

Quick guide

Rights of Way

March 2011

What is a Right of Way?

A **public right of way** is a highway¹ which anybody may use at any time. A right of way usually passes between two highways e.g. a right of passage between a road and a public footpath etc. Public rights of way are usually signed at junctions with roads with a public path sign.

A **definitive map** is kept by local highway authorities and is a legal record of the public's rights of way in their area. If a way is shown on the map, then that is legal, or conclusive, evidence that the public had those rights along the way at the relevant date of the map (and has them still, unless there has been a legally authorised change). However, if paths are not shown on the definitive map it is not proof that the public has no rights over it – it could be that the map needs updating.²

A **private right of way** is for an individual, or any group other than the public, to gain access to a particular feature e.g. to gain access to a house or a field.

The Land Registry keeps a record of all registered land in England and Wales. Official Land Registry copies of Title Registers and Title Plans³ can be purchased from here. The **Title Register** contains a description of the property and other information but also refers to any rights of way and other easements affecting the property.⁴

What are the different types of Public Rights of Way?

There are four types of public rights of way in Wales which can be used in different ways, depending on the type:

- **Footpaths** - over which the right of way is on foot only. Of the public rights of way in Wales 79 per cent are classed as footpaths.
- **Bridleways** - for walkers, horse riders and cyclists. This classification covers 15 per cent of public rights of way in Wales.

¹ There is no statutory definition of a highway, only a common law one. That definition is quite clear: a "highway is a way over which all members of the public have the right to pass and repass. Their use of the way must be as of right, not on sufferance or by licence".

² The highway authority has a duty under the *Countryside and Rights of Way Act 2000* to keep its definitive map up to date.

³ Title Register and Title Plans were historically called Title Deeds

⁴ Land Registry, [Title Deeds](#), website [accessed 22 February 2011]

- Byways – make up 6 per cent of the public rights of way network and consist of:
 - **Byways open to all traffic (BOATs)** - open to all traffic, including vehicles but which are mainly for the purposes for which footpaths and bridleways are used.
 - **Restricted byways** – these carry the rights for all types of traffic except motorised vehicles.⁵

Who is responsible for Public Rights of Way?

Responsibility for keeping public rights of way open is shared by **highway authorities⁶ and the occupiers of land⁷**. Under the *Highways Act 1980*⁸ **highway authorities have a duty to protect and maintain** public rights of way for public use. They also have a duty to prevent the obstruction or closing of any public rights of way. If a person believes that the highway authority is failing in this duty, they can serve notice on the highway authority to request that the obstruction be removed. If the local authority fails to act, the individual serving the notice can seek a magistrates' court order to require action. Only certain types of obstructions are covered by these provisions. They only apply to footpaths, bridleways and restricted byways, and to ways shown on a definitive map as restricted byways or byways open to all traffic.

Some local authorities have delegated their powers over rights of way to National Park authorities and community councils. Community councils also have discretionary powers which enable them to maintain the footpaths or bridleways, and can require the highway authority to carry out its duty to remove obstructions.

How can a Public Right of Way be changed?

The *Highways Act 1980* gives **highway authorities the power to create, extinguish or divert a footpath or bridleway**, normally by making a **public path order**. Also the *Town and Country Planning Act 1990* gives an authority the power to divert, extinguish or temporarily divert a footpath or bridleway in order to develop the land they are on. Extinguishment of a footpath or bridleway can only be achieved where it can be shown that there is no longer a need for the path. In deciding this, an authority must take into account how much the route is likely to be used by the public if it is not extinguished and the effect of the extinguishment on the land over which the route passes.

Proposals to change the rights of way network can arise from applications or requests made to the local authority (for example from local residents, path users, farmers or landowners) or the authority itself may propose to make a change.⁹

Any **objections made to a public path order** must be relevant to the grounds upon which the order was made i.e. objections to an order for a public right of way to be extinguished

⁵ Countryside Council for Wales, Enjoying the Country, *Public Rights of Way*, website [accessed 21 February 2011]

⁶ In Wales, the 22 Unitary Authorities are the highway authorities (the Welsh Government is the highway authority for the Trunk Road Network).

⁷ The occupier is usually the tenant or the owner-occupier.

⁸ *Highways Act 1980*, (chapter 66)

⁹ Planning Inspectorate Wales, *Rights of Way*, webpage [accessed 21 February 2011]

must be made on the basis that the path is still in use by the public. If no objections are made to the order then the local authority may confirm the order itself. If however, objections are made then the power to confirm the order is transferred to the Welsh Government for determination. In most cases investigation into the order will be completed by the **Planning Inspectorate**¹⁰ who will report to the Welsh Government. The Planning Inspector may review any objections by holding a public inquiry, by holding a hearing or by written correspondence.

What are the different types of Private Rights of Way?

A private right of way is for an individual, or any group other than the public, to gain access to a particular feature, e.g. to gain access to a house or a field.

Private rights of way may exist in a variety of forms, namely through a **licence**, '**mere equities**' or an **easement**.

Licences and mere equities

Under the terms of a licence, a **landowner may grant particular persons permission to enter his/her land for specified purposes**. Generally, licences are revocable by the grantor although, in certain circumstances, the courts may recognise and enforce 'irrevocable' licences linked to proprietary interests until the purpose for which the licence was given has been fulfilled (e.g. builders allowed onto a neighbour's land during building work). The courts have recognised a wide variety of **proprietary and quasi-proprietary rights and interests** in or over land, which can be **enforced through the principles of equity**¹¹. Such 'mere equities' may be enforced where there is an informal agreement, representations by one party which have induced another into acting to his/her detriment (reliance), acquiescence and estoppel¹².

Easements

An easement is **attached to a specific piece of land** rather than to the individual(s) who own or occupy it. An easement is a right benefiting one piece of land (known as the **dominant tenement**) that permits the rightful users of that land to perform specified actions over an adjacent piece of land (known as the **servient tenement**). Easements can be either '**positive**' (e.g. a right to use a path over land) or '**negative**' (e.g. a right to light).

The High Court has described the essential qualities or legal requirements for all types of easement:

- There must be dominant and servient tenements (i.e. there must be land that carries

¹⁰ The Planning Inspectorate is an Executive Agency of the UK Government. They report to the Department of Communities and Local Government (DCLG) in England, and the Welsh Government in Wales. The Planning Inspectorate acts as an impartial body to determine rights of way orders made by local councils (or other relevant authorities) that have outstanding objections/representations or require modification.

¹¹ Equity is the name given to the set of legal principles, in jurisdictions following common law, which supplement strict rules of law where their application would operate harshly.

¹² Most estoppels prohibit an individual or group from being harmed as a result of another's deeds, statements or promises, when later actions or statements contradict or undermine what was originally stated, promised, or inferred.

the benefit of the right and land that carries the burden of the right);

- The right must accommodate the dominant tenement (i.e. it must be a benefit for the land, not a personal benefit for the individual landowner);
- The dominant and servient tenements must be owned by different persons;
- A right over land cannot become an easement unless it is a right capable of being granted at law (i.e. there must be persons capable of making a grant and the right must be sufficiently definite).¹³

An easement can be created in a number of ways:

- **By express grant** (i.e. the owner of the land expressly gives permission to use of the land, e.g. in the deed transfer upon sale). An oral promise to create an easement can be given effect through the common law principle of proprietary estoppel, enforceable through the courts.
- **By implied grant** (i.e. an easement is implied into the conveyance/deed of transfer of land, either under the common law principles or by operation of statute).
- **By prescription** (i.e. the acquisition of a right from a landowner on the basis of established use over a period of time). Easements may be created by prescription in several ways (prescription under common law¹⁴; the doctrine of the lost modern grant¹⁵; and, statutory prescription under the *Prescription Act 1832*^{16/17}). Two principles are common to all forms of prescription:
 - the use must be 'as of right' (as prescription is based on the assumption that the right has been expressly or impliedly passed to the landowner at some point in the past); and
 - the use must satisfy the legal maxim *nec vi, nec clam, nec precario* – i.e. the use of the right must be exercised without force, must not be exercised secretly, and must be exercised without permission from the landowner.

Who is responsible for Private Rights of Way?

If the private right of way falls into disrepair, and if there is no agreement as to maintenance¹⁸, and if the owner of the servient tenement is unwilling or unable to repair the way (or their identity is unknown), then the owner of the dominant tenement (who is inconvenienced by the poor condition of the way) may repair the way but must be careful

¹³ *Re Ellenborough Park* [1956] Ch 131.

¹⁴ Presumes there has been continuous use since 'time immemorial' (which, in law, means the year 1189).

¹⁵ The doctrine of the 'lost modern grant' supplements common law prescription by allowing an easement to be created if there is evidence of continuous use over the past 20 years.

¹⁶ *Prescription Act 1832*, Chapter 71

¹⁷ The *Prescription Act 1832* creates two periods for the acquisition of easements by prescription: a 'short' period of 20 years and a 'long' period of 40 years continuous use. The period of 'use' required is actual enjoyment without interruption for the full period of 20 years (i.e. evidence of interruption of one year or more will defeat a claim). Rights acquired on the basis of 40 years of continuous use are absolute and indefeasible (unless permission was granted in writing or by deed).

¹⁸ As specified in Title Register and Title Plans.

not to improve the way (for it is not their land to develop). Thus a gravel drive may be re-gravelled by the owner of the dominant tenement but they cannot develop it by improving the surface.

How can a Private Right of Way be changed?

The owner of the **servient tenement is entitled to develop their own land**, and this can come into conflict with the dominant tenement's overriding interest, i.e. the right of way. It may be possible, bearing in mind the configuration of the land in the servient tenement, to redefine the right of way along a new route. This has to be negotiated with the owner(s) of the dominant tenement(s) before a **Deed of Variation** can be drawn up by a solicitor.

It may be desirable for a right of way to be extinguished altogether. Again, this has to involve negotiation with owner(s) of the dominant tenement(s). It is usual in these circumstances for the owner of the servient tenement to pay all of the costs associated with obtaining a replacement right of way (over a third party's land) for the dominant tenement(s). A **Deed of Extinguishment** is needed to formalise the extinguishment.

Further information

For further information on aspects of Rights of Way, please contact **Nia Seaton** (nia.seaton@wales.gov.uk), Members' Research Service.

For further information on the topics below, double click on the links.

- Institute of Public Rights of Way and Access Management (IPROW), [FAQ](#)
- Ramblers, [Blue Book Extra](#)
- Countryside Council for Wales, [A Guide To Definitive Maps And Changes To Public Rights Of Way](#)

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