

Appendix B – Legislation briefing note

Public Rights of Way - Modification of the Definitive Map

The following briefing sets out the legal framework and considerations for modifications to the Definitive Map.

Wildlife and Countryside Act 1981

The Wildlife & Countryside Act 1981 places a duty upon the City Council as 'Surveying Authority' to keep the Definitive Map under continuous review and make Modification Orders in consequence of:

Section 53(3)(b) - 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) - 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 to which this Part applies;
- (ii) that a highway shown in the map and statement as a highway of a particular description ought to be shown as a highway of a different description; or
- (iii) that there is no public right of way over land as shown in the map and statement as a highway of any description, or other particulars contained in the map and statement require modification.

Section 53(5) - any person may apply to the Authority for an order which makes such modifications as appear to the Authority to be requisite in consequence of the occurrence of one or more events falling within 53(3), (b) or (c).

Modification Orders made under the above provisions are published and notices served upon owners and occupiers of land affected. Any objections or representations to the Order are considered by an inspector appointed by the Secretary of State for the Environment to determine the matter, usually after a public inquiry. Applicants under Section 53(5) may appeal to the Secretary of State if the Council decide not to make an Order.

Before deciding to make a modification order the Council has a duty to investigate the matter. This may involve interviewing witnesses, archive research etc and will seek to clarify any serious discrepancies in the evidence. The owner should be given the opportunity to produce evidence and comment upon other evidence.

The Council when considering a Modification Order must only look at relevant evidence and apply the relevant legal test.

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In considering a Modification Order the Council is not altering public rights. The Definitive Map records public rights, it does not create or alter them. The question is what public rights exist, not what rights the Council, landowners or the public would like to have. Lawful public rights may have languished unused or been obstructed for years, nonetheless they are rights. Conversely if a right of way is shown on the Map and Statement, but is proved not to exist then the error must be remedied and the way deleted. Modification Orders are not concerned with the suitability for use of the rights alleged. If there is a question of whether a path or way is suitable for its legal status or that a particular way is desirable for any reason, then other procedures exist to create, extinguish, divert or regulate use - but such procedures are under different powers and should be considered separately.

Highways Act 1980 Section 31 Presumed Dedication

The effect of S31 is, very broadly, that in certain circumstances 20 years public use of a way can lead to deemed dedication of that way as a highway unless there is evidence of a contrary intention. To understand the operation of the section it is necessary to examine its precise wording. This begins as follows:

- (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) 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 1st 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.

- (4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.
- (5) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public and statutory purposes to dedicate

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a way over land as a highway if the existence of a highway would be incompatible with those purposes.

- (6) Nothing in this section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less than 20 years, or being presumed or proved in any circumstances in which it might have been presumed or proved immediately before the commencement of this Act.
- (7) Nothing in this section or section 32 below affects section 56(1) of the Wildlife and Countryside Act 1981 (which provides that a definitive map and statement are conclusive evidence as to the existence of the highways shown on the map and as to certain particulars contained in the statement).
- (8) For the purpose of this section 'land' includes land covered with water.

Highways Act 1980 Section 32 Evidence of dedication of way as highway

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 such 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.

More on Section 31

To establish the presumed dedication of a right of way under S31, it is necessary to show that the following **all** apply:

- (a) The nature of the way was not such that dedication could not be presumed at common law.
- (b) The public at large must have used the way.
- (c) The use must have been over a period of at least 20 years without effective interruption.
- (d) The use must be 'as of right.'
- (e) That 20-year period must have ended with an act that brought into question the public's right to use the way.
- (f) The landowner must be able to demonstrate he had no intention to dedicate the way.

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'A way over land'

The section applies to any way, ie a footpath, a bridleway or a carriageway. 'Land' is defined as including land covered by water. Thus the section can apply to the acquisition of a right of way through a ford or along a causeway covered in water at some stage of the tide.

"Other than a way of such a character that its use could not give rise at common law to any presumption of dedication"

An example would be a way the use of which was a criminal offence, eg to walk along a motorway except for the purpose of obtaining assistance.

Similarly, in the case of land held for some statutory purpose and dedication would be inconsistent with that purpose. This can also apply to corporations or other bodies or persons.

Limitations or conditions

The public's right to use a way may be subject to limitations or conditions. For example, the landowner may have a right to erect and maintain a stile or gate to prevent movement of stock. If the public freely uses a way subject to such a limitation during the qualifying period, the right of way is held to have been dedicated subject to the limitation. But once the way has been dedicated, no further limitation can be imposed other than by statutory means, such as the authorisation of a stile under Section 147 of the Highways Act.

"Actually enjoyed"

There must have been sufficient use of the way for the required period. This will be a matter of fact to be determined in each case. The motive in using the way is irrelevant. It will accordingly be sufficient if the sole purpose of the use was recreation.

"By the public"

Use must be by the public at large. It is not sufficient if the use has been merely by a class of the public, such as the employees of a particular employer, customers of a particular business or tenants of a particular landlord.

"As of right"

This means that the use must have been as if a right of way existed. There will be no deemed dedication if the landowner can show that the use was by his permission, or that the use had entailed force. Use must also be 'open', ie it must have been such that the landowner could have challenged it if he wished.

Inherent within the requirement of use as of right is the notion that there must have been acquiescence by the landowner. (Acquiescence should not be interpreted as permission but clearly there can have been no acquiescence if the user was by force

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or if it was undetectable). The onus is not on the user to show that the landowner acquiesced; it is on the landowner to show that he did not.

"Without interruption"

"Interruption" means "actual and physical stopping of the enjoyment" of the public's use of the way by the landowner or someone acting lawfully on his behalf, eg an employee acting in the course of his employment. The words do not refer to interruption of use; there is no requirement that the use must have been constant, although it must have been sufficient to satisfy the requirement that the way was "actually enjoyed".

The interruption must be with intent to prevent public use of the way. It will not be sufficient if the interruption is shown to have been for some other purpose, eg to prevent cattle straying.

"Deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it"

The opening words of Section 31 create a presumption that a way has become a highway, the class of highway (footpath, bridleway or carriageway) depending on the use made of the way. However the above words emphasise that they create no more than a presumption which is rebuttable by evidence of a contrary intention.

The landowner must show sufficient evidence that there has been no intention to dedicate. This is often demonstrated by overt acts directed at users. However such acts are not strictly necessary if there is other sufficient contemporaneous evidence of a lack of intention.

A common method of showing a contrary intention is by a notice with such words as "Private road (or Private path), no public right of way" sometimes followed by a reference to the legislation current when the notice was erected. Section 31(3) confirms that such a notice, erected so as to be visible to users of the way, will be sufficient evidence of an intention that the way is not intended to be dedicated.

"The period of 20 years ... is to be calculated retrospectively from the date when the right of the public to use the way is brought into question"

It might be thought that the 20-year period would start when use began, but this is not how the Act operates. The period is 20 years calculated backwards from the date when the right of the public to use the way is "brought into question" by the landowner (or his agent) doing some act that challenges the public's right to use the way. So the 20-year period of use has no fixed starting point, only a fixed finishing point.

Bringing the right to use the way into question

Acts that would bring the public's right to use the way into question include the following:

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- (a) Locking a gate, so as to prevent public use.
- (b) Putting up a notice denying the existence of a right of way.
- (c) Physically preventing a walker from proceeding along a path.
- (d) Bringing an action for trespass (for damages or for an injunction to prohibit future use). Seeking a declaration from the court that the way is not public.
- (e) Opposing an application for a definitive map modification order that adds the way to the definitive map or lodging an objection to such an order.

The effect of a notice denying right of way status should be noted. If after, say 10 years' use of a path a landowner puts up such a notice, this rebuts any presumption of dedication and even if the public uses the path for a further 10 years, no right of way will arise by virtue of the Act.

It should also be appreciated that in some instances an act which brings the right of the public to use a way into question could also be considered an act which demonstrates a lack of intention to dedicate.

Presumed Dedication at Common Law

The provisions of Section 31 of the Highways Act 1980 do not supersede the principles of implied dedication at common law. Indeed Section 31 (9) expressly preserves these principles.

The burden of proof remains with the claimants who must establish on a balance of probabilities that a landowner intended to dedicate the way as a public right of way. There is no requirement for use as of right to be for 20 years, so it can be a shorter period. Whether dedication can be inferred will be a question of fact. Ultimately, the more intensive and open the use and the more compelling the evidence of knowledge and acquiescence, the shorter the period that will be necessary to raise the inference of dedication.

Any such dedication will be ineffective if that person does not have the capacity to dedicate. A landowner may be able to show title would preclude dedication e.g. lessees, the Church, Charities prior to 1993. Certain public bodies operating within specific statutory provisions do not have capacity and implied dedication will not arise if the existence of a public right of way would be incompatible with the purposes of a corporation or other body or person in possession of land for public or statutory purposes.