

What if the definitive map is wrong or incomplete?

Any member of the public may make an application to modify the definitive map if they believe it to be incorrect. Such an application would have to be accompanied by the relevant evidence on which the argument is being based. We would then deal with the matter and make an assessment, on the balance of probabilities, as to the correct status of the routes. Whatever decision we make can be appealed against, and the matter would then ultimately be resolved by the Secretary of State.

The process can be lengthy.

Such evidence would normally consist of a mixture of usage and documentary – although strong cases can be built with only one type of evidence. **Usage** is basically ‘have people used the path as if it were a right of way of a particular status?’ If they have done so for 20 years or more, and there has been no, or little, counter evidence to show that the landowners have made it clear that they did not intend the way to become a footpath – then this is likely to result in a footpath modification order. **Documents** include old maps, such as tithe maps, enclosure awards and estate plans which help.

Unfortunately, although this may seem simple, the legislation concerning the establishment of public rights of way is one of the most complex areas of English Law, with thousands of cases constantly setting precedents. It is an area of law hotly contested right up to the Court of Appeal. So, what might seem, at the outset, a straightforward black and white issue, generally gets greyer fairly quickly.

The best place to seek guidance on these matters is probably the internet, and I advise that if you are interested, then the following webpage would be useful.

www.ramblers.org.uk/rights_of_way/take_action/claim_an_unrecorded_right_of_way.htm

On the following pages I have included our draft guidance, which we adapt for the relevant committee reports into each claim. This guidance gives a good indication of the legal tests that apply.

1 Legal Guidance on Section 53(3) – Wildlife & Countryside Act 1981

- 1.1 Section 53(3) allows the surveying Authority to make an order to amend the definitive map and statement. All relevant available evidence must be considered before making a decision. We must only consider the facts and whether the legal grounds for an order are met. The law is not concerned with the desirability or otherwise of claimed modifications.
- 1.2 The legal grounds for modifying the definitive map by the addition of a right of way asks two questions, which are commonly known as Tests A & B.
 - A. Does the evidence show that on the balance of probabilities a right of way exists? – This requires clear evidence in favour of the allegation, and no credible evidence to the contrary.
 - B. Is it reasonable to allege that a right of way exists? - This test is less onerous and allows for a conflict of credible evidence (that is, sound arguments may be brought forward on both sides). If there is such a conflict, and the evidence, or argument, that a right of way does not exist is not incontrovertible, then the answer to this test must be that **it is** reasonable to allege that one does exist.
- 1.3 It is not for us to fully resolve any conflict of evidence. But we must consider all the relevant evidence in answering these two questions. Any unresolved conflicts can be determined by the Secretary of State at the later stages of the process if necessary. If the answer to either question is yes – then we must make a modification order.

2. Addition of a right of way (Section 53(3)(b))

Has the public's use of a way raised the presumption that the way has been dedicated as a public path?

- 2.1 We must decide whether, on a fair reading, the evidence shows that a right of way exists. The law deems that a right of way has been dedicated and exists when the public have used it for a continuous period of twenty years or more before the use was questioned, and that this use was open, without permission and without force.
- 2.2 If the landowner has taken sufficient steps to show that they had no intention to dedicate a public right of way, such as erecting signs or giving appropriate notice to the highway authority, we cannot conclude that a right of way exists.
- 2.3 If the way has been used with permission (such as on council owned land held for the purpose of public walks), then this could defeat a claim.
- 2.4 If evidence of use for the full 20-year period is not shown then a path may still be added to the definitive map at common law on a shorter period of use. Each case will be different, but the more intensive and open the user and the more compelling the evidence of knowledge and acquiescence of the landowner, the shorter the period that is necessary to infer a dedication of a right of way.

Statutory inference of dedication

- 2.5 Section 31 of the Highways Act 1980 provides that a right of way exists when the public have used it for a continuous period of 20 years or more before the usage was questioned, and that this use was open, without permission and without force.
- 2.6 There is a proviso to section 31(1) however, which provides that deemed dedication does not apply where there is sufficient evidence showing that the landowner had no intention to dedicate a public right of way. So, if the landowner has taken sufficient steps to show that they had no intention to dedicate a public right of way, such as erecting signs or giving appropriate notice to the highway authority, we cannot conclude that a right of way exists.
- 2.7 For a landowner to demonstrate a lack of intention to dedicate it is necessary for their lack of intention to be aimed at users or the general public. But there is no requirement for the lack of intention to be demonstrated throughout the entire relevant period of claimed usage.
- 2.8 There must be sufficient evidence to show the intention – the act must be something contemporaneous and of substance and must be something more than *de minimis*. (*De minimis* means too small, or too temporary to affect the long-term effect.). In the absence of some contemporaneous action, a landowner would find it difficult to provide sufficient evidence that this lack of intention did actually exist
- 2.9 Documentary evidence is also important and can back up user evidence. When weighing up the documentary we must pay attention to the source of the document and the purpose for which it was produced.
- 2.10 There is a legal maxim 'once a highway, always a highway'. If there is historical, documentary evidence available that shows that a way once had public rights over it, the highway still exists, unless there is evidence of legal stopping up of the rights. In such a case, we must make an order to record it. Simple disuse of a right of way does not mean that the right no longer exists, just that the right is not being exercised.

Inference of dedication at common law

- 2.11 In some instances, the statutory inference, and statutory tests cannot be applied. Such instances include:
- If evidence of use for the full 20-year period is not shown;
 - there is evidence of an intention not to dedicate within the 20 year period;
 - if the date of challenge is unknown; or
 - if the date of challenge cannot logically be applied.
- 2.12 In these circumstances it is necessary to apply the common law tests to see whether a right of way exists.
- 2.13 For a way to be successfully claimed under common law, the evidence must infer that the landowner's conduct was such that he/she intended to dedicate the right of way. Effectively, this means that the usage was great enough that the landowner should have known it was taking place, yet he/she did nothing to stop that usage.
- 2.14 Under section 31 of the Highways Act 1980 (above), 20 years usage must be proved. At common law, there is no specified period. Each case will be different, but the more intensive and blatant the use and the more compelling the evidence of knowledge and acquiescence of the landowner, the shorter the period that is necessary to infer a dedication of a right of way.
- 2.15 Under common law, there must be someone capable of dedicating a right of way. If there is no owner in actual possession of the land, then the common law test will fail.
- 2.16 There is a legal maxim 'once a highway, always a highway'. If there is evidence available showing that a way once had public rights over it, the highway still exists, unless there is evidence of legal stopping up of the rights.
- 2.17 We must consider any documentary evidence, but in weighing up the evidence, attention must be paid to the source of the document and the purpose for which it was produced.
- 2.18 Other relevant information would be evidence of maintenance. For example, if a way has been maintained at public expense – then there are likely to be some public rights attached to this maintenance.