Cyngor Bwrdeistref Sirol
MERTHYR TUDFUL
MERTHYR TYDFIL
County Borough Council

Civic Centre, Castle Street,
Merthyr Tydfil CF47 8AN

Main Tel: 01685 725000 www.merthyr.gov.uk

RIGHTS OF WAY INFORMATION REPORT

Date Written	1st October 2015
Report Author	Geraint Morgan
Committee Date	5 March 2018

To: Chairman, Ladies and Gentlemen

Guidance on the law relating to the continuous review of the Definitive Map and Statement of Public Rights of Way

Definitions

The Wildlife and Countryside Act 1981 gives the following definitions of the public rights of way which are able to be recorded on the Definitive Map:-

Footpath – means a highway over which the public have a right of way on foot only, other than such a highway at the side of a public road; these rights are without prejudice to any other public rights over the way;

Bridleway – means a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway; these rights are without prejudice to any other public rights over the way;

Byway open to all traffic (BOATs) – means a highway over which the public have a right of way for vehicular traffic and all other kinds of traffic. These routes are recorded as Byways recognising their particular type of vehicular highway being routes whose characters make them more likely to be used by walkers and horse riders because of them being more suitable for these types of uses;

Restricted Byway – means a highway over which the public have a right of way on foot, on horseback or leading a horse and a right of way for vehicles other than mechanically propelled vehicles, with or without a right to drive animals along the highway. (Mechanically propelled vehicles do not include vehicles in S189 Road Traffic Act 1988).

Duty of the Surveying Authority

Section 53 of the Wildlife and Countryside Act 1981 provides that a Surveying Authority shall keep a Definitive Map and Statement under continuous review and as soon as reasonably practicable after the occurrence of any of a number of prescribed events by Order make such modifications to the Map and Statement as appear to them to be requisite in consequence of the occurrence of that event.

Orders following "evidential events"

The prescribed events include –

Sub section (3) of section 53

(b) the expiration, in relation to any way in the area to which the Map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway;

(c) the discovery by the Authority of evidence which (when considered with all other relevant evidence available to them) shows –

  (i) that a right of way which is not shown in the Map and Statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, a byway open to all traffic; or

  (ii) that a highway shown in the Map and Statement as a highway of a particular description ought to be there shown as a highway of a different description; or

  (iii) that there is a public right of way over land in the Map and Statement as a highway of any description, or any other particulars contained in the Map and Statement require modification.

The modifications which may be made by Order shall include the addition to the statement of particulars as to:-

(a) the position and width of any public path or byway open to all traffic which is or is to be shown on the Map; and
(b) any limitations or conditions affecting the public right of way thereover.

Orders following "legal events"

Other events include

"The coming into operation of any enactment or instrument or any other event" whereby a highway is stopped up diverted widened or extended or has ceased to be a highway of a particular description or has been created and a Modification Order can be made to amend the Definitive Map and Statement to reflect these legal events.

Government Policy – Welsh Office Circulars 5/93 & 45/90

In considering the duty outlined above the Authority should have regard to the above circulars.

Circular 5/93

Paragraph 13 of Annex B of that circular states "Surveying Authorities, whenever they discover or are presented with evidence which suggests that a Definitive Map and Statement should be modified, are required to take into consideration all other relevant evidence available to them concerning the status of the right of way involved. Moreover before making an Order they must be satisfied that the evidence shows on the balance of probability that a right of way of a particular description exists or that a way shown on the Map is not in fact a public right of way. The mere assumption, without any supporting evidence, that a right of way does or does not exist would be insufficient to satisfy that test. In the case of deletions, the conclusive evidential effect of definitive maps and statements means that the evidence must show that no right of way existed as at the relevant date of the Definitive Map on which the way was first shown. If the evidence does support this, consideration should also be given to whether the way has acquired such rights in the intervening period."

Further advice on deletions is contained in Welsh Office Circular 45/90.

In relation to byways open to all traffic (BOATs) Paragraph 12 of Annex B states "by definition BOATs are vehicular rights of way which are used by the public mainly for the purposes for which footpaths and bridleways are used. The Principal factor Surveying Authorities should bear in mind when deciding whether a way ought to be shown on the Definitive Map and Statement as a BOAT is therefore the purposes for which it is used. Thus if it is mainly used by vehicular traffic as opposed to walkers and horse riders it should as a general rule not be shown. Instances may occur where a way presumed to

have been dedicated as a highway for all purposes under Section 31 of the Highways Act 1980 also satisfies the definition of a BOAT. In such circumstances, it would be open to Surveying Authorities to add the way to the Definitive Map and Statement under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981. Section 53(3)(c) also allows for ways presently shown on Definitive Maps and Statements as footpaths and bridleways, but which enjoy vehicular rights, to be upgraded to BOATs."

Circular 45/90

The circular explains that following the Court of Appeal decision in R v Secretary of State for the Environment ex parte Sims and Burrows (1989), authorities may consider applications to delete or downgrade rights of way on the basis that the evidence relates to events prior to the relevant date of the Definitive Map.

The circular also states:

"However, in making an application for an Order to delete or downgrade a right of way it will be for those who contend that there is no right of way or that a right of way is of a lower status than shown to prove that the Map is in error by the discovery of evidence which, when considered with all other relevant evidence, clearly shows that a mistake was made when the right of way was first recorded. The Authority is required by Paragraph 3 of Schedule 14 to the Act to investigate the matters stated in the application. However, it is not for the Authority to demonstrate that the Map is correct but for the applicant to show that an error was made…"

"In making an Order the Authority must be able to say in accordance with Sections 53(3)(c)(ii) or (iii) that a highway of a particular description ought to be shown on the Map and Statement with a different description; or that there is no public right of way over land shown in the Map and Statement as a highway of any description…"

"Authorities will be aware of the need, as emphasised by the Court of Appeal, to maintain an authoritative Map and Statement of highest attainable accuracy. The evidence needed to remove a public right from such an authoritative record will need to be cogent. The procedures for defining and recording public rights of way have, in successive legislation, been comprehensive and thorough. Whilst they do not preclude errors, particularly where recent research has uncovered previously unknown evidence, or where the review procedures have never been implemented, they would tend to suggest that it is unlikely that a large number of errors would have been perpetuated for up to 40 years without being questioned earlier."

Definitive Maps

The process for the preparation and revision of definitive maps was introduced by Part III of the National Parks and Access to the Countryside Act 1949.

Merthyr Tydfil was exempt from the provisions of Part III and it was not until 1990 that the first Definitive Map and Statement was prepared for Merthyr Tydfil by the then Highway Authority, Mid Glamorgan County Council. This was reviewed and the present Definitive Map and Statement is dated 15th December 1995.

Test to be applied when making an Order

The provisions of the Wildlife and Countryside Act 1981 set out the tests which must be addressed in deciding that the Map should be altered.

Section 53 permits both upgrading and downgrading of recorded highways and additions of way not previously recorded as well as deletions from the Map.

The statutory test at S53(3)(b) refers to the expiration of a period of time and use by the public such that a presumption of dedication is raised.

The statutory test at S53(3)(c)(i) comprises two separate questions, one of which must be answered in the affirmative before an Order is made under that subsection. There has to be evidence discovered. The claimed right of way has to be found on balance to subsist (Test A) or able to be reasonably alleged to subsist (Test B).

This second Test B is easier to satisfy.

Test B has been described in a recent case as imposing a "lesser burden, namely one which obliges the Authority only to be satisfied of the existence of facts which raise a prima facie case for the subsistence of the way."

The case of R v Secretary of State for the Environment, ex parte Bagshaw (1994) seems by inference to accept that an Order made on resumed dedication under Statute can be made under s53(3)(b) or s53(3)(c)(i).

In the Court of Appeal case, R v Secretary of State for Wales, ex parte Emery (1996), Lord Justice Roch found that in the case of a dedication deemed under statute; Test A is satisfied if there is "clear evidence of 20 years user uncontraverted by any credible evidence to the contrary and no credible evidence that there was on the part of the landowner no intention during the period to dedicate the way to the public".

Neither Test A nor Test B will be satisfied if there is "no credible evidence of 20 years use or where there is incontrovertible evidence that the landowner had no intention during the period to dedicate the way to the public".
Test B can be satisfied where "an applicant for a Modification Order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years and there is conflict of apparently credible evidence in relation to one of the other issues which arose under S31 of the 1980 Act". This is because it is possible, even though there is conflicting evidence, that a reasonable person having considered all relevant evidence available could reasonably allege a right of way to subsist.

The Court in the Emery case asked Order Making Authorities to bear in mind that making an Order still leaves both parties with the ability to object to the Order when conflicting evidence can be heard and those issues determined following a public inquiry.

The statutory test at S53(3)(c)(ii) again refers to the discovery of evidence that the highway on the Definitive Map ought to be shown as a different status.

The statutory test at S53(3)(c)(iii) again refers to evidence being discovered that there is no public right of way of any description after all or that there is evidence that particulars in the Map or Statement need to be modified.

The judgement in O'Keefe v Secretary of State for the Environment and Isle of Wight CC (1997) reminds Order making Authorities that they should make their own assessment of the evidence and not accept unquestioningly what officers place before them.

All evidence must be considered and weighed and a view taken on its relevance and effect.

An Order making Authority should reach a conclusion on the balance of probabilities. The balance of probability test demands a comparative assessment of the evidence on opposing sides. This is a complex balancing act.

Recording a "new" route

For a route to have become a highway it must have been dedicated by the owner either directly or by inference.

Once a route is a highway it remains a highway, even though it may fall into non use and perhaps become part of garden.

This is the position until a legal event causing the highway to cease can be shown to have occurred, or the land on which the highways runs is destroyed perhaps by erosion which would mean that the highway length ceases to exist.

Sometimes there is documentary evidence of actual dedication but more often a dedication can be inferred because of how the landowner appears to have treated the route and given it over to public use (dedication at Common Law) or dedication can be deemed to have occurred if certain criteria laid down in Statute are fulfilled (dedication under S31 Highways Act 1980)

Dedication able to be inferred at Common Law

At common law dedication of a highway may be inferred if the evidence points clearly and unequivocally to an intention on the part of the landowner to dedicate. The burden of

proof is on the claimant to prove a dedication. Evidence of use of the route by the public and how an owner acted towards them is one of the factors which may be taken into account in deciding whether a path has been dedicated. No minimum period of use is necessary. All the circumstances must be taken into account. How a landowner viewed a route may also be indicated in documents and maps.

However, a landowner may rely on a variety of evidence to indicate that he did not intend to dedicate, including signs the way was private, blocking off the way or turning people off the path, or granting permission or accepting payment to use the path.

There is no need to know who a landowner was.

Use needs to be by the public. This would seem to require the users to be a number of people who together may sensibly be taken to represent the people as a whole/the local community. Use wholly or largely by local people may still be use by the public. Use of a way by trades people, postmen, estate workers or by employees of the landowner to get to work, or the purpose of doing business with the landowner or on payment would not normally be sufficient. Use by friends of or persons known to the landowner would be less cogent evidence than use by other persons.

The use also needs to be as of right which would mean that it had to be open, not secretly or by force or with permission. Open use would arguably give the landowner the opportunity to challenge the use. Toleration by the landowner of a use is not inconsistent with user as of right. Recent case law would indicate that the use has to be considered from the landowner's perspective as to whether the use, in all the circumstances, is such as to suggest to a reasonable landowner the exercise of a public right of way.

The use would have to be of a sufficient level for a landowner to have been aware of it. The use must be by such a number as might reasonably have been expected if the way had been unquestioningly a highway.

Current use (vehicular or otherwise) is not required for a route to be considered a Byway Open to All Traffic but past use by the public using vehicles will need to be sufficiently evidenced from which to infer the dedication of a vehicular route.

Dedication deemed to have taken place (Statutory Test)

By virtue of Section 31 of the Highways Act 1980 dedication of a path as a highway may be presumed from use of the way by the public as of right – not secretly, not by force nor by permission without interruption for a full period of twenty years unless there is sufficient evidence that there was no intention during the twenty year period to dedicate it.

The 20 year period is computed back from the date the existence of the right of way is called into question.

A landowner may prevent a presumption of dedication arising by erecting notices indicating that the path is private. Further, under Section 31(6) a landowner may deposit with the Highway Authority a map (of a scale of not less than 1:10560 {6 inches to the mile}) and statement showing those ways, if any, which he or she agrees are dedicated as highways. This statement must be followed by statutory declarations. These statutory declarations used to have to be renewed at not more than 6 yearly intervals, but the interval is now 10 years. The declaration would state that no additional rights of way have been dedicated. These provisions do not preclude the other ways open to the landowner to show the way has not been dedicated.

If the criteria of Section 31 are satisfied a highway can properly be deemed to have been dedicated. This deemed dedication is despite a landowner now protesting or being the one to now challenge the use as it is considered too late for him to now evidence his lack of intention when he failed to do something to sufficiently evidence this during the previous twenty years.

Guidance on the various elements of the Statutory criteria:-

Use – see above as to sufficiency of use. The cogency, credibility and consistency of user evidence should be considered.

By the public – see above as to users which may be considered "the public".

As of right – see above.

Without interruption – for a deemed dedication the use must have been without interruption. The route should not have been blocked with the intention of excluding the users.

For a full period of twenty years – use by different people, each for periods of less than twenty years will suffice if, taken together, they total a continuous period of twenty years or more. The period must end with the route being "called into question".

Calling into question - there must be something done which is sufficient at least to make it likely that some users are made aware that the owner has challenged their right to use the way as a highway. Barriers, signage and challenges to users can all call a route into question. An application for a Modification Order is itself sufficient to be a "calling into question" (as provided in the new statutory provisions of Section 31(7a & 7b) Highways Act 1980). It is not necessary that it be the landowner who brings the route into question.

Sufficient evidence of a lack of intention to dedicate – this would not need to be evidenced for the whole of the twenty year period. It would be unlikely that lack of intention could be sufficiently evidenced in the absence of overt and contemporaneous acts on the part of the owner. The intention not to dedicate does have to be brought to the attention of the users of the route such that a reasonable user would be able to understand

that the landowner was intending to disabuse him of the notion that the land was a public highway.

Documentary Evidence

By virtue of Section 32 of the Highways Act 1980 in considering whether a highway has been dedicated, maps plans and histories of the locality are admissible in evidence and must be given such weight as is justified by the circumstances including the antiquity of the document, status of the persons by whom and the purpose for which the document was made or compiled and the custody from which it is produced.

In assessing whether or not a highway has been dedicated reference is commonly made to old commercial maps of the County, Ordnance Survey maps, sometimes private estate maps and other documents, other public documents such as Inclosure or Tithe Awards, plans deposited in connection with private Acts of Parliament establishing railways, canals or other public works, records compiled in connection with the valuation of land for the purposes of the assessment of increment value duty and the Finance Act 1910. Works of local history may also be relevant, as may be the records of predecessor highway authorities and the information gained in connection with the preparation and review of the Definitive Map.

It should be stressed that it is rare for a single document or piece of information to be conclusive (although some documents are of more value than others, e.g. Inclosure Awards where the Commissioners were empowered to allot and set out highways). It is necessary to look at the evidence as a whole to see if it builds up a picture of the route being dedicated as a highway.

It should be noted that Ordnance Survey Maps (other than recent series which purport to show public rights of way and which derive their information from the Definitive Map) contain a disclaimer to the effect that the recording of a highway or right of way does not imply that it has any status. The maps reflect what the map makers found on the ground.

Similarly, in relation to other map evidence such as Tithe Maps, they simply indicate that there was a track in existence at the time of the inspection, they do not establish the status of the track.

Synergy between pieces of highway status evidence – coordination as distinct from repetition would significantly increase the collective impact of the documents.

Recording vehicular rights

Historical evidence can indicate that a route carries vehicular rights and following the case of Bakewell Management Limited v Brandford case in 2004 (House of Lords) it is considered that vehicular rights could be acquired on routes by long user during years even since 1930. However, in May 2006 Part 6 of the Natural Environment and Rural Communities Act 2006 came into force. Public rights of way for mechanically propelled

vehicles are now extinguished on routes shown on the Definitive Map as footpaths, bridleways or restricted byways unless one of eight exceptions applies. In essence mechanical vehicle rights no longer exist unless a route is recorded in a particular way on the Council's Definitive Map or List of Streets or one of the other exceptions apply. In effect the provisions of the Act curtail the future scope for applications to record a Byway Open to All Traffic to be successful.

The exceptions whereby mechanical vehicular rights are "saved" may be summarised as follows:-

1. main lawful use of the route 2001-2006 was use for mechanically propelled vehicles.
2. that the route was not on the Definitive Map but was recorded on the List of Streets.
3. that the route was especially created to be a highway for mechanically propelled vehicles.
4. that the route was constructed under statutory powers as a road intended for use by mechanically propelled vehicles.
5. that the route was dedicated by use of mechanically propelled vehicles before December 1930.
6. that a proper application was made before 19th May 2005 for a Modification Order to record the route as Byway Open to All Traffic (BOAT).
7. that a Regulatory Committee had already made a decision re an application for a BOAT before 6th April 2006.
8. that an application for a Modification Order has already been made before 6th April 2006 for a BOAT and at 6th April 2006 use of the way for mechanically propelled vehicles was reasonably necessary to enable that applicant to access land he has an interest in, even if not actually used.

It is certainly the case that any application to add a byway to the Definitive Map and Statement must still be processed and determined even though the outcome may now be that a vehicular right of way existed before May 2006 but has been extinguished for mechanically propelled vehicles and that the route should be recorded as a restricted byway.

Downgrading a route or taking a route off the Definitive Map

In such matters it is clear that the evidence to be considered relates to whether on balance it is shown that a mistake was made when the right was first recorded.

In the case of Trevelyan v Secretary of State for the Environment, Transport and the Regions (2001), Court of Appeal, it was considered that where a right of way is marked on the Definitive Map there is an initial presumption that it exists. It should be assumed that the proper procedures were followed and thus evidence which made it reasonably arguable that it existed was available when it was put on the Map. The standard of proof

required to justify a finding that no such right of way exists is on the balance of probabilities and evidence of some substance is required to outweigh that presumption.

Authorities will be aware of the need, as emphasised by the Court of Appeal, to maintain an authoritative Map and Statement of highest attainable accuracy. "The evidence needed to remove a public right from such an authoritative record will need to be cogent. The procedures for defining and recording public rights of way have, in successive legislation, been comprehensive and thorough. Whilst they do not preclude errors, or where the review procedures have never been implemented, they would tend to suggest that it is unlikely that a large number of errors would have been perpetuated for up to 40 years without being questioned earlier."

Taking one route off and replacing it with an alternative

In some cases there will be no dispute that a public right of way exists between two points, but there will be one route shown on the Definitive Map which it is claimed to be in error and an alternative route claimed to be the actual correct highway.

There is a need to consider whether, in accordance with Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 a right of way is shown to subsist or is reasonably alleged to subsist and also, in accordance with Section 53(3)(c)(iii) of the same Act whether there is no public right of way on the other route.

The guidance published under the statutory provisions make it clear that evidence to establish that a right of way should be removed from the authoritative record will need to be cogent.

In the case of R (on the application of Leicester County Council) v Secretary of State for the Environment, Food and Rural Affairs (2003), Mr Justice Collins said there "has to be a balance drawn between the existence of the definitive map and the route shown on it which would have to be removed and the evidence to support the placing on the Map, in effect a new right of way. If there is doubt that there is sufficient evidence to show that the correct route is other than that shown on the Map, then what is shown on the Map must stay."

The court considered that if it could merely be found that it was reasonable to allege that the alternative existed, this would not be sufficient to remove what is shown on the map. It advised that, unless in extraordinary circumstances, evidence of an alternative route which satisfied only the lower "Test B" (see above) would not be sufficiently cogent evidence to remove the existing recorded route from the Map.

Confirming the Order

An Order is not effective until confirmed.

The County Borough Council may confirm unopposed Orders. If there are objections the Order is sent to the Secretary of State for determination. The County Borough Council usually promotes Orders and actively seeks confirmation from the Secretary of State.

Until recently it was thought that the test to be applied to confirm an Order was the same test as to make the Order, which may have been under the lower Test B for the recording of a "new" route. However, the Honourable Justice Evans-Lombe heard the matter of Todd and Bradley v Secretary of State for the Environment, Food and Rural Affairs (2004) and decided that confirming an Order made under Section 53(3)(c)(i) "implies a revisiting by the Authority or Secretary of State of the material upon which the original Order was made with a view to subjecting it to a more stringent test at the confirmation stage" and that to confirm the Order the Secretary of State (or the Authority) must be "satisfied of a case for the subsistence of the right of way in question on the balance of probabilities", i.e. that Test A is satisfied.

It is advised that there may be cases where an Order to record a new route can be made because there is sufficient evidence that a highway is reasonably alleged to subsist, but unless Committee also consider that there is enough evidence, on balance of probabilities, that the route can be said to exist, the Order may not be confirmed as an unopposed Order by the County Borough Council. This would mean that an Order could be made, but not confirmed as opposed, nor could the confirmation actively be supported by the County Borough Council should an opposed Order be submitted to the Secretary of State unless additional information came to light at or before the confirmation stage to enable the County Borough Council to be satisfied that the way existed.