

Business Guides



Acquiring (and preventing the acquisition of) new rights of way through a period of long use in England

Business Guide Ref: 401E

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INTRODUCTION

Note: This guide applies to England only. Since 1 October 2013 there are some important differences between the situation in England and the situation in Wales, so it is important to ensure that you have the correct version of this guide. Business Guide 401W discusses the situation in Wales, and can be downloaded from the NFU website, or ordered from NFU CallFirst on 0370 845 8458.

English law makes provision for rights of way to be acquired by “deemed dedication”. This means that in certain situations the landowner is deemed to have granted a public right of way over his land.

Section 31 of the Highways Act 1980 states that (subject to certain conditions and exceptions) if a path is used as a right of way “as of right” for a period of not less than 20 years, without interruption, the landowner is deemed to have dedicated the right of way, unless it can be shown that the landowner did not intend to dedicate a right of way. For use to be “as of right” it has to be without force, without secrecy and without permission.

At any time after the required period of use has been established it is possible for an application to be made to have the route added to the Definitive Map. Many such applications are made by users when the landowner is seeking to prevent use of the route or the management of the land has changed. Unfortunately, by this stage it may be too late for the landowner to prevent the rights being acquired if the required period of use can be established.

This business guide discusses what steps landowners can take to prevent such rights of way being acquired over their land, and what happens if an application is made to have the route added to the Definitive Map.

This document is intended to provide a general overview of the law in this area, and is not intended to be a substitute for independent legal advice. **NFU members can obtain free initial legal and professional advice from NFU CallFirst on 0370 845 8458.** This document also does not consider the position where an application is made to add a route to the Definitive Map on the basis of historic documentary evidence. That is considered in NFU Business Guide 402, which can be downloaded from the NFU website or ordered from NFU CallFirst.

It is possible to bring a claim based on a shorter period of use, or in a situation where the right to use the right of way has not been brought into question under the common law rules. These cases depend on their own facts, but generally speaking, where the period of use is less than 20 years the Court is

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likely to expect to see greater evidence of the landowner's intention and/or a more intensive use of the route due to the shorter duration of the use. When claims are based on the common law rules, it is necessary that the landowner had the capacity to dedicate the right of way.

As claims under the common law provisions will be determined on the basis of their own facts, this guide will focus on the provisions in the Highways Act 1980.

THE 20 YEAR PERIOD

Contrary to what may be thought, the 20 year period does not necessarily run from the date when the use of the path started. The period is the 20 years' preceding the date on which the right to use the path is "brought into question". The public's right to use the path will be brought into question by an act/event which clearly demonstrates that their right to use the path is being challenged. So, use of a path could be brought into question by:-

- gates on the route being locked;
- the erection of notices stating that there is no public right of way;
- erecting a notice stating that use of the route is by permission of the landowner; or
- seeking a declaration from the court that the route is not a public right of way.

(This is not intended to be an exhaustive list).

Making an application for a Definitive Map Modification Order is also capable of bringing the right to use the path into question.

It is important that landowners remain vigilant. If, for example, a sign saying that there is no public right of way is erected but allowed to become illegible or is taken down, and use of the path begins again it is possible that such use could, if allowed to continue for at least 20 years, result in a claim for a public right of way over the land.

So, the first step when considering an application based on user evidence is to identify the event(s) which brought the use of the right of way into question. Evidence regarding the use of the route needs to cover a 20 year period running from the date on which the public's right was brought into question. There can be more than one such event, for example a sign may have been erected in 2002, then a gate may have been erected and locked in 2005; both could be events that bring the use of the right of way into question. In those circumstances, if the sign was sufficient to bring the use of the right of way into question the 20 year period would end in 2002, when the sign was erected, which would mean a claim based on 20 years use ending in 2005 would not cover a full 20 year period, and is unlikely to result in a right of way being acquired under the statutory provisions. This is something which can be considered by the authority/inspector, so it can be useful to retain evidence showing what actions were

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taken to prevent the use of a route, when and who was responsible (e.g. was it done by the landowner or on his instructions?).

PREVENTING THE ACQUISITION OF NEW RIGHTS OF WAY

Although it can be tempting to turn a blind eye to members of the public wandering across your land if they are not causing any problems, this can be a dangerous tactic in the long run. Acting early, and preventing the required 20 years use being established can save frustration and time in the long run, by avoiding any prospect of a right of way being established. Unfortunately, once a 20 year period of use as of right has been completed it can be very difficult to challenge the fact that a right of way has been established.

The courts have ruled that it is essential that the landowner's intention not to dedicate a right of way has been communicated to the public. So, terms in a lease requiring a tenant to prevent new rights of way being established or private letters to a solicitor regarding trespassers on the route are unlikely to be sufficient. However, there are a number of things that a landowner can do to prevent rights being acquired, as discussed in the paragraphs below. Not all of these options will be appropriate in every case, so landowners will have to decide what measures are appropriate in their situation.

Depositing a map and statement with the local authority

Section 31(6) of the Highways Act 1980 allows a landowner to deposit a map and statement with the Council, showing which rights of way he accepts are on his land and stating that he does not intend to dedicate any new rights of way. This must be in the "prescribed form". Since 1 October 2013, this means that it must be in the form prescribed by the Commons (Registration of Town or Village Greens) and Dedicated Highways (Landowner Statements and Declarations) (England) Regulations 2013 (the 2013 Regulations). The 2013 Regulations, including the prescribed form, can be found at <http://www.legislation.gov.uk/ukxi/2013/1774/made>.

The landowner must then lodge a declaration stating that no new rights of way have been dedicated (or showing which new rights of way they have dedicated if applicable), again this must be in the format provided for in the 2013 Regulations. The landowner and his successors in title can lodge a statutory declaration with the Council at least once every 20 years (prior to 1 October 2013, this had to be done at least once every 10 years), confirming that no new rights of way have been dedicated over the land since the date of the previous statutory declaration in order to maintain the protection offered by the deposit. It is important that statutory declarations are submitted as this creates and maintains the protection offered by section 31(6), so it is better to do declarations more frequently than required, rather than less frequently. A new declaration may also be necessary following a change of ownership of the land as the previous landowner's declaration is unlikely to constitute evidence of the current landowner's lack of intention or if there are changes to the rights of way network over the land, such as the diversion of an existing right of way or the dedication of a new public right of way.

Making section 31(6) declarations means that the onus in future is placed on users of the route to bring forward evidence of the landowner's intention to dedicate a route in support of a claim for a new right

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of way. In practice, this is likely to be difficult for users to do, and so provides strong protection against new claims.

In addition, under the new provisions, it is possible to submit a declaration which brings an end to a period of use for village green purposes at the same time as depositing a map and statement under section 31(6), thus protecting land from village green claims as well as highway claims (further information can be found in NFU Business Guide 450E, which can be downloaded from the NFU website or ordered from NFU CallFirst on 0370 845 8458).

A declaration is only effective where no public right of way exists at the time the declaration is made or could be established on the basis of user or other evidence. This means that, for example, a map and declaration will not prevent a right of way being established on the basis that there has been a 20 year period of use before the map was lodged with the local authority, or where there is historic documentary evidence showing that the route exists.

Local authorities are obliged to take certain steps to publicise the fact that a s.31(6) deposit has been lodged with them, this means that they will: -

- Publish a notice on their website;
- Notify individuals who have asked to be notified of such deposits; and
- Display a notice at the site. Where possible, this notice should be at an obvious point of entry to the land, in other circumstances it should be at a conspicuous location.

Local Authorities also have to maintain a register of such notices. The aim of this is to ensure that it is possible for members of the public to ascertain what land is covered by such a deposit. Some user groups will be looking for new deposits that have been submitted, and may try to ensure that any rights of way they believe have been established prior to the deposit being made are claimed.

Even if you have made a deposit under s.31(6), it may still be necessary to take some action to prevent members of the public using routes, such as putting up “no public right of way” signs or challenging those using the routes as it will not necessarily deter people from trespassing.

If a notice displayed at the site is torn down or defaced by a member of the public, that does not prevent the notice from being valid.

Points to remember:-

- The scale of the map must not be less than 6 inches to 1 mile (1:10,560). A good starting point is, therefore, to obtain a copy of a recent map of all of the land you want to include.
- Study the Definitive Map and Statement (held by the County Surveying Authority/Local Authority), and any later creation or modification orders, for recorded rights of way. If the route

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is shown on the Definitive Map that will be conclusive evidence that the route exists. If you disagree with the existence of a route marked on the definitive map there are procedures for applying for the Definitive Map to be modified, and you could indicate in the statement that this is the case (providing a new map and statement when the issue has been resolved).

- Mark the precise route of all rights of way shown on the Definitive Map, and any others that you know to exist on the map to be submitted. Accuracy is important. It may well be worth obtaining professional assistance (e.g. from a surveyor) to ensure that the routes are accurately marked on the map. Ensure that you accurately colour code routes to indicate their status (e.g. footpath or bridleway).
- Unofficial diversions and permissive paths should not be shown since their inclusion could then suggest that you did intend those routes to be rights of way. If you do mark permissive paths or unofficial diversions it is important to ensure that they are clearly marked as permissive paths so that there can be no suggestion that they were shown as rights of way.
- Do not assume that you will be informed when you need to submit a new declaration; keep a record of this yourself and ensure that a new declaration is submitted on time.
- Keep copies of maps, statements and declarations with the title deeds or Land or Charge Certificates for future reference.

Displaying signs

As well as bringing the right to use the path into question, signs stating that there is no public right of way over the route can help to show that the landowner did not intend to dedicate a right of way. Indeed, section 31(3) of the Highways Act 1980 specifically states that, in the absence of evidence to the contrary, a notice stating that there is no public right of way erected by the landowner would be sufficient evidence that the landowner did not intend to dedicate a right of way.

If notices erected by the landowner are torn down or defaced, section 31(5) of the Highways Act 1980 allows landowners to give notice to the appropriate council of the fact that a route is not a highway and they do not intend to dedicate it as a highway.

Section 31(4) of the Highways Act 1980 also gives Landlords the right to erect notices stating that there is no right of way over a route on land subject to a tenancy. This is useful for both Landlords and Tenants as a notice erected by the Tenant, unless on the instruction of the Landlord, may not provide evidence of the Landowner's intention.

Signs should be displayed at locations where they are likely to be seen by those using the right of way. Gates on the route would be one possible location, or posts or trees alongside the route are also possible locations for signs.

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Preventing access

As well as bringing the right to use the path into question, taking action to prevent access to land can help to show that the landowner did not intend to dedicate a right of way. Access could be prevented by, for example, locking gates or putting barriers across the entrance to a route. However, be careful not to obstruct existing rights of way, or other rights of access.

Challenging users

If the landowner (or his agent) challenges people using the route and makes it clear to them that there is no right of way this can help to show that the landowner did not intend to dedicate the route as a right of way. However, it could be risky to rely on this alone, particularly if the challenges are infrequent. This is because the landowner's intention needs to be communicated to the public at large. If a landowner turns back just a few users it could be suggested that the public generally would not have been aware of those challenges.

Permissive paths

In some cases, landowners may be happy to allow members of the public to use a route for the time being, but without creating legal rights, so that the route can be altered or closed in the future. One way of doing this is to allow use of the route as a permissive path. As use of a permissive path is dependent on the permission of the landowner, these paths can be closed or diverted to suit the landowner's needs, although such changes would need to be clearly communicated to the public.

Landowners should consider erecting signs stating that the route is open by permission, so that the public is aware that the route is a permissive path, rather than a right of way. Landowners are also free to impose conditions on the use of the route or to impose restrictions on the times that the route can be used (e.g. the route could be closed, and all gates locked, overnight).

As landowners would be inviting people onto their land to use the path there is a risk that landowners would owe a duty of care to the users of the path under the Occupiers Liability Acts. Landowners may, therefore, want to take legal advice about the implications of opening a permissive path. Landowners may also want to consider their insurance position in relation to permissive paths.

Further information on the duty of care owed by landowners to those visiting their land can be found in NFU Business Guide 451, which can be downloaded from www.nfuonline.com or ordered from NFU CallFirst on 0370 845 8458.

Keep records

In 20 years' time it may be difficult to remember how many times you challenged Mr and Mrs Smith as they walked along the route, or when you erected the sign indicating that there was no right of way. So, making a note of these events at the time they occur can be very useful.

You may also want to take dated photographs of signs erected on the route or locked gates on the route and keep receipts for any signs purchased, or work/materials associated with repairing damaged gates/fences etc. Although these items may seem insignificant, they could provide valuable evidence in the future.

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If any gates or fences are damaged by members of the public, in order to gain access to your land, you should consider reporting the damage to the police (as this could amount to criminal damage), and obtaining a crime number. Records of such reports could also help to show that fencing was damaged, and could provide an independent record of the dates on which incidents of damage were reported to the police.

DEFINITIVE MAP MODIFICATION ORDERS

This section describes the current procedure for dealing with a definitive map modification order. It is expected that there will be some changes to this procedure when the rights of way reform package is implemented; unfortunately the implementation of this package has been delayed due to Brexit and at the time of writing it was not known when the package would be implemented. Further information will be available on NFU Online once details are known.

The first step towards the route being added to the definitive map as a public right of way is usually for an individual or organisation to make an application to the local authority to have the route added to the Definitive Map.

Such applications have to be made in the correct format (application forms are available from the local authority), and copies of the evidence relied on has to be provided with the application. The evidence in these cases is usually in the form of statements from users of the path describing their use of the path.

Defects in the application can result in the application being invalid, so affected landowners may wish to take legal advice to ascertain whether there is any defect in the application which could invalidate it.

The applicant is also obliged to give notice to the owners and occupiers of the land crossed by the right of way that the application has been made. If the owner of the land cannot be identified it may be possible to do this by fixing the notice to conspicuous objects on the land. This notice is often the first a landowner will hear about the application. It is likely to be an official looking document, with little explanation of the procedure involved or what will happen next. (This is one of the areas which should be improved when the changes are implemented).

The applicant has to give a certificate to the Local Authority confirming that notice has been given to the required people. Again, failure to comply with this requirement or defects in the notice given may give grounds for landowners to challenge the application.

If notices have been fixed to your land when you believe you could easily have been identified by the applicant (e.g. if you are registered as the owner of the land at HM Land Registry) it may be possible to challenge the validity of the application. However, as there is no cut-off date for applications at present, in many instances this may result in a delay in the process, as a new application can be submitted, or the local authority may allow time for the defect to be rectified, rather than being a conclusion to the matter. If you wish to go down this route, you should consider taking independent advice regarding your circumstances. It is likely to be worth raising these sorts of issues at the earliest

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stage possible, to minimise the delays in dealing with matters and avoid unnecessary expense being incurred.

The Local Authority will then investigate the application and consult with certain other Local Authorities before deciding whether to make the Order adding the route to the definitive map. If the Local Authority decides to make the Order they must serve a copy on, amongst other people, the owners and occupiers of the affected land, and publish the Order in a local newspaper. The Order must also be displayed at various places, including Council Offices, and at both ends of the route in question. Again, this is likely to be an official looking document, but may be accompanied by a letter from the Local Authority providing further information.

If the Local Authority decides not to make the Order at this stage the applicant can appeal to the Secretary of State.

Notice of the Order should explain how objections to the Order can be made, the deadline for submitting an objection and how to see the evidence submitted in support of the application. It is important that any deadlines specified in the notice are complied with as failing to do so could result in the opportunity to object being lost. If you need more time to submit your objection, contact the local authority as soon as possible to request an extension to the deadline; it is worth obtaining this in writing in case there are any problems at a later date.

If any objections are made to the Order the Local Authority must pass the matter to the Secretary of State for him to determine the application. When this happens, the Secretary of State usually appoints an Inspector who holds either a public hearing or a public inquiry, and then provides a report including his recommendations to the Secretary of State. Further information on Public Inquiries and hearings can be found in NFU Business Guide 400 Rights of Way: Public Inquiries and Hearings.

The Secretary of State then decides whether to confirm the Order or not. If the Order is confirmed notice should be given to specified people (including the owners and occupiers of the land) and the route will be added to the Definitive Map. As discussed later in this document, further challenges in the High Court may be possible.

If the Order is unopposed the Local Authority can confirm the Order.

GROUNDS FOR OBJECTING

When reaching his conclusions, the Inspector will only be able to consider objections that are made on appropriate grounds; any other objections will have to be disregarded. The following paragraphs discuss some of the grounds that may be available in these cases. Each case needs to be considered on its own facts and it may be necessary to take independent advice and seek professional assistance in researching the case and preparing the objections.

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Procedural points

If applications are not made in the correct format or if the correct procedures are not followed this can invalidate an application. So, one area that can be investigated is whether the applicant has complied with the necessary procedures. For example, did the applicant serve the notice on the required people? Is the application on the correct form?

Checking the evidence submitted

It may be worth checking the evidence submitted to support the application. For example:-

- Are there inconsistencies in the evidence of the various users which could undermine their evidence?
- Is it possible for the route of the path to be that shown on the map accompanying the application (e.g. would the route shown on the application involve people walking through a barn or over a river at a point where there is no bridge)?
- Is there any evidence on the ground that the route has been used? If not, photographic evidence showing that the route shows no sign of use may assist in some cases.
- Were any of the users exercising a private right of access that has been granted to them, rather than a public right of way? (e.g. an easement to access their property?). Details of private rights of way may be shown on your title deeds/the land registry documents.
- Have you given permission to anyone to use the route? If so, this could be used to challenge their evidence that those individuals have used the route as of right.

This is not an exhaustive list of points that can be raised as the arguments available will vary from case to case depending on what evidence is available.

Individuals wishing to object to an Order may want to obtain assistance from an appropriate expert (perhaps a solicitor or a retired local authority rights of way officer) in order to assess the evidence presented by the applicant and gather evidence to counter it.

Gathering other evidence

What evidence do you have to support the fact that the required period of use has not been established or that you did not intend to dedicate a right of way? Points that could be considered include:-

- Have you lodged a map and statement with the local authority under section 31(6) of the Highways Act 1980? If so, this could help to show that you did not intend to dedicate the route as a right of way.
- Are there any signs on the route which indicate that there was no right of way or that use was by permission of the landowner? If so, those signs, together with details of when they were erected and who by could be used as evidence to help to defeat a claim for a right of way.

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- Are there any people who could give statements countering those presented by the users of the route? For example, have people who live near the route seen it being used?
- Has the landowner (or his agents) challenged users of the route? If so, evidence of that, including evidence from the users who were challenged, could assist in some cases.
- Was any damage done to fences/locked gates in order for the use claimed to have been made?
- Is there any other evidence to show that the landowner did not intend to dedicate the route as a right of way?
- Were there any events within the 20 year period which could have brought the right to use the route into question? If so, it may be possible to show that the application is based on the wrong 20 year period, in which case the user evidence may not cover the actual period that needs to be considered.

This is not intended to be an exhaustive list of things that could be considered as much will depend on the facts of each particular situation.

Much of the above evidence will probably be in the form of witness statements and photographic evidence. It may be useful to obtain professional assistance in preparing and presenting these documents from an experienced professional adviser. Further information about preparing evidence can be found in NFU Business Guide 400 Rights of Way: Public Inquiries and Hearings.

CHALLENGING THE DECISION

It is not possible to challenge an Order which has not yet been confirmed in court. However, it is possible to submit objections to that Order within the specified time limit, and in accordance with the relevant procedure. Duly made objections then have to be considered before the Order is confirmed.

It may be possible to challenge decisions not to make or confirm an Order in the High Court through Judicial Review proceedings. The grounds for bringing a Judicial Review claim are limited, and the time limits for submitting such a claim are tight (proceedings must generally be issued within 3 months of the date of the decision), so it is important to act promptly in these situations. For further information on judicial review proceedings contact NFU CallFirst on 0370 845 8458.

Confirmed Definitive Map Modification Orders can only be challenged in the High Court under Paragraph 12 of Schedule 15 to the Wildlife and Countryside Act 1981; they cannot be challenged through Judicial Review.

Paragraph 12(1) of Schedule 15 to the Wildlife and Countryside Act 1981 allows any person who is aggrieved by an Order which has taken effect to challenge the validity of the Order on the grounds that it is not within the powers of the Local Authority under section 53 of the Wildlife and Countryside Act 1981 (i.e. the provisions governing modification orders on the discovery of new evidence). Applications

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to the High Court under these provisions must be made within 42 days of the date of the publication of the notice confirming the Order. So, it is vital to act promptly in these situations.

Paragraph 12(2) of Schedule 15 to the Wildlife and Countryside Act 1981 gives the High Court the power to quash the Order, or any provision contained in the Order, either generally or in so far as it affects the interests of the person who made the application to the Court if it is satisfied that:-

- the interests of the applicant have been substantially prejudiced by the failure to comply with the relevant requirements; or
- the order is not within the scope of the relevant powers.

Individuals considering challenging a decision in the High Court should consider taking independent legal advice regarding their situation. It may also be necessary to have legal representation for the court hearing in these cases. Due to the tight time limits for bringing such challenges it will be important to act promptly in these situations.

WHAT HAPPENS AFTER THE ORDER IS CONFIRMED?

The route should be added to the definitive map. The route should be regarded as having been dedicated subject to any obstructions (e.g. stiles and gates) that are already present. It is important that these are shown when the route is added to the Definitive Map as this will be evidence that those “obstructions” are lawful. If you have stiles and gates on the route already it is, therefore, important to ensure that these are recorded. It is also worth checking the other details recorded (e.g. in some cases a width could be recorded) as it is likely to be difficult to challenge things at a later date.

As the route is likely to be in use, or to have been in use recently, minimal work should be needed on the ground to ensure that the route is suitable to be used. The Local Authority will discuss what work is necessary, and should explain who will be responsible for carrying out that work.

CONCLUSIONS

The public can acquire rights of way through a period of long use. Although it can be tempting to ignore the fact that members of the public are walking across your land, particularly if they are not causing any problems, this can be a dangerous tactic in the long run. Once the required period of use has been established it can be difficult or impossible to prevent the rights being acquired. For that reason, it is best to take action as soon as possible.

If you do receive notice of an application to add a route to the Definitive Map and statement it is important that you respond promptly and in an appropriate manner. If you, or others, object to the proposal to add the route to the Definitive Map it is likely that a public inquiry or hearing will have to be held; NFU Business Guide 400 Rights of Way: Public Inquiries and Hearings contains further information on what happens at public inquiries and hearings, and preparation for inquiries and hearings.

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This document cannot take account of the individual facts and circumstances of every situation, and is not a substitute for independent legal advice based on the facts of your case. NFU members can obtain free initial legal and professional advice from NFU CallFirst on 0370 855 8458.

All of the NFU Business Guides referred to in this document can be downloaded from the NFU website or ordered from CallFirst on 0370 855 8458.

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