



# **Members' Guide to Rights of Way, Common Land and Village Green Law**

## **Introduction**

The following guide has been produced to assist Members in understanding the context in which they may take decisions at Planning and Rights of Way Committee.

## **Purpose**

The purpose of this document is to provide a guide to members of the County Council on the law relating to Rights of Way. Every effort will be made to ensure that the information provided in this Guide is current. The date on the front page indicates when the document was last updated.

NB. Please bring this booklet with you to each Planning and Rights of Way Committee meeting

## **Legal Services**

**January 2024**

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# Introduction and Background

## 1. The County Council's Rights of Way Powers and Duties

- 1.1** The County Council is the Highway Authority responsible for legally recording, protecting and maintaining public rights of way in West Sussex. The County Council is also the registration authority for Common Land and Town or Village Greens.
- 1.2** Some of the County Council's powers and duties, including those relating to public rights of way and common land/town or village greens, are non-executive functions and so may not be performed by the Cabinet or by Cabinet Members. In order to undertake these powers and duties the County Council has delegated them to non-Executive committees and under its terms of reference, the Planning and Rights of Way Committee exercises the powers and duties of the County Council, under the associated legislation, in relation to:-
- The diversion and extinguishment of public footpaths, bridleways, byways open to all traffic and restricted byways and including the creation of footpaths, bridleways and restricted byways;
    - Applications relating to Commons and Town or Village Greens;
    - The relevant provisions of the Countryside and Rights of Way Act 2000 and Wildlife and Countryside Act 1981;
    - Reviewing and adjusting delegations to officers within the functions delegated to the Committee.
- 1.3** The purpose of this guidance is to set out the law relating to the more common types of rights of way and village green/common land matters determined by the Planning and Rights of Way Committee and officers under delegated powers and to give general guidance on the application of the law. Members are therefore asked to consult this booklet when considering Committee agenda items which relate to rights of way and village green/common land and to bring it with them to each Committee. This guide should be read in conjunction with the Protocol on Public Participation at Planning and Rights of Way Committee contained in the West Sussex County Council Constitution (Part 5, Section 3). Where necessary, more detailed consideration of the law will be provided by officers at Committee and/or in the Committee reports themselves.

## 2. The Definitive Map and Statement of Public Rights of Way and Rights of Way

**2.1** The Definitive Map consists of a series of ordnance survey based maps for the whole of the county showing Footpaths, Bridleways, Byways Open to All Traffic and Restricted Byways. The written statement accompanying the Definitive Map includes a description of each way and may also contain details of width and features such as gates or bridges.

**2.2** The duty to prepare a Definitive Map and Statement (DMS) and to keep it under continuous review rests with the County Council as the 'surveying authority' (Section 53 Wildlife and Countryside Act 1981). When a way is shown in the DMS, that is conclusive evidence of the existence of that way as at a specified date, known as the "relevant date". If a way is not shown on the DMS then it may still be a public right of way, though its status may have to be proved. Similarly, the fact that a way is shown on the map, as e.g. a footpath, does not preclude the possibility that there exists a higher public right e.g. a bridleway.

### 2.3 Definitions

The terms 'footpath', 'bridleway' etc, have meanings defined by common law and statute as follows:-

Term	Definition
(a) Footpath (S. 329 (1) Highways Act 1980)	is a highway over which the public have a right of way on foot only, but which is not a pavement or footway at the side of a public road.
(b) Bridleway (S.329 (1) Highways Act 1980 and S.66 Wildlife and Countryside Act 1981) (S.30 Countryside Act 1968)	is a highway over which the public have a right of way on foot and on horseback or leading a horse, and over which there may be a right to drive animals of any description.  If a way is classified as a bridleway then since 1968 it may also be used by cyclists, but in exercising that right cyclists shall give way to pedestrians and persons on horseback.
(c) Byway Open to All Traffic (BOAT) (S.66 Wildlife and Countryside Act 1981)	is a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purposes for which footpaths and bridleways are used.
(d) Restricted Byway (S.47 Countryside and Rights of Way Act 2000)	is a highway over which the public have a right of way on foot, on horseback or leading a horse, with or without a right to drive animals and in a vehicle other than a mechanically propelled vehicle, thereby giving

Term	Definition
	<p>a right of way for pedal cyclists and drivers of horse drawn vehicles.</p> <p>The class of highway known as 'Roads Used as Public Paths' ceased to exist on 2 May 2006, pursuant to S.47 of the Countryside and Rights of Way Act 2000 and are reclassified as "Restricted Byway".</p>
(e) Permissive Paths	<p>These are routes which the landowner has consented for use by the public. Consent can be given by way of a formal agreement with the County Council, allowing use initially for a specified period (usually a minimum of between 5 and 10 years) An owner may also permit by agreement the exercise of additional rights (e.g. to allow cycling on a public footpath). Alternatively an owner may simply allow the public to use a route on his land without any formal record and this consent can be withdrawn at any time.</p> <p>The County Council as Highway Authority could be responsible for the maintenance of a permissive path only where there is a formal agreement in place.</p>
(f) Cycle Tracks (S.3 Cycle Tracks Act 1984)	<p>these are routes for use by persons on foot and pedal cycle and are created by Orders to convert an existing public footpath to a route for use by both pedestrians and cyclists, under the Cycle Tracks Act 1984. Works may include physical measures to separate the two types of use.</p>

### **3. The Crime and Disorder Act 1998, the Human Rights Act 1998 and the Equality Act 2010**

- 3.1** Reports seeking a decision are required to address the 1998 Acts, as the implications (if any) of the Acts have to be considered.
- 3.2** On crime and disorder, the Sussex Police Crime Prevention Adviser's views are sought but because some processes (particularly the consideration of Definitive Map Modification Order (DMMO) proposals) involve the application of strict legal tests, it is not always possible to give substantial weight to the Act's implications.
- 3.3** The Human Rights Act makes it unlawful for a public authority to act in a way which is incompatible with a convention right. Some rights incorporated under the Act are absolute rights, for example the right to life and the right not to be treated in a degrading manner. Other rights are qualified rights, for example the right to respect for private and family life. This means a public authority may interfere with those rights in certain circumstances.
- 3.4** Generally speaking the rights which the Planning and Rights of Way Committee should consider are Article 8 and Article 1 Protocol 1 before making decisions, for example, to divert or extinguish public paths, to add new rights of way to the Definitive Map or to register village greens.

#### **Article 8 Right to Respect for Private and Family Life states:**

- Everyone has the right to respect for their private and family life, their home and their correspondence;
- There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

#### **Article 1, Protocol 1 Protection of Property states:**

- Every natural or legal person is entitled to the peaceful enjoyment of their possessions. No one shall be deprived of their possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law;
  - The preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.
- 3.5** Any interference with an individual's Human Rights must be proportionate. The Committee will usually be considering the protection of the rights and freedoms of others as against those of a landowner. A similar consideration of the public interest will be when there is potential interference with a person's property. Again, the interference must be proportionate.

- 3.6** The focus for Article 6 (Right to a Fair Trial) is the determination of an individual's civil rights and obligations. In the determination of these rights an individual is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Article 6 has been subject to a great deal of case law. For rights of way matters, it has been decided that the decision making process as a whole, which includes the right to review by the High Court, complies with Article 6 (R v Secretary of State for the Environment, Transport and the Regions ex parte Alconbury Developments Ltd and others [2001] UKHL 23).
- 3.7** The Equality Act bans unfair treatment and seeks equal opportunities in the workplace and in wider society. It also introduced a Public Sector Equality Duty. The Duty requires the County Council to have due regard in all decision making to the need to:
- (a) eliminate discrimination, harassment, victimisation or other prohibited conduct;
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and
  - (c) foster good relations between those who share a relevant characteristic and those that do not share it.

The relevant protected characteristics are age, disability, gender reassignment, marriage/civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

# Changing the Rights of Way Network

## 4. Changing the Public Path Network – Public Path Orders (PPOs): Extinguishment and Diversion Orders, Creation Orders and Agreements – Highways Act 1980

### 4.1 Section 118 Highways Act 1980 - Extinguishment of Footpaths, Bridleways and Restricted Byways

**4.1.1** The County Council may approve the making of an Order under Section 118 of the Highways Act 1980 to extinguish a footpath, bridleway or restricted byway only if satisfied that the legal test for making an Order has been met i.e. that a footpath is not needed for public use, for example there is another public footpath close by that adequately serves the public. Any temporary circumstances preventing or diminishing the use of the way have to be disregarded.

**4.1.2** When an Order is made, it does not come into effect until it is confirmed. The legal tests for making and confirming an Order are different. It is important to first determine whether the making test is satisfied at which time there is discretion whether to make the Order and then move to consideration of the confirmation test. It is accepted best practice for both the making and confirmation test to be considered before deciding to make an Order as it reduces the risk of an authority deciding to abandon an Order in the light of objections raised following its advertisement.

**4.1.3** If there are objections to an Order which are not withdrawn, if the County Council decides to proceed with it, then it can only be determined by an Inspector appointed by the Secretary of State, who may hold a public local inquiry before reaching a decision. If there are no objections, then the Order may be confirmed by the County Council as the Order making authority.

**4.1.4** Under the test for confirmation, an Extinguishment Order shall not be confirmed until the confirming authority is satisfied that it is expedient so to do. The confirming authority must have regard to the extent (if any) to which it appears to them that the way would, apart from the Order, be likely to be used by the public, having regard to the effect which the extinguishment of the right of way would have as respects land served by the way, and taking into account the provisions as to compensation. Again, any temporary circumstances preventing or diminishing the use of the way have to be disregarded. The confirming authority must also have regard to any material provision of a rights-of-way improvement plan.

**4.1.5** Confirmation may not necessarily be ruled out if the way was or was going to be used to something more than a minimal extent. Therefore, an Order can be confirmed if, despite the fact that a way was likely to be used, it was not needed. For example there may be an equally convenient way nearby.



**4.1.6** The test for confirmation, however, places use as the prime consideration. The part of the test which refers to the effect of the extinguishment on land served is directed only to the consideration of adverse effects from the extinguishment on nearby landowners who derive a benefit of one sort or another from the use of the way.

## **4.2 Section 119 Highways Act - Diversion of Footpaths, Bridleways or Restricted Byways**

**4.2.1** The County Council may approve the making of an Order to divert under Section 119 of the 1980 Act a footpath, bridleway or restricted byway only if satisfied that the legal test for making an Order has been met i.e. that :-

- (a) in the interests of the owner, lessee or occupier of land crossed by the way; or
- (b) in the interests of the public;

it is expedient that the line of the path or way, or part of it, should be diverted.

**4.2.2** A diversion is achieved by an Order which creates a new length of footpath/bridleway/restricted byway and extinguishes the existing way. The diverted route can be placed on land of the same or another owner, lessee or occupier and part, but not all, of the diverted route may be along an existing right of way. In such case the plan will clearly distinguish between the existing way and the diverted route to be created by the Order.

**4.2.3** There are other considerations to be taken into account within Section 119 of the 1980 Act. Section 119 (2) of the 1980 Act prevents the diversion of the end of the way if it is not on a highway. If the way does end on a highway, it may be diverted only to a point which is on the same highway or a connected highway and which is substantially as convenient to the public. The test of 'substantially as convenient' would mean 'as good as' or as close to that as would make no difference.

**4.2.4** When an Order is made, it does not come into effect until it is confirmed. The legal tests for making and confirming an Order are different. The County Council must first determine whether the making test is satisfied at which time there is discretion whether to make the Order and then move to consideration of the confirmation test (paragraph 4.1.2 refers). Before confirming an Order the confirming authority must also have regard to any material provision of a rights-of-way improvement plan.

**4.2.5** Under the test for confirmation as provided by Section 119 (6) of the 1980 Act, a Diversion Order shall not be confirmed until the confirming authority is satisfied that the diversion meets the making test mentioned in paragraph 4.2.1 above and further that the way will not be substantially less convenient to the public in consequence of the diversion and that it is **expedient** to confirm the Order having regard:-

- (a) to the effect which the diversion would have on public enjoyment of the way as a whole (for example, consideration could be given to any

enhanced views, amenity value and quality of the experience to be enjoyed as a result of the diverted route);

- (b) to the effect which the coming into operation of the Order would have as respects other land served by the existing public right of way (for example, if the existing route provided the only access to a village green or common); and
- (c) to the effect which any new public right of way created by the Order would have as respects the land over which the right is so created and any land held with it, (for example, if the diversion would cause detriment to the owner, lessee or occupier of the land crossed by the existing public right of way or the land crossed by the diverted route).

**4.2.6** It has been confirmed by the Courts in *The Open Spaces Society v Secretary of State Environment Food and Rural Affairs 2021* that when considering the expediency test for confirmation, the decision-maker (County Council in cases of unopposed orders) may have regard to any other relevant matter including, if appropriate, the interests of the owner over which the path currently passes, or the wider public interest.

**4.2.7** For the purposes of (b) and (c) account has to be taken of the provisions as to compensation and expenses and the County Council can enter into an agreement with an applicant who is the owner, lessee or occupier of land crossed by the way that he or she will defray or make a specified contribution to any compensation which may become payable and any expenses incurred in bringing the diverted route into fit condition for use by the public. The County Council may also recharge its reasonable costs incurred in processing path orders made as a result of owners' applications.

**4.2.8** In reaching a conclusion with regard to a recommendation to make an Order on a diversion request, a number of wide ranging considerations are taken into account including:-

- Physical features which include distance and direction of travel, path widths, gradients, levels and condition, convenience and future maintenance of surfaces and structures;
- Assessment of the public's enjoyment of the path, which requires subjective judgements to be made about views, amenity value and quality of the experience offered to users of the path;
- Generally, a proposed route would need to compare reasonably favourably with the length of path proposed to be stopped up under the application in terms of distance, other physical characteristics and amenity value.
- The County Council should take into account its responsibilities under the Equality Act 2010. Open access would generally be expected on the new route – any gate, stile or barrier that may be required by the landowner would need to be the subject of a separate application for consent to the County Council, upon confirmation of a Diversion Order.

- 4.2.9** The considerations in Section 119 (6) of the 1980 Act are not straightforward. They require contemplation of the possibility that a proposed diversion would be as easy to use as an existing public right of way; that is to say as convenient, but would not be as enjoyable to the public, perhaps because the route was less scenic. In such a case, the confirming authority must balance the interests of the applicant against those of the public to determine whether it is expedient to make the Diversion Order. Conversely, a proposed diversion might give greater public enjoyment but be less accessible or longer than the existing way and so be considered to be substantially less convenient.
- 4.2.10** The right of way created by a Diversion Order pursuant to the Highways Act 1980 may be unconditional or subject to such conditions or limitations as are specified in the Order, e.g. the right to keep a gate across the way. The Order can allow such conditions or limitations even if none existed over the original public right of way.
- 4.2.11** If there are objections to a Diversion Order which are not withdrawn, if the County Council decides to proceed with it, then the Order can only be determined by an Inspector appointed by the Secretary of State, who may hold a public local inquiry before reaching a decision. If there are no objections the Order may be confirmed by the County Council as Order making authority.

#### **4.3 Section 118A and 119A Highways Act 1980 - Rail Crossing Extinguishment and Diversion Orders**

- 4.3.1** The Highways Act 1980 Section 118A (extinguishment) and Section 119A (diversion) makes provision for the diversion and extinguishment of a footpath, bridleway or restricted byway which crosses a railway, otherwise than by a tunnel or bridge.
- 4.3.2** The making test, for both extinguishment and diversion under these provisions provides that "where it appears to a Council expedient in the interests of the safety of members of the public using it or likely to use it that a footpath, bridleway or restricted byway in their area which crosses a railway, other than by tunnel or bridge, should be diverted/stopped up".
- 4.3.3** Before confirming a Rail Crossing Extinguishment or Diversion Order, the County Council (or in the cases of opposed orders, submitted to the Secretary of State) must ensure that the test for confirmation are met. This is that it is expedient so to do having regard to all the particular circumstances, and in particular to :-
- (i) Whether it is reasonably practicable to make the crossing safe for use by the public, and
  - (ii) What arrangements have been made for ensuring that, if the order is confirmed, any appropriate barriers and signs are erected and maintained

#### **4.4 Section 118B and 119B Highways Act - Extinguishment or Diversion for school security purposes**

**4.4.1** The Highways Act 1980 Sections 118B (extinguishment) and 119B (diversion) makes provision for special extinguishment or special diversion orders for public footpaths, bridleways, restricted byways and byways open to all traffic where they cross land occupied for the purposes of a school.

**4.4.2** The making test provides that, where the County Council considers it expedient, for the purposes of protecting the pupils or staff of a school from:-

- (i) Violence or threat of violence
- (ii) Harassment
- (iii) Alarm or distress arising from unlawful activity
- (iv) Or any other risk to their health and safety arising from such activity

it can approve the making of a Special Extinguishment or Diversion Order to either stop up or divert the way.

**4.4.3** The County Council must first determine whether the making test is satisfied at which time there is discretion whether to make the Order and then move to consideration of the confirmation test. Before making a Special Extinguishment or Diversion Order the County Council must have consulted the police authority for the area in which the way is situated.

**4.4.4** Before confirming a Special Diversion Order, the County Council (or the Secretary of State if the Order is opposed and submitted for determination) must have regard to:-

- (a) Any other measures that have or could be taken for improving or maintaining the security of the school;
- (b) Whether it is likely that the coming into operation of the Order will result in substantial improvement to that security;
- (c) The effect the coming into effect of the Order will have as respects land served by the existing rights of way;
- (d) The effect any new right of way created by the Order would have as respects the land over which the right is to be created and any land held with it.

**4.4.5** Before confirming a Special Extinguishment Order, the County Council (or the Secretary of State if the Order is opposed and submitted for determination) must have regard to:-

- (a) Any other measures that have or could be taken for improving or maintaining the security of the school;
- (b) Whether it is likely that the coming into operation of the Order will result in a substantial improvement in that security;

- (c) The availability of a reasonably convenient alternative route or, if no reasonably convenient alternative route is available, whether it could be reasonably practicable to divert the highway under S.119 B of the 1980 Act rather than stopping it up and;
- (d) The effect the extinguishment of the public right of way would have as respects land served by the highway, account being taken of the provisions contained in S.28 as applied by S.121 (2) of the 1980 Act.

#### **4.5 Sections 118ZA and 119ZA Highways Act 1980 – The “Right to Apply” Provisions – Extinguishment and Diversion Orders<sup>1</sup>**

**4.5.1** The aim of the “Right to Apply” provisions is to provide owners, lessees or occupiers of land with a right to apply to divert or extinguish footpaths and bridleways which cross any land of a prescribed description. This is an extension of the current provisions, which only relate to land used for agriculture, forestry or the breeding and keeping of horses. The provisions were originally introduced by the Countryside and Rights of Way Act 2000 and recently amended by the Deregulation Act 2015, and **are yet to be brought into force**. The rights of way clauses are part of a wider de-regulatory package of public rights of way reforms, all aspects of which will be implemented through secondary legislation (Regulations) and guidance in due course.

**4.5.2** Once implemented, the Right to Apply will enable owners, lessees or occupiers of land, to apply to divert or extinguish footpaths and bridleways which cross any land of a prescribed description. The legal tests to satisfy are set out in Sections 118 and 119 Highways Act 1980 and are already detailed in paragraphs 4.1 and 4.2 above.

The Government has committed to issue guidance, to be known as Presumption Guidance, which will act as a presumption to divert or extinguish any public right of way that pass through the gardens of family homes, working farmyards or commercial premises, where privacy, safety or security are a problem. The Presumption Guidance will be issued for surveying authorities to follow in considering applications made under the “Right to apply” provisions.

**4.5.3** Applications made under the “Right to Apply” provisions will be subject to a prescribed timeframe for determination, which is four months from receipt of an application to determine whether or not to make an Order to which the application relates. Where a determination has not been made within four months, the applicant has a right of appeal to the Secretary of State who may, by direction, require the County Council to make a determination on the application within a prescribed time frame.

**4.5.4** Orders made under Section 118ZA and Section 119ZA will be subject to the same statutory tests as set out in Section 118 and 119 Highways Act 1980.

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<sup>1</sup> These provisions are not yet in force.

**4.5.5** Applicants for orders under the “Right to Apply” provisions will have the right of appeal to the Secretary of State where the County Council:

- (i) refuse to make an order on the application
- (ii) refuse to confirm as an unopposed order an order made on the application
- (iii) refuse to submit to the Secretary of State an opposed order

**4.6 Statutory Provisions in relation to PPOs (Extinguishment and Diversion Orders)**

**4.6.1** Before any Extinguishment, Diversion, Special Extinguishment or Diversion or Rail Crossing Extinguishment or Diversion Order can be made and notice of its making published, there must be consultation with the relevant District or Borough Council. District and Borough Councils, as well as the South Downs National Park have concurrent powers to make Orders. They must consult, or as the case may be, be consulted by, the relevant local authority making the Order. If a diversion or extinguishment is proposed in a National Park, there must also be consultation with Natural England.

**4.6.2** There is no statutory requirement for users, landowners or even local parish/town councils to be consulted for Extinguishment and Diversion Orders, however, in practice, the County Council widely consults in order to get a general view of the local Councils, relevant amenity groups and users. The local member is also informed.

**4.6.3** Statutory Undertakers are also consulted as an Order cannot be confirmed if its effect would be to extinguish a right of way over land, under, over, along or across which there is any apparatus belonging to or used by Statutory Undertakers for the purpose of their undertaking, unless the undertakers have consented to the confirmation of the Order. Consent may be given subject to there being included in the Order such provisions for the protection of the undertakers as they reasonably require, but the consent cannot be unreasonably withheld. Questions of reasonableness shall be determined by the appropriate Secretary of State.

**4.6.4** For a way that lies partly within and partly outside the County, the County Council may make a Diversion or Extinguishment Order, Special Diversion or Extinguishment Order for the whole route, provided the consent of every authority for the land crossed by the way outside the County has been obtained.

**4.6.5** Subject to certain provisions, compensation is payable if it is shown that the value of a person’s interest in land is depreciated, or that a person has suffered damage by being disturbed in his enjoyment of land in consequence of a Diversion or Extinguishment Order. Compensation is equal to the amount of depreciation or damage. The person making the application to extinguish or divert is required to be responsible for any compensation that may be payable.

**4.6.6** the diversion or extinguishment of Byways Open to All Traffic is processed by way of an application to the Magistrates’ Court under Section 116 of the

Highways Act 1980. The reason for this is because S.118 and 119 of the 1980 Act, which allow for the making of Extinguishment and Diversion Orders do not extend to Byways Open to All Traffic, which have vehicular rights.

#### **4.7 Creation Agreements - Highways Act 1980 Section 25**

- 4.7.1** The County Council may enter into an agreement to dedicate a new footpath or bridleway or restricted byway to the public with any person consenting to the proposal and having the necessary capacity to dedicate.
- 4.7.2** The relevant District or Borough Council is required to be consulted and before authorising an agreement, due regard to the needs of agriculture and forestry has to be given. A proposal to dedicate is not subject to public objection. An agreement may specify appropriate and reasonable conditions or limitations.
- 4.7.3** S.118 of the Highways Act 1980 relating to Extinguishment Orders, precludes the confirming authority from taking account of creation agreements, while allowing concurrent Creation or Diversion Orders to be considered. The inability of the public to object to creation agreements provides an important policy reason why they should not be taken into account when considering an Extinguishment Order.

#### **4.8 Permissive Path Agreements**

- 4.8.1** From time to time an owner who is not prepared to commit to a permanent path agreement under Section 25, is willing to allow public use as a footpath, bridleway or restricted byway, or for example to permit horse riding and/or cycling on an existing footpath. The County Council may enter into an agreement which would usually last for a minimum period of 5-10 years to permit such use. There is no requirement to consult and it is not subject to public objection. The terms of any agreement are those agreed between an owner and the County Council.

#### **4.9 Creation Orders - Highways Act 1980 Section 26**

- 4.9.1** Section 26 of the 1980 Act permits a highway authority to make an Order to create a new footpath, bridleway or restricted byway where it appears to the authority that there is a need but the owner of the land is unwilling to dedicate by creation agreement, although this is not a pre-requisite to a creation Order. The relevant District or Borough Council is required to be consulted,. Such Orders are open to objection and compensation may be payable to the owner upon confirmation of such an Order.
- 4.9.2** An Order can be made subject to the County Council being satisfied as to:
- The extent to which the path would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of the persons resident in the area; and
  - The effect which the creation of the path would have on the rights of persons interested in the land, account being taken of the provisions as to compensation contained in Section 28 of the Highways Act 1980;

- The needs of agriculture, forestry and the desirability of conserving flora, fauna and geological and physiological features (section 29 Highways Act 1980)

**4.9.3** Before confirming an Order the confirming authority must also have regard to any material provision of a rights-of-way improvement plan.

**4.9.4** The County Council may wish to impose limitations or conditions on the right of way to be created and these must be specified in the Order.

## **4.10 Town and Country Planning Act 1990**

### **The South Downs National Park**

**4.10.1** The South Downs National Park was formally designated in March 2010 and became fully operational on 1 April 2011. It stretches from Winchester in Hampshire to Eastbourne in East Sussex and is the fourth largest National Park in England and Wales, covering some 1,600 square kilometres. A substantial part of West Sussex is incorporated into the boundary.

**4.10.2** The South Downs National Park Authority (SDNPA) is the Statutory Planning Authority for the South Downs National Park (SDNP) area. The District/Borough Councils are the Local Planning authorities that consider planning applications under the Town and Country Planning Act 1990 for areas within West Sussex but outside the SDNP boundary. The SDNPA is also the Local Planning Authority for minerals and waste development for those areas within the South Downs National Park area. The County Council remains the Local Planning Authority for minerals and waste development for areas outside the SDNP Park within West Sussex.

### **Section 257 and 261 - Extinguishment or Diversion of footpaths, bridleways or restricted byways to enable development to take place**

**4.10.3** The granting of planning permission for development of land over which there is a public right of way does not itself constitute authority for interference with the public right of way or for its extinguishment or diversion. Powers are granted to Local Planning Authorities to make Orders under the Town and Country Planning Act to stop up or divert public rights of way affected by development in cases where an application for planning permission has been made and or granted.

**4.10.4** Where a local planning authority grants planning permission for a development which would affect a public footpath, bridleway or restricted byway, it may then make an Order under Section 257 of the 1990 Act to stop up or divert the way, if it is satisfied that it is necessary to do so in order to enable that development to be carried out. The County Council would be consulted on the proposals where it is not the local planning authority.

**4.10.5** In order for the power to be exercisable, the relevant Local Planning Authority must be satisfied that it is necessary to stop up or divert in order to enable development to be carried out. It is not sufficient that the making of the Order would facilitate the carrying out of development, it must be necessary in that without the Order development could not be carried out.



When considering whether to make or confirm an Order the Local Planning Authority should not question the merits of planning permission but neither should an Order be made solely on the grounds that planning permission has been granted. That planning permission has been granted does not mean that the way will be diverted or stopped up.

- 4.10.6** The disadvantages or loss likely to arise as a result of the stopping up or diversion of the way to members of the public generally or to persons whose properties adjoin or are near the existing way should be weighed against the advantages of the proposed Order.
- 4.10.7** An Order may, if the Local Planning Authority are satisfied that it should do so, provide for the following:-
- (a) the creation of an alternative highway for use as a replacement, or for the improvement of an existing highway for such use;
  - (b) the authorisation or requirement of works to be carried out in relation to any footpath, bridleway or restricted byway which is being stopped up, diverted, created or improved under the Order;
  - (c) the preservation of any rights of statutory undertakers in respect of any apparatus of theirs which immediately before the date of the Order is under, in, over, along or across any such footpath, bridleway or restricted byway;
  - (d) the requirement of any person named in the Order to pay, or make contributions in respect of the cost of carrying out such works.
- 4.10.8** In West Sussex, either the County Council or the SDNPA are responsible for minerals and waste planning and the relevant Local Planning Authorities for planning applications of this kind. An Order to close or divert a way permanently as a result of mining or quarrying developments is made under Section 257 of the Town and Country Planning Act 1990. However, an Order may be made to stop up a way temporarily for mineral workings, as provided by Section 261 of the 1990 Act.
- 4.10.9** If the County Council is satisfied that an Order under the 1990 Act is required for the purpose of enabling minerals to be worked by surface working and that the footpath, bridleway or restricted byway can be restored, after the minerals have been worked, to a condition not substantially less convenient to the public, then, pursuant to S.261 of the 1990 Act, an Order to stop up or divert the way for a temporary (rather than permanent) period can be authorised, which can include a requirement for its restoration accordingly.
- 4.10.10** An Order made pursuant to S.261 of the 1990 Act may contain such provisions as appear expedient to the Local Planning Authority for the:-
- (a) imposition on any person with a liability with respect to the repair of the original way, a corresponding liability in respect of any way provided under the Order;

- (b) stopping up of any way provided by the Order at the end of the temporary period allowed and for the reconstruction and maintenance of the original way;
- (c) requirement for the payment of a capital sum in respect of any estimated amount of any costs or expenditure that can be required under the Order.

**4.10.11** When an Order under the 1990 Act is made, it does not come into effect until it is confirmed and the required certificate has been issued. The test for the confirmation of the Order is the same as that for making the Order. If objections are received when an Order is published, then it can only be determined by an Inspector appointed by the Secretary of State, who may hold a public local inquiry before reaching a decision. If there are no objections then the Order may be confirmed as an unopposed Order by the Order Making Authority.

## **5. Definitive Map Modification Orders**

### **5.1 Definitive map statement**

**5.1.1** The County Council is under a duty to keep the Definitive Map and Statement (DMS) under continuous review and to make modifications to the DMS by way of orders as events of the relevant kind occur. These orders are made under the Wildlife and Countryside Act 1981 (WCA 1981) and are known as "Definitive Map Modification Orders (DMMOs)".

There are two types of order:-

- Legal Event Order
- Evidential Event Order

### **5.2 Legal Event Orders**

**5.2.1** These Orders are used to effect a change in the DMS following changes to the rights of way network, including dedications, creation agreements, creation orders, diversion orders, extinguishment orders, Magistrates' Court orders and side road orders which either impact on the location and/or particulars of an existing public right of way or create a new one. The Legal Event Order reflects the changes that have taken effect since the relevant date of the preceding DMS (paragraph 2.3 above refers).

**5.2.2** A Legal Event Order takes effect immediately and no provision is made for an objection to be made to the making of the Order, since it is purely administrative. Therefore, they do not need to be advertised, as they merely record the effect of original orders (which would have had publicity and been open to objections at the time) and agreements.

### **5.3 Evidential Event Orders**

#### **The Application -**

**5.3.1** Any person can apply to the County Council as surveying authority, pursuant to Section 53 (5) of the 1981 Act, for a DMMO. Such applications are made on the basis that an evidential event has occurred. It is also possible for the County Council to initiate the DMMO process itself following the discovery of evidence.

**5.3.2** DMMO applications either come before the Committee for a decision, or are dealt with by officers under delegated powers (Section 9 refers).

#### **The Evidential Events -**

### **5.4 Event 1: Section 53 (3) (b) – The expiration of a period of use**

**5.4.1** This event relates to the establishment of new or increased rights of way through user – either by virtue of the operation of the Highways Act 1980 (s31) or by the inference of dedication at Common Law.

## **5.5 Event 2: Section 53 (3) (c) (i) – The discovery of evidence of an unrecorded right of way**

**5.5.1** The discovery, by the County Council (often following an application by a member of the public) of evidence which shows that a right of way which is not shown in the DMS subsists or is reasonably alleged to subsist over land.

**5.5.2** There are currently two tests to consider (although when the Deregulation Act 2015 provisions are brought into force, Test B will no longer be in use):

- **Test (A)** - Whether a public right of way subsists (the standard of proof for this is the balance of probabilities)
- **Test (B)** - Whether a public right way has been reasonably alleged to subsist (the standard of proof is that a reasonable person, considering all relevant evidence available could **reasonably allege** a public right of way to subsist).

**5.5.3** Where an applicant for a DMMO produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, but there is a conflict of apparently credible evidence from the owner in relation to one or other issues arising under Section 31 of the 1980 Act; then the allegation that the right of way has been reasonably alleged to subsist is used (Test B). That is unless there is documentary evidence produced which must inevitably defeat the claim. Either, for example, by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such character that the use of it by the public could not give rise at common law to any presumption of dedication.

## **5.6 Event 3: Section 53 (3) (c) (ii) – the upgrading or downgrading of a right of way**

**5.6.1** An application would be made for a way to be recorded as having different status than already recorded (for example, from footpath to bridleway or restricted byway). This requires the discovery of new evidence not previously considered when the DMS was drawn up, which when considered with the other evidence, justifies the modification.

## **5.7 Event 4: Section 53 (3) (c) (iii) – the deletion of a right of way**

**5.7.1** An application would be made to delete a public right of way from the DMS following the discovery of evidence which shows that there is no public right of way over land shown in the DMS. Alternatively, it could be that the particulars contained in the DMS, i.e. the position, width, any limitations or conditions affecting the public right of way or where the Statement is vague as to the route of the public right of way require modification. A modification would not cover a change in the status of the public right of way.

## **5.8 The Evidence of Rights of Way Status**

### **The Standard of Proof:**

- 5.8.1** The standard of proof for DMMO applications is whether, the evidence produced by the applicant, or discovered by the County Council itself, together with all the other relevant evidence available shows that on the balance of probability, a public right of way of a certain class exists (Para 5.5.2 Test A refers). Or alternatively (in relation to applications made under S53 (3) (c) (i) that it is reasonable to allege the existence of a public right of way of a certain class exists (Para 5.5.2 Test B refers). If the County Council is satisfied that a public right of way of a certain class does exist, a DMMO would be made and would take effect when confirmed.
- 5.8.2** DMMO applications have to be determined on the basis of the available evidence and the rule of law. Matters relating to suitability of a way and possible nuisance or need are irrelevant and cannot be taken into account in reaching a decision.

### **Burden of Proof:**

- 5.8.3** Where an application has been made, the burden of proof is on the applicant.

### **Evidence of right of way status:**

- 5.8.4** Evidence falls into two main categories:
- (a) evidence of use sufficient to raise a presumption of dedication ('user evidence')
  - (b) evidence that shows, irrespective of use, that a way has been created by due legal process, or that it has been recorded as having the reputation of public status, or that it has existed physically at the time the document was compiled ('documentary evidence')

## **5.9 User Evidence**

- 5.9.1** There are two ways in which a public right of way can be created with user evidence:
- Under Statute by deemed dedication (Section 31 of the 1980 Act) (Section 5.10 refers)
  - At common law, by an act of dedication by the owner of land over which the way passes (Section 5.11)

Although DMMO applications are generally made under statutory provisions (s53) the common law principles are expressly preserved.

## **5.10 S.31 Highways Act 1980 - Statutory Inference of Dedication**

- 5.10.1** The relevant provisions are contained in Section 31 of the Highways Act 1980. The effect of which is that after 20 years use a way is deemed to

have been dedicated as a highway unless there is evidence of a contrary intention.

**5.10.2** Section 31 of the 1980 Act specifically states:

*"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.*

*The period of 20 years referred to 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 or otherwise."*

**5.10.3** There are a number of considerations arising from Section 31 as follows:

**5.10.4 Nature of the Way –**

Land is defined as including land covered by water, such as a right of way through a ford or along a causeway covered in water at some stage of the tide. Notwithstanding this, a right of navigation along a river is not included within the meaning of a right of way over land within this section. Long usage cannot, if the usage is criminal, give rise to the acquisition of rights. For example, it is an offence under the Road Traffic Act to drive a motor vehicle on a footpath or bridleway and so use of this sort would be disregarded.

**5.10.5 Nature of the Use –**

- 'actually enjoyed' – This requires sufficient use of the way for the required period, which will be a matter of fact to determine in each case. The motive for using the way is irrelevant.
- 'by the public' – This must be by the public at large not just a particular class of the public; e.g. employees of a particular employer.
- 'without interruption' – Interruption must be with the intention to prevent the public from using the way. Interruption includes actual and physical stopping of the enjoyment of the public's use of the way, either by the landowner or someone acting lawfully on their behalf. There must be interference with the enjoyment of a right of passage, with the intention to prevent public use of the way.
- 'as of right' has the same meaning as applied under the common law, i.e. the user has to be without force, without secrecy and without permission.

**5.10.6 The 20 Year Period –**

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

- In order for the right of the public to have been 'brought into question', the right must be challenged by some means sufficient to bring it home to the public that their right to use the way is being challenged. Most commonly, this would include, locking a gate, putting up a notice denying the existence of a public right of way or preventing a walker from proceeding along the route.

### **5.10.7 Contrary Intention –**

Evidence of a landowner's intention not to dedicate a public right of way must be overt and contemporaneous. The landowner cannot assert after the event that there was no intention to dedicate.

In R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs, the House of Lords overturned the Court of Appeal decision in two test cases on whether landowners had shown sufficient evidence of lack of intention so as to rebut the presumption of dedication of a public right of way. It was unanimously held that the landowners' lack of intention to dedicate the footpaths as public rights of way should have been communicated to the public to defeat the dedication claims under s.31 of the Highways Act 1980 in an objectively identifiable manner.

The test for intention is objective and therefore whether a reasonable user of the way would have understood that the landowner was disabusing them of the notion that the way was a public highway.

It is therefore necessary for there to be evidence of objective acts or declarations (i.e. notices or a barrier or closing the way for one day a year) which exist and are perceptible outside the landowners mind and further that these objective acts or declarations are perceptible by the relevant audience. The onus is on landowners.

The House of Lords rejected an argument that there had to be sufficient evidence of an intention not to dedicate for the whole 20 year period as provided by Section 31 of the 1980 Act. Once it has been demonstrated, it would seem that usage would no longer be 'as of right' and the right of the public to use the way would have been brought into question.

## **5.11 Common Law**

**5.11.1** Where the origin of a highway is unknown its status at common law will depend on the inference that it was dedicated at some time in the past. Dedication can be achieved in a number of ways and may be express, e.g. by formal agreement, or it can be implied, e.g. by evidence of use and enjoyment by the public 'as of right'.

**5.11.2** When determining whether use is 'as of right', the following points need to be considered:-

- Was there force? – Rights should not be acquired by the use of force. "Force" can include damage to property such as fences or gates, e.g. breaking a lock on a gate or cutting barbed wire. Once there is knowledge on the part of the person seeking to establish a public right

of way that there are objections to the exercise of that right and that the right claimed was disputed and therefore contentious, exercise of that right was exercise by force. Continuous conflict between parties therefore negates the 'as of right' element of the user.

- Was the use secret? – In order for the owner to accept the public right of way he must have knowledge, or the means of knowledge that the way is being used. The use would have to be of such character that an ordinary owner of the land would have a reasonable opportunity of becoming aware of it, e.g. the use must be open. The scope of this is much wider than the literal meaning of hidden, or secret use. At the same time, a landowner cannot 'shut his own eyes' in an attempt to make the use secret. They must be taken to have a reasonable opportunity of becoming aware of the enjoyment of the right of way.
- Was use with permission? – A landowner's consent to the use of the land would imply that it is for a limited period only. However, the landowner needs to make it clear that there is regulation to the access of the land, for example by occasionally closing the access or by charging for admission on to the land. The fact that some persons used the way with permission will not necessarily prevent use by others from being as of right. Acts encouraging use (e.g. benches, surface improvement) cannot be interpreted as a revocable permission. Acceptance or tolerance by the landowner will not make the exercise of the right permissive.

**5.11.3** The period of use under the common law is not fixed and depending on the facts of the case can range from a few years to several decades. The period of use does not have to be calculated retrospectively from any particular date.

## **5.12 Documentary Evidence**

**5.12.1** When considering whether a way has been dedicated as a highway, the County Council as surveying authority has a duty under Section 32 of the 1980 Act to take into consideration any available archive evidence, i.e. any map, plan or history of the locality or other relevant document. The County Council must give such weight to that evidence as they think justified in the circumstances. In doing so, account must be taken of the antiquity of the 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.

## **5.13 Natural Environment and Rural Communities Act 2006**

**5.13.1** The Natural Environment and Rural Communities (NERC) Act 2006 significantly curtailed the scope for recording further public rights of way for mechanically propelled vehicles (Byways Open to All Traffic (BOATs)) on the DMS. Section 67 NERC Act 2006 extinguished, on commencement, (2<sup>nd</sup> May 2006) public motor vehicular rights over every highway that is not already shown on the DMS, or is shown as a footpath, bridleway or restricted byway. There are, however, five exceptions:-



- The way had been lawfully used more by motor vehicles than other users during the five years preceding commencement
- The way was recorded on the 'list of streets' (kept under S.36 (6) of the Highways Act 1980) as being maintainable at the public expense but is not recorded on the DMS
- The way was expressly created or constructed for motor vehicles
- The way was created by the construction of a road intended to be used by mechanically propelled vehicles
- The way had been in long use by mechanically propelled vehicles before 1930 (when it first became an offence to drive off road).

## **6. Traffic Regulation Orders (TROs)**

- 6.1** With increasing numbers of people using public rights of way for different uses, it is possible for potential conflicts to arise. The type of conflict that has received most publicity and generates considerable concerns is the use of motorised vehicles on public paths. This stems from the amount of damage that can be caused to the surface of the right of way, the noise of motorised vehicles in generally quiet areas, the potential danger to other users and illegal driving off the right of way causing damage to adjoining land. There are also occasionally conflicts of use between walkers and cyclists but these tend to be restricted to specific areas and can usually be resolved more easily.
- 6.2** As Traffic Authority, the County Council has the power to make a TRO to exclude certain classes of traffic from a right of way. This power can be exercised where there is inappropriate use of a public path which is damaging the path and adjoining land and impeding the peaceful use for others, and where other management options have failed to prevent further damage or conflict, or are inadequate.
- 6.3** The procedure for making TROs involves consultation, a notice period, inspection period (relevant documents are made available for public inspection during the objection period) and a duty to consider objections received before making a decision to make the TRO.
- 6.4** The decision to proceed with a TRO is an executive decision and rests with the appropriate County Local Committee (CLC) or the Cabinet Member. If objections are received following advertisement, it would be necessary for a decision on whether the order be made.

# Land with Public Access

## 7. Common Land and Town or Village Greens – Commons Act 2006

### 7.1 Common Land

**7.1.1** The Commons Act 2006, when fully enacted, will repeal the Commons Registration Act 1965 in full, although the Act has not yet been fully implemented and only applies to a number of pilot areas. West Sussex is not one of the identified pilot areas, therefore parts of the Commons Registration Act 1965 remain in force. The Commons Registration Act 1965 confers on the County Council as a 'commons registration authority' the requirement to keep a register known as a register of common land. Common Land carries a right of access on foot for the public at large under the Countryside and Rights of Way Act 2000, and there may be certain other rights for specified individuals (rights of common). Details of those rights of common are also recorded in the formal register.

**7.1.2** Rights of Common are a remnant of the manorial system which in mediaeval times was the basis of the county's economy. The manor was the basic unit and was self-sufficient. The Lord of the Manor owned the whole of the land but others had rights over the land, which were recognised by the Courts.

There are six types of rights of common which can be exercised:-

1. Pasture - the right to graze stock
2. Pannage - the right to graze pigs
3. Estovers - the right to take small branches and underwood
4. Turbary - the right to dig turf or peat for use as fuel
5. Piscary - the right to fish in another person's lake
6. Soil - the right to take sand, gravel, stone or minerals

**7.1.3** The Commons Registration Act 1965 procedures to add land to the register of common land continue to apply outside of the pilot areas. In order to succeed and claim the rights of common, an applicant needs to show on the balance of probability that the land has been used as of right for an uninterrupted period of 30 years, for purposes which are capable of being registered as rights of common.

### 7.2 Town or Village Greens

**7.1.4** A Town or Village Green is land subject to the right of local people to enjoy lawful sports and pastimes on it. Town and village greens are kept on a register by the commons registration authority.

**7.1.5** Under Section 15 of the Commons Act 2006, which came into force on 6 April 2007, it is possible for an application to be made to the County Council to register new areas of land as town or village green. Provisions brought in under the Growth & Infrastructure Act 2013 prevent applications being made where certain 'trigger events' apply and no corresponding 'terminating event' has occurred. Examples of trigger events include:

- the first publication of an application for planning permission for the land, which will include circumstances where planning permission is subsequently granted;
- the publication by the local planning authority of a draft local plan or neighbourhood plan proposal which identifies the land for potential development;
- the adoption or making by the local planning authority of a local plan or neighbourhood plan which identifies the land for potential development;
- a proposed application for development consent under the Nationally Significant Infrastructure project regime is first publicised by the applicant; and
- an application for development consent under the Nationally Significant Infrastructure project regime which has been accepted by the Secretary of State (in practice the Planning Inspectorate) is first publicised by the applicant.

**7.1.6** Every trigger event can have a corresponding 'terminating event'. So for example, if planning permission is not granted, or lapses, then it would no longer be considered a trigger event and an application for town or village green status could then be made and considered by the County Council. Similarly, if the land was no longer identified as an area for potential development as part of a local plan etc this would be classed as a terminating event and would enable the County Council to accept and investigate a town or village green application on it.

**7.1.7** Section 15 of the Commons Act 2006 sets out the criteria for land to be registered as a town or village green as:

S15(2)

- (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
- (b) they continue to do so at the time of the application.

There is no right of appeal to Village Green decisions taken by the County

**7.1.8** Council; the only course of appeal being a legal challenge by way of Judicial Review. Therefore, dependant on the circumstances it may be appropriate for an independent Inspector to be appointed to hold a non-statutory inquiry into the application. This process provides a suitable platform to

enable various evidence to be efficiently explained and tested before an inspector. The Inspector will then prepare a report on their findings and make a recommendation on the application to the County Council.

**7.1.9** When considering the applications received, the following legal tests must be satisfied:

**7.1.10 A significant number of inhabitants –**

'Significant' does not need to mean considerable or substantial numbers. In the case of *R v Staffordshire County Council, ex parte McAlpine Homes Ltd [2002]*, the court did not accept that 'significant' would mean a considerable or substantial number but that the number of people using the land had to be sufficient to signify that the land was in general use by the local community. This use is as opposed to occasional use by individuals as trespassers

**7.1.11 Inhabitants of any locality or of any neighbourhood with a locality –**

**Inhabitants of any Locality:**

"Locality" is not an arbitrary line on a map. Rather, it is an administrative unit. This could be a county, a city, a town, a borough, a parish (civil or ecclesiastical) or an electoral ward. "Locality" in the context of section 15 of the 2006 Act relates to a defined administrative unit known to law, which ought to reflect some community of interest on the part of its inhabitants.<sup>2</sup>

**Neighbourhood within a Locality:**

"Neighbourhood" is not a sub-division of a "locality" and need not be a recognised administrative unit. However, it is not any area of land that an applicant chooses to delineate upon a plan. It must have a "sufficient degree of cohesiveness" A neighbourhood does not need to fall within a single locality.

**7.1.12 The 'As of Right' Test –**

Use of land 'as of right' means use without force, secrecy or permission and does not turn on the subjective beliefs of the users. Please refer to paragraphs 5.10.2.2 and 5.11.1 above.

**7.1.13 Implied Permission –**

The law in relation to implied permission was previously well established. Permission could not be implied from the inaction of a landowner with knowledge of the use to which the land was being put. Instead, the landowner had to do something positive to make the public aware that their use of the land was by licence. However, in the recent case of *R (on the application of Newhaven port & Properties Ltd) v East Sussex CC [2015]*

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<sup>2</sup> Gadsden & Cousins on Commons and Greens Sweet & Maxwell, 3rd edition, 2020.

*UKSC 7*, one question was whether the public enjoyed an implied licence to use the beach by virtue of the making of byelaws by the Port. There was no evidence that at any time during the relevant 20 year period any recreating inhabitant had known the byelaws existed. Despite the absence of communication of the byelaws, it was found that, on the basis that it is not always necessary for the landowner to show that members of the public have to have had it drawn to their attention that their use of the land was permitted for their use to be treated as being "by right" rather than 'as of right', the Supreme Court therefore found that the use was with implied permission. In that case the land could not be registered as a village green.

#### **7.1.14 Statutory Incompatibility –**

Another question recently tackled by the Supreme Court relates to whether land owned by a local authority which is held for the purpose of recreational use by the public, is used by the public "by right" rather than 'as of right' on the basis of a statutory entitlement to use it. For example, land held as public open space acquired under one of the Public Health Acts or the Open Spaces Act or land otherwise laid out and maintained as public recreational land pursuant to other legislation. This issue reached the Supreme Court in *R (on the application of Barkas) v North Yorkshire CC [2014] UKSC 31*, in which the Court held that where land is held and laid out as public recreational land by a local authority, the public have a statutory right to use that land for recreational purposes. Therefore, their use of such land for those purposes is undertaken pursuant to a statutory right and so is "by right" and properly regarded as a use with permission and so not 'as of right'.

However, not all publicly owned land that is used for recreational purposes is necessarily used "by right". Land may be held for purposes other than as public recreational open space, such as school playing fields, which the public are not entitled to use, whilst other land may not be laid out or identified in any way for public recreational use.

In the case of *Newhaven* quoted above, the Supreme Court found that section 15 does not apply to land acquired by a statutory authority which is held for statutory purposes that are inconsistent with its registration as a town or village green. Where Parliament has conferred powers to acquire land and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire rights which are incompatible with the continuing use of the land for those statutory purposes. The mere ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. The land must be held for specific statutory purposes and the registration must be incompatible with the continuing use of that land for such purposes for the principle to apply.

#### **7.1.15 Lawful Sports and Pastimes –**

The words 'lawful sports and pastimes' form a composite expression which includes informal recreation such as walking, with or without dogs, cricket, blackberry picking and children's play. It does not include walking of such character as would give rise to a presumption of dedication as a public right

of way (for example simply walking along the line of a path). Once land has achieved Town or Village Green status, all lawful sports and pastimes can be indulged in the green, not just the particular sport or pastime that gave rise to the registration.

#### **7.1.16 The 20-year period test –**

The Commons Act 2006 has clarified the position on the 20 year period of use, which has to:

- continue at the time of the application (S15 (2) (b)); or
- if use has ceased before the time of the application but after commencement of Section 15 (S15 (3) (b + c) the application has to be made within the period of two years beginning with that cessation or
- it has ceased before the commencement of Section 15 (S15 (4) (b + c)) the application has to be made within the period of five years beginning with that cessation.

In May 2006 the House of Lords gave judgement in the “Trap Grounds” [*Oxfordshire County Council v Oxford City Council and another [2006] UKHL 25*] case which contained some important decisions concerning applications to register Town or Village Greens, including that:

- (a) the registration authority is not bound by the 20 year period selected by the applicant unless it would be unfair to the objectors
- (b) the registration of new greens is not in breach of landowners’ human rights
- (c) a non-statutory inquiry is appropriate in a difficult case.

#### **7.1.17 Amendment of Application Land**

The County Council, as registration authority, may be guided by the general principle that the application may be amended to refer to a smaller area. This is only on the proviso that no prejudice would be caused to either party. The County Council are also entitled, without any amendment of the application, to register only that part of the land which the applicant had proved to have been used for the necessary period.

#### **7.1.18 Voluntary Registration of Land**

The Commons Act 2006 has introduced, under S. 15(8), the ability for the owner of land to voluntarily register land as a village green. As registration authority, the County Council cannot reject such an application, but can return it if the application appears to be made by someone who is not the owner of the land, if any necessary consents have not been obtained or if the application is otherwise incomplete.

### **7.1.19 Corrective applications to amend the registers of Common Land and Town or Village Greens**

The Commons Registration (England) Regulations 2014 allow, where circumstances (i) or (ii) below apply, for the general public to make an application to the County Council in its capacity as Commons Registration Authority to amend the Registers of Common Land and Town/Village Greens under the following provisions of the Commons Act 2006:

- (i) to correct a mistake made by the Commons Registration Authority when it made or amended an entry in the register; and
- (ii) to remove 'buildings' and 'other land' wrongly registered as either Common Land or Town or Village Green.

Where objections are received from persons with a legal interest in the land to which the application relates, the Regulations provide that the application must be referred to the Secretary of State for determination.



## **8. Access Land – Countryside and Rights of Way Act 2000**

**8.1** Part 1 of the Countryside and Rights of Way Act 2000 provides that any person is entitled, subject to certain restrictions, to enter and remain on land defined as 'access land' for the purpose of open air recreation. This right is popularly known as the 'Right to Roam'.

Access Land is defined in CROW 2000 S.1 as:

any land which -

- (a) is shown as open country on a map in conclusive form issued by the appropriate countryside body for the purposes of this Part,
- (b) is shown on such a map as registered common land,
- (c) is registered common land in any area outside Inner London for which no such map relating to registered common land has been issued,
- (d) is situated more than 600 metres above sea level in any area for which no such map relating to open country has been issued, or
- (e) is dedicated for the purposes of this Part under section 16, but does not (in any of those cases) include excepted land which is treated by section 15(1) as being accessible to the public apart from this Act.

**8.2** The Countryside and Rights of Way Act 2000 defines "open country" as land which is predominantly mountain, moor, heath or down and is not registered as common land.

**8.3** Schedule 2 CROW 2000 sets out a list of activities which are not permitted on access land, however some of the restrictions may be relaxed by Natural England with the consent of the landowner:-

- Driving or riding any vehicle other than an invalid carriage;
- Using a vessel or sailboard on any non-tidal water;
- Being accompanied by any animal other than a dog, and dogs are required to be kept on a short lead in the vicinity of livestock;
- Committing any criminal offence;
- Lighting or tending a fire or doing any act likely to cause a fire;
- Intentionally or recklessly taking, killing, injuring or disturbing any animal (bird or fish);
- Intentionally or recklessly taking, damaging or destroying any eggs or nest;
- Feeding livestock;

- Bathing in any non tidal water;
- Hunting shooting fishing trapping etc;
- Uses or has with him any metal detector;
- Intentionally removing damaging or destroying any plant shrub tree or any part thereof;
- Obstructing the flow of any drain or watercourse;
- Interfering with any fence or barrier (without reasonable excuse);
- Neglecting to shut or fasten gates where possible unless it is reasonable to assume the gate is intended to be left open;
- Affixing or writing any advertisement, bill, placard or notice;
- Intimidating, obstructing or disrupting lawful activities;
- Without reasonable excuse, doing anything which disturbs annoys or obstructs persons engaged in lawful activities.

**8.4** The owner of land subject to public access must tolerate the access and cannot put up signs to deter the public from the land (e.g. private or keep out notices) unless the land is treated as "excepted land". Excepted Land under CROW 2000 is any land that falls into one or other of the categories of land listed in Part 1 of Schedule 1 of the Act. Such land includes:-

- Land which is being or has been used in the last twelve months for agricultural or forestry operations;
- Land covered by buildings, including caravans, tents etc but not a fence or wall;
- Land within 20 metres of a dwelling;
- Land used as a park or garden;
- Land used for the getting of minerals by surface working;
- Land used as a golf course, racecourse or aerodrome;
- Land which is regulated under s.14 of the Military Lands Act 1892 or s.2 Military Lands Act 1900;
- Land covered by works used for the purposes of statutory undertakers or telecommunications code system or the curtilage of such land.

**8.5** The public's right of entry to access land (which is not excepted land) may be excluded or restricted by direction of the County Council as access authority. This can be for up to 28 days in a year for land management purposes. Access may also be excluded or restricted by the direction of the County Council in an emergency situation e.g. for the avoidance of fire risk.

- 8.6** CROW 2000 contains a number of provisions designed to protect the landowner from additional liability. Public access is not use that would be suitable to create a prescriptive town or village green, nor to presume dedication of a highway. Furthermore, a person who enters on to access land does not count as a visitor for the purposes of the Occupiers' Liability Act 1957. The owner does however owe a duty where a danger is due to recklessness or something they have done with the intention of creating the risk.
- 8.7** Access authorities have powers to make byelaws to protect the land, appoint access wardens, erect notices concerning boundaries, make directions regarding restrictions, enter into agreements with landowners to secure a means of reaching access land, and agreements on works to provide an opening on to the land, and if necessary to take action to enforce the provision of an opening on to access land and to enforce the removal of false or misleading notices.

## 9. Decision Making for Rights of Way, Common Land and Town/Village Green matters

**9.1** Who takes the decision, Planning and Rights of Way Committee or Delegated Decision?

**9.1.1** The Constitution sets out the criteria for determining whether a matter should go to the Planning and Rights of Way Committee for consideration or whether it can be decided by officers under delegated powers. The following table shows the instances where a matter will come to Committee or where officers will be capable of determining the application.

<b>Criteria</b>	<b>Determination by Planning and Rights of Way Committee</b>	<b>Determination by Officers in consultation with Chairman of the Planning and Rights of Way Committee and the local member</b>
DMMO Application where significant evidence in conflict has been received	✓	X
DMMO Application where no significant evidence in conflict has been received	X	✓
PPO application where any local member (or adjacent division member where appropriate) expresses a view in conflict with the view of officers on the application	✓	✓ Where the cause of disagreement can be resolved through discussion.
PPO application where as a result of the consultation process a borough, district, town or parish council, CLC, or a prescribed user group objects in writing to the application	✓	X
PPO application where as a result of the consultation process, there remain outstanding substantive	✓	X

<b>Criteria</b>	<b>Determination by Planning and Rights of Way Committee</b>	<b>Determination by Officers in consultation with Chairman of the Planning and Rights of Way Committee and the local member</b>
comments from members of the public		
PPO application where as a result of the consultation process, no view has been expressed in conflict by the local member or adjacent division member, the borough, district, town or parish council, CLC, or a prescribed user group has not objected and there are no outstanding comments from members of the public	X	✓
TVG application where significant evidence in conflict has been received (usually following a non-statutory public inquiry)	✓	X
TVG Application where no significant evidence in conflict has been received	X	✓
Corrective applications for Common Land and TVG	X	✓

**9.1.2** Although the Planning and Rights of Way Committee can determine all applications, in practice if there is no significant evidence in conflict in relation to a DMMO application and in consultation with the chairman of the Planning and Rights of Way Committee and local member, the matter will usually be determined by officers under delegated powers. In respect of applications for public path orders, where as a result of the consultation process, a borough, district, town or parish council, the CLC or a prescribed user group objects in writing to the application, the matter will be brought to the Planning and Rights of Way Committee for a decision.

- 9.1.3** Similarly, if there remain outstanding substantive comments from members of the public the matter will be brought to the Planning and Rights of Way Committee for a decision.
- 9.1.4** As soon as a DMMO application is accepted the local member is notified by the case officer by email. In respect of new PPO applications these are reported within two weeks of receipt in The Bulletin members' newsletter and again when the public consultation process is begun. The list will indicate the local member and in cases of applications having wider significance, adjoining division members. The application/consultation will not be decided for a period of 21 days from the latter date of notification in The Bulletin.

## **Legal Services**

**April 2021**