

## Legal

# Gamekeepers on the front line

Peter Burfoot of Knights Solicitors discusses the issue of rights of way and what you can do to help new ones being claimed.

GAMEKEEPERS CAN PLAY A VITAL ROLE IN ensuring that public rights of way are not acquired over the land for which they are responsible. They are likely to know their beat on an intimate basis and are in a position to detect the slightest changes on the ground and to the vegetation. Gamekeepers can distinguish between those tracks which have been created and are used only by wildlife and those, whether created by animals, birds or mankind, which are used by mankind whether on foot or otherwise. Gamekeepers are in a unique position to ensure that paths, tracks, and private roads do not become public

footpaths, legal public bridleways or other public thoroughfares.

The law of England and Wales classifies all paths, tracks, bridleways, roads and other thoroughfares over which the public has a right of way as 'highways'. Traditionally, highways were created by the landowner dedicating the right of way over the soil and acceptance by the general public by use. This could be done by landowners entering into an agreement or simply by implication. Long-standing use by the public believing they have a right of way and not having permission or using the way forcefully or secretly could result in it being inferred that the

landowner intended at some point in the past to dedicate for public use and result in the creation of a highway by "presumed dedication". The period over which public use has been enjoyed to justify the presumption of dedication under the traditional (non-statutory) law is not fixed. A highway could only be created by presumed dedication if it had the necessary character for a highway, for example it could be used by the public at large throughout the year without restrictions. Restrictions might include locking a gate crossing the way on particular days in each year. There would normally need to be a reason for the public to use

A gateway that is locked annually can prevent a route from becoming a highway.

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the way, whether it was to get from one place to another, such as a shortcut or to reach a natural feature such as a beauty spot. It is possible for a right of way to be created over an artificial structure, such as an embankment beside a drainage ditch. The traditional law about the creation of public rights of way is now largely governed by Highways legislation.

**DEEMED DEDICATION**

Section 31 of the Highways Act 1980 states that where it can be shown that a way over land has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate. The period of 20 years is to be calculated backwards from the date when the right of the public to use the way is brought into question. The highway has to have the characteristics which it would have needed for it to be presumed to have been dedicated.

**PREVENTING DEDICATION: THE STATUTORY METHODS**

Sections 31(3), (4) and (6) prescribe methods by which a landowner can negate (the Act actually says “negative”) intention to dedicate a way as a highway. They are:

- (3) The erection, in such manner to be visible to persons using the way, of a notice inconsistent with the dedication of the way as a highway (coupled with maintenance of the notice after 1 January 1934 or any later date on which it was erected). The landowner is given the right over most types of occupying tenant to maintain a notice erected under Section 31(3) provided that no damage is done by the erection of the notice to the business or occupation of the tenant.
- (4) If a notice is torn down or defaced, the landowner can give to the appropriate council notice that a way is not dedicated as a highway and that is sufficient to negate the intention of the owner of the land to dedicate the way as a highway, in the absence of proof of a contrary intention.
- (6) The deposit by the freehold landowner under Section 31(6) of the Highways Act 1980 of:
1. A map of land owned;
  2. A statement indicating what ways (if any) over the land the landowner admits to have dedicated as highways; and

3. Declarations, in valid form, made by the landowner or his successors in title and lodged with the appropriate council at any time to the effect that no additional way over the land delineated on the deposited map (other than any specifically indicated in the declaration) has been dedicated as a highway at:

- the date of deposit; or
- since the date of lodgement of a previous declaration, within the relevant number of years from the date of the deposit or within the relevant number of years from the date of any previous declaration lodged under that section.

In England, the relevant period is 20 years, in Wales it is 10 years. The map, statement and declaration must comply with statutory requirements. “The appropriate council” means the council of the county or metropolitan district, or London borough in which the land is situated or where the way is situated in the City of London, the Common Council. The appropriate council has to keep a register with respect to maps and statements deposited and declarations lodged with that council which is available for inspection free of charge at reasonable hours. This includes the Definitive Map of the area and an associated Statement, which is, in fact, a list.

Planning Inspectors determining applications to modify the Definitive Map under the Highways Act 1980 have to

determine the date when public use was “brought into question” to establish the date from which the 20-year period runs.

So if, for example, a landowner erected a sign in 2006, and that is regarded as the date when public use was brought into question, the Inspector has to establish whether such public use was made of the way as can be proven during the period of 20 years ending with the date when the notice was erected (ie. the period from 1986 to 2006) was sufficient to justify deemed dedication by the landowner and acceptance by the public at large.

In addition to evidence about use, the Inspector will also consider evidence about interruptions in use and written and verbal challenges.

The making of an application under Section 53(5) of the Wildlife & Countryside Act 1981 for an order making modifications so as to show the right on the Definitive Map and Statement can itself constitute the date when the right of the public to use the way is brought into question.

**OPEN ACCESS**

Those gamekeepers whose beats include land in Open Access areas will be pleased to know that the exercise by members of the public under the Countryside & Rights of Way Act 2000 of a right to enter access land on foot, does not result in the creation of a highway.

**NOTE IT!****KNIGHTS SOLICITORS**

Peter Burfoot is a Partner in Knights Solicitors. He heads the Public Rights of Way team and his focus is stopping new public rights of way being created and on preventing existing public rights of way being extended. He has 40 years’ experience of property litigation, including public and private rights of way. Knights Solicitors specialise in countryside and country sports litigation and have acted on behalf of gamekeepers throughout England and Wales. Tel: 01892 537311, [www.knights-solicitors.co.uk](http://www.knights-solicitors.co.uk). Ask for Matthew Knight, Richard Atkins, Peter Burfoot or Joshua Quinn.

**NGO FREE LEGAL HELPLINE**

NGO members in need of emergency legal advice relating to gamekeeping and field sports can call the helplines below. Up to 30 minutes telephone advice is available free of charge as a benefit of your NGO membership.

For those in the South: Matthew Knight, Richard Atkins, Peter Burfoot and Joshua Quinn, Knights Solicitors (Tunbridge Wells), 01892 537311 (24hr line).

For those in the North, Scotland and Wales: Michael Kenyon, Solicitor (Macclesfield), 01625 422275 or 07798 636460.



## SOME TIPS FOR GAMEKEEPERS



- Ensure that you are familiar with the Definitive Map covering your beat. Most Highway Authorities publish the Definitive Map for their area online. Make sure that you are aware of the category which the ways on the map fall into, for example footpath, bridleway, restricted byway, etc.
  - Put up Notices visible to users of the route (in all directions) ensuring that the wording makes it clear that there is no intention to dedicate the route for public use – for example: “No public right of way”.
  - If there is a limited right of way over a route such as for a public footpath, but not as a public bridleway or other greater right, the Notice should make this clear – for example: “No right of way except as a public footpath”.
  - Document the erection of the Notices by photographing them and keeping records of the person who placed the Notices, photographed them and the dates on which they were put up, replaced and photographed. Keep those records for at least 20 years.
- Maintain the Notices and ensure that they are regularly re-documented and photographed on an on-going basis.
- Ensure that where any Notice which has been torn down or defaced, the landowner gives notice to the council that the route is not dedicated as a highway (other than any highway for which it is already dedicated).
- Make sure that the landowner makes and renews deposits, ensuring that lodgement with the council is properly documented.
- Make sure that you get from the landowner details of all those who have private rights of way and that you know what those rights permit them to exercise, such as on foot only, on horseback, with or without animals, motor vehicles, etc.
- Consider installing a gate across a way and locking it on particular days in each year, keeping records of the days on which it was locked.
- Inform trespassers orally that they have no right of way, and if you know who they are, write to them afterwards, or get the landowner to do so.
- Document every occasion when you inform a trespasser that they have no right of way. This is called “Challenging”. You need to keep a sufficient record of challenges so that if called upon to do so, you can describe:
  - Who you challenged.
  - What you said.
  - Where you found the trespasser.
  - Where they were going from and to.
  - The date and time of the challenge.
  - What the response was.
- Consider carrying some cards in your pocket to hand to a trespasser to inform them there and then of the trespass and warning them not to trespass again.
- Avoid confrontation and breach of the peace and be especially careful if you are carrying a firearm to ensure that your challenge might not be considered threatening behaviour. Avoid approaching a trespasser with a firearm altogether.
- Consider installing CCTV at access points and challenge recurrent trespassers whose images are recorded.
- Get the landowner to act straight away if interest groups, parish councils or local residents or others start to try to drum up support to apply to modify the Definitive Map. The application needs to be nipped in the bud by the landowner showing the council all the documentary evidence showing non-intention to dedicate and any permissive use.
- If the council makes a Modification Order, suggest to the landowner considering whether a local Public Inquiry is more appropriate or whether to rely on written representations. Remember that if an Inquiry is held, some alleged users who have supported an application may not attend. If they do, when pressed at an Inquiry, witnesses tend to tell the truth, which often means they cannot actually confirm the alleged use they claim to have had or be able to give specific details, such as when they had use and what signs they remember seeing.

Any notice needs to be absolutely clear what is allowed and what is not. You cannot restrict access over a public right of way.

