

## How Do We Make a Decision?

In every case we research a standard set of documents. These are listed in the investigation report. The investigation report also provides a summary of any contemporary evidence we have received. We request that any additional evidence available to our consultees (landowners, parish council, applicant, users etc.) but not referred to in the report is sent to us for consideration prior to the decision meeting. At the decision meeting, all the evidence made available to Hertfordshire County Council (HCC) is considered. This includes both documentary evidence and evidence received from contemporary witnesses such as users and landowners.

It is important to understand that if the evidence shows that a right of way was established 100 years ago or more and has not subsequently been stopped up by legal order, it still exists - even if there is witness evidence about the route now being blocked.

HCC's position is completely impartial when we start investigating. During our investigation, we look for information that will help us to determine the following questions at the decision meeting:

- Does the route physically exist?  
*If it does, when did the route come into existence, where does it start and end, how wide is it and what evidence is there of the existence of limitations e.g. gates etc. which have existed continuously since the time the route came into existence.*
- Do highway rights exist over the route?  
*Is there evidence that the route is a highway? If there is evidence of a highway, does the evidence show that it is a carriageway, a bridleway or a footpath? Does the route under investigation join with other highways of the same or higher status (unless there is evidence that it is a cul de sac route)? Is there evidence that the position or status of the route differs from the application? If so this will need to be highlighted in the investigation report and/or decision.  
Is there evidence that a highway once existed and has subsequently been stopped up, extinguished or diverted?*
- What evidence is there that there is public liability for maintenance?  
*Is the route an "ancient highway" that existed prior to the Highways Act 1835? Is it a right of way that was recorded on the first Definitive Map under the National Parks and Access to the Countryside Act 1949?<sup>1</sup> Has there ever been an order made for the route – creating, diverting or extinguishing it; or is there any evidence showing that the route was 'adopted'? (N.B routes not previously recorded which have come into existence through use are unlikely to be maintainable at public expense)*
- Have the landowners taken any steps to prevent dedication?  
*If so, what did they do, when did this occur and was this made clear to the public? What evidence was provided which supports this? Is there corroboration about the steps taken from other contemporary evidence?*
- Where the evidence in support of the alleged route is solely user evidence, has

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<sup>1</sup> see chapter 10 of "Rights of Way, a Guide to Law and Practice" (4<sup>th</sup> Edition) by John Riddall and John Trevelyan

use been challenged?

*When did this occur and what form did the challenge take? What evidence was provided which supports this? Is there corroboration from other contemporary evidence?*

- Where the application is to downgrade or delete a recorded right of way, what evidence is there to show that a mistake was made when the route was recorded on the Definitive Map and Statement (DMS)?

## **What sort of evidence is considered?**

### Documentary evidence

Old documents can provide evidence as to the existence of historic routes.

Investigation of a standard set of documents is usually sufficient for us to make a decision. Documents submitted by the applicant or other interested parties before the decision will be included in the decision report, as will any additional documents researched by the investigating officer. Occasionally further investigation may be required where there is insufficient evidence to make a decision.

### Witness evidence

Witness evidence can show that a route has come into existence through use, or it may support documentary evidence. Any evidence received from people familiar with the area or who have used the alleged route is considered.

Evidence of use can raise a “presumption of dedication” as described in section 31 of the Highways Act 1980. For this to happen, use must be shown to have occurred for 20 years prior to a ‘date of challenge’. The 20 years’ use has to be without force, secrecy or permission. Usage for 20 years does not have to be by a single individual, but can be provided by two or more people who can show use over the full 20 years of the same route for shorter although overlapping periods. The 20 year period is counted back from the date users are challenged using the alleged route. Evidence of a challenge could include when users were asked to turn back or when a structure blocked the route. Where there is only evidence of use, and there is no evidence that use has been challenged, section 31 of the Highways Act 1980 specifies that the date of application should be used as the end of the 20 year period.

Evidence can also be given to us from people familiar with the area, such as landowners. This can include whether or not they are aware that people use the alleged route and what steps, if any, they have ever taken to encourage or discourage people from using it. Landowners can do this for example by closing the way or erecting notices which clearly indicate that no public right of way exists. Further, under the Highways Act 1980, a landowner may make a declaration to the highway authority together with a map and statement showing those ways which they agree are highways.

## **How is the decision made?**

All the available evidence is considered by the case officer, Definitive Map Team Leader and a solicitor who provides legal advice, to build a picture of the area and the alleged route. A decision is made by for each piece of evidence available, assessing what it shows, including consideration of the purpose for which the document was

produced, and where it has been kept<sup>2</sup>. The decision made for each document is on the “balance of probability”, and not “beyond all reasonable doubt”.<sup>3</sup> The decision is made by an officer with delegated authority, normally the Definitive Map Team Leader. Relevant legislation and case law is taken into account when we make our decision. A report called “Reasons for Decision” records the decision made for each document and then HCC’s conclusion as to whether or not an order is to be made.

The courts have given guidance on how evidence is to be considered. In the *Fortune case*,<sup>4</sup> Lewison LJ said, at paragraph 22,

In the nature of things where an inquiry goes back over many years (or, in the case of disputed highways, centuries) direct evidence will often be impossible to find. The fact finding tribunal must draw inferences from circumstantial evidence. The nature of the evidence that the fact finding tribunal may consider in deciding whether or not to draw an inference is almost limitless. As Pollock CB famously directed the jury in *R v Exall* (1866) 4 F & F 922:

"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."

HCC’s decision is therefore based on the assessment of all the evidence, which is often taken all together rather than relying on an individual document. The conclusion explains the decision made.

The decision will be either to make an order to change the Definitive Map and Statement under the Wildlife and Countryside Act 1981 (“WCA”), or not to make an order.

## **The Decision**

For each document, decisions are made about the alleged route’s physical existence and whether highway rights exist. Contemporary witness evidence is assessed in regard to the actions the landowner has taken and to ascertain the level of use and over which years. If it is decided that highway rights exist, further decisions are made as to the status (i.e. footpath, bridleway or carriageway) together with the width of the route and any limitations, and whether HCC will be responsible for maintenance.

If a route is investigated which is currently recorded on the DMS, the evidence will need to be assessed as to whether its status is correct, or if any details about the route such as its width need to be recorded or changed.

Alternatively, where an alleged route is not currently recorded on the DMS, an order can only be made if:

- the evidence shows a right of way has been established through use (“raising the presumption that the way has been dedicated”); or
- through the evidence showing either:

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<sup>2</sup> See Section 32 Highways Act 1980

<sup>3</sup> See “*Todd, Bradley v SOS for EFRA* [2004] 4 All ER 497”

<sup>4</sup> See “*Fortune and Others v Wiltshire Council and Another* [2012] EWCA Civ 334”

- that **the right of way subsists** - in this case it will be necessary to show that on the balance of probabilities the right does exist, or
- that **it is reasonable to allege that a right of way subsists** - in this case, it will be necessary to show that a reasonable person, having considered all the evidence available, could reasonably allege a right of way to subsist

These two tests were identified in the case of *R v Secretary of State for the Environment ex parte Norton and Bagshaw*, and accepted in the case of *R v Secretary of State for Wales ex parte Emery*.

In cases where the evidence shows carriageway rights, or if the application is to record a byway open to all traffic, the Natural Environment and Rural Communities Act 2006 has to be applied. This Act affects the order we make because this Act extinguished unrecorded rights for mechanically propelled vehicles unless one of the exemptions set out in the Act applies. These exemptions include whether the application was properly made before 1<sup>st</sup> January 2005, if the route was recorded on the County Council's List of Streets on 2<sup>nd</sup> May 2006, whether the route was used by mechanically propelled vehicles prior to 1930 or whether the route was created or constructed for vehicular use.

Defra's guidance is available at

<http://webarchive.nationalarchives.gov.uk/20130402151656/http://archive.defra.gov.uk/rural/countryside/prow/nerc06.htm>

It is also possible for a public right of way to be established at common law. This requires the use of the way and the actions of the landowner to have been of such a nature that dedication of the way can be presumed to have occurred. Dedication can occur in less than 20 years where use is sufficient and obvious to the owner that it is happening.

It should be noted that if the decision is to make an order to add the route to the DMS, it is possible that the order may be different from the application in terms of the location of the route or its status. This is because the decision is made on the evidence found during the investigation, which may differ from the application.

Once the decision has been made, our 'Reasons for Decision' are published on [www.hertfordshire.gov.uk/rowapps](http://www.hertfordshire.gov.uk/rowapps). The report remains available on line until the case reaches the next stage in the process, when the documents will be changed.

### **Other information**

The law is strict about what we can and cannot consider when examining evidence. We know that people can feel strongly about issues like the suitability of a route, the possible impact on personal privacy and damage to wildlife and habitat. These are some of the issues we are not by law allowed to consider. This is because the modification order process is purely evidential and is concerned only with whether or not a public right of way exists. However, if we decide that a route should be added to the Definite Map and Statement, we try to work with people to address their concerns.

The Planning Inspectorate has published information about how they interpret evidence at: <https://www.gov.uk/government/publications/definitive-map-orders-consistency-guidelines>. You can find more Planning Inspectorate guidance via the government information website <https://www.gov.uk/government/collections/rights-of-way-advice-notes>.