



## Subject: Establishing a right of way

Standard Note: SNSC 06026

Last updated: 6 July 2011

Author: Emma Downing

Section Science and Environment Section

---

A common rights of way issue raised by constituents concerns the options available for formalising a right of way.

This note highlights a variety of relevant legal provisions and procedures and provides a summary timeline of the key legislative acts which have shaped the classifications of rights of way since 1949. The options available depend on how the path came to be of use in the first place and if it has any official classification on the Definitive Map for the area. The Definitive Map records all recognised rights of way.

The most common way that rights of way come into existence is by presumed dedication. There is a long established principle that long use by the public without challenge can constitute evidence that the landowner intended to dedicate the used route as a public right of way. Presumed dedication can take place by common law or statute law. Statute law requires a period of use of 20 years from the point the use of the path is brought into question. Common law dedication may require less time.

Overall, the rights of way officer at the relevant local authority will be the most appropriate person to contact regarding clarification of the status of any path in question as well the required procedures to make changes to the Definitive Map.

This information is provided to Members of Parliament in support of their parliamentary duties and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as being up to date; the law or policies may have changed since it was last updated; and it should not be relied upon as legal or professional advice or as a substitute for it. A suitably qualified professional should be consulted if specific advice or information is required.

This information is provided subject to [our general terms and conditions](#) which are available online or may be provided on request in hard copy. Authors are available to discuss the content of this briefing with Members and their staff, but not with the general public.

**Contents**

- 1 When does a path become a right of way? 3**
  - 1.1 Key mechanisms 3
    - Presumed dedication 3
    - Creation orders 3
    - Creation Agreements 3
    - Express dedication 3
  - 1.2 The Definitive Map 4
- 2 Limiting access to a right of way 4**
  - 2.1 Obstructions 4
  - 2.2 Provisions to alter the network in the Highways Act 1980 5
  - 2.3 Section 118 Extinguishment Order 5
  - 2.4 Changing classification 6
- 3 Key legislative background – pre 2006 7**
  - 3.1 National Parks and Access to the Countryside Act 1949 7
  - 3.2 The Countryside Act 1968 7
  - 3.3 Wildlife and Countryside Act 1981 7
  - 3.4 Countryside and Rights of Way Act 2000 8
  - 3.5 The Natural Environment and Rural Communities Act 2006 8

# 1 When does a path become a right of way?

Public rights of way can come into existence through creation (either by order or by agreement made with the landowner) or dedication by the landowner (either expressly or by presumption). However, the Natural Environment and Rural Communities Act (Section 66) provides that no new public rights of way for mechanically propelled vehicles can now be created unless an enactment or instrument expressly provides for it to be such a right of way or it is built legally as a road to be used by vehicles.

## 1.1 Key mechanisms<sup>1</sup>

### Presumed dedication

This is the most common way that rights of way come into existence. There is a long established principle that long use by the public without challenge can constitute evidence that the landowner intended to dedicate the used route as a public right of way. Presumed dedication can take place by common law or statute law.

The key guide on rights of way law, John Riddall and John Trevelyan, *Rights of Way: A guide to law and practice* (Fourth Edition 2007), states the following about acquisition of a right of way by long usage:<sup>2</sup>

The common law accepts local custom as being capable of giving rise to a valid, legally enforceable right, provided that the custom is ancient in origin, has been exercised continuously, is certain, and is reasonable.

In terms of statute, the Highways Act 1980 provides for a period of 20 years for a right of way to become a highway but this does not stop a claim being made under common law with less time. The 20 years is calculated retrospectively from the date the right of the public to use the way is brought in to question.

### Creation orders

Highways authorities and the Secretary of State can make a public path order, under the Town and Country Planning Act 1990, creating any type of right of way over a piece of land where they think it would add to the convenience or enjoyment of the public. Such an order can also establish higher rights of use over an existing right of way. There is a set procedure for such an order which requires public consultation.

### Creation Agreements

This is an agreement between the Highways Authority and a landowner, with public notice given.

### Express dedication

A landowner decides unilaterally to dedicate a right of way and the public are deemed to have accepted the dedication if they begin to use the way. The highway authority may subsequently agree to adopt it i.e. take on liability for its maintenance.

---

<sup>1</sup> Summarised from information provided by the Ramblers website, [Creating a right of way](#) [on 7 April 2011]

<sup>2</sup> John Riddall and John Trevelyan, *Rights of Way: A guide to law and practice* (Fourth Edition), Rambler's Association and Open Spaces Society, 2007, s.14.5

If a landowner does not mean to dedicate a right of way, then he has to show “contrary intention”. A common means of doing this is to put up a sign such as “No public right of way”. The sign must clearly deny a public right of way.

## **1.2 The Definitive Map**

Most rights of way are already recorded on the Definitive Map for the county/borough which has been built up through successive legislative requirements to record rights of way (see Annex 1). These have usually been classified as rights of way because of a long tradition of use either through common law or statute. Rights of way which are not already shown on the map can be established through proof of use or reclassified if historical evidence challenges the current classification. Most council websites have a page explaining who to contact about making changes to rights of way registers etc.

If someone thinks that a right of way should be on the Definitive Map or reclassified they can apply for a Definitive Map Modification Order under the Countryside and Rights of Way Act 2000. The Defra circular [Rights of Way Circular 1/09 – Guidance for Local Authorities, March 2009 v.2](#), explains the system as well as providing details of the rights of way responsibilities of local authorities. Each highways authority also tends to set out the process on its website.

The local highways authority has duties under the Wildlife and Countryside Act 1981 and the Highways Act 1980 to maintain and keep a definitive map and statement of rights of way, and to ensure that ways are adequately signposted, maintained, and free from obstruction (see below).

A right of way which is already shown on the Definitive Map for the county is immediately entitled to the maintenance responsibilities etc associated with however it has been classified. Equally existing rights of way can be diverted or extinguished by the county council if certain conditions are met.

## **2 Limiting access to a right of way**

### **2.1 Obstructions**

The Highways Act 1980 S130(1) of the Act states that it is the duty of the highways authority (usually the county council or unitary authority) to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it. A similar duty under section 130(3) of the Act requires that they prevent, as far as possible, the stopping-up or obstruction of those public rights of way for which they are responsible.<sup>3</sup>

Local highway authorities are essentially responsible for the management and maintenance of the rights of way network. However, a national park authority or a district council may take over the rights of way functions from highway authorities by agreement.<sup>4</sup>

---

<sup>3</sup> J. Riddall and J. Trevelyan, *Rights of Way: A guide to law and practice*, Fourth Edition, Rambler’s Association and Open Spaces Society, 2007

<sup>4</sup> Defra, [Rights of Way Circular 1/09 – Guidance for Local Authorities](#), March 2009, v.2, para 1.10

## 2.2 Provisions to alter the network in the Highways Act 1980

The Highways Act 1980 allows highway authorities (i.e. county councils or unitary authorities) to make changes to the rights of way network for a variety of reasons, including:<sup>5</sup>

- A new right of way may be created where it can be shown that there is a need for it (section 26).
- A right of way may be extinguished where it is not needed for public use (section 118).
- A right of way may be diverted where it can be shown that it is in the interest of the relevant landowner and/or the public to do so, but only where:  
i) the diverted route would not be substantially less convenient to the public; and  
ii) the diversion would not alter any point of termination of the path, other than to another point on the same highway, or a connected highway. The effect the diversion would have on public enjoyment of the path as a whole must also be taken into account before a decision is made (section 119).
- A right of way which crosses a railway may be extinguished (section 118A) or diverted (section 119A) where it can be shown that it is expedient to do so in the interests of public safety, but only if it is not possible to make the crossing safe.
- A right of way may be extinguished (section 118B) or diverted (section 119B) for reasons of [school security](#), or, if it falls within a [designated high crime](#) area, for [reasons of crime prevention](#).
- A right of way may be diverted in order to protect a Site of Special Scientific Interest (section 119D).
- A right of way may be [gated](#) (i.e. closed off) where it can be shown that it is expedient to do so to tackle anti-social behaviour. Gating a right of way does not extinguish the public right (section 129A).

## 2.3 Section 118 Extinguishment Order<sup>6</sup>

Section 118 of the Highways Act 1980 allows a council to make a public path extinguishment order if it appears to them that a footpath or bridleway in their area (not a trunk road or special road) is expedient or that it should be stopped up on the grounds it is not needed for public use. This may be because other paths adequately serve the area, or because the path, although available for use by the public, has not been used for many years. Lack of use due to unavailability of the path does not constitute grounds for extinguishment; the obstruction of a path by, for example, development does not alter its legal status or the test for making an extinguishment order.

The legislation also requires that, before confirming an order, the council or (if the order is opposed) the inspector must apply a separate and somewhat different legal test. The council or inspector must be satisfied that it is expedient to confirm the order having regard to the extent to which the path is likely to be used and the effect that its closure would have on the land served by it. This means that an authority must look not just at any present use of the path but at the use that is likely to be made of the path in the future. Any temporary

---

<sup>5</sup> Ramblers website, [Changes to the path network](#) [6 July 2011]

<sup>6</sup> Summarised from the online Good Practice Guide, Section on [Extinguishment Orders](#), Institute of Public Rights of Way and Access Management [on 6 July 2011]

circumstances that diminish the public use must also be disregarded; temporary circumstances have been held to include unauthorised and illegal obstructions, including buildings.

The authority's power to make a public path extinguishment order is not dependent on an application having been made and the authority can, if it wishes, initiate an order without having been asked to do so (providing the legal tests set out above can be satisfied). However, the extinguishment order itself must be in the prescribed form, as must the wording of the notices which are put up on the line of the path and advertised in a local paper.

Extinguishment orders are subject to public objection and opposed orders must be referred to the Secretary of State for determination in the same way as other public path orders.

## **2.4 Changing classification**

A change of classification of a right of way may effectively limit its use and the local council may then perhaps erect barriers to deter vehicles or manage it in such a way as to benefit the legal users. Each type of right of way is classified in legislation. For example, a bridleway can be used by people on foot, riding and by pedal cyclists and a Byway Open to All Traffic (BOAT) has vehicular rights but is used mainly as footpaths and bridleways.

Legislation over the years has allowed for vehicle use on rights of way to be extinguished in certain circumstances. Section 67 of the Natural Environment and Rural Communities Act 2006 provided for the extinguishment of all existing public rights of way for mechanically propelled vehicles over ways which, immediately before commencement of the legislation, were either:

- a) not shown on the definitive map and statement at all or
- b) shown, but only as a footpath, bridleway or restricted byway

Some such restrictions may still be working their way through the system as rights of way are re-classified.

If a claim for reclassification has been made under the Wildlife and Countryside Act 1981 for a Definitive Map Modification Order, the highways authority will have had to consult with interested parties (e.g. local walking and horse-riding associations) and present a case to their planning committee. The highways authority then has 12 months to come to a decision and has to publicise this decision in the local paper for 42 days. In this time anyone may object to this order. If an objection is made which cannot be resolved the matter can be referred to the Planning Inspectorate. A clear explanation of the process is offered on Plymouth City Council's website as an example.<sup>7</sup>

Under Section 53B of the Wildlife and Countryside Act, the County Council maintains a register of all current Map Modification Order (MMO) applications made under schedule 14 of the Wildlife and Countryside Act 1981.

If some change has been made by a Public Path Order public consultation is usually required. I have enclosed a helpful diagram setting out the process provided by the Ramblers.<sup>8</sup>

---

<sup>7</sup> Plymouth City Council website, [Modification Orders Process](#) [6 July 2011]

<sup>8</sup> Ramblers website, [Comment on a path order](#) [06 July 2011]

### **3 Key legislative background – pre 2006<sup>9</sup>**

The classifications of rights of way have a complicated history because of the various requirements under a series of legislative acts. One mistake along the way can mean that rights of way are currently wrongly classified on current definitive maps and deadlines to correct these may have already passed. This series of legislation has also left local authorities with a lot of work to update their definitive maps and deal with applications for re-classification or any objections.

#### **3.1 National Parks and Access to the Countryside Act 1949**

The National Parks and Access to the Countryside Act 1949 (Part IV) required county councils as surveying authorities to maintain a definitive map and statement showing various categories of highway:

- Footpaths (right of way on foot only)
- Bridleways (right of way on foot, horseback, leading a horse)
- Roads used as public paths (RUPPs – other highways used by the public mainly for the purposes for which footpaths and bridleways are used)

#### **3.2 The Countryside Act 1968**

The Countryside Act 1968 amended the NPAC Act to require the surveying authorities to reclassify each RUPP shown on their definitive map as either a footpath or a bridleway or as a BOAT in accordance with specified criteria. This classification was far from complete when the relevant provisions of this Act and the 1949 Act were replaced by Part III of the Wildlife and Countryside Act 1981.

#### **3.3 Wildlife and Countryside Act 1981**

Section 54 of the 1981 Act required surveying authorities, as soon as reasonably practicable, to review all RUPPs remaining on their definitive maps and to make modification orders reclassifying each as:

- (a) a BOAT, if a public right of way for vehicular traffic had been shown to exist; or
- (b) a bridleway, if (a) did not apply and bridleway rights had not been shown not to exist; or
- (c) as a footpath, if neither (a) nor (b) applied.

"Byway open to all traffic" was defined in section 66 of the Act as "a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used."

Section 53 of the Act, contains provisions relating to orders modifying the definitive map and statements and the conditions for doing so and how to deal with objections. Under this Act orders could not be confirmed by the local authority if opposed until referred to the Secretary of State.

---

<sup>9</sup> Summarised from background provided in a judgement of the England and Wales High Court (Administrative Court) Decision [\[2007\] EWHC 2786 \(Admin\)](#), November 2007

### **3.4 Countryside and Rights of Way Act 2000**

The Countryside and Rights of Way (CROW) Act 2000 was enacted when the reclassification of RUPPs was still far from being complete. Section 47 (2) provided that every way which, immediately before commencement of the Act was shown in any definitive map and statement, as a RUPP should be treated instead as a “restricted byway”. i.e a highway over which the public have restricted byway rights (on foot, on horseback and for vehicles other than mechanically propelled vehicles), with or without the right to drive animals, but no other rights of way

To allow the 1981 Wildlife and Countryside Act provisions to complete their course. The CROW Act included provisions to ensure that it did not prevent the operation of the modifications already sought.

The Act also made provision for the extinguishment in 2026 of unrecorded rights of way for mechanically propelled vehicles over byways. It also inserted into the 1981 Act a requirement that every surveying authority should keep a register of applications.

### **3.5 The Natural Environment and Rural Communities Act 2006**

This Act was the culmination of growing public concern that minor vehicular ways in the countryside (green lanes) used by walkers and riders were being damaged by off-road vehicles and motorcycles. Previous legislation meant that historic evidence of use by horse drawn vehicles or dedications for vehicular use before the internal combustion engine could give rights to use modern, mechanically propelled vehicles.

Section 67 of the NERC Act provided for the extinguishment of all existing public rights of way for mechanically propelled vehicles over ways which, immediately before commencement of the legislation, were either:

- c) not shown on the definitive map and statement at all or
- d) shown, but only as a footpath, bridleway or restricted byway

Section 67 set out a range of exceptions and exemptions to this extinguishment provision. These include scenarios such as:

- a) Where before 20 January 2005 an application under section 53(5) of the 1981 Wildlife and Countryside Act had been made to reclassify a right of way as a BOAT
- b) Where before commencement (2 May 2006) the authority had determined such an application.
- c) The way was used by motor vehicles for five years before 2 May 2006
- d) It was specifically made for motor vehicles by legal instrument or physical construction

A public vehicular right was created pre 1930 by the use of mechanically propelled vehicles