LAF Training: Maidenhead 2016

These notes apply to England only and were written before the coming into effect of relevant parts of the Deregulation Act 2015

What is a right of way?

In law a public right of way is a public highway. Private rights of way that may exist in addition to public rights are not the concern of the public - they are useable only by a certain sub-set of the population and there is no public maintenance liability.

What are the rights of the public?

(a) Footpaths: the public has the right to pass and repass on foot.

(b) Bridleways: the public has the right to pass and repass on foot and leading or riding a horse or similar animal (donkey?). Sometimes there are also rights to drive animals. Additionally, the public were given the right under the Countryside Act 1968 to ride bicycles along bridleways.

(c) Byways open to all Traffic (Boats): the public has the right to pass and repass on foot and leading or riding a horse or similar animal and with driven horses and all classes of vehicle. The distinction between a Boat and a road is that whilst the public have the above rights on both, the main use by the public of a Boat is that of foot rights or bridle rights.

(d) Roads used as Public Paths (Rupps): this category of rights of way was created by the National Parks and Access to the Countryside Act, 1949. It has never been very clear whether or not these rights of way included a public vehicular right and Parliament has had several attempts to clarify matters culminating in the Countryside and Rights of Way Act 2000 by which all remaining RUPPS, not the subject of a DMMO, are automatically reclassified as Restricted Byways (see below).

(e) Restricted Byways (RBs): this category of right of way was created by the Countryside and Rights of Way Act 2000. The public has the same rights over RBs as it does over bridleways and also the right to drive mechanically propelled vehicles

Like many areas of work, rights of way has its own jargon. Appendix A to these notes aims to help "jargon bust".

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The Role of Local Access Forums

Local access forums ("LAFs") are advisory bodies. Section 94 of the Countryside and Rights of Way Act, 2000 defines their statutory function as being to:

"…advise as to the improvement of public access to land in the area for the purposes of open-air recreation and the enjoyment of the area, and as to such other matters as may be prescribed".

The statutory function of forums was extended by Regulation 22, which prescribes an additional matter on which it is the function of forums to advise, namely:

"public access to land in the area for "any lawful purpose" other than the purposes already mentioned [in paragraph 3.1.1] above." Access to land for any lawful purpose is where access is not a trespass and where by accessing land no offence is committed. Land is not defined in the CROW Act or any associated regulations.

The advice which forums give to section 94(4) bodies should fall within one (or more) of the following categories:

(a) improvement of public access (whether on foot or by horse, cycle, mechanically propelled vehicle or any other lawful means) to land in the area for the purposes of open-air recreation and the enjoyment of the area;
(b) public access to land in the area for any other lawful purpose (whether on foot, horse, cycle or by any means other than by mechanically propelled vehicle);
(c) public access to land in the area by means of a mechanically propelled vehicle for any other lawful purpose, but only insofar as the access relates to byways open to all traffic (BOATs).

Section 94 of the CROW Act makes it the statutory function of forums to give advice to the following bodies:

- the appointing authority(ies)(which will be a highway authority or National Park authority)
- any county, unitary, district or borough council within the area of the forum
- the Secretary of State (in effect this means any Government Department with a Secretary of State, e.g. Defra and MOD, as well as "executive agencies" such as the Planning Inspectorate
- Natural England
- the Forestry Commission
- English Heritage

Forums may also give advice to Sport England, AONBs and parish and town councils.

The legislation does not define when, how or in what circumstances a forum should offer advice. It is up to each forum to decide what is appropriate in the local context. Forums may be requested to give advice by a Section 94(4) body, but forums do not need to receive a request in order to give advice. There are specific matters over which forums must be consulted, but their role is not constrained to only offering advice about those matters.

The specific matters are:

- Highway authorities shall consult the relevant forum before preparing or reviewing a rights of way improvement plan (section 61(1)(e) of the CROW Act);
- Access authorities shall consult the relevant forum before making byelaws in respects of access land (section 17(3) of the CROW Act);
- Access authorities shall consult the relevant forum before first appointing wardens for access land, and thereafter from time to time consult the forum on the exercise of that power (section 18(2) of the CROW Act); and the relevant authorities (i.e. Natural England, National Park authority or Forestry Commission) or the Secretary of State as appropriate, shall consult the relevant forum before giving or reviewing a long-term direction to exclude or restrict access to access land for a period which exceeds or may exceed six months (sections 27 and 28 of the CROW Act, and regulations 9, 15 and 16 of the Access to the Countryside (Exclusions and Restrictions)(England) Regulations 2003).
- The Secretary of State shall consult a forum before making or reviewing a long-term direction to exclude or restrict access to access land (for a period which exceeds or may exceed six months) on grounds of defence or national security (regulations 9 and 16 of the Access to the Countryside (Exclusions and Restrictions)(England) Regulations 2003.
- An appointing authority shall consult any forum which they consider will be affected by proposed changes to forum arrangements in accordance with regulations 16, 17 and 18 of the Local Access Forums (England) Regulations 2007.

There is a statutory requirement to notify or provide forums with information in the following circumstances:

- The Access to the Countryside (Provisional and Conclusive Maps) (England) Regulations 2002 require Natural England to send reduced scale provisional and conclusive maps to the relevant forums (regulation 8).
- The appointing authority must give 21 days' notice to any forum affected by changes to forum arrangements (regulations 16, 17 and 18 of the Local Access Forum (England) Regulations 2007)

Appendix B to these notes contains the content of Annex A to the (now in part superseded) advice issued by Defra in 2007 which set out is greater detail what matters forums could advise on. Areas that are no longer relevant (due to changes in the legislation) have been removed.

Recording rights of way

Many rights of way came into being simply by being used by the public. Legal processes, such as Inclosure Awards, have specifically created some. It is often very difficult to prove the status of public rights of way or establish their widths or other conditions relating to their use. For this reason Parliament introduced the concept of a definitive map and statement. (See below)

Where do rights of way come from?

- Always been there since time immemorial (1189) if the public can prove a customary use since then, it is held to be.
- Once a highway always a highway at least until 2026: unless it is legally stopped up or an 'Act of God' has physically destroyed the land it crossed (cliff fall for example). Except for rights for mechanically propelled vehicles.
- Specifically created: by Inclosure Award; side roads order; diversion order or other legal acts.
- Overt dedication of a route by the landowner and subsequent acceptance by the public.
- Deemed dedication: use by the public that the landowner should have known about but did nothing to prevent; the use being consistent with the use of a route by the public.

What is the Definitive Map, and where did it come from?

Highway authorities need to know which tracks are public and which were liable to be maintained and which were not. Historically, councils kept a list of streets (there is still a legal requirement to keep this information), which are highways maintainable at public expense. This list generally did not list the majority of public rights of way; these, though sometimes publicly maintainable, being wrongly considered too minor to be included in the list of streets. (Often the 'list of streets' that is presently kept by an authority still wrongly excludes those public rights of way that are highway maintainable at public expense.) Also by their nature most rights of way did not warrant much attention by way of maintenance. Most local people knew where the old rights of way were; but rural depopulation and decreasing use of rights of way (owing, for example, to the advent of the public bus service) meant that rights were being lost.

If a right of way was challenged it was necessary, as there was no modern legal record of its existence, to go to Court to prove it. Increasingly, people began to feel that this was unwarranted and as rural life was changing dramatically it became harder and harder to prove the existence of a path through usage. This coupled with the acts of mass trespass brought sufficient political pressure to bear for matters to be changed, the result was the National Parks and Access to the Countryside Act 1949 and the Rights of Way Act 1932.

It was the National Parks and Access to the Countryside Act that brought in the idea of the definitive map. This, together with the accompanying statement, was to be legally conclusive evidence of the existence of a public right of way of at least the status shown. The Act put a duty on the surveying authorities of England and Wales to draw up such maps and to review them every five years.

The response of most authorities was to write to the parish councils and ask them where the rights of way were in their parish. Where Inclosure Award documents were readily available and easily interpreted, paths given in them were also included. This information formed the basis of the draft definitive map. This was published, and advertised locally and in the London Gazette. The Act did not require individual landowners to be notified so this was not done. It was possible to make representations regarding the draft map. If the council felt that a mistake had been made then it could alter it.

After this stage it was possible in some cases to make representations to the Secretary of State. Once the Secretary of State had considered cases put to him the council amended the draft map. The resulting document was known as the provisional map; this could only be challenged by landowners and occupier and the challenge was made in the courts. Finally, the definitive map was produced. This could only be challenged on procedural grounds in the High Court.

The original legislation envisaged a five yearly review to take account of the changes in the network etc. However, the great majority of authorities could not live up to this and in the case of some no reviews at all were undertaken as the definitive map took a long time to produce.

It became clear that the procedure for reviews was long and unwieldy, as everything that was challenged had to be referred to the Secretary of State. Additionally, there were problems with Rupps, which had never been properly defined and there was a challenge to the definitive map in Lincolnshire, which although it was legally unsuccessful showed that genuine mistakes had been made which could not under the contemporary legislation be put right. There was a partial review of the law under the Countryside Act 1968 which simplified the review process and introduced a mechanism for dealing with Rupps.

Eventually, the Government brought in a change to the law in the shape of part III of the Wildlife and Countryside Act, 1981. This enabled definitive maps to be continually under review and allowed members of the public to make applications for orders known as Definitive Map Modification Orders which modified the definitive map by adding, deleting or changing the status of a right of way shown on it. Additionally, surveying authorities had to produce maps for areas previously exempted as being mainly urban.

Poor drafting of this section of the Act which allowed mistakes to be corrected whilst still maintaining the status of the definitive map as legally conclusive evidence of the existence of a right of way, led to a number of High Court cases in the late 1980s. However for the present it is possible for surveying authorities if they are so minded to make Definitive Map Modification Orders to delete, include, downgrade and upgrade rights of way on the definitive map.

Changes to the law introduced by the Countryside and Rights of Way Act 2000 (CROW) will mean that rights of way not recorded on the definitive map by 2026 (‘the cut-off date’) will legally cease to be. It will still be possible to add certain rights of way on the basis of deemed dedication and user evidence but all other rights will be ‘killed’. This puts pressure on authorities to get their maps completed and up to date before the 2026 cut off. Though there may be some saving provisions introduced to protect paths shown on other Council held records; we have yet to see these.

Changes to the law introduced by the Natural Environment and Rural Communities Act 2006 have made it more difficult to record byways open to all traffic and, finally, dealt with Rupps.

New provisions were proposed to come into force in April 2016 as a result of the Deregulation Act 2015, for the moment it is not certain when these provisions will be applied, but we can expect to see streamlined processes for recording and diverting rights of way not presently shown in the Definitive Map and Statement, but which are supported by sound documentary evidence of their existence, and the introduction of a right to apply for public path orders for certain categories of land.

Highway rights and how they arise

Dedication at Common Law

Intention and inference from user

For a way to be lawfully claimed, a landowner must be shown to have intended to dedicate the right of way over his land.

However, at common law, the question of dedication is purely one of fact and public user is no more than evidence, which has to be considered in the light of all available evidence. Public use will not, therefore, raise the inference of dedication where the evidence in its totality shows that the public right of way status was not intended.

Burden of proof

The crucial difference between common law and the statutory position under Section 31 Highways Act 1980 (S31 HA) is that, to show common law dedication, the claimant must prove that it can be inferred from the landowner's conduct that he had actually dedicated the route as a public right of way.

Time

As noted below, under S31 HA 1980 20 years' user must be proved. At common law, there is no specified period. Blackburn J provided helpful, if necessarily rough, guidance in *Greenwich Board of Works* v *Maudslay*[1]:

> *"It is necessary to show in order that there may be a right of way established, that it has been used openly as of right, and for so long a time that it must have come to the knowledge of the owners of the fee that the public were so using it as of right."*

If the landowner has done exactly what would be expected from any owner who intended to dedicate a new highway, the time may be comparatively short: for example, 18 months in *North London Railway Co* v *Vestry of St Mary, Islington*[2]. In most cases it will not be nearly so clear.

To prove statutory deemed dedication it is only material to show 20 years' continuous user. As a matter of proof at common law, the greater the length of user that can be demonstrated, the stronger the inference of dedication will (usually) be.

Capacity

Intention to dedicate a way can only be inferred against a person who, at the material time, had the capacity to make an effective dedication. Where dedication is claimed at common law (as opposed to by operation of S 31 HA), this will generally be the owner of the fee simple absolute.

[1] (1870) LR 5 QB at 404, approved by Pollock MR in *Moser* v *Ambleside UDC* [1925] 89 JP 118, at 119.
[2] (1872) 27 LT 672.

A lessee cannot dedicate land as a public right of way without the consent of the owner of the freehold[3]. There is no rule of law preventing the dedication of a right of way over land that has been continuously tenanted[4].

Highways Act 1980, Section 31
"The twenty year rule"

Introduction

Highways can only come into existence by two means, creation by statute and by the dedication of the highway by the owner of the land and its acceptance by the public. The law has long been that evidence of use by the public, provided it meets certain criteria, can be taken to be evidence of the existence of a highway that is 'presumed' to have been dedicated by some past landowner. S31 HA provides for a mechanism whereby a highway is "deemed to have been dedicated" under certain circumstances. This is often referred to as the 'twenty year rule' and erroneously simplified as 'twenty years use by the public creates a highway'. S31 HA is rather more complex and it is necessary to understand the elements of the section before applying it.

S31 HA originated in The Rights of Way Act 1932[5], which came into effect in 1934. The original legislation was slightly different to what is now contained in S31. The 1932 Act also codified the law relating to the legal weight of warning notices and provided for the statutory deposit of maps and declarations that now forms S31(6) HA.

Highways do not generally arise in England and Wales by prescription, simply because it would be necessary to establish user in a continuous period back to 1189 (the date of legal memory) and it is not usually possible or necessary to do this.

The requirements of Section 31

"Section 31 Dedication of way as a highway presumed after public use of 20 years

Subsection (1)

Where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication[6], has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

Subsection (2)

[3] *R* v *East Mark Inhabitants* (1848) 11 QB 877, at 883 per Patteson J.
[4] *Powers v Bathurst (1880)* 49 LJ Ch 294, cited in *Huntingdon v SoS for the Environment and Cornwall County Council* [1998] EWHC Admin 802 (30th July 1998)
[5] Originally introduced as a private member's bill
[6] Section 31 has been amended by Section 68 of the Natural Environment and Rural Communities act 2006 so that it applies to the dedication of a way as a restricted byway, in the same way as it applies to the dedication of footpaths and bridleways. S68 came into force on 2nd May 2006 in England and 16 November 2006 in Wales.

The period of twenty 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 notice such as is mentioned in subsection (3) below or otherwise.

Subsection (3)

Where the owner of the land over which any such way as aforesaid passes –

(a) has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and
(b) has maintained the notice after the first January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway."

Brought into question

Before any twenty year period of use can be considered there has to be a "bringing into question", and it should be noted that the twenty-year period runs back from this point in time. So what constitutes a "bringing into question"? Clearly a notice as in S31(3) HA constitutes a "bringing into question" but other actions may also suffice: common ones would include locking a gate or erecting some other form of barrier, or turning people back. What constitutes bringing into question was considered in the *Dorset*[7] case, where the court was asked to consider if an Inspector had been correct in his view that an objection by the landowner in 1975 to a proposal to add a route as a bridleway as part of a review that was then later abandoned, constituted a "bringing into question". Counsel for the Secretary of State argued that since the Department of the Environment had notified the Council of the landowners' objection in April 1975 this constituted a "bringing into question". The Court rejected that submission and concluded that the Inspector was wrong to have taken the 1975 letter as a calling into question. In *Godmanchester*[8] the question of whether or not the lodging of notices or declarations under S31(5) HA and S31(6) HA are always actions that have the effect of bringing the right of way into question was not determined, though Lord Hoffman thought that they probably would.[9]

For a long time it was not entirely clear whether or not an application for a DMMO to add a right of way to the DM&S constituted a bringing into question, or if it did what the date of bringing into question would then be, (the date of the application, the date of any response by the owner to that application; what if there was no response by the owner?). Section 69 of NERC[10] provides, in England, that where the matter bringing the right of way into question is an application the date that application is made will be the date of bringing into question.

It should also be noted that Planning Inspectorate guidance to Inspectors is that the bringing into question may be by some other means than the action of the landowner[11]. So, for example, the obstruction of a route by a structure erected by a third party may constitute a bringing into question.

[7] *R v SoS for the Environment ex parte Dorset County Council* [1999] NPC. See RWLR S6.3 pp69-72
[8] R (oao) Godmanchester Town Council v SoS EFRA and R (oao) Drain v SoS EFRA [2007] UKHL 28
[9] At paragraph 37
[10] Brought into force in England on 2nd May
[11] A view also shared by Lord Scott in Godmanchester at paragraph 70

Twenty Years User: full period

The twenty-year period must be for the full twenty years and this can be difficult to establish. A little used but regularly used path, say one used once a month but every month for twenty years would qualify, whereas a well-used path, used heavily and frequently for nineteen years would not, even though the total use for the second path was higher than the use of the first path. Long periods of disuse may also render the user evidence insufficient for the purposes of S31 HA; though these circumstances and periods of user for less than twenty years may give rise to a claim at common law.

It is not necessary for any one member of the public to have used the path for the full twenty-year period (though obviously in circumstances where this is the case it makes it much easier to establish that the use has been continuous), overlapping periods of use by many users, provided that they add up to twenty years can suffice.

The Planning Inspectorate has issued guidance that periods of closure during the outbreak of Foot and Mouth disease do not in their opinion adversely affect claims based on continuous long user. This is not a universally accepted view.

- **As of right**

As of right stems from the common law and means "without force, without secrecy and without permission"[12].

Use must be "as of right" both under S31 HA and at common law. Evidence of user where the use has meant the breaking of locks or fences to gain entry is not therefore useful evidence. Likewise entry at times when the landowner (or his tenant or agent) is known to be away or for the purposes of poaching is not as of right. Use that may be use under licence granted for example to a particular class of employee[13] or solely to the inhabitants of the parish[14] will not usually support a claim of dedication.

- **Interruption**

Interruption means the actual and physical stopping of the enjoyment of the public's use of the way. It is generally held that this is distinct from periods of non-use or sparse use[15] and therefore means some actual action taken to prevent user. A common example is the locked gate or bar across a route, often on a certain, specified day in the year. This is not absolute proof of interruption: for example, as Staughton LJ speculated in *R* v *Secretary of State for the Environment* ex parte *Cowell*[16], a locked gate on Christmas Day only and in a blizzard may not actually and physically stop enjoyment. (It may be strong evidence of a lack of intention to dedicate[17] see below and may also render the user *precario.*) Nevertheless,

[12] In Latin: nec vi, nec precario, nec clam
[13] *Leckhampton Quarries Co Ltd v Ballinger and Cheltenham RDC (1904)* 68 JP 464
[14] *Barraclough v Johnson (1838)* 8 Ad & E 199
[15] Though periods of sparse or non use are relevant to the question of 'full period of twenty years'
[16] [1993] JPL 851
[17] *British Museum Trustees v Finnis* (1833) 5 C&P 460.

in most circumstances, the courts have attached particular weight to evidence of such physical barriers.

Mere challenges to enjoyment do not, of themselves, interrupt the user. Thus, a verbal challenge to a user, which he ignores, will not necessarily constitute "interruption", although, again, it may be significant evidence of the absence of intention to dedicate. However, it is important to note that a verbal challenge by the landowner or his agent that results in the user turning back or being removed from the land or continuing with permission will actually interrupt enjoyment. As Halsbury's Laws of England suggests, in such circumstances, "user by that person is valueless and will usually outweigh evidence of user by other persons"[18]: i.e., such interrupted user weighs heavily *against* evidence of other witnesses who attest to uninterrupted user.

- **Actually enjoyed**

This is a matter of fact to be determined in each case, and will vary with the circumstances, but there must be enough use by the public to satisfy the requirement. It follows that desultory and intermittent use by few members of the public will probably not suffice. The most difficult question to judge is "how many users, how much use". In *Smith v Baxter*[19] it was held that the public must have "had the amenity or advantage of using" the route.

- **By the public**

Use must be by the public at large. Use simply by certain classes of user, such as employees or tenants of the landowner is not use by the public at large. Certain users may be implied visitors[20] (e.g. Royal Mail staff delivering mail, district nurse). The oft-cited example of a way that is limited to a certain class of people is the 'churchway', where use is limited to parishioners attending their church for divine service or for burial.[21] However, if evidence is given simply by parishioners, unless it is clear that the right to use the route is restricted to parishioners only, and not the general public it would be wrong to conclude that there was no public right of way[22].

Lack of intention to dedicate

As stated above 20 years use by the public does not create a right of way, it is simply taken in law to be evidence of dedication. If within the twenty-year period the landowner can show that there was sufficient evidence of lack of intention to dedicate the route to the public then this will over-ride the presumption of dedication.

An obvious way of providing such evidence is by submitting and keeping up to date a deposit under S31(6) HA, but other things such as notices, locking of gates (even for one day, such as on Good Friday or on Christmas Day) also provide evidence of a lack of intention. Some things, such as notices may be taken to be both a 'calling into question' and a 'lack of intention to dedicate', depending on the circumstances.

[18] Fourth edition re-issue Volume 21, para 125. See *R* v *Secretary of State for the Environment* ex parte *Cowell* [1993] JPL 851; *Stone* v *Jackson* (1855) 16 CB 199; *Healey* v *Batley Corpn* (1875) LR 19 Eq 375.
[19] [1900] 2 Ch 138 at 144
[20] *Selby v Crystal Palace Gas Company* (1862) 4 DeGF&J 246
[21] *A-G v Mallock* (1931) 146 LT 344
[22] R (oao) North Yorkshire County Council v SoS for the Environment EWHC Admin 962 (14 October 1998)

S31 HA provides a number of means by which a landowner can demonstrate his lack of intention to dedicate a way:

- The erection and maintenance of a notice inconsistent with the dedication of the way as a highway "in such manner as to be visible to persons using the way" (S31(3) HA).
- The erection and maintenance of such a notice on land that the landowner has let, without derogating from his grant by doing so (S31(4) HA).
- Depositing a map showing admitted routes (if any) and making a declaration that there is no intention to dedicate other routes to the public (originally this declaration had to be made within 6 years and renewed every 6 years, this was changed by CROW to 10 years and then by the Growth and Infrastructure Act 2013 to 20 years. The 2013 Act also provided that notices had to be erected on site and extended the purpose of S31(6) HA to include protecting land against claims that it was a village green. It is likely that new regulations under the Deregulation Act 2015 will further alter some of the detailed requirements.)

In *Godmanchester* the House of Lords held that *during* does not mean "throughout", therefore if a landowner does not express his lack of intention to dedicate throughout the whole twenty-year period, it does not automatically mean that his expression of lack of intention to dedicate is not "sufficient". Actions may be sufficient to express lack of intention to satisfy the proviso in S31(1) HA even if they are not for the whole period of 20 years, particularly if those actions are one of the activities set out in S31(3) HA (erection and maintenance of notices inconsistent with dedication) or S31(5) HA (notice given to the appropriate council following the defacing or tearing down of notices under subsection 3) or S31(6) HA (deposit of a statement). S31(3) HA and S31(6) HA are two particular examples of what will constitute "sufficient evidence" of lack of intention to dedicate. They are not exhaustive examples. Further examples are verbal challenges, obstructions to the route (such as gates and bars, locked gates will carry greater evidential weight than unlocked gates) and actions for trespass.

An expression of lack of intention to dedicate that is private and cannot be made, or is very unlikely to be made available to the public using the path would not constitute a sufficient lack of intention to dedicate.

It is for the fact-finder (the order making authority in the first instance and, in practice more likely, the Inspector in the second instance) to determine whether or not the actions of the landowner that give rise to the lack of intention to dedicate are "sufficient" to fulfil the proviso in any particular case.

Where land is leased, the law does not require that only the landlord should be capable of showing the contrary intention that will rebut the statutory presumption. Action by the tenant sufficient to show an intention not to dedicate is capable of resulting in the presumption being rebutted. See *Rowley*[23]

Nature of the way

There must be a definable route[24], and the way must not be of a character that would prevent a claim arising at common law. Thus for example a way over land that is controlled

[23] Rowley v SoS for Transport Local Government and the Regions (2002) 21 FW 3,7
[24] A route may be sufficiently defined albeit that it has varied slightly from time to time. Fernlee Estates v City and County of Swansea and the National Assembly of Wales (2001) P&CR DG 10 [2001] 24 EG 161 (CS), 21 FW 28

by by-laws preventing use or making certain kinds of use an absolute criminal offence use could not give rise to a claim at common law. Neither would it be possible at common law for a landowner to dedicate a route subject to permanent restrictions that are contrary to the dedication. For example, it would not be possible to dedicate a route as a carriageroad, if it were permanently blocked by a wall, whereas it would be possible to dedicate a carriageroad subject to closed, but not locked, gates.

Capacity to dedicate

It is argued that the Rights of Way Act 1932 (which is retrospective) as amended by the National Parks and Access to the Countryside Act 1949 did away with the argument that if there was no landowner with the capacity to dedicate then the claim by the public automatically failed. However, in *Jaques*[25] it was held that, the fact that the twenty-year period included a period of time when the land had been requisitioned (for the war) and, at that time there was no person owning the land, who had capacity to dedicate, defeated the claim.

It has also been suggested that if the land is continuously tenanted proof of the freeholder's concurrence or acquiescence is required in establishing dedication; this is not the case[26].

There is a question over land held in mortgage, in that Halsbury states that:
"Where a mortgagor is still in possession of the mortgaged land it would seem that the mortgagee's assent to dedication is necessary"[27]

It is suggested that clear legal advice should be sought if it is argued that the dedication could not have occurred due to the existence of a mortgage.

It is clear that the ownership of the land in question is a material fact and reasonable care should be taken to establish who the owners are. In general in the absence of any better claim to title the ownership of "lanes" be they highway or not is presumed to be halfway to the middle of the land, however care should be taken to establish whether or not there is a party with a better claim to title.

Notices

The Rights of Way Act introduced a special standing for notices, this was carried into S31(3) HA and provides that notices erected and maintained on or after 1 January 1934 that are inconsistent with the dedication of a highway provide in the absence of evidence of a contrary intention evidence sufficient to negative the intention to dedicate the way as a highway.

The question here is; what constitutes a notice inconsistent with the dedication of a highway? Clearly those notices (sometimes seen in pub car-parks and shopping centres) that actually cite the relevant section of the Highways Act 1980 (or its predecessor 1959 Act) or the Rights of Way Act 1932 providing they have been erected and maintained are to be taken as encompassed by the legislation. It is submitted that notices that do not cite the

[25] Jaques v SoS for the Environment [1995] JPL 1031 (1994) 15 FW 3,3
[26] *Huntingdon v SoS for the Environment and Cornwall County Council* [1998] EWHC Admin 802 (30th July 1998)
[27] Halsbury's Laws of England Vol 21 Highways para 116 4th edition

relevant legislation, but that are direct and to the point, such as "Private – No public right of way" also constitute notices for the purposes of this section. There may, however, depending on circumstances, be doubt about other notices that simply say "Private" or "Private Road"; these may not be clear and direct enough to constitute a notice that is "inconsistent with the dedication of the highway". For example, a sign erected on a public footpath that is also a private road, and reading "Private Road" might not be taken as intention not to dedicate a public bridleway, it could be argued that the words "Private Road" were simply directed at those who intended to bring vehicles along the way. This is a difficult area. There is some guidance in the case of *Burrows v Secretary of State (for EFRA)*[28].

It should also be noted that notices can serve both the function of being a "calling into question" and as evidence of lack of intention to dedicate (whether or not they have been maintained within the whole of a relevant period under consideration.)

Cul-de-sac highways

It is clear that a highway need not form part of a through-route. In *Williams-Ellis* v *Cobb*[29], Lord Wright in the Court of Appeal endorsed the first instance and Court of Appeal decisions in *Moser* v *Ambleside UDC*[30]:

> *"It is no longer the law (if ever it was) that a highway must end in another public highway. Thus a public right of way may lead only to a point of natural beauty."*

Mechanically Propelled Vehicles and Vehicular Highways

The Natural Environment and Rural Communities Act 2006[31] (NERC) now means, use in mechanically propelled vehicles after commencement of the Act[32] will not give rise to a route that may be recorded as a byway on the definitive map and statement. This provision and others in NERC coupled with the provisions in CROW concerning the use of historical documents as evidence of public vehicular rights means that it is very unlikely that any new byway claims will arise.

NERC provided for the automatic extinguishment of all public vehicular rights if a way was not shown on the definitive map and statement, or where it was shown as a footpath, bridleway or restricted byway.

Certain savings against automatic extinguishment are set out in NERC, broadly these are:

1. When a route is used mainly by the public in motor vehicles
2. When a route is recorded on the list of streets but is not also shown as a footpath, bridleway or restricted byway on the definitive map and statement
3. Where a route is recorded on the list of streets and is also shown as a footpath, bridleway or restricted byway on the definitive map and statement and created expressly for public vehicular use.
4. Where a route is recorded on the list of streets and is also shown as a footpath, bridleway or restricted byway on the definitive map and statement and was built for use by the public in vehicles.

[28] Burrows v Secretary of State [2004] EWHC (Admin)
[29] [1935] 1 KB 310.
[30] [1925] 89 JP 118
[31] Section 66
[32] In England 2 May 2006, in Wales 16 November 2006

5. Where a route is recorded on the list of streets and is also shown as a footpath, bridleway or restricted byway on the definitive map and statement and arose through deemed or presumed dedication by vehicular use
6. Where an application for a Byway to be recorded on the Definitive Map was made in accordance with the regulations to the 1981 Act prior to 19 May 2005 (20 January 2005 in England).
7. Where an Authority determined to make an Order (other than a Rupp reclassification Order) prior to 2nd May 2006
8. Where the application is by someone seeking to record access rights to their own land.

These exemptions are complex and are the subject of an extensive body of case law of their own.

Crown land

S31 HA does not apply to Crown land. It is suggested that if a claim involves land owned by the Crown legal advice should be sought. Crown land includes land owned directly by the Crown, the Duchies of Lancaster and Cornwall, Government departments (e.g. Ministry of Defence) and the Forestry Commission. Title in land owned by companies that go legally bankrupt might revert to the Crown; a circumstance that may affect, for example, un-adopted estate pathways where ownership remained in a development company that became bankrupt.

Consecrated land

Land in England consecrated by the Church of England requires special consideration. It is recommended that if a claim involves consecrated land legal advice should be sought.

S31HA v Common Law

At common law any period of public use might give rise to an inference of dedication to the public and, as noted above, there are highway cases (predominately 19th century ones) where very short periods of intensive user has been held to be sufficient evidence of dedication to the public. Apart from the "hoops" that a S31 HA case must go through, the principal difference between S31 HA and common law lies in the burden of proof. If the S31 HA "hoops" are successfully negotiated then the burden of proof (which remains 'balance of probabilities') lies with those who assert that the way is not public, whereas in any case based on common law user the burden lies with those seeking to prove that the way is public.

In practice the majority of cases where user evidence is involved are not simply based on user evidence: there may be some supporting (or contradictory) documentary evidence and frequently the oral evidence is conflicting. Generally, therefore claimants and order making authorities prefer to be able to rely on the S31 HA claim rather than common law.

Definitive Map Modification Orders (DMMOs)

The present legislation (Wildlife and Countryside Act 1981 as amended) allows authorities to make DMMOs to:

- Add a right of way not previously shown on their Definitive Map and Statement;
- Upgrade a right of way to record previously unrecognised higher rights (e.g. from footpath to bridleway);
- Delete a right of way, erroneously shown on a Definitive Map, and
- Downgrade a right of way if higher rights have been erroneously recorded (e.g. from bridleway to footpath)

Authorities have a duty to ensure that their records are as accurate and up to date as possible. DMMOs must be made on discovery of evidence, which when considered with all other available relevant evidence shows that an amendment needs to be made. It is not a requirement that the authority has an application for a DMMO before one can be made; though it can decide to prioritise matters that are the subject of an application.

All decisions MUST be based on a proper consideration of the evidence.

Matters of utility, environment, public safety and privacy and security, though concerns about these may be validly held, are irrelevant to the consideration of what rights exist.

The investigation stage

Before a Council decides to make a DMMO it must have determined whether the evidence shows that it is appropriate to make a change to the DM&S. The requirement that the Council consider any discovery of evidence together with all other available relevant evidence means that it make not simply act on one piece of information in isolation. Case law (the O'Keefe No 1 case) has set out that before determining to make a DMMO, on the basis of an application (but the principle also applies where there is no application) the Council must make appropriate inquiries. The Wildlife and Countryside Act 1981 set out an obligation to consult other local authorities (including Town and Parish Councils) before making a DMMO, but case law imposed an obligation to do more than this. How much more is not defined precisely, but usual practice would be for the Council to consult owners and occupiers and ask them for relevant evidence, and to do some documentary research into its own records and historical documents that may provide evidence of the existence of or status of highways. If a case is made to the Council that use by the public has given rise to circumstances where dedication of a way might be presumed or deemed (this is discussed below) it might be appropriate for people to be interviewed about their use of and knowledge of the route in question. There is however no obligation to interview witnesses.

Investigations should not seek to actively prove or disprove a particular position but should be an open-minded inquiry about the evidence. It is important that evidence be weighed in its context and all the evidence is looked at in the round. Common failings in investigation are setting out to 'prove' a particular position, discounting evidence on a piece by piece basis (rather than looking at the whole picture that the evidence shows) and perceptions of bias in investigation (such as interviewing user witnesses, but not offering to interview landowners and their witnesses).

The decision stage

The nature of this decision is 'quasi-judicial', that is the Council is 'standing in' for a Court (remember originally disputes about public rights of way had to be settled in Court). The Council's decision-maker must therefore consider the evidence before it and weigh it and arrive at a reasoned decision as a Court would.

What does "quasi-judicial" mean?

Quasi-judicial powers are administrative powers that must be exercised in accordance with the rules of natural justice. In taking quasi-judicial decisions, a decision maker or decision making body must act and be seen to act fairly and even-handedly, by bringing an unbiased and properly directed mind to his/their consideration of the matter. The decision maker or decision making body must take into account all relevant matters and not take into account irrelevant ones. The factors common to a quasi-judicial decision do not necessarily differ from the factors to be taken into account in other decisions but there may be a different degree of scrutiny by the courts.

The important qualities of the decision-making process therefore are:

- The decision must be taken fairly and even-handedly
- The decision makers must take an unbiased and properly directed view of the matter
- The decision maker must take into account all the relevant matters and not take into account any irrelevant matters.

Importantly, the Council must be able to demonstrate that it has discharged its responsibilities properly in making a quasi-judicial decision. A good way of doing that is to have a good quality written report.

Making a decision

It is important that the Council allows all parties equal access to the information it is considering and that individual Members (or Officers) do not introduce, in committee meetings, new information that the applicant for an order or the landowner or other interested parties may not then be able to fully respond to. (The O*'Keefe* 1 case).

The Council must make a decision; the decision-maker need not accept Officers' recommendation but it must have clear, cogent reasons, based on the evidence, for its decision. The Council must apply the law.

This is a civil matter: 'balance of probabilities' not 'beyond reasonable doubt'. If a route not presently shown at all on the Definitive Map can be reasonably alleged to subsist[33] then the Council should make the order; even if it feels that the case might not stand up at a public inquiry. Absence of evidence is not evidence of absence. To remove a right of way or downgrade it the Council must have before it evidence of some substance; mere assertions are not evidence.

[33] This will change when parts of the Deregulation Act 2015 are fully implemented.

Taking into account all relevant matters and not taking into account irrelevant matters

Precisely what is relevant and what is not relevant will to some extent depend on what part of Section 53 the matter relates to and whether or not the terms of Section 31 of the Highways Act 1980 have been made out or the case is one where common law principles apply. However, factors such as desirability, suitability, financial viability, need, the effect on nature conservation, public safety, the need to provide equal opportunities and the aims of the ROWIP whilst they maybe expressed as genuine concerns by the parties cannot lawfully be taken into account when making a decision. The matter under consideration is the rights that exist, or do not exist, or in the case of Section 53 (3)(c)(i) are "reasonably alleged to subsist".

At best, decisions that wrongly take into account such factors will fail at the next 'appeal' hurdle; at worst, the Council will find itself in the High Court facing Judicial Review proceedings.

Application of the law

The relevant law is contained in the Wildlife and Countryside Act 1981, as amended by the Countryside and Rights of Way Act 2000 and the Natural Environment and Rural Communities Act 2006. In summary the law says that the Council has a duty to make DMMOs to record on the Definitive Map any changes to the network (these types of orders are administrative and they change the DMS to reflect changes to the network made by Public Path Orders, road schemes, development etc.) and secondly a duty to ensure that all rights of way a properly and accurately recorded on the DMS, these are known as evidential orders; orders must be made as soon as reasonably practical in both cases.

For evidential orders the Council may make them because it has received an application or because it has "discovered" evidence that suggests that the map is wrong or incomplete. The Council has to consider any such evidence together with all relevant available evidence and must make an order to add a path (or to recognise higher rights) if the evidence suggests that the path subsists or, in the case where no rights are presently shown in the definitive map where rights may be reasonably alleged to subsist.

The law in more detail

Section 53(2) of the Wildlife and Countryside Act 1981 requires that the surveying authority shall –

(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date of any of the events specified in subsection (3); and

(b) *as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence on or after that date, any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.*

In practice this places the duty on the Council to bring the map and statement up to date to reflect any events that occurred before the coming into effect of the Wildlife and Countryside Act 1981 and to keep it up to date.

Section 53(3) of the Act sets out the "events" that trigger the making of a definitive map modification order. It says:

The events referred to in subsection (2) are set out in subsections (a) (b) and (c) –

(a) the coming into operation of any enactment or instrument or any other event, whereby

- *(i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;*
- *(ii) a highway shown or required to be shown in the map and statement as a highway or a particular description has ceased to be a highway of that description; or*
- *(iii) a new right of way has been created 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.*

In practice orders under this section are purely administrative, they reflect what are known as legal events. So that for example if the Council makes and confirms a public path extinguishment order it will then be necessary to make a 'legal event modification order' under Section 53 (3) (a) (i) to amend the definitive map and statement to remove the path that has been extinguished (stopped up).

Subsection (b) states:

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 raise a presumption that the way has been dedicated to the public as a public path or restricted byway.

This relates to common law dedication and the operation of section 31 of the Highways Act 1980.

Subsection (c) states:

The discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –

- *(i) 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;*
- *(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway or a different description;*
- *(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.*

This section is the one most commonly cited in DMMOs. Some of the elements in it have been considered by the Courts so we have some guidance as to their meaning as follows:

"*Discovery of evidence*": discovery of evidence can mean the discovery of evidence or a period of user that gives rise to a presumption of dedication (O'Keefe v Secretary of State). There must be some "discovery" of evidence it is not sufficient to simply re-examine evidence that was considered when the definitive map was first drawn up (Burrows v Secretary of State). This particularly applies when cases concern the alleged wrongful recording of a route on the map.

"*Subsists, or reasonably alleged to subsist*": the test to be applied is not whether the evidence establishes that the right of way legally subsists, but whether the evidence amounts to a reasonable allegation that it subsists. This is a lesser test and the authority must make a DMMO in such circumstances even if it is of the view that the evidence is not sufficient to show that the right legally subsists (Todd v SoSEFRA 2004). This may mean that the Council makes DMMOs that in the event do not get confirmed.

DMMOs to delete: the standard of proof required to make a DMMO to delete a route from the definitive map is no more than the balance of probabilities (the civil standard of proof) but evidence of some substance must be put in the balance if it is to outweigh the initial presumption that inclusion of the route was correct.

Evidence

Broadly, there are two sorts of evidence: documentary and oral.

There are many kinds of documents that carry evidence of public rights of way: Tithe Maps, Railway Act survey documents, Quarter Sessions records, previous highway authority records, Inclosure Awards, Finance (1909-1910) Act 1910 valuation office records, S31(6) deposits, Rights of Way Act 1932 records. In some instances there may be a particular and possibly unique document has special relevance to a case, a local Act of Parliament for example. Some documents are very important to defining rights of way; the evidence in an Inclosure Award can be all that is needed to satisfy the legal test that a path subsists.

Documents have to be interpreted and put into context as this is how a Council properly approaches the evidence and 'weighs' it.

Very few records were created with the idea of recording public rights of way, this is why it was necessary to develop the idea of a definitive map, but the recording of routes was in some instances relevant to the primary function of the record. For example, roads often formed the boundaries of titheable areas and were therefore shown on tithe maps. Roads were also often not productive land and therefore not subject to tithe so they might be described in the tithe apportionment (or award) in order to identify them. Sometimes additional information will be given that indicates the road was considered to be public. For example an apportionment might record that the land crossed by the road was in the occupation of the 'surveyor of highways' and this would be good evidence that the road was considered to be public. Equally, however, roads might not be described individually but rather lumped together in a total area of 'roads and waste'; such apportionments would be less good evidence of public status.

Common types of documentary evidence:

<u>Ordnance Survey maps</u>

These show what the surveyor found on the ground at the date of survey; however the representation on an OS map of a path, track or way as a topographical feature is not evidence that it is, or is not, a public right of way. If a track is not shown where a right of way is claimed to be, this is not evidence that it did not exist since it may not have been a visible feature at the date of survey.

Other maps

Reliance can sometimes be placed on the inclusion of a route in other historic mapping, the amount of weight that can be given to such evidence depends upon the nature of the map and how much is known about the process of map making for that particular map.

Rights of Way Act 1932

Plans deposited by landowners showing acknowledged public rights of way (the forerunner of the Highways Act 1980 Section 31(6) procedure). Later deposits under S31(6) of the Highways Act may also provide evidence.

Collections of documents from firms of solicitors, land agents etc deposited in local record offices

These contain conveyances, deeds etc and may include specific references to public roads and paths; often because they are used to help to specify the exact position of pieces of land, for example, a piece of land 'abutting upon' the King's Highway, common way, etc.

Minute books and files of county and district councils and their committees

Minute books and files, of county and district councils and their committees, may contain evidence (e.g. highways and bridges committee concerning maintenance liabilities. Sometimes other related documentation has survived).

Inclosure Awards and Maps

Inclosure (or "enclosure") awards were the means by which many thousands of hectares of mediaeval "open fields" and "waste of the manor" were enclosed and distributed among those who could prove that they possessed rights on the old open fields, common or waste. The process was initially carried out under Local and Private Acts of Parliament, later General Acts were passed to provide a framework for Local or Private Acts. The main period for Parliamentary inclosure is from 1750 to about 1850. As Inclosure Commissioners were usually empowered to stop-up or divert existing highways and to set out new public carriageways and other lesser highways, inclosure awards often include schedules of new, diverted or extinguished roads and paths.

Finance (1909-1910) Act 1910 valuation office records

The Finance Act provided for the levying of a tax upon the incremental value of the land when there was an "event" (sale or the creation of a new lease). To assess the incremental value of the land it was necessary for a base valuation to be carried out. Although the tax was repealed in the 1920s, the valuation process has left behind a large number of records, some of which can be useful in rights of way cases.

There are four basic sets of records: working plans and Valuation Books ("Doomsday Books") which may be available from county record offices; and record plans and Field Books, which are held in The National Archives at Kew. The plans, both the working copies and the final record plans provide an index to the field books. The field books sometimes hold information about an allowance made in the valuation process for public rights of way. The

quality of this information varies, but can sometimes be highly significant evidence of the existence of public rights of way and roads.

Tithe maps and apportionments and awards

These records were produced for areas where tithe was still payable in kind (e.g. a tenth of the egg production or one in every ten piglets being given over as payment to the established church). Tithe was often commuted to a monetary payment where land was subject to Parliamentary Inclosure, so for areas where there was little or no Parliamentary Inclosure, there will usually be tithe records. The recording of public rights of way and roads was incidental to the process, but sometimes tithe records can provide valuable evidence of the existence of public rights of way and roads. These documents are hugely variable in quality and the evidential weight that can be placed upon them.

Deposited Plans of Public Utilities

There were and still remain statutory requirements that plans of undertakings such as railways, major roads and canals and drainage channels be deposited with the appropriate public authorities. Where the works were authorised by Act of Parliament, the Acts, plans and books of reference can be inspected at the House of Lords Record Office. All three documents must be considered together. Some works were authorised but not constructed in which case the evidence for right-of-way status will be less cogent than that for ways associated with works that were built. Surveys carried out in connection with such works, whether or not they were initiated, may also be available and provide useful evidence.

Evidence of use

Oral evidence is usually evidence of use or of non-use. This can be a lot harder to evaluate as it is often contradictory, vague and may be subject to bias. In cases where the evidence is almost all oral and it is contradictory the case law presently allows the Council to make a DMMO to add a right of way (where none is presently recorded on the DM&S) on the basis that it can be said to reasonably subsist. The detail of oral evidence in such cases is then usually tested at a public inquiry. These sorts of cases are very hard to deal with and may be very controversial.

If the public can demonstrate 20 years user running back from the point at which the right of the public to use a path is brought into question then the law puts the burden of proof on the person contesting the public nature of the route. At common law the public may have a lesser period of use, but the burden of proof is then with the public to show that the route has been dedicated as a highway.

Courts have traditionally viewed live witnesses as 'best evidence'; however in rights of way matters it is often the 'dead' witness of documents that helps decide a finely balanced case.

Many cases involve a combination of both types of evidence. Each case is unique and all evidence varies. The Council should to treat its evidence sources consistently, but weigh each case separately.

If the Council refuses an application for an order the applicant has the right of appeal to the Secretary of State, who may then direct the authority to make the Order applied for[34].

[34] This will also be altered by the Deregulation Act 2015

Proposed changes under the Deregulation Act 2015

The Act proposes several key changes to rights of way law in England:

- The 'right to apply' for a diversion order for owners of prescribed land
- Guidance will be issued to Councils about making public path orders to divert paths out of gardens (and other private areas), farmyards, industrial areas etc. (We have yet to see how this will be framed, but there is a suggestion that where a diversion is not possible Councils will be guided to make extinguishment orders.)
- Councils will be able to discount 'irrelevant objections' to certain orders
- The requirement to advertise DMMOs and public path orders in a local newspaper will be dropped
- DMMO applications will be subject to a 'preliminary assessment' to see if they are supported by cogent evidence; applicants will have to provide a statement explaining why the evidence adduced meets the preliminary assessment. The preliminary assessment will apply to any backlog of applications that a Council has
- Reasonably alleged to subsist, the 'lower' test for making a DMMO, to add a right of way to the D&S will be abolished; all such orders will then have to be made on the grounds that the right of way 'subsists'.
- Appeals against non-determination of an application for a DMMO within 12 months will have to go to the Magistrates' Court (presently such appeals go to the Secretary of State; in practice appeals are determined by a 'planning' Inspector appointed by the Secretary of State).
- Where an applicant appeals against refusal by a Council to make a DMMO and the Secretary of State concludes that the DMMO should be made there will no longer be a direction to the Council, instead the Secretary of State will draft an Order. (This is to provide a one step process, instead of a two step process as at present.)

Changes are aimed at streamlining and simplifying the DMMO process. However, much of the detail of how this is to work is not in the Act but will be in regulations (that are yet to be published). It is not yet clear when these will be implemented. The need for guidance on the detail of right to apply for public path orders goes somewhat against the Government's programme of reducing and simplifying Government guidance; and we have yet to see how the guidance will mesh with the legislation (Highways Act 1980) which sets out statutory tests for public path orders.

Access and equality for disabled users of the rights of way network

Councils must consider the needs of people with mobility problems and other disabilities. Guidance about public path orders is currently given in Section 5.4 of Circular 1/09 (but the Circular is under review pending the changes to be introduced by the Deregulation Act).

This currently says:

"Note that all aspects of the specification of Public Path Orders (unlike Definitive Map Modification Orders which represent what is believed to have been the route, width and structures existing when a way was dedicated) will be affected by the DDA, particularly in relation to the limitations and conditions to be defined in the statement."

The public sector equality duty (under the Equality Act 2010) specifically applies to diversions under the Highways Act 1980 and the authorisation of new structures (to control the ingress and egress of animals) under Section 147 of the Act. It also applies to situation where the Council may be erecting barriers under section 66 of the Highways Act 1980.

Councils are able to negotiate with landowners to replace stiles with gates (or to remove gates and stiles completely). However, where a landowner has the *right* to have a gate or stile the Council has no power to insist that it be removed or replaced with a better structure.

Government guidance to Councils says (www.gov.uk accessed September 2016):

"**Improvements**
You should make improvements to public rights of way so they are accessible to all users, eg stiles should be replaced with gaps or gates, wherever possible.

Before making improvements you should consider the:

- historical character of existing structures and the landscape
- needs of other users, eg parents with children in pushchairs
- accessibility of the route as a whole
- needs of the landowner - you should negotiate with the landowner to make improvements to existing structures

New structures
When creating a new public right of way or diverting an existing one you should:

- keep the number of structures to a minimum - there must be a reason for each one
- use the most accessible type of structure available, eg a gap or gate rather than a stile
- detail each type (standard and design) of structure clearly in the legal documentation - you might need to refer to this in future if the use of the land changes or if you need to prove why certain structures were used

You must record any new structures on the definitive map and statement.

Policies
You should develop a policy about structures on public rights of way either as part of your Rights of Way Improvement Plan or as part of a wider policy on the Equality Act. Make sure that the policy states that structures on public rights of way must be built to the most accessible standard possible."

More detailed (and much better) guidance on structures in the 'gaps, gates and stiles' document that applied the British Standard 5709:2006 has been archived by Defra (under the programme to reduce Government guidance), but many Councils have adopted this is their own policy. Some Councils have pioneered a 'miles without stiles' approach (but this may not be readily practicable in areas of farmland where there is a large amount of stock, or where numbers of horses are kept).

Guidance is generally lacking about other aspects of disabled access such as access for people with other disabilities (such as partial sight) and how Councils should approach the issue of such matters as surfacing and maintenance in order to extend access opportunities for people with disabilities. There is therefore an opportunity for Councils to develop their own policies and guidance and for the LAF (and the ROWIP) to play an important role in this.

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