Advice on

Recording public bridleways and byways in England and Wales

The law relating to public access rights varies widely between the four countries of the United Kingdom. The following advice applies only in England and Wales.

More advice is available on www.bhs.org.uk/accessadvice.

IMPORTANT This guidance is general and does not aim to cover every variation in circumstances. Where it is being relied upon, The Society strongly recommends seeking its advice specific to the site.

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Definitions

Equestrians — Riders and drivers of horses.

Highway — a public right of way, generally assumed to mean a public road, but a public footpath, bridleway or byway is a highway in law.

The Definitive Map and Statement

The National Parks and Access to the Countryside Act 1949 requires each highway authority (county council or unitary authority in England, county or county borough council in Wales) to keep a Definitive Map and Statement of public rights of way, which is the formal legal record of the existence of footpaths, bridleways, restricted byways and byways open to all traffic in its area.

Each public right of way on the Map and Statement will have a unique reference which may indicate the parish (or district) and number of the path in that parish. The Map shows status (that is, footpath, bridleway or byway) and alignment. The Statement may be brief, giving only status and start and end point, or it may include details of width, gates, bridges or constraints. Some Maps do not have a Statement for each right of way shown.

The Map is conclusive evidence of any route recorded on it, but is without prejudice to the existence of rights that are not recorded, either because they were omitted when the Map was first created, or because they have come into being since that date.

There are many errors on the Definitive Map and Statement because the initial record depended on parish councils, some of which were still struggling after the second World War and may not have had map reading skills, and local views which may have wished to deny public rights of way, and poor guidance on the task which was not fully understood. The process was then completed by county councils, some of which determined to reduce their maintenance liability by under-recording rights. Compiling the original Map and updating it has been complex and contentious, and the work has been chronically under-funded.

When a right of way is not shown or is shown incorrectly, highway authorities (county councils) can correct the Definitive Map by a legal process called a Definitive Map Modification Order (DMMO).

Members of the public who find evidence that a right of way is not correctly recorded can apply to the council for a Modification Order to be made. If an application results in a confirmed Modification Order, the Definitive Map and Statement will be modified with the result of the Order, most commonly the addition of rights.

Modifying the Map to show rights correctly is not creating new rights, it is simply correcting the record to reflect the rights which have been shown to already exist.

BHS supports the work to correctly record the many bridleways and restricted byways that were omitted or recorded as footpath, as well as creating any new definitive routes. Many of its volunteers are dedicated to the task and any more people who can help gather evidence and make applications are welcome because it is important to have all rights recorded so they can be protected.

This advice note describes how to investigate a route which is used (or was used in the past) as a bridleway or byway that is not recorded or is shown as a footpath (under-recorded) and how to prepare an application for a Definitive Map Modification Order (below). Alternative means of adding rights to the Definitive Map are also described. Anyone interested in making applications for missing rights is encouraged to attend BHS Access training days and refer to the book 'Rights of Way – Restoring the Record' (Bucks and Wadey) available from the BHS bookshop.

Ways of adding routes to the Definitive Map

A Definitive Map Modification Order is used to record rights which have been shown to exist. This may be through documentary evidence, such as old maps and legal records, perhaps going back centuries, or evidence from users alive now. They are not new rights, they may have existed for centuries but have not been recorded. The process can be lengthy and requires robust evidence.

Sometimes the evidence cannot be found, or evidence exists for a route which is no longer available because of buildings or other change of landscape, but there may be a clear need for a bridleway or byway so that the public can pass from A to B without use of roads.

New rights, with no history of use, can be created by a Creation Agreement, Creation Order or Express Dedication on a convenient route. A Definitive Map Modification Order can only record the right of way shown by the evidence, which may be old and the route may not be ideal for use today, so a second legal

process would be required to move the historical line to an accessible route. In this case, a creation (by agreement, order or express dedication) of an accessible route in the first place can save the time and expense of a DMMO plus the second process to divert the line.

There are four ways of creating a new bridleway or restricted byway.

1. Creation Agreement Highways Act 1980 Section 25

A local authority may enter into an agreement with a landowner to create a bridleway or restricted byway, or to upgrade a footpath. The default agreement will include the local authority assuming responsibility for maintenance of the right of way, but a clause can be included making maintenance someone else's liability.

A creation agreement is the simplest and most cost-effective way to create a new bridleway or restricted byway.

With reduced budgets, some authorities may refuse to enter into a creation agreement unless they can justify it in terms of their priorities, so it may be necessary for the public to make the case for the importance of the way to local people.

If the council finds itself unable to justify the cost against the benefit to the public, the agreement process can include payment from local crowdfunding, either to the council as a contribution to the legal work or for any work required to enable the route to become usable, e.g. surface or gates. Supply of materials or volunteer labour might also help.

2. Creation Agreement Highways Act 1980 Section 30

Parish or community councils have the power to create a bridleway or restricted byway, or upgrade a footpath, under section 30 of the Highways Act 1980. The way would not be maintainable at public expense under this power, although it can then become maintainable at public expense under the Highways Act Section 38. This method can be used if the parish/community council supports the dedication but the highway authority does not.

3. Public Path Creation Order Highways Act 1980 Section 26

A local authority can make a Public Path Order to create a bridleway or restricted byway, or to upgrade a footpath. Evidence of need will be necessary and the effect

on the rights of landholders would have to be considered. The right of way would be maintainable at public expense.

Compensation may have to be paid to the landowner. Dispute about the level of compensation is decided by the Lands Tribunal.

The process is sometimes used where the owner of the land is not known and compensation is unlikely to be claimed. It can be used against the landowner's wishes, but this is rare because of the cost.

The cost implications of making a creation order, particularly against opposition, of maintenance liability and potential compensation may make an authority reluctant to use this power except where the need is shown to be high, with substantial local support, and within the council's priorities. Reference to those priorities and the council's Rights of Way Improvement Plan may assist an application.

4. Express Dedication at Common Law

A less common method to record a right of way on the Definitive Map is for the landowner to expressly dedicate the right of way at common law. This can be done for completely new rights as well as an affirmation of unrecorded rights which evidence suggests already exist, and to upgrade an existing right of way.

If there is evidence of an unrecorded right, which landowners agree exists, it is worth asking them to make an Express Dedication because this means the way immediately becomes available for use. Detailed information on express dedication is available through The Trails Trust,[1] which has published 'Creating Multi-user Public Rights of Way – A Guide for Local Groups'.

The highway authority may accept the Express Dedication and simply add the route to the Definitive Map by an internal process called a Legal Event Modification Order, or it may fall to the person promoting the agreement with the landowner to make an application for a Definitive Map Modification Order, for which the evidence is the landowner's dedication and declarations of acceptance by members of the public.

An Express Dedication does not require the involvement of the highway authority, apart from to add it to the Definitive Map, and can proceed without its support, although it is strongly recommended that its Rights of Way Officers are consulted

[1] www.thetrailstrust.org.uk/

at an early stage to ensure that it is progressed in a way most likely to be added to the Definitive Map with least work.

Such a dedication should be in writing and include proof that the signatory is the owner of the land, and able[2] to dedicate a right of way over it.

The highway authority does not have to accept maintenance liability but may do so, especially if maintenance is likely to be minimal (e.g. a track used and maintained by the landholder for their own use). Guidance from Defra[3] states that it would seem good practice for the authority to accept maintenance liability in conjunction with its liability to assert and protect the right of way. The same guidance also states that an Express Dedication is a legal event, for the purpose of adding to the Definitive Map.

If the landowner wishes to be certain that the highway authority will accept liability for maintenance,[4] they must give notice to the highway authority of their intention to dedicate the right at least three months before the dedication. The highway authority can decide to accept liability for maintenance after the highway has been dedicated.[5]

If a dedicated route is physically unsuitable it may have to be brought up to a certain standard before the authority will accept maintenance liability. Local crowdfunding may be helpful in this case.

Modification Orders

A Definitive Map Modification Order (DMMO) modifies the Definitive Map and Statement of public rights of way (DMS or 'the Map'), when evidence shows that a right of way exists which is not recorded on the Map or is marked as a right of way of a different description, e.g. the evidence shows a bridleway but the Map has a footpath.

[2] Having 'capacity' to dedicate means being legally free to take that action without constraint in the deeds. Land held in trust or by a company, or in probate, for instance, may not have that capacity.

[3] Letter from Dave Waterman, Landscape and Outdoor Recreation, Defra, to Paul Johnson, Natural England, on 19 November 2012

[4] Highways Act 1980 Section 37

[5] Highways Act 1980 Section 38

Evidence is required to substantiate a claim that rights exist which are not recorded, and an application is made to the local highway authority for a Definitive Map Modification Order (DMMO) under the Wildlife and Countryside Act 1981.

The application for a DMMO is a case made by an individual, a parish council, a bridleways group or other organisation (such as BHS), who produces evidence that rights exist that are not recorded and should be added to the Definitive Map and Statement. They may be rights over a route that is not recorded at all, or higher rights than those recorded, such as evidence of a bridleway or restricted byway that is recorded as footpath.

It is time-consuming to prepare an application and, once made, it can take years to be processed by the council. However, unlike a creation (1–4 above), it does not depend on cooperation from a landowner, council or other organisation.

The application needs to show that the route has been used by the public as of right for a considerable period, either with reference to historical documents that demonstrate that the route was used in the past or by witness accounts of use, or both.

The law

Highways Act '20-year rule'

A right of way can be explicitly dedicated, as described in 1–4 above, or it can 'come into being' through use (often the case in 5 above). If a landowner has either facilitated the use, or done nothing for the public to realise that no right of way exists, such as periodically locking a gate or erecting notices (Figure 1), then they can be presumed to have dedicated a right of way.



Figure 1

Under Section 31 of the Highways Act 1980 ('S.31'), there must be enough use of a route by the public over a period of at least 20 years without the landowner preventing or challenging use in a way that could reasonably be considered by the public to mean there is no right of way.

The 20-year period is counted backwards from the point at which use of the route was challenged. The challenge is commonly a gate being locked, change of ownership, or a planning application for change of use of the land. The onus is on the landowner to demonstrate that dedication was not made.

In the absence of a challenge, the date of the application for a Modification Order can be taken as the date from which the 20 years is counted backwards.[6]

Common law

A case can be made under common law without reliance on the 20-year rule. The period may be for fewer than 20 years but the shorter the period of use, the more evidence of use is required to infer that dedication has occurred.

The claimant must show that there has been dedication by the landowner. This is more difficult than a S.31 case above, because it requires more than absence of effort to inform the public that there is no right of way. A common law case is most likely achieved by physical provision for the public and signs indicating public use (Figure 2).[7] Use alone is not enough to show that dedication has occurred.



Figure 2

A common law case does not need a point of challenge.

Whether the case is made using S.31 or common law (or both), an application for a Definitive Map Modification Order is usually required for the highway authority to investigate the evidence.

Making a DMMO Application

The highway authority (county council) can make a Definitive Map Modification Order to modify the Definitive Map on the basis of evidence that shows the Map to be incorrect. That evidence is usually 'discovered' by the council because of an application for an Order from the public. An application is a specific form which the applicant must complete and send with copies of the evidence and a plan showing the route.

Evidence may be historical (Documentary evidence below), that is, documents such as old maps, deeds or other records, or User evidence, statements from people who have used the way. An application can include either or both historical and user evidence.

[6] Natural Environment and Communities Act 2006 Section 69

[7] e.g. 'Horse riders please keep to the path'

Preliminaries

Each highway authority will have its own method, its own versions of user evidence forms and the prescribed forms mentioned below. It is useful to contact the authority and seek to follow their preferred methods. Local BHS Access and Bridleways Officers may have established contact if you need help where it is not possible to reach the council officer directly.

The council will hold two registers (below) and the List of Streets, which should all be consulted before beginning work as they may affect what is required and the period to be considered.

Register of applications

Information on Modification Order applications received by the council should be included in a register of applications to add, remove or change a right of way, which is available for public inspection and should be on the council's website.

If a bridleway or byway is not shown on the Definitive Map, first check the register for whether an application has already been submitted and is waiting to be processed. Some registers lack detail so you may have to contact the council to clarify.

Register of declarations Highways Act Section 31(6)

The highway authority will keep and should publish on its website a register of declarations by landowners who have deposited a map and statement with the authority under Section 31(6) of the Highways Act 1980. The deposit and declaration acknowledge rights of way over their land "and no other", so prevent a new right of way coming into being. The register should be checked when any evidence being considered post-dates 1932 (when declarations were first able to be made).

A declaration is evidence that the landowner did not intend to dedicate a public right of way so may affect the period for which evidence will be required to make a case for a Modification Order, i.e. twenty years back from the date of the declaration or the date of deposit, whichever is earlier.

List of Streets maintainable at public expense

Each highway authority will have a 'List of Streets maintainable at public expense'. This is a list which a highway authority is required to maintain and keep up-to-

date and available to the public for inspection free of charge. It records all the highways in its area which it is liable to maintain. Most authorities have the data from the List on the National Street Gazetteer, and it may also be on their own website, in the form of an interactive map.

The List of Streets does not have a prescribed process for its format or maintenance so it varies between authorities. There is also a difference between 'maintainable' and 'maintained' which has a history of misunderstanding and has created anomalies within and between authorities in what is shown on the List.

The List should include all highways which are maintainable at public expense, whether surfaced or not, which includes classified and unclassified roads, cycle tracks, byways open to all traffic and restricted byways, public bridleways and public footpaths (they are all classes of highways, highway does not mean only roads).

This is not duplication with the Definitive Map, which shows footpaths, bridleways and byways, because the List is a record of *liability* to maintain, not status, and the Definitive Map is a record of *status*, not liability, therefore the two records overlap.

In practice, most authorities only record highways which are not shown on their Definitive Map, so primarily carriageways (whether surfaced or not) plus footways and cycle tracks that are surfaced and maintained.

The National Street Gazetteer may also show highways which are privately maintainable, which cannot be shown on the List of Streets. Some councils have included public rights of way which are recorded on the Definitive Map but some have not. You will need to clarify the practice of your highway authority.

Because the List of Streets is a register of publicly maintainable routes, then it provides evidence that any route on it is public because it is illegal to maintain a private road with public funds. It is often taken as evidence of a public road, although the latter may be argued by some authorities who will state that it only indicates at least a right on foot because it is a record of maintenance liability, not status and the List may include routes which are pedestrian only or cycle tracks. In practice, unless the route is physically constrained to use on foot only, e.g. by steps or width, List of Streets routes are more likely than not to be roads, even those which are unsurfaced tracks.

Some minor roads on the List of Streets are shown on modern Ordnance Survey maps as Other Routes with Public Access (ORPAs), whether surfaced or not. The

designation has no legal meaning, but the information to enable OS to show them came from highway authorities.

When checking the List of Streets, it is important to see just how much of the route is recorded on the List: in some cases, it may be only a section, perhaps which has been surfaced to serve a few houses at one end, and not the whole length of the road/track even though the whole route is a highway. There are many through routes which are tarmaced at the ends but metalling reduces beyond the last premises.

What an application comprises

Apart from evidence (below) which justifies making an application, there are some requirements (see bullet points below) that must be fulfilled to make a DMMO application valid. An authority is entitled to reject an application that is not compliant with the regulations, but it can *only* reject on that point. There have been compliant applications rejected for invalid reasons, such as that the route is recorded on the List of Streets, that there is no user evidence, that some landowners (who the applicant cannot reasonably discover) have not been notified. To avoid this, people wishing to make applications are advised to have an application checked by a BHS Officer before sending it to the authority to be assured that it is compliant so that any rejection may be challenged.

Authorities will each have their own policy for dealing with applications and their own versions of the prescribed forms on which the application is made. To avoid any wasted effort, applicants should acquire the guidance and application pack from the relevant authority (often on its website) and read it carefully. Making an application accurately is important to avoid it being rejected, or found to be deficient when it is investigated, possibly years after its submission. If the council does not provide its version of the required forms, standard ones are available from BHS. The pack should supply three forms:

1. Application form
2. Notice to owners and occupiers of the land crossed by the right of way
3. Certificate that notice has been served

All three forms are simple and self-explanatory.

The completed application form (1.) must have appended to it:

- A map at a scale no smaller than 1:25,000 with the route marked accurately on it.

An extract of the current Ordnance Survey (OS) map at a scale of 1:25,000 or larger is the best plan to include with the application, with the route marked on it.[8]

- A full description of the route with start and end points, preferably using grid references.
- A list of the historical documents relied upon, together with references of their sources and photographs or photocopies of the documents (see Documentary evidence below).

  And / or

- User evidence forms (see User evidence below) from people with recent or current use of the way.

It is useful (though is not required) to supply photographs, particularly of each end of the route and, if needed, for clarification at the junction with another right of way or road and any feature or turning along the route.

The application should be for the status (bridleway, restricted byway or byway open to all traffic) indicated by the evidence, so if evidence is consistent with an old road, the application would be for restricted byway rather than bridleway.

Keep copies of all evidence and submitted forms in case anything should go astray. It can take years for an application to be processed, with changes in staff, offices and even authorities in that time.

The application, with the evidence and plan, take the application to the point of being 'Paragraph 1 compliant' when submitted, which means it must be registered by the authority as 'duly made' under paragraph 1 of Schedule 14 of the Wildlife and Countryside Act 1981.

The next stage is dictated by paragraph 2 of Schedule 14 and brings in 2. above, serving notice on those with an interest in the land. It requires:

- Evidence that you have made 'reasonable enquiry' to find and notify any landowner and occupier of the application

The Land Registry will show whether the route is on or adjacent to registered land, so details of the owner(s) can be obtained (for a fee) and notice served on them.

[8] Other maps may be used but as the OS 1:25,000 map is ideal and freely available, it makes most sense to use it.

Adjacent landowners are included where the route is a lane that is not registered, on the assumption that they may have an interest in the lane.

If it is not registered land, the parish council may know the owner or occupier.

Notices do not have to be to a named person, 'The Owner or Occupier' of an address is enough.

If no landowner can be found by these two means, which fulfil the 'reasonable enquiry' requirement, the applicant should ask the authority for permission to erect the notices at each end of the route. This is the same notice that would have been posted to a person with an interest, if one had been identified. In some cases, the authority may take responsibility for erecting the notices.

Notification is a statement that an application has been made, when and for what route, described in the same way as on the application form. It is a specific form of words and will be in the council pack or supplied by BHS.

Having posted the notices to those with an interest in the land, the final stage is the third form, 3.

- A certificate (in the prescribed form) that notification (in its prescribed form) has been served on any 'person with an interest in the land' who has been identified.

The Paragraph 2 stage (serving notice on landholders) does not have to follow immediately on the submission of the Paragraph 1 documents (the application) but many applicants will complete the requirements of Paragraphs 1 and 2 in one delivery to the authority to have the task done. Some authorities will not investigate an application unless it complies with both Paragraph 1 and 2.

An authority must register the application even if notice has not been served on landholders.

Evidence

User evidence

User evidence is gathered to show that the route has been in use for at least a continuous 20-year period counting back from the date when the use was challenged or the DMMO application submitted (or date of declaration of rights of way by the landowner, see Register of declarations above). Each individual does

not need to have used the route continuously for 20 years but, cumulatively, there must be use by several people for periods which have overlapped so it can be shown that there has been use by different people throughout the 20-year period. It is useful to summarise user evidence in a chart to check for any gaps in evidence, Figure 3 is an example. There is no specified minimum number of uses, much depends on location of the route and how much use is reasonable for it to be apparent to the landowner.

No evidence of use for a period, without documented reason why use could not take place (e.g. foot and mouth disease closure, bridge missing) may be deemed on investigation to comprise an 'interruption to use', which could mean there is not a period of 20 years of evidence before or after it, and the application could fail, so check carefully for gaps.

Users	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Jo		1	1	1	1	1	1	1							1	1	1	1	1	1	1					
Jane	1	1	1				1	1	1	1	1	1	1										1	1	1	1
John					1	1	1	1	1	1	1	1	1	1	1	1										
Sue		1	1	1																						
Sarah												1	1	1	1	1	1	1			1	1	1	1	1	1
Sam	1	1	1	1	1	1	1	1	1	1																
Ben	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Bert							1	1	1	1	1				1	1	1	1	1	1	1					
Barbara																		1	1	1	1	1	1			
Karen					1	1	1																			
Janet													1	1	1	1	1									
Anne	1	1	1	1																						
Peter						1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1		
Paul																1	1	1	1	1	1	1				
Fiona													1	1	1	1	1									
Mary																					1	1	1	1	1	1
Margaret															1	1	1	1	1							
James												1	1	1	1	1	1	1								
Philippa																								1	1	1
	4	6	6	5	5	6	8	7	6	6	5	6	8	7	10	11	10	9	7	6	8	6	6	6	5	5

Figure 3: User evidence summary chart

Quality of user evidence is important. Evidence from a greater number of users will build a stronger case but only if the evidence of each user is true and good. This is not implying that people may lie, but memories are rarely accurate the further back in time you go, especially relating to frequency and consistency of use, width or obstructions. A case will be weakened by users whose evidence can be shown to be doubtful when questioned, perhaps because they had forgotten a period when they could not have used the route. It can be better to have fewer witnesses but with robust evidence.

Use must have been by the public (on or leading a horse for a bridleway plus driving a horse or other non-motorised users for a restricted byway) and 'as of right', that is, openly and without permission.

Use by employees, tenants, clients or invited guests of the landowner (such as a hunt) is considered to be by permission and not as of right. However, although their use of the path may not count, they may still be able to give evidence of the reputation of the path, such as an employee knowing a gate must be maintained for use by the public.

'As of right' means use openly and at any time, in the same way as any other right of way. It does not mean that the user had to have believed it to be a right of way.

If a landowner had made it known during the 20-year period that they did not intend to dedicate the route, for instance by erecting signs (such as 'No Public Right of Way') or by locking gates with the intention of preventing public use, then the use will not have been as of right and, if the application is based only on that use, it will fail. Any intention by the landowner not to dedicate must have been evident to users.

Signs saying Private Land, Private Road or Public Footpath cannot be interpreted as informing the public that there is no intention to dedicate a bridleway because most public rights of way cross private land and private roads coincident with public bridleways are common, so 'private' does not mean a public bridleway or byway does not exist. Similarly, footpath to the majority of the public does not mean 'a right of way on foot only'. Without niche knowledge of public rights of way law, people recognise only a road or a footpath: a road has tarmac and white lines and is predominantly used with motor vehicles, a footpath is every way that is not a road, used by any means not in a motor vehicle, including on a horse or bicycle. The terms bridleway and byway are rarely understood.

If the route has been in use as a permissive route, or a toll ride, or under a government-funded Stewardship Scheme, the relevant user evidence will have to go back for 20 years from the date the permissive route or toll ride was opened or the payment scheme started. In theory, such permissive routes should not have been accepted along paths which have historical higher rights, but it has happened.

Highway authorities usually prefer evidence to be submitted on their own User Evidence Forms as this makes it easier for them to compare and assess. The authority should supply these forms plus maps covering the relevant areas. BHS can supply a form if not. This does not preclude evidence in other formats, such as letters or recordings (which need a transcript, signature, and a map which should also be signed), and a witness may use whatever wording they find convenient. It

is most important that the evidence should be in the user's own words, and thorough in describing the exact route and the period it was used. It is best if the form or letter is in the user's own handwriting. If this is not possible, then a statement is needed to explain why from the person taking the evidence. Witness statements from elderly people who saw horses and riders and/or carts using the route in their youth are also useful, even if they did not ride themselves.

Maps marked by users are essential for the application but a minority of people can easily and accurately mark a route they have used on a map. It is important to demonstrate that users were able to relate the route used to what they have marked. Photographs of the route can be valuable for this purpose, especially if their date of origin can be determined, and reference to them incorporated in the witness statement or annexed to the map.

Should the Order be opposed and considered at a Public Inquiry, it is important for as many as possible of the people who gave the evidence to attend and give their evidence verbally. This can be vital to the success of a case and lack of witnesses at an Inquiry immediately reduces the strength of the evidence. It is good practice to establish at the outset that those giving evidence will attend an Inquiry when the time comes.

Finding users

Finding users may be simple if you are very familiar with the area and know a lot of riders and older residents. To find more witnesses:

- Ask every witness you find if they can suggest others.
- Parish councils may know of older people, whether still in the area or moved away, who know the route.
- Bridleway Groups may be able to help, as may cycling or walking groups.
- The local hunt may have current or past members who know the route, though it is important that they knew it as a bridleway or old road, not as somewhere the hunt had permission to go.
- Livery yards may have noticeboards or websites where you could appeal for witnesses.
- Saddlers, vets, farriers and other local equine services may know of contacts or be able to promote your need for witnesses.

- Village and village hall noticeboards may be appropriate places to put a poster asking for past users.

Documentary evidence

The BHS's tool for gathering evidence and to help make applications is called Equestrian Access Mapping (often referred to by users as Dobbin).[9] It is county-based and most counties have an Evidence Library available with documents that have been photographed and compiled over the last decade. The tool works by plotting the line of the route to be investigated, which creates a Research Record for that route, and which guides through the process of gathering evidence. The entered data can then be compiled into an application and statement of evidence to submit.

Applicants are recommended to consult and follow the guidance in the book 'Rights of Way: restoring the record' (Bucks & Wadey), available from the BHS bookshop (and some libraries). The book makes the process of checking documentation and building a strong case much easier, especially for anyone new to the process.

Documentary evidence is collected by visiting various archives and libraries to check historical maps and documents. Some maps are available online, which helps (see Evidence Library above). The aim is to show that the route was used by the public in the past as a bridleway or higher status. Evidence from Acts of Parliament and other legal procedures carries the most weight; maps sold for use by travellers are useful; and Ordnance Survey records will, as a minimum, show the physical existence of a track.

Most highway authorities' rights of way departments have a list of primary documents that should be checked. These documents should be available to view, free of charge, and can be inspected at public records offices or libraries. There may be a charge for using a camera or photocopying in which case careful planning of a visit is worthwhile. Optimum use of time (and a photography fee) can be to photograph everything for investigation later, rather than scrutinising at the time. The list can be extended, but if, after looking at these documents, there is little evidence that the route was a public right of way at the time, then checking more historical documents is unlikely to be fruitful.

[9] See www.bhs.org.uk/2026 for more on Dobbin and help on using it

Local Public Record Offices (usually in the county town) hold useful records, though not all will exist for every case:

- Inclosure awards
- Plans and books of reference for railways, canals and turnpike roads
- Quarter Sessions records of maintenance at the public expense, extinguishments, creations and diversions
- County maps
- Tithe commutation maps
- Sales documents (from the auction of farms and large estates)
- Parish histories, maps and other documents

It is advisable to check the Quarter Sessions records for earlier diversions and extinguishments before devoting time and resources to other archival research. Many also hold early Ordnance Survey (OS) maps though digitised maps are available through the National Library of Scotland on its website.[10]

Highway authorities' rights of way departments hold background information relating to the making of the definitive map (may be referred to as the 'walking survey' or 'parish footpath map' – the terms say a lot about how horse-riding was disregarded). They may indicate CRBs (cart roads used as bridleways) and CRFs (cart roads used as footpaths) because the original guidance to councils for compiling the Definitive Map defined these terms as 'public carriage or cart road, or green unmetalled lane mainly used as a footpath or bridleway'). They may have 'Handover maps' which show the highways as they were in 1930 when responsibility for them was passed to the county councils, and records from the Rights of Way Act 1932 which began the process of recording rights of way.

The National Archives in London holds records from Government Departments. Some of the most important records are those from the 1910 Finance Act. These records may show a public right of way over a holding, although declaring rights of way was not a requirement, if it is declared, it is substantive evidence. The records vary considerably; some will state the amount of reduction given for a public right of way, others state £xx for yy yards of bridleway or footpath. If a track is shown excluded from holdings, it would suggest that it was used by the public. (There are a few exceptions, such as land owned by the Church, the Crown, or Ministry of Defence, or local authorities, such as workhouses or hospitals.)

[10] https://maps.nls.uk/os/

The National Archives also holds some Ordnance Survey records, especially those relating to parish boundaries, and the OS Object Names Books which give a description of features named on the Second Series Ordnance Survey maps. The National Archives holds the tithe maps and associated papers (also available online by subscription to The Genealogist, or in Wales, free on Cynefin). It also has Acts of Parliament, deposited plans and records of parliamentary proceedings.[11]

The British Library in London holds records that can be useful, especially the First Edition County Series Ordnance Survey Maps and Books of Reference. Some of the records available will only cover some parts of the country, and there will be different records applicable for different counties.

These records can all support the evidence, but in some cases the records were not compiled or have been lost or destroyed. In some parts of the country additional different records may be available. The aim is to look at as many legitimate sources as possible and produce enough to show that, on the balance of probability, the route is more likely than not to have been in public use. Once collected, the historical evidence should be listed chronologically and it should be possible to see when the route came into existence, and its status and history since then.

It is necessary to be wary of records where multiple copies exist, such as tithe or inclosure. There is usually one document that is designated as the original, all others being copies. Be particularly careful to check the Finance Act records at the National Archives because the records at the local records office are not copies, they are the 'phase 1' of the process, and the final 'phase 2' documents at the National Archives may have different information.

Submitting the application

- Applications must be **signed and dated**: this step is often overlooked!

Many applications are submitted in the name of an organisation such as British Horse Society or a bridleways association, so that if an individual applicant dies or cannot pursue it, the application can still be carried on and the surveying authority would still have the necessary point of contact.

[11] Transferred from the Parliamentary Archives

Consent must be given by BHS to make an application in its name, and a copy of the application is required by BHS Access department.

Check the application is complete, with all its components as described in What an application comprises (above).

The process following application

The authority will register the application then investigate the evidence and determine whether it is going to make an Order. The period between registration and investigation may be years. Some authorities investigate in order of receipt of applications, others have prioritisation schemes, for example, a route that meets criteria of the authority's Rights of Way Improvement Plan or has implications to improve safety or is affected by a planning application may raise it in the list of priorities. A case dependent on witnesses may also be escalated in some authorities.

When investigation of the application begins, it is good practice for the authority to inform the applicant and consult user bodies and the landowners, asking for any evidence and comments which are considered in determining whether to make an Order, and for what.

If the authority has not determined the application within twelve months of receiving the certificate from the applicant that notice has been served on the landholders, the applicant may apply to the Secretary of State under Schedule 14 of the Wildlife and Countryside Act 1981 for the authority to be given a deadline for determination. The twelve months was set in legislation because at the time that was considered a period in which a council could reasonably be expected to investigate. Since 1981, council resources for this work have dropped, and since 2000,[12] the number of applications has increased massively, so few councils have any hope of beginning to investigate an application within twelve months.

An authority following good practice should investigate fully and could decide that the evidence provided in an application for a bridleway indicates the existence of a byway, or vice versa, and the authority is correct to make the order indicated by the evidence. However, this is their interpretation of the evidence, with which the applicant or others may disagree, in which case, they may object to an Order made for a different status. Their grounds for objection should be based on cogent interpretation of the evidence. Personal preference or view on whether it is

[12] Countryside and Rights of Way Act 2000 section 53

necessary, on use of public money to investigate, on safety, privacy or security, and similar are not relevant to the decision of whether or not an unrecorded right exists.

Having investigated, an authority may determine not to make an Order, in which case the applicant may choose to seek more evidence, if that is the reason for the decision, or the applicant may, within 28 days of the service of the notice of the decision, appeal to the Secretary of State under Schedule 14 to the Wildlife and Countryside Act. The Secretary of State may refuse the appeal or instruct the authority to make an Order.

When the Order is made it is advertised with a deadline for objections and the statutory consultees (which include the BHS) are notified. If an Order is made for a lower status than the applicant intended, say for a footpath when the applicant's interpretation of the evidence was bridleway, an objection can be made to the Order at this stage.

If there are no objections, or the objections are withdrawn, the Order can be confirmed by the authority. If objections are not withdrawn or resolved, the Order is referred to the Secretary of State who delegates the decision to an Inspector from the Planning Inspectorate (PINS).

The Inspector can deal with the Order either by holding a Public Local Inquiry, or a Hearing for less complex cases, or by written representations (an exchange of correspondence). The Inspector may decide to confirm the Order, confirm it with modifications or not confirm it. Some modifications require an Order to be re-advertised and can lead to further objection and referral again to the Secretary of State.

When an Order is confirmed, notices are published, and a copy is sent to statutory consultees. The modification is then recorded on the Definitive Map provided that within 42 days of the publication of the notices there has been no challenge in the High Court to the order's validity.

A final consideration

Even if a landowner has said they will not consider an Express Dedication at Common Law, at any stage in the process of gathering evidence, when it is reasonably clear that a right can be shown to exist, it is worth approaching the landowner(s) again to discuss the evidence and the possibility of the route being expressly dedicated to avoid the need for the entire DMMO process, particularly as

it may take decades for the application to be considered by the council. Although dedication is presumed to have occurred, a formal dedication in writing will declare the rights with potentially less effort from all involved.

The highway authority can elect to adopt the new route as publicly maintainable and can add it to the Definitive Map and Statement by a simple internal process called a Legal Event Modification Order. No application is required for a LEMO.

Further information

Despite its length, this advice note is an overview of how to investigate a route that is not recorded on the Definitive Map, or is recorded as a footpath, and prepare an application for a Definitive Map Modification Order (DMMO) to correct the record. Those interested in making applications are encouraged to work with the BHS through its volunteers and training days to ensure that applications are of good quality and most likely to succeed. Further help is available through BHS resources on www.bhs.org.uk/2026.

If this is a saved or printed copy, please check www.bhs.org.uk/accessadvice for the latest version (date top of page 2).