(c) excepts ways that have been expressly created or constructed for motor vehicles.
  - Section 67(2)(d) excepts ways that have been created by the construction of a road intended to be used by mechanically propelled vehicles.
  - Section 67(2)(e) excepts from extinguishment ways that had been in long use by mechanically propelled vehicles before 1930, when it first became an offence to drive “off-road”.
- 1.17. Any changes to the Definitive Map must reflect public rights that already exist. It follows that changes to the Definitive Map must not be made simply because such a change would be desirable, or instrumental in achieving another objective. Therefore, before an order changing the Definitive Map is made, the decision maker must be satisfied that public rights have come into being at some time in the past. This might be in the distant past (proved by historic or documentary evidence) or in the recent past (proved by witness evidence). The decision is a quasi-judicial one in which the decision maker must make an objective assessment of the available evidence and then conclude whether or not the relevant tests set out above have been met.
- 1.18. Evidence of the status of a route will often take one of two forms, documentary evidence and evidence of use. Each of these is discussed in turn below.

2. Documentary evidence

2.1. Once a highway (which includes public rights of way) has come into being, no amount of non-user can result in the right ceasing to exist. The legal principle of “once a highway, always a highway” applies.<sup>4</sup> Such rights (except in very limited circumstances) can only be changed by way of certain legal proceedings, typically a legal order pursuant to specific legislation<sup>5</sup> or a Court order. Therefore, claims based on documentary evidence will normally be accompanied by historical records which are intended to show that public rights were created or existed over a route in the past (or, in the case of a deletion or downgrading, that rights have been extinguished or never existed).

3. User evidence

3.1. Use by the general public can give rise to the presumption of dedication of a way under section 31 of the **Highways Act 1980**. Section 31 begins:

- (1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
- (2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

3.2. Therefore, under section 31 it is necessary to demonstrate that the public have used the route in question for a period of 20 or more years. That period is to be measured backwards from the date on which use was challenged by some means sufficient to alert the public that their right to use the route was in question. The use must have been uninterrupted and *as of right*, meaning that the public must have used the route

- without force: e.g. use cannot have been via the breaking of fences or locks to gain entry
- without secrecy: use must be of such a nature that a reasonable landowner would have had an opportunity to be aware of it. For example, use which was only at night when the landowner was known to be away is likely to be considered secretive

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<sup>4</sup> *Harvey v Truro Rural District Council* [1903] 2 Ch 638 and 644, and *Dawes v Hawkins* [1860] 8 CB (NS) 848 and 858; 141 ER 1399 and 1403.

<sup>5</sup> Such as the Highways Act 1980.

- without permission: use must be without the permission of the landowner.
- 3.3. Where the use has been sufficient to meet the tests of section 31, it raises the presumption that public rights have been dedicated. However, that presumption can be rebutted where it can be shown that the landowner demonstrated to the public that they had no intention to dedicate during that period. Examples of how this can be demonstrated include erecting a sign or notice with words that clearly deny a public right of way. Another example allows a landowner to deposit a map and statutory declaration with the highway authority under section 31(6) of the **Highways Act 1980** "to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit."
- 3.4. In addition to section 31 of the **Highways Act 1980**, rights of way can also be dedicated at Common Law, and this option should always be considered.

At Common Law a highway may be created by the landowner dedicating the strip of land to the public to use as a highway, and the public accepting this action by using said land. However, the act of dedication does not need to be explicit or in writing. In some circumstances it can be inferred from the actions (or inactions) of the landowner. The requirements for a Common Law dedication are summarised in *Halsbury's Law* as follows:

Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance [...] An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple [...] At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence, and is not conclusive evidence [...] any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication.<sup>6</sup>

- 3.5. As mentioned in the above quote, use by the public can be evidence of an implied dedication. If the level of use was such that the landowner must have been aware of it and they acquiesced to that use (i.e. they did nothing to stop it) then it is evidence (but not necessarily conclusive evidence) of their intention to dedicate a highway.
- 3.6. There is no minimum qualifying period at Common Law, although use still has to be without force, without secrecy and without permission. The actions of the

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<sup>6</sup> *Definitive Map Orders: Consistency Guidelines, ninth revision* (2016), 5.46.

landowner also need to be taken into account when considering whether it can be inferred that a right of way has been dedicated. Public use does not raise the inference that the way has been dedicated where evidence as a whole shows highway status was never intended, for example, the erection of “no public thoroughfare” notices and “turning people back wherever possible”.<sup>7</sup>

- 3.7. The burden of proving the landowner’s intention to dedicate rests with the party asserting the right of way. Unlike a statutory dedication there is no presumption that rights have been acquired no matter how long a route happens to have been used for.

#### Useful links

Natural England’s [A guide to definitive maps and changes to public rights of way](#) (2008) offers a detailed introduction to the Definitive Map Modification Order (DMMO) process.<sup>8</sup>

The Planning Inspectorate’s [Definitive Map Orders: Consistency Guidelines](#) (ninth revision 2016) offers clear information and advice on interpreting documentary evidence.<sup>9</sup> The *Consistency Guidelines* provide information and references to resources and relevant case law to assist in the interpretation and weighing of evidence on Definitive Map orders. These guidelines were last updated in April 2016 and consequently care should be taken when using them, as they may not necessarily reflect current guidance.

[Legislation.gov.uk](#) provides access to the numerous acts referenced above.

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<sup>7</sup> *Poole v Huskinson* (1843) 11 M&W 827.

<sup>8</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/414670/definitive-map-guide.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/414670/definitive-map-guide.pdf)

<sup>9</sup> <https://www.gov.uk/government/publications/definitive-map-orders-consistency-guidelines/wildlife-and-countryside-act-1981-definitive-map-orders-consistency-guidelines>