



SOMERSET COUNTY COUNCIL

GUIDANCE FOR LANDOWNERS AFFECTED BY RIGHTS OF WAY MODIFICATION APPLICATIONS

This document is also available in Braille, large print, on tape and on disc and we can translate it into different languages. We can provide a member of staff to discuss the details.



RNID typetalk

Background – Public Rights of Way

There are over 6000km of public rights of way in Somerset. 79% are footpaths, 16% bridleways, 5% restricted byways and 0.1% byways open to all traffic. These routes are all recorded on the Definitive Map and Statement, which is the conclusive legal record held by Somerset County Council showing public rights of way.

Can the Map and Statement be changed?

Yes. Somerset County Council has a duty to keep them under continuous review. One way that we do this is by dealing with applications to amend the map and statement (we also process applications to divert or extinguish routes).

Anyone can apply to amend the Map and Statement to:-

- add a right of way;
- delete a right of way;
- upgrade a route to a higher status (e.g. footpath to bridleway)¹;
- downgrade a route to a lower status (e.g. bridleway to footpath); or
- vary the particulars of a right of way (e.g. include a new description or add more detail to the Definitive Statement about the position, widths, limitations etc).

All applications have to be accompanied by both the evidence on which they are based and a map showing the route in question.

The application process is concerned with establishing what, if any, public rights already exist over the application route rather than what is considered to be desirable. As such we look for evidence of the existence or otherwise of

¹ Some applications may request the upgrading of routes to Byways Open to All Traffic. For specific advice on these please contact Somerset County Council's Rights of Way service.

public rights. That evidence typically takes one of two forms; either evidence of use or historic documentary evidence.

Information submitted by the applicant

- Documentary evidence

If it can be demonstrated that public rights have existed over a route at some point in the past then, unless it can be shown that due legal process has been followed to extinguish or divert them, there is a presumption that those rights still exist today. Therefore, claims based on historical evidence will normally be accompanied by documentary information which is intended to show that a right of way which is not shown on the Council's records subsists or is reasonably alleged to subsist. Importantly, it is not sufficient to simply show that a route has physically existed for a long time; an application will only be successful if the evidence collectively demonstrates the existence of public rights over that route.

There is a vast amount of historic documentary evidence available and you may find our leaflet entitled "Documentary Evidence Guide"² helpful in explaining what some of the more useful documents are and where they can be found. The County Council focuses on 10 primary sources of evidence when investigating applications. If, after examination of these documents, the status of the route is still not clear, additional pieces of historic evidence may sometimes be researched.

You may wish to carry out your own research above and beyond that undertaken by the County Council. For example, you may have material in your own family papers, deeds or tenancy agreements that is relevant to the case. Local witnesses can also sometimes provide useful information about the land and/or any paths across it. Finally, you might like to undertake research at either the Somerset Heritage Centre and/or the National Archives (contact details below).

- User evidence

Even where they have not historically existed, public rights of way can be established through the use of a route by the public over a period of time. Although a public right of way can be established under Common Law, most claims involving user evidence are based on Section 31 of the Highways Act 1980. This legislation states:

- (1) *Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.*

² Documentary Evidence Guide is available in the Information and Resources section of this page of our website: www.somerset.gov.uk/environment-and-planning/rights-of-way/apply-to-add-delete-or-upgrade-a-public-right-of-way/

- (2) *The period of 20 years referred to in sub-section (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by notice or otherwise.*

It is therefore necessary for an applicant to show that the public have used a way without secrecy, force or permission (as of right) and without interruption for a period of 20 or more years, running backwards from the date when the public's right to use the way was first challenged.

Landowners can successfully defeat a claim if they can –

- show that there has been insufficient use of the route in question;
- prove that the way was used with their express permission only;
- demonstrate that they had taken steps to interrupt the period of 20 years 'as of right' use; or
- provide evidence that, during the relevant period of use, they had demonstrated to the public a lack of intention to dedicate the route in question (e.g. by erecting notices, challenging users or by some other means).

As mentioned above, claims based on public use can also be successful at common law. Unlike section 31, there is no minimum period of use that must be shown for a claim to be successful at common law. However, it is necessary to provide evidence to show that the facts, taken as a whole, imply that at some point in the past the landowner had been willing to dedicate the way as public. It is also necessary to show that the public have accepted the route as a public right of way. Evidence of public use can be used to demonstrate both of these requirements. Where a claim is based on common law the onus of proof lies with the party claiming that rights have been acquired. A landowner can rebut a claim if they can provide evidence that they did not intend to dedicate the route to the public or that the public use had been insufficient.

In order to establish a claim based on user evidence, either at common law or under section 31, applicants will usually submit statements from witnesses who can provide evidence of use. These normally take the form of completed user evidence forms. While we will try to interview a selection of those who provide user evidence, it is important to remember that interviews are not under oath and what is said has to be taken in good faith.

Whilst there is no minimum number of evidence forms which need to be submitted, it is necessary for an application to demonstrate that a route has been used by a sufficient number of people to show that it was used by the public at large; i.e. enough to be representative of the community as a whole. There has to be sufficient quality and quantity of user evidence to persuade the Council of use by the public in order for an application to be potentially successful.

As mentioned above, use by those who have received the landowner's permission does not contribute to the acquisition of public rights. Therefore evidence from anyone with such permission, including estate workers or anyone making deliveries, cannot be taken into account. Likewise wandering at will (roaming) over an area cannot establish a public right of way.

In response to an application based on public use landowners may wish to submit one of our landowner evidence forms which seeks information on the following points:-

- Have you ever given anyone permission to use the route or required users to seek such permission?
- Have you deposited a Section 31(6) map and statement with the Council in the past? (please see additional information below)
- Have you erected notices or signs stating that the way was not public, or it is private property, etc? Do you have evidence of this?
- Have you, or someone on your behalf, ever told anyone using the route that it was not a public right of way?

How do landowners get informed?

The law recognises that it is important that landowners know about an application that affects their land as soon as possible. When applying to the County Council the applicant is therefore required to take reasonable steps to identify the landowners and to serve notice on them. We advise them to do Land Registry searches on the route itself, to contact the parish councils, and/or to ask local people who are well acquainted with the area who the landowners might be. We also advise that, in some cases, it is helpful to contact adjoining landowners.

There are times when applicants have genuinely not been able to determine who the landowner is. In such cases we would direct them to post notices at each end of the route. However, as a principle applicants should always make as much effort as possible to find out who the landowners are.

When we start to process an application – which, because of the high number we have to deal with, can be some time after it was submitted – we will also make sure that we know who the landowners are and consult them at the outset and then again at a number of stages throughout the process. You can submit comments any time before the case report has been produced, and they will be kept on file until the application is processed.

If I don't agree with the application how do I build a case against the claim, or submit relevant evidence for the County Council to consider?

The current legislation does not allow the County Council to take matters such as desirability, security, health & safety or the flora and fauna into account when deciding the application. Instead we would look to determine what, if any, rights already exist over the route in question. If you disagree with the application and want to build a case against it you will need to provide evidence which rebuts the applicants claim (e.g. shows that there is not enough evidence to demonstrate the existence to public rights). In order to do this it will be necessary to be aware of the nature of the evidence on which the application is based (i.e. user or documentary). For this reason affected landowners might find it helpful to view a copy of the relevant application on the County Council's rights of way modification register³.

³ The Modification Register is available via the County Council's Explore Somerset Map:
<http://www.somerset.gov.uk/policies-and-plans/plans/rights-of-way/>

Your deeds or tenancy agreement may reveal information that could be used to refute a claim. In addition, you may have photographs which are useful (for example showing buildings now demolished). This could help to establish whether or not a path existed in the past.

Most landowners do not seek independent legal advice but this option is always open to anyone. The NFU or CLA may also be able to offer help and guidance.

How will the County Council process the application?

All applications to modify the Definitive Map and Statement are prioritised in accordance with the County Council's adopted scoring system as set out in the Rights of Way Improvement Plan⁴. This may be varied in exceptional circumstances in line with our statement of priorities⁵. The next round of scoring will take place in 2016 until which time any 'new' applications will be placed on hold.

Please note that, due to the large number of applications which we have received and the detailed method of investigation involved in determining them, there is currently a significant backlog of cases awaiting determination. Therefore, having been scored, it may be some years before further consideration is given to an application.

When investigation of a particular application begins the relevant landowners will be contacted by the County Council. At that stage we will also post notices on site and consult with the relevant parish and district council, users groups and various other interested parties. Where appropriate we would also undertake our own research into the history of the path and/or interview a selection of people who claim to have firsthand knowledge of the route.

This consultation stage is your best opportunity to influence our decision by submitting all the evidence which you feel is relevant to the case.

Having reviewed all the available evidence, the case officer will assess the documentary and user evidence available and produce a report with a provisional recommendation. Landowners and applicants will then have 28 days to comment on that report. We anticipate that all evidence will have been received by this point and that comments will therefore relate primarily to the County Council's interpretation of the evidence. The Chair of the Regulation Committee, the local County Councillor for your area and the relevant town/parish council will receive a copy of the same report.

Who makes the decision?

After the 28 day period for comments, County Council officers will review the case before concluding whether or not they consider there to be sufficient evidence to warrant the making of an order to modify the Definitive Map. In doing so the evidence will be assessed using the Wildlife and Countryside Act

⁴ The Rights of Way Improvement plan is available in the Information and Resources section on this page of our website: <http://www.somerset.gov.uk/policies-and-plans/plans/rights-of-way/>

⁵ A copy of our statement of priorities can be found in the Information and Resources section on this page of our website: <http://www.somerset.gov.uk/environment-and-planning/rights-of-way/apply-to-add-delete-or-upgrade-a-public-right-of-way/>.

1981 legislation; at this stage the criteria used to prioritise the application cannot be taken into account.

The decision as to whether or not to make an order can be made by the Rights of Way team under delegated powers if the Chair of the Regulation Committee and the local County Councillor are in agreement with the report's recommendation. If not, or if it is a significant or controversial case, it would be referred to the Regulation Committee to be decided. If the Regulation Committee is to decide the matter then affected landowners will be informed of when this meeting is to take place and will be given an opportunity to speak at the meeting prior to a decision being made.

Whoever makes the decision, an order will only be made if it is considered that there is sufficient evidence to show that the definitive map needs to be amended because it does not accurately reflect the status of the path in question. We are not able to make an order of this type, or reject an application, simply because a particular outcome is perceived to be a good or desirable thing. In this respect, the decision maker must make an objective assessment of the evidence; they do not have a discretion whether or not to accept a claim.

If a decision is made to **accept** the application, then a legal order will be made and a notice will be advertised in a local newspaper with a 6 week objection period. Landowners will receive a copy of this order and/or be notified by notice on site

If a decision is made to **refuse** the application then the applicant would have a right of appeal against our decision to the Secretary of State. If successful then we would be directed to make an order and would follow the process set out in the paragraph above.

If a legal order is made (either following our own decision or a direction from the Secretary of State) there is an opportunity for anyone wishing to do so to object. If objections are received and not withdrawn, the case would have to be referred to the Secretary of State to determine and a decision would be made by an independent Inspector either after a public inquiry or hearing or the exchange of letters (written representations).

Once confirmed, either by the Council or by the Planning Inspectorate, it is possible for an order to be challenged in the High Court on the grounds that it was made or confirmed outside the powers of the Act or that the Act has not been complied with. The High Court may quash the order if it is satisfied that this is the case.

Please note that any evidence or correspondence that is submitted as part of, or in response to, an application will be treated in accordance with data protection principles. In order to decide if a public right of way exists it may be necessary to disclose any information received in relation to an application. That information cannot be treated as confidential. Members of the public should therefore only provide us with the information if they are happy for it to be placed in the public domain.

What if the application is successful?

If an application is successful the claimed route will be formally added to the Definitive Map and Statement. The path will then need to be made open and available for public use and will benefit from the protection afforded by the Highways Act 1980. The maintenance of the path will depend on its status and its place in the maintenance priority list.

Additional Information

- Further information regarding the circumstance in which an order can be made to modify the Definitive Map, the evidence that we are able to consider and the processes we must follow is available from the following Government departments/agencies:
 - Natural England: see 'A guide to definitive maps and changes to public rights of way': <https://www.gov.uk/government/publications/definitive-maps-of-public-rights-of-way-change-the-legal-records>
 - Department of Environment, Food and Rural Affairs: see circular 1/09, www.gov.uk/government/publications/rights-of-way-circular-1-09
 - The Planning Inspectorate www.planningportal.gov.uk/planning/countryside/rightsofway/rightsofway
- Types of Rights of Way are as follows:
 - Footpath – use on foot
 - Bridleway – use on foot, horseback and pedal cycle only
 - Restricted Byway – use on foot, horseback, pedal cycle and non-mechanically propelled vehicles (e.g. horse-drawn vehicles)
 - Byways Open to All Traffic – use on foot, horseback, pedal cycle, horse-drawn and motorised vehicles
- Section 31(6) of the Highways Act 1980 provides for a statement and map to be deposited with the County Council which declares all rights of way on your land and helps to protect property from claims for additional or higher status rights of way based on use. Please contact the Rights of Way Team at Somerset County Council for further information about how to make a deposit.
- Somerset Heritage Centre can be contacted on 01823 278805 or www.somerset.gov.uk/archives
- The National Archives can be contacted on 020 8876 3444 or www.nationalarchives.gov.uk