



# THE TRAILS TRUST

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In partnership with  
The British Horse Society

*The Charity that creates access to the countryside for all –  
on foot, bicycle or by horse*

## THE CREATION OF HIGHWAYS

### *Express dedication at Common Law*

This paper provides a legal basis for both the Defra Guidance and an analysis of the benefits of using highway creation through express dedication and acceptance for landowners and the public who want to use this method to create bridleways. A protocol to enable authorities to accept and correctly record express dedications at common law is also included.

### **Rachel Thompson MBE**

The BHS supports the use of express dedication as a means of creating urgently needed new countryside access routes. The process can be used in a timely manner to join up our fragmented public rights of way network for the benefit of healthy recreation for walkers, cyclists and equestrians alike. It also has the potential to reduce the local authority backlog of definitive map modification applications.

**Mark Weston, BHS Director of Access**

01/08/2018

# THE CREATION OF HIGHWAYS

Express dedication at Common Law

## FOREWORD

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A group comprising representatives from the Department for Environment, Food and Rural Affairs (Defra), Natural England (NE), the Institute of Public Rights of Way and Access Management (IPROW), a local highway and surveying local authority (LA), the British Horse Society (BHS) and The Trails Trust (TTT) are working together to promote the use of highway creation through express dedication and acceptance at common law as a method by which:-

- New highways (public paths) of strategic importance can be created
- Local authorities can expedite correcting the definitive map and statement

In 2012 Defra offered guidance on legal and practical issues relating to the express dedication of public rights of way at common law (EDCL) in England, as context for Natural England's (then) administration of the Paths for Communities Scheme (P4C). The guidance, contained in a letter to Natural England dated 12/11/2012 said that:-

*“EDCL enables voluntary groups or individuals to negotiate agreements directly with landowners to create public rights of way. It enables the landowner to dedicate a new or upgraded right of way unilaterally, as a common law alternative to signing a statutory public path agreement”*

*“It is not necessary for him (the landowner) to make a statutory agreement with the highway authority, the parish council or anyone else in order for the right of way to come into effect. However it is desirable that there should if possible be prior discussions with the highway authority about the practicalities of what is proposed ... to ensure that the surveying authority is able to record the new right on the definitive map and statement (DM&S) as quickly and straightforwardly as possible.”*

In 2014, all the local highway authorities in England were asked by The British Horse Society (representing the EDCL group) to confirm:-

*“whether the council accepts the principle of express dedication at common law, as laid out in the attached Defra 12/11/2012 letter, along with the content and process therein; and would record any routes, that are expressly dedicated at common law and accepted by the public, on the definitive map of public rights of way in a timely manner”.*

Fifteen responses were received of which ten were positive, one was negative and four were inconclusive.

The responses revealed that some authorities welcome the use of express dedication as a quick and efficient method for both public path creation and recording the creation on the DM&S. Other authorities misunderstand the dedication or have concerns regarding landownership, public need and acceptance, safety, liability, maintenance issues and the process required to add the dedicated bridleway to the definitive map or do not accept the legal principles used.

This paper provides a legal basis for both the Defra Guidance and the process, an analysis of the benefits of using highway creation through express dedication and acceptance for all parties and a protocol to enable authorities to accept and correctly record express dedications at common law.

With many thanks to Geri Coop (The British Horse Society) for work on drafting, editing and suggested text changes.

Finally In 2017 The Trails Trust asked barrister Matthew White (St John's Chambers, Bristol), to advise them on the creation of highways at common law, in particular in the light of reluctance on the part of some (by no means all) local authorities to recognise highways that have not been created within a statutory framework.

In the advice Matthew defines what a highway is, explains the principles of dedication and acceptance required to create a highway over a defined route and addresses some of the common misconceptions about highway creation under common law. It can be found at <http://bit.ly/2xQ00vA>

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## EXECUTIVE SUMMARY

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The paper is divided into five sections. The points are summarised at the beginning of each section for ease of reference.

Section 1 examines the principles of highway creation through the use of express dedication at common law and public acceptance. This is a response to the question posed by local authorities: 'express dedication – is it legal?' The case law relating to highway creation through the express dedication at common law and public acceptance is taken principally from the Rights of Way Law Review, Sauvain Highway Law 4<sup>th</sup> Edition and Halsbury's Laws of England.

Section 2 examines the advantages of the express creation method compared to other statutory processes commonly used responding to the question: 'express dedication – why do landowners and the public want to use it?' This section makes the case for the advantages of express dedication and acceptance as an immediate means of providing much needed bridleways (although the method may also be used to create footpaths and carriageways).

Section 3 examines the practical matters of path creation by providing a protocol that can be used by landowners and the public. This section responds to the question: 'express dedication – how do the landowner and public work together to create a public highway (bridleway)?' The documentation that needs to be collected to ensure a route has a) been legally created and b) satisfies local authority requirements for recording the route on the definitive map and statement in a timely manner is listed with examples of key documents. The statute and common law regarding the occupier's liability towards the new route is also explored.

Section 4 examines the benefits of the express creation method to local authorities. The local authority as surveying authority has statutory duties to record the new highway / right of way on the definitive map and statement and to protect and assert the right of the public to use it. As highway authority it has the power to adopt the route so that it becomes a highway maintainable at the public expense but is not obliged to. This section includes local authority good practice examples.

Section 5. Two planning inspectors consider (at appeal and subsequent public inquiry) an application to modify the definitive map and statement. The Trails Trust, supported by four landowners, considered that a new highway (bridleway) had been created through common law express dedication and acceptance at Upper Vobster in Somerset and therefore Somerset County Council should amend the definitive map and statement. Following the confirmation of the bridleway order planning inspectors consider in other cases whether dedication of a right of way can be shown to have occurred expressly or, alternatively, whether dedication can be inferred.

The Defra guidance, contained in the letter to Natural England dated 12/11/2012 is quoted throughout the paper. In exploring the law and the application of the law by councils and the planning inspectorate, this paper clearly shows that the creation of a highway through an

express dedication by the the landowner and acceptance by the public is an entirely legal process. There is no reason why it should not be used by the public to create much needed  
bridleways.

# SECTION 1 LEGAL ARGUMENT

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## Summary of points

The points in this section may be summarised as:

### 2 Statute and Common Law for highway creation

- 2.1. What is a highway? The meaning of highway is defined in both statute and common law.
- 2.2. A highway is a way over which there exists a public right of passage – a public right of way.
- 2.3. Highways can be created through statutory provision or by common law, statute law has not supplanted common law.
- 2.4. The rights of the public are established either from express dedication or from (implied) dedication presumed from long-continued user.
- 2.5. Both dedication by the owner and user by the public must concur to create a highway otherwise than by statute.

### 3 Express Creation of highway

- 3.1. Express creation of a highway depends upon an actual dedication of land for use as a public right of way. At common law a dedication by a landowner together with acceptance by the public through use completes the highway creation.
- 3.2. Subject to establishing capacity to dedicate and intention, plus acceptance, creation of the highway is immediate.
- 3.3. Express dedication of a right that has never been used means it has not come into effect.
- 3.4. Use of land as a right of way without express dedication leads to presumed dedication.
- 3.5. Once the gift of the right of way is declared it exists in perpetuity and is permanently binding.
- 3.6. Highways which may be dedicated at common law are footpath, bridleway and carriageway.
- 3.7. A landowner may dedicate additional rights over an existing highway (bridleway over footpath).
- 3.8. Express creation requires no agreement with or consent from the relevant local authority
- 3.9. The case for express or implied dedication at common law must be examined when determining applications for definitive map modifications.

### 4 Express Creation principles

- 4.1. Express dedication at common law – landowner's right to dedicate.
  - 4.1.1. Only the freeholder may dedicate because the law does not recognise a fixed term highway.
  - 4.1.2. By contrast to inferred dedication an express dedication is made by a specific landowner, having the capacity, dedicated at a specific time.
  - 4.1.3. It is for those who deny the dedication to show that the person allegedly dedicating had no capacity to dedicate.
  - 4.1.4. Where there is no express declaration there will be acts on the part of the landowner sufficiently overt as to manifest a clear intention on his part to create a highway.
  - 4.1.5. Dedication may take place immediately.

4.1.6. A declaration must be expressed in words sufficiently clear and precise to prove a definite act of dedication.

## 4.2 Adjacent landowner's rights to dedicate

4.2.1. An adjacent landowner owns up to the centre line of the road.

4.2.2. The existence of a highway does not destroy the landowner's interest in the land over which it passed.

4.2.3. A landowner who dedicates a highway over his land gives to the public only a right of passage over that land.

4.2.4. Many highways will have been created so far in the past that actual knowledge of the ownership of the subsoil will no longer exist.

4.2.5. In the absence of evidence to the contrary, the principle of ownership applies whether the land is enclosed or unenclosed.

## 4.3 Express dedication at common law: public's right to accept.

4.3.1. Dedication does not create a highway without acceptance by or on behalf of the public.

4.3.2. Dedication is not dependent upon agreed works actually being carried out.

4.3.3. User is evidence not just of acceptance but also that the way is of public benefit.

4.3.4. Repairs to the route by the parish is sufficient evidence of acceptance.

4.3.5. Acceptance is ordinarily proved by users, dedication by the owner and user must concur.

4.3.6. No single individual can speak on the public's behalf. Evidence of acceptance by the highway authority amounts to proof of acceptance.

4.3.7 Acceptance of part of the route is sufficient acceptance for the whole of the route.

## 4.4 Express dedication at common law: the whole public and in perpetuity.

4.4.1. The law does not recognise a fixed term highway it must be in perpetuity.

4.4.2. Creating a way for a limited class of people does not constitute a dedication.

## 4.5 Impediments to express dedication

4.5.1. It is for those who deny the dedication to show that the person allegedly dedicating had no capacity to dedicate.

## 2. Statute and common law for highway creation

2.1 What is a highway? The meaning of highway is defined in both statute and common law.

The Statute law definition is found in the Highways Act 1980 s328

*"A highway (for the purposes of the Act) means the whole or part of a highway other than a ferry or waterway and includes bridges".*

2.2 A highway is a way over which there exists a public right of passage – a public right of way

The (more helpful) Common Law definition is found in Halsbury's Laws of England

*“A highway is a way over which there exists a public right of passage, that is to say a right for all Her Majesty’s subject at all seasons of the year freely and at their will to pass and repass without let or hindrance.”*

2.3 Highways can be created through statutory provision (for example Highways Act 1980 s25 creation agreement and s26 creation order methods) or through common law (express or implied). Statute law has not supplanted common law.

The Highways Act 1980 s31 preserves both implied dedication at common law and express dedication at common law and says:

*“Nothing in this section operates to prevent the dedication of a way as a highway....being presumed or proved in any circumstances in which it might have been presumed or proved immediately before the commencement of the Act”*

See also the case law example following: ‘*statutes should not be construed so as to make alterations in the common law*’

2.4 The rights of the public are established either from express dedication or from (implied) dedication presumed from long-continued user.

Case Law example

Attorney General ex relatio Yorkshire Derwent Trust Ltd and Another v Brotherton and Others 1991 (House of Lords page 7 para 2).

In considering what public rights existed over the River Derwent, their Lordships made the point that statute law is not intended to make alterations in common law:

*“Thirdly, there has to be borne in mind the position at common law both of the rights of the public and of private landowners. The rights of the public ...could be established either from express dedication or from dedication presumed from long-continued user. The private landowner, for his part, was able to resist the presumption of dedication arising from user by demonstrating that the land was in settlement at the material time so that there was no landowner competent to dedicate. That ability was clearly qualified by the Act and extinguished altogether if 40 year user was proved”*

*“There is however a presumption that except in so far as they are clearly and unambiguously intended to do so statutes should not be construed so as to make alterations in the common law: see, e.g. Leach v Rex (1912) A.C. 305, 310”*

2.5 Both dedication by the owner and user by the public must concur to create a highway otherwise than by statute [our emphasis].

Quoted directly from Halsbury’s Laws of England Vol.21 para 66

### 3. Express Creation of highway

Department for Environment Food and Rural Affairs (Defra) letter to Natural England 19 November 2012

*EDCL enables voluntary groups or individuals to negotiate agreements directly with landowners to create public rights of way. It enables the landowner to dedicate a new or upgraded public right of way unilaterally, as a common law alternative to signing a statutory public path creation agreement.*

*Express Dedication - where the landowner legally dedicates or 'gives' the public use of a way and does so intentionally and consciously.<sup>1</sup>*

The legal basis for this is found in Halsbury's Laws of England Vol.21 para 66

*"A highway is created through acceptance by the public (through use)".*

*"Both dedication by the owner and user by the public must concur to create a highway otherwise than by statute. User by the public is a sufficient acceptance. It is not necessary that the way should be adopted as repairable or maintainable at the public expense".*

The legal basis for express dedication at common law is established in case law:

R V Lloyd 1808 1 Campb 260 and Woodyer v Hadden (1813)

*"A highway may be dedicated by the unequivocal act of the landowner in throwing his land open to the public for highway use"*

And in R v Mellor 1830 1 B & AD 32, where Littledale J. found

*"that a road becomes public by reason of a dedication of the right of passage to the public by the owner of the soil."*

Therefore based on the legal precedent the following points can be made:-

3.1 Express creation of a highway depends upon an actual dedication of land for use as a public right of way. At common law a dedication by a landowner together with acceptance by the public through use completes the highway creation. Both parts of the process—the dedication and the acceptance—are necessary; neither constitutes a dedication without the other.

3.2 Subject to establishing capacity to dedicate, dedication is intentional. Subject to public acceptance, creation of the highway is immediate.

3.3 Express dedication of a right that has never been used means it has not come into effect – the highway has not been created.

<sup>1</sup> Plymouth City Council 2008 'Frequently Asked Questions'

3.4 Use of land as a right of way without express dedication leads to presumed, rather than express, dedication.

3.5 Once the gift of the right of way is declared it exists in perpetuity and is permanently binding on the property and its successors in title.

3.6 Common law highways which may be dedicated are footpath, bridleway and carriageway. Public rights of way are highways therefore a landowner may dedicate footpath, bridleway or carriageway rights over his land.

3.7 A landowner may dedicate additional rights over an existing highway ('supervening dedication') e.g. the dedication of a bridleway over a footpath.

3.8 Express dedication requires no agreement with or consent from the relevant local highway authority for the right of way to come into being. The local authority has duties and powers with regard to the new route – these are explored in section 4.

3.9 Councils and the Planning Inspectorate should examine the case for express or implied dedication at common law when determining applications for definitive map modifications.

Express creation of a highway has four essential elements. The legal basis for these is explored in detail in section 4.

1. Intention to dedicate: the landowner's intention must be to dedicate the way as a public right of way.
2. Acceptance by the public: the way must come into use as a result of the public accepting the dedication.
3. For the public at large: the dedication must be for the public rather than certain people or the inhabitants of a village. The landowner's intention must be that the way can be used by anyone.
4. For all time: the dedication must be in perpetuity. A limited dedication for a period of time such as 100 years creates merely a permissive way.

## 4. Express creation principles - legal precedents

Defra letter to Natural England November 2012

*6. ...the freehold owner may create a new or upgraded right of way, for example, by signing a suitable dedication document under witness. (Other means of dedication are possible, but whatever means are used must constitute sufficient evidence of the landowner's intention to dedicate the way.)*

### 4.1 Express dedication at common law: landowner's intention to dedicate

Source: Rights of Way Law Review January 2000 Section 6:2 Pages 19 -21

Jonathan Mair, LL B Dip.LG., Principal solicitor Dorset County Council discusses the precedents for express dedication at common law to clarify the legal principle of dedication by the landowner.

Jonathan Mair says *"the declaration must be clear and unambiguous, must identify the land the subject of the grant, and must refer to the public right of way asserted"*.

4.1.1. Only the freeholder may dedicate because the law does not recognise a fixed term highway. (A leaseholder may not bind the land for a period beyond the lease).

S.1(1) Law of Property Act 1925 provides that the only estates in land which are capable of subsisting or being conveyed are an estate in fee simple absolute in possession (i.e. a freehold interest) and a term of years absolute (i.e. a leasehold interest). However, "the law does not recognise a fixed term highway". The position at common law, since highways are dedicated in perpetuity is that "only the owner of the fee simple absolute, i.e. the freeholder, may bind land for all time by dedicating a highway over it".

Authority for this is found in *Corsellis v London County Council (1907) 1 Ch 704* where a

*"leaseholder could not dedicate a highway for the life of his lease"*.

4.1.2. By contrast to inferred dedication an express dedication is made by a specific landowner, having the capacity, dedicated at a specific time.

The authority for inferred dedication is found in *R v Petrie (1855) 4 E1 & B1 737*

*"When considering ownership there is an important distinction between express and inferred dedication. In R v Petrie public use of a road was sufficient prima facie evidence to raise an inference of dedication by the owner of fee simple (whoever he was) and it was unnecessary to show who had actually dedicated the way. By contrast, if there is to be an express dedication at common law, it is necessary to point to a specific person, who at a specific time dedicated the land and had a legal capacity to do so."*

4.1.3. It is for those who deny the dedication to show that the person allegedly dedicating had no capacity to dedicate.

The authority for this is found in Powers v Bathurst (1880) 49 Li Ch 294

*“Once one is able to point to what is prima facie an intention to dedicate, express or implied, the burden of proof shifts. It is then for those who deny the dedication to show that the person allegedly dedicating had no capacity to dedicate because at that time his legal estate was something less than freehold.”*

4.1.4. Where there is no express declaration there will be acts on the part of the landowner sufficiently overt as to manifest a clear intention on his part to create a highway.

Jonathan Mair says “there are cases where there will be *“no express declaration but there will be acts on the part of the landowner sufficiently overt as to manifest a clear intention on his part to create a highway”*”.

The authority for this is found In Woodyer v Hadden (1813) Taunt 125

*“for instance if a man builds a double row of houses opening into an ancient street at each end, making a street and sells or lets the houses, that is instantly a highway”*.

4.1.5. Express dedication may take place immediately, it is the opposite of implied which is presumed from a length of time.

The authority for this is also found In Woodyer v Hadden (1813) Taunt 125

*“No particular time is necessary for evidence of a dedication; it is not, like a grant, presumed from a length of time: if the act of dedication be unequivocal, it may take place immediately”*

4.1.6. A declaration must be expressed in words sufficiently clear and precise to prove a definite act of dedication.

The authority for this is found in Halsbury’s Laws of England Vol 21 para 66

*“An intention to dedicate may be expressed in words or writing”*.

Jonathan Mair suggests this means that an intention to dedicate may be expressed in words or writing but is more often a matter of inference. In his view:-

*“to be sufficient a declaration (though it need not be in writing) must be clear and unambiguous, must identify the land the subject of the grant, and must refer to the public right of way asserted”*.

Authority for this is also found in Hall v Bootle Corporation (1881) 44 LT 873

*“The mere setting out of an intended road was not such an irrevocable act that the person who did it and allowed the public to use the road was to be held to have dedicated it. There should be evidence of a definite intention to dedicate “*.

Also in Simpson v Attorney General (1904) 68 JP 85

*“A dedication must be made with intention to dedicate, and the mere acting so as to lead persons into the supposition that a way is dedicated to the public does not of itself amount to dedication”.*

## 4.2 Adjacent landowner’s rights to dedicate

Defra 19/11/2012

*A situation sometimes occurs where there is no record of ownership of an existing way, perhaps running along the space between two field boundaries. In this situation there is a rebuttable presumption at common law that the landowners on either side own the soil of the way up to the mid line. If those owners are willing jointly to upgrade the status of the way, for example to bridleway, and there is no affirmative evidence that they do not own the land in question, this is sufficient to warrant the surveying authority accepting the dedication as valid subject to other considerations in this letter.*

The presumption at common law is that:

4.2.1. An adjacent landowner owns up to the centre line of the road.

This principle is found in Whites Charities 1898 and New Towns v J J Gallagher 2003

*“There is a rebuttable presumption that the adjacent landowner owns up to the centre line of the road, absent evidence to the contrary. The ‘legal fiction’ used for the presumption is that the owner either side of the road was assumed to have given up part of their land for the road.”*

Also from Sauvain Highway Law 4<sup>th</sup> edition published by Sweet and Maxwell excerpt 3-20

*“The owners of land adjoining a highway are presumed in law to own the subsoil of the highway up to the middle point of the road, usque ad medium filum viae. This is a rebuttable presumption of law, which may be displaced by actual evidence of ownership of the soil. The adjoining landowners are each presumed to have contributed a portion of their land to the formation of the highway”*

4.2.2. The existence of a highway does not destroy the landowner’s interest in the land over which it passed.

Sauvain Highway Law 4<sup>th</sup> edition Excerpt 3-19.

The principle is found in Goodtitle d Chester v Alker & Elmes (1757) 1 Burr 133

*“It was an accepted principle of common law that the existence of a highway did not destroy the landowner’s interest in the land over which it passed”.*

Note: therefore a landowner retains the capacity to re-dedicate a highway or to dedicate a highway of a higher right over an existing highway (e.g. dedicate bridleway over a footpath).

4.2.3. A landowner who dedicated a highway over his land gave to the public only a right of passage over that land.

Sauvain Highway Law 4<sup>th</sup> edition excerpt 3 – 19

The principle is found in Davison v Gill (1800) 1 East 64 at 70, Salisbury v Great Northern Rail Co (1858) 5.C.B. (N.S.) 17

*“It was established that a landowner who dedicated a highway over his land gave to the public only a right of passage over that land (together with activities that were reasonably incidental to the right of passage) and retained all the other rights of ownership over that land which are not inconsistent with that right of passage. This principle continued to be applied to certain kinds of highway created under statutory powers.”*

4.2.4 Many highways will have been created so far in the past that actual knowledge of the ownership of the subsoil will no longer exist.

Sauvain Highway Law 4<sup>th</sup> edition excerpt 3-20

The principle is found in 20 Cockburn CJ in Holmes v Bellingham (1859) 7 C.B (N.S.) 329 1t 336

*“The presumption may perhaps be said to be a rule of convenience arising from the difficulties in establishing the ownership of the subsoil.*

*Many highways will have been created so far in the past that actual knowledge of the ownership of the subsoil will no longer exist. Where highways have arisen more recently, however, the presumption is nonetheless quite difficult to displace.”*

4.2.5. In the absence of evidence to the contrary, the principle of ownership applies whether the land is enclosed or unenclosed

Sauvain Highway Law 4<sup>th</sup> edition excerpt 3-20

The principle is found in DoE d Pring v Pearsey (1827) 7 B & C 304

*“The presumption of ownership applies whether the land adjoining an existing highway is enclosed or unenclosed.”*

### 4.3 Express dedication at common law: public’s rights to accept

Defra letter to Natural England November 2012

*“...there is a requirement at common law for there to be some evidence of public acceptance of the grant of this right in order for it to come into effect. In our view the standard of proof is relatively low. It is only necessary for evidence to be produced that the route has come into use subsequent to the execution of the dedication deed.”*

Source: Rights of Way Law review Januay 2000. 6:2 Creation: Common Law Pages 19 -21

Jonathan Mair, LL B Dip.LG., Principal Solicitor Dorset County Council

4.3.1. Dedication does not create a highway without acceptance by or on behalf of the public

Authority is found in Halsbury's Laws of England Vol 21 para 66

*"Both dedication by the owner and user by the public must concur to create a highway otherwise than by statute. User by the public is a sufficient acceptance".*

And in the following cases:-

R v Mellor 1890 1B & AD 32

Littledale J said; *"If an express dedication is proven, it is still necessary to establish an acceptance of the dedication by or on behalf of the public."* and *"that a road becomes public by reason of a dedication of the right of passage to the public by the owner of the soil and of an acceptance of the right by the public or the parish."*

Cubitt v Maxse (1873) 29 LT 244; LR & CP 704

Brett J found that *"acceptance by the public was ordinarily proved by user by the public"*, establishing that dedication by the owner and acceptance by the public must concur.

Mackett v Herne Bay Commissioners (1876) 35 LT202

Roads intended to be laid out on land dedicated through a Private Act of Parliament were not constructed. The land was cultivated between 1833 and 1868. When the commissioners sought to construct the roads forty years later, it was held that as there had been no use and adoption by the public, the dedication was not complete.

Points 4.3.2 to 4.3.7 are found in the following source:

Rights of Way Law review October 2000. 6:2 Creation: Common Law Pages 23-25

David Braham QC discusses the authority for the public's right to accept in the case of *Secretary of State v Baylis / Bennett* (2000). Reported in The Times 16 May 2000.

4.3.2. Dedication is not dependent upon agreed works actually being carried out

Secretary of State v Baylis / Bennett 2000

Kim Lewison QC found that an agreement between the landowner and the highway authority for widening a highway was found to establish an immediate (express) dedication and not merely an agreement to dedicate as and when certain agreed works had been completed by the highway authority.

Both dedication and acceptance are needed and, atypically, acceptance was an issue in this case. Acceptance by the highway authority was held to suffice; and if that were wrong, the subsequent public use of part of the roadside strip amounted to public acceptance of the whole strip.

The case considers the issue of public acceptance at length. Dedication does not create a highway without acceptance so the judge considered the question 'what amounts to acceptance' since it was contended that actual use by the public is the only way in which acceptance can be proved (actual exercise by the public of their right to pass and repass).

*'... the landowners hereby forthwith GIVE UP AND DEDICATE TO THE PUBLIC ... ALL THAT ... piece of land containing an area of 0.77 of an acre or thereabouts situate on the north side of Road Number A438 leading from Teddington to Tewkesbury in the Parish of Ashchurch in the County of Gloucester...'*

Kim Lewison QC considered whether the wording in the agreement (above) represented an immediate act of dedication. In his judgment:

1. 'hereby ...dedicate' is a present dedication (see also *Overseas Investments v Simcobuild*<sup>2</sup>)
2. The word 'forthwith' reinforced it
3. The dedication was not dependent upon the (agreed) works being carried out (which they had not).
4. The land to be dedicated was identified in the memorandum of agreement
5. There were no provisions for the termination of the agreement (in perpetuity)

The judge concluded that a present intention to dedicate as a highway was established:

*"Evidence of use serves a dual function. On the one hand it is evidence ... that the landowner has dedicated the land as a highway, on the other ...the evidence is used to prove acceptance by the public".*

Precedents cited by Kim Lewison QC :

#### 4.3.3. User is evidence not just of acceptance but also that the way is of public benefit

Authority is found in *R v Inhabitants of Lordsmere* (1850) 15 QB 689

The Court of Queen's Bench considered the liability of the parish to repair a turnpike road which had been constructed under powers contained in a private Act of Parliament.

Patteson J. said *"In all cases where a highway is created by dedication, user is of great importance, not as evidence of adoption, but as evidence that the way was of public benefit"*.

The function of the evidence of use is to prove public benefit, which in effect provides consideration for the liability of the parish to repair the highway but, the judge (Kim Lewison) concluded that evidence of actual use by the public is not the only evidence from which an acceptance may be proved.

#### 4.3.4. Repairs to the route by the parish is sufficient evidence of acceptance

Authority is found *Eyre V New Forest Highway Board* (1892) 56 JP 517

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<sup>2</sup> *Overseas Investments v Simcobuild* (1995) 70 P & CR322; (1996) 1 EGLR 49; RWLR s.2.3 p.1 Peter Gibson L.J. 'hereby dedicate' is a present dedication

Wills J explained that repairs by the parish were always an important piece of evidence when the question of highway or no highway was an issue, and said that ‘conformably with Will J’s direction, evidence that a way has been swept, scavenged or lighted is evidence of acceptance’.

4.3.5. Acceptance is ordinarily proved by users, dedication by the owner and user must concur

Authority is found in Fisher V Prowse (1862) 2 770

Blackburn J said

*“acceptance by the public is ordinarily proved by user of the public” and “both dedication by the owner and user by the public must concur to create a road otherwise than by statute”.*

Mr Kim Lewison QC concluded from the above case that public use is not critical to proving acceptance it is “simply the ordinary way of proving acceptance”.

4.3.6. No single individual can speak on the public’s behalf. Evidence of acceptance by the highway authority amounts to proof of acceptance.

Secretary of State v Baylis / Bennett 2000 conclusions by Kim Lewison QC

In the case before him (*Secretary of State v Baylis / Bennett* (2000) (2)) where he found that there had been an ‘immediate’ dedication of land that had not been wholly used by the public he concluded:

*“In the case of acceptance... (in this case) “no single individual can speak on the public’s behalf”.*

*Hence it is “necessary to show acts on the ground which amount to acceptance”.*

*But “under modern highways legislation...the highways authority is the representative of the public (duty to assert and protect the rights of the public over highways – Highways Act 1959 s. 116 / Highways Act 1980 s.130). Evidence of acceptance by the highway authority is capable of amounting to proof of acceptance by the public. It is not invariably necessary to show actual exercise by members of the public of their rights in the case of an express dedication”.*

4.3.7. Acceptance of part of the route is sufficient acceptance for the whole of the route

Part of the land expressly dedicated had been used by the public. Of interest is Kim Lewison QC’s view that:-

*“use of part of the dedicated land can amount to a (public) acceptance of the whole ... if part of the benefit on offer is accepted by the offeree, he must be bound by the contract”.*

Authority for this is found in *Tottenham Urban District Council v Rowley* (1912) 2 CH 633 (1914) AC 95

Sir Herbert Cozens Hardy M.R. said

*"I think it must be a dedication of the whole or none, and I am satisfied that the latter alternative would do a great injustice".*

#### 4.4. The whole public and in perpetuity

Defra 19/11/2012

*...by making an EDCL, the freehold owner of the land declares his intention on behalf of himself, binding all future owners of the land to dedicate that land as a public highway, such that the public will have the permanent right to pass and repass along the route in accordance with the usual law applicable to the class of highway dedicated.*

4.4.1 The law does not recognise a fixed term highway it must be in perpetuity.

Source: Rights of Way Law review January 2000. 6:2 Creation: Common Law Pages 19 -21

Jonathan Mair, LL B Dip.LG., quoted the authority in

*Corseilis v London County Council (1907) 1 Ch 704*

A leaseholder could not dedicate a highway for the life of his lease.

*"The holder of an estate for a term of years absolute i.e. the leaseholder cannot dedicate a highway. Unlike a private right of way which may be granted for a limited number of years, the law does not recognise a fixed term highway. The position at common law is that only the owner of the fee absolute i.e. the freeholder, may bind land for all time by declaring a highway over it".*

And in

Source: Rights of Way Law review October 2000. 6:2 Creation: Common Law Pages 23-25

David Braham QC discussed *Secretary of State v Baylis / Bennett (2000)*.

*1: 'hereby ...dedicate' is a present dedication (see also Overseas Investments v Simcobuild (1995) 70 P & CR322; (1996) 1 EGLR 49; RWLR s.2.3p.1 Peter Gibson L.J. 'hereby dedicate' is a present dedication. 2: the word 'forthwith' reinforced it. 3: the dedication was not dependent upon the (agreed) works being carried out (which they had not). 4: the land to be dedicated was identified in the memorandum of agreement. 5: **there were no provisions for the termination of the agreement (in perpetuity).***

Kim Lewison QC concluded, therefore, that a present intention to dedicate as a highway was established - there can be no termination of the dedication (in perpetuity).

4.4.2 Creating a way for a limited class of people does not constitute a dedication

Source: Rights of Way Law review January 2000. 6:2 Creation: Common Law Pages 19 -21

Jonathan Mair, LL B Dip.LG., quoted the authority in *Woodyer v Hadden (1813)*

Chambre J said

*“the laying out of a street may be a sufficiently overt act to constitute an immediate express dedication. However, creating a way for a limited class of people will not at the time of construction constitute a dedication.”*

## 4.5 Impediments to dedication

Defra 19/11/2012

*Anyone contemplating EDCL should bear in mind that before recording the new right on the Definitive Map and Statement, the surveying authority will need to be satisfied on a number of detailed points that have a bearing on capacity to dedicate.*

Defra’s points include evidence of ownership, legal charges, the rights of lease holders and tenants, and the presence of ancient monuments, conservation constraints and potential nuisance to other users of the highway—for example where a footpath is upgraded to bridleway.

4.5.1 It is for those who deny the dedication to show that the person allegedly dedicating had no capacity to dedicate.

Source: Rights of Way Law review January 2000. 6:2 Creation: Common Law Pages 19 -21

Jonathan Mair, LL B Dip.LG., quoted the authority in *Powers v Bathurst 1880*

*“If there is to be an express dedication at common law (important distinction between express and implied), it is necessary to point to a specific person, who at a specific time dedicated the land and had a legal capacity to do so.....Once one is able to point to what is prima facie an intention to dedicate, express or implied, the burden of proof shifts. It is then for those who deny the dedication to show that the person allegedly dedicating had no capacity to dedicate because at that time his legal estate was something less than freehold”.*

See also Section 3 highway creation protocol for landowners and the public and Section 5 application of the law by the planning inspectorate.

## SECTION 2 BENEFITS OF HIGHWAY CREATION TO THE NETWORK, LANDOWNERS AND THE PUBLIC.

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### Summary of points

The points in this section may be summarised as

5. The benefits of creating public rights of way through express dedication are the provision of a free and safe network for all, encouraging access to the countryside, healthy communities and rural economic growth.

5.1. The existing network of rights of way, connecting roads and other available multi user routes is not designed for modern day users.

5.2. In modern times there has been a reduction in the number of available routes due to traffic, land management and usability issues or the loss of safe connecting links.

5.3. There are multiple examples of currently unavailable existing routes that could be brought into public use to ensure a usable and safe network is available.

5.4. User groups consistently say that a coherent network of routes and reasonably safe connecting roads is needed to provide a variety of linear and connecting community trails.

5.5. The existing public rights of way network is a wasted national resource. There are multiple opportunities for highway creation to deliver linking local networks of lasting benefit through express dedication at common law

5.6. A comparison of the three principal statutory and common law methods to create or re-establish public rights of way shows that express creation is the only method available to the public to urgently and successfully create usable networks.

5.7. Whilst express creation is the process most likely to deliver the benefits of new and upgraded rights of way to the public, there are also considerable advantages of its use to all of the parties involved in the dedication process, the landowner, the public and the local authority - in its dual role as both surveying authority and highway authority.

5.8. An express dedication can be sought as a means to establish (or re-establish) an historic or used route to avoid a WCA 81 modification claim.

### 5. Network benefits

The benefits of creating public rights of way through express dedication are the provision of a free and safe network for all, encouraging access to the countryside, healthy communities and rural economic growth.

The Department for the Environment, Food and Rural Affairs said in 2010,

*High quality, accessible green spaces are highly valued by the public. In addition to their intrinsic value, they provide considerable benefits to quality of life, health and wellbeing. People's needs have changed, and more provision of accessible green space and high-quality landscapes closer to where they live are needed to enable them to build more outdoor recreation into busy, modern lifestyles.*

Safe routes, accessible from home, provide:

1. A free-at-point-of-use facility open to all.
2. Opportunities for exercise and contact with nature, improving mental and physical health through combinations of walking, running, cycling, riding and carriage-driving.
3. Reduced use of motor vehicles for utility journeys with corresponding benefit to cost of infrastructure and health.
4. A sense of place and social adhesion through sharing exercise and space with friends, colleagues or the community.
5. Rural economic growth and regeneration through encouragement of local use and tourism. Direct beneficiaries are small businesses (shops, pubs, farms, cafes, accommodation providers and riding schools). Indirect benefits arise from the support of horse populations for veterinary practices, feed merchants, farmers, farriers, various other suppliers and service providers.

*"If we all swapped one car journey a week for walking instead, car traffic levels would reduce by at least 10 per cent."* (Sustrans 2009).

The Government's 2015 paper Sporting Future: A New Strategy for an Active Nation emphasises the benefits of activity, much of which can be gained through use of public rights of way rather than formal sports facilities. Public rights of way have the advantage of providing benefit free at point of use so available to all, and available at all times of day, every day.

### 5.1. Do existing rights of way deliver the benefit?

The existing network of rights of way, connecting roads and other available multi user routes is not designed for modern day users.

The existing 'network'<sup>3</sup> comprises public footpaths, bridleways and byways, roads and some routes used as if they were bridleways, such as disused railway lines, but which are not dedicated. They arise primarily from historically established paths and minor roads that were

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<sup>3</sup> The majority of routes are connected only via roads so do not comprise an independent off-road network

not surfaced with tarmac. It is clearly not a network designed for modern day users who want to ride, walk or cycle from their homes with minimal exposure to motor vehicles.

In most of the country, users will have to use roads, in varying degrees of safety, to reach the routes which are free from motor vehicles. Many multi-user routes are isolated because they do not link to safe routes for non-motorised users and require use of a motor vehicle to reach them.

Some areas have dense networks offering options for journeys but more common are large areas without any multi-user routes at all.

## 5.2 Loss of routes to the modern network

In modern times there has been a reduction in the number of available routes due to increasing traffic volume, land management and usability issues or the loss of safe connecting links.

Examples include:-

1. Increased volume and speed of traffic and size of vehicles making roads unsafe for non-motorised users to be able to reach motor-free routes
2. Unrecorded routes being closed due to conflict, changes in land ownership or land management
3. Obstruction or lack of maintenance making a route unusable
4. Loss of safe connecting links making others unusable even if they are individually sound

## 5.3 Wasted routes unavailable to the network

There are multiple examples of currently unavailable existing routes that could be brought into public use to ensure a usable and safe network is available. Examples include:-

1. Routes recorded as public footpath but which are physically usable by all
2. Dead-end rights of way where the continuation has been lost or was never recorded, or recorded at a different status
3. Rights of way that are unavailable as they are isolated by unsafe roads
4. No provision for crossing major roads, railways or rivers between safe public highways.
5. Unrecorded customary routes that are known only to a few local people

## 5.4 A Coherent safe network of routes is needed

User groups consistently say that a coherent network of routes and reasonably safe connecting roads is needed to provide a variety of linear and connecting community trails. A modern network of countryside access routes should deliver:

- National trails (long distance)
- Inter-community paths (utility or recreational use)
- Community circuits (local short distance options for frequent use)

## 5.5 Opportunities for highway (public rights of way) creation

The existing public rights of way network is a wasted national resource. There are multiple opportunities for highway creation to deliver linking local networks of lasting benefit through express dedication at common law.

All that is required to create the right is the agreement of landowners, the wish of the public to use the route, and to make the route physically available (If it is not already).

Examples include:-

1. Extending cul-de-sac bridleways and byways to the next public multi use safe highway.
2. Creating 'over the hedge' bridleways adjacent to unsafe road links.
3. Installing crossing facilities where major roads, railways or rivers need to be crossed.
4. Maintenance programmes and / or taking enforcement action to re-open routes.
5. Recording historic routes which are currently used or were used in the past particularly corridor routes such as green lanes and droves.
6. Promoting a culture of sharing on all off route paths such as disused railway paths and cycle tracks

## 5.6 Comparison of creation and dedication processes

A comparison of the three principal statutory and common law methods to create or re-establish public rights of way shows that express creation is the only method available to the public to urgently and successfully create usable networks.

The methods compared are:

1. Statutory process to amend the DMS through an evidential application under Wildlife and Countryside Act 1981 (WCA 81) - a local authority duty.
2. Statutory process for a landowner to dedicate a public highway under the Highways Act 1980 Section 25 (HA80s25) - a local authority power.
3. Common law process for highway creation through landowner's express dedication - a landowner's right to gift a strip of land for public use and the public's right to accept.

Thirty five years of experience enables a subjective comparison of methods to ascertain which is most likely to enable the public to successfully create the public rights of way needed.

The scoring reflects the listed criteria (from the public user perspective) most difficult / complex / unable to be changed = 10 and likely / easy / full control = 0.

LA = Local authority, LO = Landowner, UG = User group (the public)

	<b>WCA81 application</b>	<b>SCORE</b>	<b>HA80s25 dedication</b>	<b>SCORE</b>	<b>Express dedication</b>	<b>SCORE</b>
Control / Ease of process	Legally complex	10	LA control	5	UG control	0
Evidence burden	User / historical	10	Some if used to persuade to dedicate	5	Not required	0
Relationship with provider	Conflict	10	Negotiation – assume good	0	Partnership	0
Community benefits / involvement	Poorly understood	7.5	Possible conflict with other groups	5	Community involvement	2.5
Cost to each party	LA / LO / UG	30	LA / UG	20	UG	10
Project management	With LA	7.5	LA / UG	5	UG control	0
Grant funding	Statutory process not available	10	Statutory process – difficult to access	5	Non statutory, all avenues open	0
Route location	Fixed	10	Fixed on agreement before installation	5	Flexible	0
Time scale	Queue / long legal process	10	Dependent on LA	5	Immediate	0
Last minute changes to route	Historical / user so fixed	10	Agreement signed before installation	10	Flexible no dedication until acceptance	0
Unintended consequences	E.g. loss of nearby unrecorded routes	7.5	Unlikely - partnership with LO	0	Unlikely - Partnership with LO	0
Land sale	N/A	0	Loss of agreement	5	LO passes on dedication deed	0
Highway exits	N/A	0	Development	10	No rules	0

			rules			
Unowned land	Still evidence based	10	Consultation required / difficult	10	Dedication by adjoining landowner(s)	5
Use as a tool to deliver modern network	Very poor	10	Possible with willing LA	5	Full public control but dependent on LO	5
Statutory duty to record	Only if successful	5	No duty	10	Duty to record	0
User and ROW officer satisfaction		10		5		0
Future goodwill	Not likely	10	Depends on LA	5	Very likely	0
2026 cut - off date	Not permitted	10	Depends on LA	5		0
<b>Total</b>		<b>177.50</b>		<b>120</b>		<b>22.5</b>

## Conclusion

Seeking express dedications for the purpose of public path creation is the only method that the public can use to successfully overcome the known problems in developing community networks.

Express dedication has significant advantages over other processes commonly used.

## 5.7 Advantages of highway creation through express dedication and acceptance.

Whilst express dedication and public acceptance is the process most likely to deliver the benefits of new and upgraded rights of way to the public, there are also considerable advantages of its use to all of the parties involved: the landowner, the public and the local authority (in its dual role as both surveying authority and highway authority).

### 5.7.1 Advantages to the Landowner

- a) Developing routes in partnership: no uncertainty, conflict or cost involved in protecting land from a DMS application.
- b) Contribution to community (our place): landowners and farmers often have a deep affinity for farm location and community. Opening new routes (where compatible with modern farming), particularly where the benefit is getting riders away from dangerous roads or provides a missing link can be their contribution to the wider community.

- c) Capital payment and infrastructure costs: the voluntary group can agree a payment for the right and the installation costs with the landowner. Payments can be made at any time as the project progresses.
- d) Location is flexible and can be away from farm yards and highly stocked areas, not where history dictates, using criteria such as existing and proposed land uses, the rights of others, land designations.
- e) Route installation (e.g. gates, bridges, fencing) design: considered with land use and stock security in mind and agreed between landowner and user
- f) Last minute changes: dedication is not final on signing the express agreement. Public acceptance completes the dedication. Changes to route location and design can be made before the landowner opens the route.

#### 5.7.2 Advantages to the public (user groups and individuals)

- a) Partnership working in the community: local landowners, farmers and users work for community benefit therefore:
  - Avoidance of confrontation and conflict (as for definitive map and statement applications)
  - Generation of goodwill amongst landowning community setting up the next successful project
- b) Control over process and timescale
  - Users manage the project instead of a remote local authority
  - No waiting for a dusty file to be opened, investigated and decided by public inquiries
  - No waiting for 20 years user to prove presumed dedication
  - Agreement, installation and fundraising can be expedited, satisfying expectations
- c) Satisfying grant funders because:
  - Permanent route
  - Non statutory process
  - Short project timescales
  - The dedication agreement is signed before project work commences
  - Security in respect of capital payments made in advance of installation
- d) Volunteer satisfaction because:

- Investing time and skills in positive action to assist the project
  - No need for evidence collection (user or documentary)
  - No difficult to understand complex legal procedures (appeals and public inquiries)
  - Win-win not lose-lose
- e) Flexibility in route design because:
- Routes can be located with consideration for land use
  - Routes can be constructed and designed to meet modern access needs and stock control
  - Route installation and location can take into account future maintenance needs.
- f) Secure permanent route – dedication is immediate upon acceptance, therefore:
- LA statutory duty to record on the definitive map and statement
  - Security if the land changes hands before recording on the definitive map and statement
  - Great investment for energy expended
- g) Highway exits and crossings
- A common sense approach to safety assessment instead of blind adherence to local authority safety criteria for routes created through the 1980 Highway Act (HA 80) s25 and s26.
- h) 2026 cut - off date
- The Countryside and Rights of Way Act 2000 established 2026 as the date when rights based on historical evidence that are not recorded on the definitive map will be extinguished.
  - The capacity of landowners and adjacent landowners to expressly dedicate will be the only method by which the public can re-establish ancient highways over both freehold and unowned land (including useful route corridors such as green lanes and droves).

## 5.8 Historic and Used Routes

Express dedication instead of WCA81 application to modify the definitive map and statement

A situation may arise where there is documentary or user evidence pointing to the existence of an unrecorded public right of way. An informal approach to the landowner(s) suggests that an express dedication is achievable. There is no reason in law why an express dedication should

not be sought along with acceptance by the public as a means to immediately establish (or re-establish) the route.

Local authorities have used the same pragmatic approach by asking landowners for Highways Act 1980 s25 dedications where these can be achieved in place of the lengthy modification order process.

## SECTION 3 HIGHWAY CREATION PROTOCOL FOR LANDOWNERS AND PUBLIC

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### 6. Summary for part 6

This section offers guidance to landowners and users on the use of express dedication as a mechanism for the creation and acceptance of highways (public rights of way). The role of the local authority as surveying authority and highway authority responsible for recording and protecting highways in its local area is discussed in section 4.

It is recommended that the local authority is invited to be a project partner at an early stage once the route has been agreed with the landowner(s). If the authority does not wish to be involved, this does not stop the dedication process continuing.

In the simplest example of dedication, that of a farm track owned and maintained by a single landowner who offers to dedicate a public bridleway over it, and where all parties are in accord (including the local authority), only documentation of dedication and acceptance will be required – mandatory proof of dedication (document D in the list) and acceptance (document K in the list).

However the greater the number of landowners involved and the more complicated the route in terms of making it available, the greater the need to keep very good records and to ensure original documents are securely held.

Collecting a complete file of evidence at each stage provides the legal proof that a public right of way has been created. This legal proof should provide all the necessary evidence to ensure that the local authority treats the dedication as a legal event and adds it to the definitive map and statement in a timely manner. If the authority refuses to recognise the dedication as a legal event, the file should be sufficient evidence for an application for a definitive map modification order and to protect the public's right of way until an order is confirmed.

In this section the points with regard to collecting file documents are self-explanatory.

Part 7 deals with liability issues

### Summary for part 7

The points in 7 may be summarised as

- 7.1. The local authority must record the new highway. It has the power to adopt it for maintenance but it is not obliged to.
- 7.2. Users of the new highway are highway users not visitors
- 7.3. The statute on occupier's liability owed to visitors does not apply to highway users.

#### 7.4. Case Law

7.4.1. Users of a public highway are owed no duty under the Occupiers Liability Act 1957

7.4.2. The occupier's liability to highway users is limited to acts of misfeasance. *Widgery J* limited the liability of landowners and occupiers to acts of wilful endangerment.

7.4.3. Acts of non feasance do not attract a claim of negligence

7.5. In terms of liability there are advantages for the landowner In respect of dedicating a highway instead of giving a permissive path (where users are visitors under the occupier liability acts).

### 6.1 The creation model file bundle

At the end of each section there is a file bundle suggestion. The bundle contains documents that may be necessary to prove that a right of way has been dedicated, laid out on the ground and accepted by the public through use.

#### Model file bundle

- A Ordnance Survey explorer map of route in relation to local area
- B Landowner notice
- C Any consents required
- D Dedication document and plan (mandatory)
- E Documents dealing with other matters
- F Works schedule, plan and before and after photographs
- G Maintenance plan
- H Newspaper, magazine or website articles referring to an opening event
- J User photographs
- K User statements and plan (mandatory)
- L Explanatory letter to local authority with enclosures or attachments.
- M Ancillary documents with regard to proof of ownership
- N Letter to authority reminding of duty to protect
- P Section 38 agreement to maintain

There is a useful step by step guide at the end of this section.

## 6.2 Defining the route

The route of the proposed right of way may already physically exist. Examples include: unsurfaced lanes, droves, farm access roads, tracks and paths and disused railway lines. The route may need to be physically defined on the ground by fencing, mowing or installing waymark posts until it becomes visible through use.

The route may need to be repaired, cleared or constructed, such as:

- a) Drainage and surface improvements to sustain use on horse or cycle
- b) Clearing vegetation
- c) Removal of stiles and/or replacement with gates

File Bundle A: Route location map showing the route on 1:25,000 Ordnance Survey map to demonstrate how it connects with other public access.

## 6.3 Identifying the landowner and others with an interest in the land

Only the freehold owner of the land can dedicate a public highway. The owner may be an individual, company, settled trust or charity and is named in the title deed. The freeholder can usually be identified through a land registry search or local contacts (e.g. parish council, neighbouring properties).

Where no freehold owner can be identified, which is common for a corridor of land between adjacent boundaries, the adjacent landowners can dedicate if there is no evidence that they do not own the land. In this case erect dated notices at either end of the land corridor to alert an unknown owner that a dedication has been agreed with the adjacent owners. Maintain the notices for at least four weeks. Take photographs of the notices *in situ* and keep a record of checks that the notices are still in place and clearly visible.

Tenants, leaseholders and others with an interest in the land, including banks and mortgage holders, may need to be consulted and their agreement gained. Obtain written consents where possible.

Where the land is subject to protection as a conservation area (ecology or heritage), agri-environment scheme or other constraint, consult the relevant authority on whether consent or conditions will be required. It is important to check for such constraints at an early stage.

Consult utility companies (water, gas, electricity, telecommunications) if ground will be broken for any works, including signposts, to ensure that plant will not be affected.

Consult the planning authority if significant construction works are required in case planning permission is required.

File Bundle B: Notice alerting unidentified landowners to the proposal; photographs of erected notices, schedule of checks that notices were visible.

File Bundle C: Consents from others with an interest in the land, statutory bodies, utilities or the planning authority.

## 6.4 Dedication statement and plan

If the dedication is unequivocal it may take place immediately. The dedication does not have to be expressed in writing providing the intention is sufficiently clear but the local authority is unlikely to accept as a legal event anything other than a formal deed of dedication.

Obtain a signed dedication document and plan for each holding over which the route passes. Where there are joint landowners for a holding, each should sign.

A project can involve lengthy negotiations with multiple landowners and adjacent owners, fund raising and construction works before the route can be opened and accepted by the public. It is helpful to obtain dedications or consents as soon as agreement is reached with each person or body.

A dedication is not binding until the complete route is open and accepted by the public. Dedications can be voided or alterations to the course of the route may be made prior to opening the route and inviting public acceptance.

The dedication document details must be accurate, enabling the local authority to protect and assert the public right of way and to add the route to the definitive map and statement.

The dedication document should:

1. Accurately describe the location and course of the route as shown on the accompanying plan (use a scale of map showing field boundaries such as Ordnance Survey 1:25,000 or larger; 1:5,000 is ideal if the route will fit on a reasonable sized piece of paper).
2. State the measured length of the route.
3. State the measured width. If it is not the same throughout, then describe the width in the form of A–B x metres, B–C y metres, C–D z metres and mark the points on the plan. If the route is defined by boundaries on both sides, describe it as ‘x metres wide between the hedges/walls/fences’. If the boundaries are hedges or trees, measure the commonly usable width when the hedges have been cut.
4. Clearly state the public rights being created by making reference to the footpath, bridleway or carriageway depicted by the green line (of the route) on the attached plan.
5. Name the freehold landowner (or landowners if jointly owned).
6. Differentiate between freehold ownership and assumed ownership (unclaimed land).
7. State that the dedication is for the public in perpetuity.
8. Be signed by the landowner(s) and witnessed by a third party.

Give copies of the signed dedication document to the landowner for retention with his deeds. This is an important legal document to be passed to an incoming landowner if the land changes hands before the new right of way is recorded on the definitive map and statement.

File Bundle D: Dedication document for each holding owner labelled D1, D2 etc.

A plan forms part of the dedication and must be signed by the dedicating landowner. The dedicated route must be shown on a plan at a scale sufficient to show its course in relation to land holdings (boundaries) through which it passes. The route plan must:

1. Show the course of the entire new route (normally green), marked with points of reference (A, B, C) from its start and end points on other highways of equal or higher status and where the route passes through adjacent holdings.
2. Show the individual landowner's freehold boundaries outlined in (normally) pink. In both the dedication document and on the plan the green line is referred to as 'public bridleway dedication' or 'public carriageway dedication' (as appropriate). The pink line is referred to on the plan as land in the freehold ownership of (landowner's name).
3. Be signed by the individual landowner (all landowners if jointly owned)
4. Show, in the case of any unclaimed land, the green route line clearly between pink boundaries of freehold land.

The plan accompanies the dedication document given to the landowner for retention.

File Bundle D: Plan comprising part of the dedication document.

## 6.5 Other dedication matters

It is usual to deal with any other matters agreed or to be agreed in an accompanying letter. They may include:

1. The terms of any agreed capital payment for the dedication of the new public right of way if a payment has been agreed.
2. Clarity on the agreement being subject to the raising of funds to pay for the capital payment and for construction costs.
3. Construction start date.
4. Route opening date.

File Bundle E: Any other documents relating to the dedication.

## 6.6 Route construction and maintenance

Where works are required to repair the surface or structures, remove obstructions or construct the route, these should be recorded in a schedule with reference to a plan of the route at a scale sufficient to identify the works and their extent.

Work should be to the highest feasible standard to reduce the need for future maintenance or replacement.

Establish who will own any structures such as gates or adjacent fencing and who will maintain them; who will maintain the surface and cut any vegetation from the surface or overhanging trees or adjacent hedges.

## 1. Works Plan

Show the route on a large scale plan showing field boundaries at a scale sufficient to identify field boundaries and location points where work is planned.

Mark the location of any existing gates or other limitations, bridges, fords, steps or other surface structures that are to be used along the course of the route.

Label each location (A, B, C, D, E etc) where works are to be undertaken, e.g. gates installed, surfacing works, vegetation clearance.

## 2. Works Schedule

Create a works schedule which:

Describes the route (so a contractor would be able to identify the exact location of any works) with reference to the works plan.

Lists all the landowners, other interested parties and any contractors who will carry out the works.

Lists the works to be undertaken at each point on the corresponding route plan, including:

- Description of works to be undertaken and by whom (landowner, contractor, volunteers)
- Type (and model if appropriate) and supplier of new structures (e.g. gate, bridge, fence) plus any specification (e.g. closing speed of self-closing gate to be set)
- Other materials and suppliers
- Lists existing gates / structures that are to be used (as listed in (1) Works Plan.

List any outstanding reports for which additional works or quotes are still required (for example bridge structural report)

Attach the works plan to the schedule.

Take photographs of the line of the route before works commence and after the work has been carried out.

Each project partner should sign the works schedule (project manager, landowner, local authority (if involved) and the contractor(s)) to avoid misunderstanding and as evidence of the intent of the work to create a public highway. Give each partner a copy.

File Bundle F: Works schedule, plan, before and after photographs, list of who has been given the schedule.

### 3. Maintenance plan

Show the route on a large scale plan showing field boundaries at a scale sufficient to identify field boundaries and location points where work is planned. Label each location (A, B, C, D, E etc) where works have or are to be undertaken, e.g. gates installed, surfacing works, vegetation clearance. Mark and photograph any existing structures such as bridges which are to be used as part of the route.

### 4. Maintenance schedule

List who owns or will own any structure. The landowner will normally own the gates and fencing since they are required for stock control. Note who will be responsible for various items or activities necessary to keep the route open. The landowner will be responsible for gates, overhanging vegetation, reinstatement after cultivation and keeping a route free from crops. However note that maintenance can be carried out either by landowners or by anyone with their agreement (e.g. a user group) or, if it has accepted maintenance liability, the local highway authority. A local authority, if it has accepted liability, will also be responsible for surface vegetation that is not a crop but again this may be undertaken by another body irrespective of whether the authority has accepted the route as maintainable at public expense for example by a user group, the parish council or the landowner.

Some routes will require no additional maintenance e.g. the example used previously - the farm access road.

File Bundle G: Maintenance plan, schedule, photographs of any existing structures.

## 6.7 Public acceptance of the new route

The standard of proof of public acceptance is lower than the statutory presumption of implied common law dedication.

To execute an express dedication, it is only necessary to show that the route has come into use by a sufficient number of members of the using public once the freeholder has dedicated the route and made it available. For example horse riding and cycling use to execute a bridleway dedication may take place spontaneously or be encouraged through holding a well-publicised opening event which shows that the new route has come into use.

In the months following the opening of the route, collect signed statements from users detailing one or more occasions when named individuals have used the route. Users should also sign a copy of the dedication plan. Photographs of the users on the route are very helpful.

If the local authority has refused to recognise the dedication and acceptance as a legal event, an application for a modification order may be required to add the route to the definitive map and statement. If it is known or believed that that situation will or is likely to arise, the signed statements should contain the following information, some of which is useful to identify others who have used the route or accepted that the route is in use:

- Personal details: name, address, age (over eighteen), contact details
- Employment to establish that the user is not an employee of the landowner
- Route description (to accord with the dedication plan)
- Period(s) of use in weeks, months or years as appropriate
- Frequency of use - descriptors such as 1-5, 6-12, more than 12 times a year; or 1-2, 3-4, 5 or more times a week or month are helpful
- Confirmation that the user is not related to freeholder or leaseholder
- State if the user saw or met other users or the landowner, occupier or other right holder
- State that use is never prevented or discouraged and used openly
- State if used in company and who with
- Why is it important (safe, traffic-free, circular, access to a place). This is not relevant to the existence of the public right of way or confirmation of an order but it may be helpful to the local authority in prioritizing the application for determination.

File Bundle H: Any newspaper, magazine or website articles referring to an opening event using the newly dedicated route. Include the date of the article where possible.

File Bundle J: User photographs

File Bundle K: User statements (K1, K2 etc) plus signed plan. The plan must be at a scale sufficient to clearly identify the route taken by the user. A copy of the dedication plan is usually ideal. Include a description of the route in words on both statement and plan(s). Use either the same plan for all users or individual plans corresponding to statements.

## 6.8 Informing the local authority

The local authority should be notified that a new highway in its area has been created. The local authority's legal duties and statutory powers relating to highway creation are fully explored in section 4.

### 6.81 Recording the new highway

Write to the county solicitor briefly explaining how the new right of way came into existence and enclosing the bundle copies of documents and photographs (electronic or printed) as appropriate. Request that the route is recorded as soon as practically possible.

The local highway authority may require evidence that the landowner holds the freehold title and has the capacity to dedicate and that there is no other impediment to his dedication.

The proponents may assist the authority by collecting evidence of ownership to expedite recording the route. Obtaining the following will be helpful to the authority:

For each dedicating owner and / or adjacent owner (for land corridors where there is no known owner) one of the following:-

- a) Land registry search (if registered)
- b) Title deeds (if not registered) including plan showing the extent of the holding
- c) Signed statement or statutory declaration from the landowner (in the case of unregistered land or deeds not being available)

File Bundle L: Explanatory letter to local authority with enclosures or attachments.

File Bundle M: Ancillary documents: copies of deeds, land registry searches, signed statements and statutory declarations.

Note: never send original paper documents to the authority. The only place these can be deposited safely is the county archives.

Proponents of the new route and dedicating landowners should be aware that the local highway authority has a statutory duty to protect and assert the public's right to pass and repass on any public highway, including one created through express dedication, whether or not it is recorded on the definitive map.

The duty includes taking action to keep the route clear from obstruction, crops, overhanging vegetation and natural surface vegetation if appropriate. In addition, it has the power to sign and waymark a route for clarity and to improve it.

File Bundle N: Remind the highway authority of its duty when necessary

### 6.8.2 Adopting the new highway (for maintenance).

Assessment of F and G in the File Bundle should provide the local highway authority with the maintenance requirements of the new route.

The highway authority may assume the maintenance liability by agreement through the Highways Act 1980 Section 38. This power is at the discretion of the authority.

File Bundle P: Certificate of adoption (Section 38) if the new highway has been adopted for maintenance.

## 6.9 Highway Creation step by step guide

Section	Action	File Bundle
2	Define route	A: Map showing the proposed route on 1:25,000 Ordnance Survey
3	Identify landowners and others with an interest in the land	B: Notice alerting unidentified landowners to the proposal (original or copy), plus photographs of erected notices and record of notices being visible on site C: Copies of any written consents granted from others with an interest in the land and / or the local planning authority
4	Landowner(s) dedication statements and plans Other matters	D: Dedication document for each holding owner D: Dedication plan attached to the dedication document E: Copies of any other documents relating to the dedication
5	Recording construction works	F: Works schedule, plan and before and after photographs G: Maintenance plan, schedule, structure photographs
6	Public acceptance	H: Copies of any newspaper, magazine or website articles referring to an opening event using newly dedicated route J: User photographs K: User statements plus signed plan (use either the same for all users or individual plans corresponding to statements)
7	Recording the new route	L: Explanatory letter to local authority with enclosures or attachments.
8	LA other information	M: Copies of deeds, land registry searches, signed statements and statutory declarations
9	LA other duties	N: Remind the authority of its duty when necessary
10	LA power to maintain	P: Copy of s38 agreement for file

## 7.0 Occupier's liability on highways not maintainable at public expense

References from this section are taken from the paper 'Ways, Highways and Highways Maintainable at Public Expense:- The Differences and Defences' dated 26/04/12 written by Matthew White, St John's Chambers, Bristol.

### 7.1 Local Authority duty and power

The local authority as surveying authority has a legal duty to record the newly created highway. The local authority as highway authority also has the power to adopt the new highway for the purposes of maintenance but it is not legally obliged to. These two should not be confused see section 4 protocol for local authorities for more information.

Refusal to adopt by the local authority does not prevent the highway (right of way) coming into existence provided it has been legally dedicated, laid out (if not already available) and accepted by the public.

Landowners, occupiers and the using public may have concerns regarding the liability of users of the new highway.

### 7.2 Users of the new highway are highway users not visitors

A reminder of Halsbury's Laws of England 21[1] common law definition of highway:

*'A highway is a way over which there exists a public right of passage, that is to say a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance'*

Whether or not the highway is adopted by the LA for the purposes of maintenance, users of the newly created route are highway users not visitors.

### 7.3 The statute on occupier's liability owed to visitors does not apply to highway users

Since users of an expressly created route are highway users not visitors

Occupiers Liability Act 1957 Section 2 does not apply:

*S.2 (1) An occupier of premises owes the same duty, the 'common duty of care' to all his visitors.*

*And (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.*

Occupiers Liability Act 1984

Matthew White argues that liability claims such as *McGeown v Northern Housing Executive* (1995) AC 233 (HL), could not succeed under this Act.

*“Whilst it has been suggested that such claims might succeed under the Occupiers’ Liability Act 1984, s.1 (7) of that Act seems to me to militate against that conclusion”.*

*“1 (7) No duty is owed by virtue of this section to persons using the highway, and this section does not affect any duty owed to such persons”.*

#### 7.4 Case law on liability

7.4.1. Users of a public highway are owed no duty under the Occupiers Liability Act 1957.

Greenhalgh v British Railways (1969) 2 QB 286 CA

Per Lord Denning MR

*“She (Mrs Greenhalgh) was a person who was exercising a public right of way and to her (the railway board) owed no duty under the Occupiers Liability Act”.*

7.4.2. The occupier’s liability to highway users is limited to acts of misfeasance. Widgery J limited the liability of landowners and occupiers to acts of wilful endangerment.

The position of landowners was made clear by Widgery LJ in Greenhalgh (supra) at 295:

*“As I have endeavoured to show, there was at common law no duty on the occupier of the land over which there is a public highway towards persons using the highway and arising out of his occupation or control of the premises. His liability was limited to positive acts of misfeasance and nothing else”.*

The Occupiers Liability Act 1984 section 1 defines the duty to persons other than visitors in respect of danger due to the state of the premises or to things done or omitted to be done. However subsection 7 states that no duty is owed by virtue of section 1 to persons using the highway, and this section does not affect any duty owed to such persons.

Gautret v Egerton (1867) L.R. 2 C.P. 371

Willes J said,

*“It may be the duty of the Defendants to abstain from doing any act which may be dangerous to persons coming upon the land by their invitation or permission...But what duty does the law impose upon these defendants to keep their bridges in repair? If I dedicate a way to the public which is full of ruts and holes, the public must take it as it is. If I dig a pit in it, I may be liable for the consequences: but if I do nothing, I am not”.*

McGeown v Northern Housing Executive (1995) AC 233 (HL)

C lived on a housing estate owned by the defendant housing authority. She tripped in a hole on a path through the estate. She sued the housing authority under the Occupiers’ Liability Act 1957. She lost on the basis that a person using a public right of way did so by right and could not, therefore, be a visitor/licensee (restating the rule in *Gautret v Egerton*).

7.4.3 Acts of non feasant do not attract a claim of negligence

Young (now Phillips) v Merthyr Tydfil CBC & another (2009) PIQR P23

A charity, with the agreement of the highway authority, created a park with a path network including a bridge on decommissioned coal mining land owned by the authority. Less than four years later the complainant crossed the bridge and fell on a dangerous defect arising from the erosion of a non-slip surface. The claim was made on the basis that the path was a highway maintainable at public expense owned by the defendant.

A summary judgment showed that the path was not maintainable at public expense. The complainant then asserted that the local authority had acted in a way that had lead the public to infer there was a right of passage (common law dedication) and the public had accepted through four years of uninterrupted user. This was upheld.

However that being the case, it was also upheld that the complainant did not have a claim in negligence or in the Occupiers' Liability Act 1957 following *McGeown* since the erosion of the bridge constituted nonfeasance rather than misfeasance. The position was "quite clear".

See also *Huggett v Cardiff Council*, Cardiff County Court, 13/12/11.

*Crowther v Sonoco Cores & Paper*, Bradford County Court 7/7/09

A cyclist who used a track on private land claimed under the Occupiers' Liability Acts. However the landowner successfully argued that the path was a highway on the basis of common law and acceptance. Since the cyclist could not prove misfeasance, his action failed.

*Matthew White on defence strategies*

*"A hidden advantage of relying on common law dedication / acceptance is that if all that is known that the way is used by the public that might well shift the burden to the other party to establish that it is not a highway".*

## 7.5 Conclusion:

Users of the newly created highway are not visitors. They are highway users whether or not the highway is adopted by the local authority. The occupier's liability is limited to acts of misfeasance. Clearly no landowner would wish to dedicate a route that was dangerous. The public's acceptance would reflect the safety of the route as well as its utility. In addition an act of non feasance is unlikely to attract a claim of negligence.

In terms of liability there are advantages for the landowner In respect of dedicating a highway instead of giving a permissive path (where users are visitors under the occupier liability acts).

## SECTION 4 LOCAL AUTHORITIES: BENEFITS, DUTIES AND POWERS

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Defra 19/11/2012

*An EDCL is a legal event for the purposes of sections 53(2) and 53(3)(a) of the Wildlife and Countryside Act 1981. This means that so long as the above conditions are fulfilled, the surveying authority must make a legal event modification order to record the new or upgraded public right of way on the DM&S. There is no necessity for the authority to follow up the EDCL with any kind of statutory creation agreement. Nor is the evidential DMMO process appropriate in such a case.*

### Summary of points

#### 8. Advantages to the local authority

8.1. The express creation method offers a number of advantages to the local authority compared to other creation or modification statutory processes.

#### 9. Local authority duty to record the new highway

9.1. The permission of the local highway authority to create a new public highway is not required.

9.2. The LA has duties and powers towards all public highways contained within legislation.

9.3. The local surveying authority must record the new highway because a legal event has occurred.

9.4. The local surveying authority must make a legal event order to record the event.

#### 10. Local authority duty to assert and protect the new highway

10.1. Even if the authority fails to record the new highway it still has a legal duty to assert and protect the rights of the public to use it.

10.2. This duty does not depend on the highway being recorded or being adopted as publicly maintainable.

#### 11. Local authority power to maintain the new highway

11.1. A new highway has been created through express dedication at common law, the local authority has a power to adopt it but not a statutory duty.

11.2 If the local authority decide to adopt the new highway for maintenance purposes it is then known as a highway maintainable at public expense.

11.3 Some routes need little or no maintenance or may already be maintained by others.

11.4 A useful history of adoption for maintenance follows.

11.4.1 All highways pre 1835 were assumed to be publicly maintainable.

11.4.2 The Highway Act 1835 s.23 laid down conditions for adopting a dedicated highway for maintenance purposes.

11.4.3 Most public rights of way are highways maintainable at public expense, some are maintained privately, some are maintained by no-one.

11.5 Local highway authorities have statutory powers to adopt the newly created highway.

12. Application of the law by local authorities – good practice examples from Bristol City Council and East Sussex County Council.

## 8. Express creation: advantages to the local authority

- a) Reduction in definitive map modification application queue: work in partnership to resolve applications through creation payment schemes instead of costly investigations and public inquiries.
- b) Rights of Way Improvement plans: forging a strong partnership between users and local authorities through Local Access Forums (LAF) working on route creation can deliver Rights of Way Improvement Plans (ROWIPs) at a local level.
- c) Route funding: community groups and users are able to access funding for route creation that is not available to the local authority. Route investment is not by the state.
- d) Future maintenance: the local authority is not obliged to adopt maintenance liability for the route created (although obviously desirable from the public perspective)
- e) Value for time expended: the route creation project is managed by the voluntary sector not by local authority officers.
- f) Road crossings and exits: the route creation is not agreed between the local authority and the landowner. Therefore there is no requirement to audit against new development criteria.
- g) Consultation: the route creation has not been initiated by the HA, therefore there is no requirement to advertise in the local press or consult user groups.
- h) Health: creation of a safe to access and use rights of way has obvious benefits for the health of local people.
- i) Legal process: simple and cost-effective process to record on the Definitive Map and Statement via legal event modification order.

## 9. Local authority duty to record the new highway

9.1 A landowner does not require the permission of the highway authority, the Secretary of State or the courts to create a highway; neither does the public require the permission of the highway authority, the Secretary of State or the courts to accept dedication of a highway. A reminder from Halsbury's Laws of England

*“Both dedication by the owner and user by the public must concur to create a highway otherwise than by statute. User by the public is a sufficient acceptance.”*

In the Rights of Way Law Review January 2000 Section 6.2 Jonathan Mair said:

*“It is very easy, when investigating claimed rights of way and their status, to be preoccupied with looking for evidence for or against an implied dedication, and to overlook the possibility of an express dedication.....Before even reaching for a copy of the Highways Act, certainly before looking for evidence of an implied dedication at common law, we should look first for what evidence there is of an express dedication.”*

*“...one may well overlook the obvious point, that there has been an express dedication and that one does not need to ask the highway authority, the Secretary of State or the courts to imply one.”*

9.2 The local authority, as both surveying and highway authority, has statutory duties and powers relating to all the public highways in its area contained within legislation that includes: National Parks and Access to the Countryside Act 1949

Countryside Act 1968

Highways Act 1980

Wildlife and Countryside Act 1981

Countryside and Rights of Way Act 2000

Natural Environment and Rural Communities Act 2006

9.3 The local surveying authority must record the new highway because a legal event has occurred.

The Wildlife and Countryside Act 1981 (WCA 81) requires the local surveying authority to record a public right of way on the definitive map and to maintain the definitive map under continuous review - which means adding new rights of way as soon as practical.

The surveying authority is the local authority responsible for updating the Definitive Map and Statement in its local area. It has a statutory duty under the WCA 81 to modify the Definitive Map and Statement when a legal event occurs.

A highway created through express dedication and public acceptance is a legal event.

The Highways Act 1980 S.31 (9) says:

*‘nothing in this section operates to prevent the dedication of a way as a highway ... being presumed or proved in any circumstances in which it might have been presumed or proved immediately before the commencement of this Act.’*

9.4 The local surveying authority must make a legal event order to record the event.

The highway has been created through (actual) common law express dedication and public acceptance. The legal event is not an evidential event and the authority should make a legal event modification order. An evidential test (definitive map modification application) to prove whether or not the highway has been created (implied dedication) is not appropriate.

WCA 81 Section 53 (3)(a) says:

*The coming into operation of any enactment or instrument, or any other event, whereby:*

- i. A highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;*
- ii. A highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be of that description; or*
- iii. A new right of way has been created 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.*

Section 53(3)(a)(ii) applies where an existing public footpath recorded on the definitive map has been upgraded through express dedication (dedication of a bridleway or carriageway).

Section 53(3)(a)(iii) applies where a new public right of way (footpath, bridleway or (restricted byway)) has been dedicated through express dedication.

9.5 Legal event process – quotes from Local Authorities

9.5.1 Cornwall County Council

Letter to British Horse Society reference CL/CAT/MJG/SP\_002 dated 23 January 2014

Re Dedication of Public Rights of way over land owned by Cornwall Council. Common Law Dedication by means of a “signed statement and plan”.

A number of Public Footpaths on Par Beach

Tywardreath and Par CP

“Please note that the certified copy of the Statement and Plan together with the annexed Scheme of Delegation is provided for the purposes of information. No formal response is required or expected from any addressee. It is not intended that this communication should be regarded as a consultation or request for information that are Utilities Undertakers or Telecommunications Providers.

An Officer of Cornwall Council having the authority to act for the Council has dedicated a number of public rights of way over land that is owned freehold by Cornwall Council.

The new ways are Public Footpaths as described (together with any limitations and conditions if any) and shown in the attached Statement and Map. As referred to in the Statement the ways are dedicated in perpetuity and are highways to be maintained at public expense.

Cornwall Council is satisfied the ways subsist and are in a fit condition for use by the public. The Council is, therefore, satisfied that the dedication of the ways has been secured. Where necessary and to comply with its various duties under Countryside Act 1968 Section 27 Cornwall Council will erect signposts and way marks for the guidance of path users.

**The nature of the dedication is such that it may be treated as a “Legal Event” within the meaning of the Wildlife and Countryside Act 1981 Section 53 (3)(a)(ii).** The additional rights of way will be consolidated.”

#### 9.5.2 North Lincolnshire Council to British Horse Society (2014)

“recognise that we have a duty to keep the definitive map and statement under continuous review **and that express dedication constitutes a legal event under section 53 of the 1981 Act.** Furthermore, we realise that such events should be acted upon as soon as practicable.

A path dedicated in this manner would not, however, be maintainable at the public expense unless it underwent a separate process of formal adoption (unlike paths created by agreement under, say, section 25 of the 1980 Act).”

#### 9.5.3 Bristol City Council to the British Horse Society (2014)

Express dedication at common law (EDCL) will impact on Bristol City Council (BCC) in its capacity as both Highway and Surveying Authorities and also as a major landowner.

The advice provided by DEFRA in their letter dated 19 November 2012, intended as general guidance to both local community groups and local authorities, is considered by BCC as being consistent with the Surveying Authority’s duties and powers under Part III of the Wildlife and Countryside Act 1981 (Section 53(3)). That is, if a highway is properly declared under the common law principles and that highway is then used by the public (and there is evidence to that fact), the route becomes a new right of way under Section 53(3) of the 1981 Act provided that it fulfils the relevant definitions of a public path (contained in Section 66 of the 1981 Act), **and should be included on the Definitive Map and Statement by way of a legal event order.** Consequently, BCC does accept the principle of EDCL as laid out in DEFRA’s letter of 19.11.12.

#### 9.5.4 Somerset County Council to The Trails Trust 6<sup>th</sup> October 2014

“You have made reference to Defra internal EDCL guidance in the context of the Paths for Communities Scheme (Dave Waterman’s letter of 19th November 2012), the content of which Somerset County Council broadly supports.

Where evidence of an EDCL is submitted and the Council is satisfied from the evidence that the EDCL fulfils all the conditions set out in the aforementioned Defra guidance, then the **Council will add such routes to the Definitive Map & Statement by legal event modification order** as soon as is practicably possible.”

#### 9.5.5 Northumberland County Council to The British Horse Society October 2017

If the landowner had the capacity and was willing to make an express dedication **then this would be a legal event which would be sufficient for the route to be added to the Council's Definitive Map and Statement.**

We would be interested to ensure that any express dedication was capable of creating the right so it would be best for us to be consulted.

There would be no charge from us regarding the Legal Event Order to record the route on the DM&S.

## 10. Local authority duty to assert and protect the new highway

Defra 19/11/2012

On duty:

*The highway authority has a duty under section 130 of the Highways Act 1980 to assert and protect the rights of the public to use and enjoyment of all highways in their area, including any created through EDCL; and to prevent as far as possible the stopping up or obstruction of all such highways...*

10.1 Even if the authority fails to record the new highway it still has a legal duty to assert and protect the rights of the public to use it. The duty to assert and protect the right of the public to pass is the same as for all rights of way that have been created in the area to which the map relates.

10.2 This duty does not depend on the highway being recorded or being adopted as publicly maintainable.

Highways Act 1980 section 130

The duty includes taking action to keep the route clear from obstruction, crops, overhanging vegetation and natural surface vegetation if appropriate. In addition, it has the power to sign and waymark a route for clarity and to improve it

Halsbury's Laws of England (Vol.21 para 66) says:

*Both dedication by the owner and user by the public must concur to create a highway otherwise than by statute. User by the public is a sufficient acceptance. It is not necessary that the way should be adopted as repairable or maintainable at the public expense.*

## 11. Local authority power to maintain the new highway

Defra 19/11/2012

On power to adopt:

*This is the case whether or not the highway authority elects to adopt a completely new route as publicly maintainable. It would seem good practice for the highway authority to do so, consistently with these core duties towards the route. In a case where higher rights are dedicated along an existing public right of way, there is a particularly strong practical case for the highway authority to adopt the path at its upgraded status rather than continuing to maintain it at its original status, while asserting it on behalf of the public at its upgraded status.*

11. 1. A new highway has been created through express dedication at common law, the local authority has statutory duties to record it and to assert and protect the public's right to use it, it has the power to adopt it but it does not have a statutory duty to maintain it.

11.2 If the local authority decide to adopt the new highway for maintenance purposes it is then known as a highway maintainable at public expense.

11.3 Some routes need little or no maintenance or may already be maintained by others (as the original example of dedicating a bridleway over a farm track that is maintained by the landowner.) However the more works carried out to make the route available, the more likely future maintenance will be required.

## 11.4 A useful history of adoption for maintenance purposes

11.4.1 All highways pre 1835 were assumed to be publicly maintainable

R v Leake (inhabitants) (1835) 5 B & Ad 469

Pre 1835 all highways were presumed to be maintained by the inhabitants of the parish

11.4.2 The Highway Act 1835 s.23 laid down conditions for adopting a dedicated highway for maintenance purposes.

Any new roads and occupation ways built post 1835 had to be adopted by the parish following a requirement that the landowner served notice of his intention to dedicate on the highways surveyor. Provided that the way was of sufficient utility, constructed satisfactorily, used by the public and kept in repair by the owner for twelve months – 'such highway shall forever thereafter be kept in repair by the parish in which it is situate.'

11.4.3 The current position with regard to the maintenance of public rights of way is that most are highways maintainable at public expense, some are maintained privately, some are maintained by no-one.

Dyne Solicitors give this helpful advice<sup>4</sup> (with examples) regarding the current position for footpaths which are either privately maintainable or not maintained at all (the same applies for all classes of public rights of way that are not adopted).

*'The majority of public footpaths are publicly maintainable. However, some are privately maintainable while others are maintainable by no-one'.*

### *Examples*

- *If the footpath was created after 16 December 1949 by express dedication by the landowner and has not been adopted;*
- *If the footpath was created after 1 January 1960 by dedication at common law or presumed statutory dedication and has not been adopted;*

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<sup>4</sup> Dynes Solicitors News 14/02/14

- *If the footpath was created by dedication agreement with a parish or community council, although the council may carry out repair or improvement works or contribute towards the cost of such works.*

*There is a slight grey area concerning the maintenance status of footpaths, created by dedication at common law or deemed statutory dedication, between 16 December 1949 and 1 January 1960 which have not been adopted.*

*Private landowners can be responsible for maintenance of a public footpath by prescription, statute, enclosure (where for some reason the public footpath became enclosed within private land) or tenure (land granted in consideration of a promise to keep a footpath in repair).*

*If a highway authority disputes public liability for maintaining a footpath, the onus is on the highway authority to prove that the landowner has private maintenance responsibilities.*

*If it is established that a private landowner does have a maintenance responsibility, it should be noted that there is no defined standard of repair. However, good practice would adhere to the statutory standard of "safe condition and fit for the type of traffic which ordinarily is expected to use them".*

*Do be aware that, although the highway authority would be expected to attend to the keeping free from obstruction of public footpaths, private landowners are expected to cut back overhanging vegetation growing on adjoining land which encroaches the footpath and endangers or obstructs footpath users.'*

11.5 Local highway authorities have statutory powers to adopt the newly created highway

Highways Act 1980 S38 contains a power for highway authorities to adopt new and existing highways by agreement. This power is at the discretion of the Council. It is the method by which many new housing estate roads are dedicated and become publicly maintainable.

## 12. Application of the law by local authorities – good practice examples

Example 1 Bristol City Council on dedicating a path over its own land at Glenavon Park dedication Legal Procedure 15 March 2012

Points made:

12.1 Express dedication at common law / acceptance by the public or the local highway authority on the public's behalf/ in perpetuity

12.2 Express declaration / type of user / limitations and conditions

12.3 Landowner legal capacity to dedicate / no statutory requirement to consult / use of legal event

12.4 Adoption of the maintenance liability agreed (in principle) by Bristol City Council

Quotes substantiating points

12.1) *“At Common Law a highway is created by the express or implied dedication of a right of passage to the public by the owner of the land together with the acceptance by the public of that right. A dedication will be in perpetuity: i.e. the public will have the right of passage for all time. From the moment that a dedicated way has been accepted, i.e. use by the public, or accepted by the highway authority on behalf of the public; the way is a highway.”*

12.2) *“Bristol City Council cannot go through the process of creation by agreement with itself. However, the Council’s landowning department may dedicate a public right of way over its land by way of a deed of dedication under section 2 Local Government Act 2000. A common law dedication and acceptance is what is needed to effect this. The landowning part of the Council make a written declaration by way of committee resolution or delegated decision and the public can signify their acceptance by their use of the right of way or by acceptance by the highway authority on behalf of the public. The land may also be dedicated subject to restrictions on the type of user or subject to the existence of limitations or conditions.”*

12.3) *“Once the principle of dedication of public rights is agreed, approval to proceed with a deed of dedication is sought from the relevant Directorate. The Council as landowner has the legal capacity to expressly dedicate a right of way and is not required to consult the public on the dedication procedure. However, it is considered good practice to undertake informal consultation. It is advisable for the notice of dedication to be advised in the local press and the Ordnance Survey should be notified of the subsequent ‘legal event’ order.”*

12.4) *“The costs of improving and signing ... the route ... will be met by the highway authority. Ongoing maintenance of the path ...will be carried out by Bristol City’s land managing department, Parks and Estates Services, who have agreed in principle to the dedication of the route”.*

Example 2 South Downs National Park Authority on creating a bridleway

Report SDNP/13/00854/FUL

Points made:

12.5 East Sussex County Council on creating a bridleway through the use of express dedication and subsequently recording it

12.6 No intention to maintain (creating a highway not a highway maintainable at the public expense).

Quotes substantiating points:-

In PC 25/13 re planning application SDNP/13/00854/FUL 11 April 2013: proposed construction of a (crushed limestone surfaced) bridleway alongside the River Ouse, Director of Planning Tim Slaney said:

12.5 *“At present cycling from Rodmell or the surrounding area to Southease Station on the C7 road is far too dangerous. The creation of the bridleway ... a safe path for all persons...”*

*“It is intended that the path would be funded through the governments ‘Paths for Communities’ scheme which aims to create new bridleways linking communities. It is intended to formalise the bridleway using the ‘Express Dedication under Common Law’ (EDCL) procedure. This enables voluntary groups or individuals to negotiate agreements directly with landowners to create public right of ways. It enables landowners to dedicate a new public right of way unilaterally as a common law alternative to signing a statutory public path creation agreement. Once created ESCC would be obliged to put the route on the definitive map.”*

*“Express Dedication under Common Law would mean that the bridleway would be formalised and added to the definitive map and be visibly marked on the Ordnance Survey.”*

*12.6 “ESCC (East Sussex County Council) would not however be liable for ongoing maintenance, this would be funded by the OVCN (Ouse Valley Cycle Network) and volunteer labour.”*

## SECTION 5 APPLICATION OF THE LAW BY THE PLANNING INSPECTORATE

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### 13. CASE STUDY: The express dedication of a bridleway in Upper Vobster, Somerset

Under Section 53 of the Wildlife & Countryside Act 1981 Planning Inspectors are required to apply the law when determining definitive map modification orders on behalf of the Secretary of State for Environment, Food and Rural Affairs.

#### 13.1 Summary of case

This section examines the recent case of a highway (bridleway) created through express dedication at common law that was claimed through the WCA81 process. The case was unusual since definitive map modification applications are usually based on the presumption that a highway has come into being through implied dedication.

In the Vobster case all the landowners who had dedicated land for the highway either appeared alongside the public users at the Public Inquiry in support of the Order or sent supporting statements.

#### 13.2 Background to the application to modify the Definitive Map and Statement

The route, a definitive public footpath, ran along a former colliery railway from the hamlet of Upper Vobster through concrete Works to the village of Coleford in Somerset. The railway (FP) had been used by horse riders from 1965 until and 1992 when it was challenged and prevented by the Works owners, concerned for the safety of horses ridden through an industrial area. A modification order application under the Wildlife & Countryside Act 1981, based on public use / presumed dedication was investigated by the County Council in 2011 and refused.

In 2003/4 an application to divert a section of the public footpath around the Works perimeter provided The Trails Trust with the opportunity of successfully negotiating with the known owners of the land crossed by the path with a view to their signing agreements with Somerset County Council to create bridleway rights over the route. Works were carried out to bring the path up to bridleway standard (partly at the County Council's expense). Somerset County Council refused to enter into any creation agreement agreements because of what it considered to be a problem with highway safety at Vobster Cross. The Trails Trust responded to this refusal by asking the landowners to create a bridleway through the principle of express dedication at common law and acceptance by the public.

The case was examined at appeal by Planning Inspector Peter Millman BA (Appeal ref FPS/G3300/14A/5 decision date 11 October 2012). The appeal being allowed a bridleway Order was made and advertised. Following objections a public inquiry was held by Planning inspector Heidi Cruickshank BSc (Hons), MSc, MIPROW (Order ref: FPS/G3300/7/91 interim decision date 20 Nov 2013, FPS/G3300/7/91M 14<sup>th</sup> July 2014 Formal Decision – the order then being confirmed.

### The Trails Trust's case

'The Trails Trust claimed that an order should be made to show as a bridleway on the (Somerset) County Council's Definitive Map and Statement a route currently shown as a footpath, leading from the public highway in the Hamlet of Upper Vobster along a green track and then an old railway path to the Newbury Cement Works. It then follows a perimeter path around the southern side of the Works before continuing to Dark Lane in the Parish of Coleford.'

'The Trails Trust's case that the owners of the land crossed by the appeal route have expressly dedicated bridleway rights over it, and that the public, by using it on horseback, has accepted and thus completed the dedication. The County Council's case is that the evidence is insufficient to show that dedication and acceptance have taken place'.

The bridleway order was confirmed on 14<sup>th</sup> July 2014 Formal Decision following a modification with respect to the alignment and widths to be recorded, south of the Works – see Order Ref FPS/G3300/7/91M.

### 13.3 Points considered at appeal and subsequent public inquiry:

1. Express Dedication at Common Law
2. Landowner's intention to dedicate
3. Presumption of adjacent landowner's capacity to dedicate over unowned land
4. One landowner dedication period of less than two years
5. Public acceptance – of the users and the wider public
6. The whole public and in perpetuity – particularly with regard to some of the land being sold (twice)
7. Nuisance (due to upgrade of existing public footpath rights and path width (at its narrowest point 8. metres))
8. Impediments such as the alleged existence of a mortgage, and 9) exit onto the public highway

#### 13.3.1 Express dedication at Common Law

Heidi Cruickshank FPS/G3300/7/91

*7. Reliance is placed upon express dedication at common law, which depends upon there being an intention on the part of the landowner to dedicate a right of way in perpetuity and acceptance by the public, to be the general public and not a limited class thereof. Questions were raised as to the capacity to dedicate for some of the relevant land.*

*20. (On past use). Whilst the route has not been formally recognised as a bridleway in the past, this does not fetter the ability of the landowners to make such a dedication on their own land. ...*

*I have not found it necessary to consider the matter under presumed dedication in relation to historical use*

*21. Taking all the matters into account I am satisfied that there has been a clear intention on the part of the landowners, with a capacity to do so, to dedicate a public bridleway over this land. The offer of dedication has been accepted by the public who have taken to using the route of foot, horse and bicycle.*

*I consider that ...there has been dedication and use of the Order route as a public bridleway such that express dedication at common law has been demonstrated.*

### 13.3.2 Landowner's intention to dedicate

Heidi Cruickshank FPS/G3300/7/91

*14. .... Forms (dedication forms) were signed at different times by the owners of different sections of the route and further statements of intent were supplied to the Inquiry both in writing and orally. Taking account of all the formal and informal paperwork, as well as the oral evidence, I consider it abundantly clear that the relevant landowners intended to dedicate the route as a public bridleway.*

### 13.3.3 Adjoining landowner's capacity to dedicate and

### 13.3.4 a landowner dedication period of less than two years

Peter Millman FPS/G3300/14A

*16. The land on one side (of the corridor) is registered to Mr How, and the land on the other side to Ms Wallace. She made an unconditional dedication of bridleway rights over her land in 2003.....Mr How made a similar dedication in February 2011*

*17. The (Somerset) County Council accepts that there is a legal presumption, which is rebuttable, that the landowners either side of a highway own its soil to the mid-line. The (County Council) November 2011 report stated 'This (the evidence) is insufficient to prove capacity to dedicate, as it is only a presumption which may be readily rebutted by evidence to the contrary.*

*It seems to me that this statement shows a lack of understanding of how such presumptions operate. They hold good in the absence of counter evidence, and here no counter evidence had been provided. I conclude that Mr How and Ms Wallace do own the soil to the mid-point, and they can in the absence, of other impediments, dedicate highway rights on part of the appeal route.*

Heidi Cruickshank FPS/G3300/7/91

*16. A matter which led to the OMA deciding not to make the Order was a concern that the landowners did not have the capacity to dedicate the land as a public bridleway. There were suggestions that there may be other landownership in relation to the western end, however, Land Registry searches did not reveal any different ownership and the relevant party did not provide any documentary evidence of such title.*

### 13.3.5 Public acceptance

Peter Millman FPS/G3300/14A

*21. The (Somerset) County Council relies on user evidence forms and interviews with users to conclude that there is insufficient evidence of public use ...on horseback to show that any dedication to the public has been accepted. For reasons which I do not understand, it appears to have ignored the clear evidence of the owners of the land crossed by the route, adjacent owners and the relevant parish councils on this matter.*

*27. The County Council's own report.... also notes in describing the appeal route that 'there is evidence of use by horses.*

*28. The report stated that 'the lack of users is insufficient to bring to the attention of owners that the route has been used by horses... This in my view is plainly wrong, and can only be accounted for by a mistaken belief that reports by landowners, adjacent landowners, parish councils and even its own officers cannot be taken into account.*

*29. It seems to me that the evidence of use described ...is clearly more than sufficient to show that acceptance of the dedications has occurred, even where one of the dedications was not made until February 2011.*

Heidi Cruickshank FPS/ G3300/7/91

*18. I heard evidence from a number of people of use of the Order route on horse-back, as well as on foot and bicycle.....It had been argued in objection that the number of horse users was slight. Whilst it may not have been sufficient were I considering the matter under presumed dedication at common law, or by statute of the 1980 Act, I am satisfied that for express dedication the user by the public need not be significant; it is only necessary to show that the route has come into use.*

*19. Looking at the user evidence in its entirety, I agree with the supporters that it is sufficient in both quantity and quality to demonstrate the acceptance of the route by the public since it was thrown open to them.*

### 13.3.6 The whole public and perpetuity

Heidi Cruickshank FPS/ G3300/7/91

*14. Taking account of all the formal and informal paperwork, as well as the oral evidence, I consider it abundantly clear that the relevant landowners intended to dedicate the route as a public bridleway.*

*Furthermore, it is clear that the intention was for it to be available to the general public and not simply a limited or defined class of the public.*

*It is also clear, particularly in relation to the land that has been sold subsequently, that it was intended to be dedicated as such for all time.*

*19. I am satisfied that the users are representative of the general public and not simply a defined class of user.*

### 13.3.7/8 Impediments to dedication

### 13.3.7 Path width and nuisance

Peter Millman FPS/G3300/14A

*30. The (Somerset) Council argued that 'there is an authority which suggests that a landowner does not have the capacity to dedicate higher rights where they would interfere with existing rights'.*

*31. Some objectors to the upgrading of the footpath to bridleway commented on the potential for conflict between walkers and riders ...despite these comments the County Council conceded that there had been no reported accidents (in at least 9 years of use by horses) and that 'there is no evidence at present of conflict arising'....I conclude that the relevant landowners' capacity to dedicate is not invalidated.*

Heidi Cruickshank FPS/ G3300/7/91

*12. There was anecdotal evidence of potential fear for some people in using a shared route (note footpath upgraded to bridleway through express dedication). However, those giving evidence to the Inquiry, who had used the route on foot, horse and bicycle, had not encountered problems with different users. They may stop at a wider section, or slow down to pass others, but this was little different to the consideration required when using the narrow lanes and other bridleways in the area. There was insufficient evidence to demonstrate that there was a danger to lawful users of the footpath, such that it may constitute a nuisance at common law, as referred to in the Encyclopedia of Highway Law and Practice. I am satisfied ...that the character of the way is such that it is suitable for use as a bridleway and it was open to the landowners to dedicate it as such.*

### 13.3.8 On mortgage and legal charges

Peter Millman FPS/G3300/14A

*18. The [Somerset] County Council argues ...'one of the owners has a legal charge on their property but no evidence has been provided to show that the mortgagee has consented to the dedication.' It seems to me again that the County Council is wrong to claim that this statement shows that either Ms Wallace or Mr How does not have the capacity to dedicate. They clearly believed that they had the capacity to dedicate bridleway rights over their land. If the County Council denies that dedication by one of the two has taken place because of lack of capacity, then the Council must prove its assertion...On the evidence before me, both Ms Wallace and Mr How have the capacity expressly to dedicate bridleway rights over their land and both have done so.*

Heidi Cruickshank FPS/ G3300/7/91

*17. The landowner herself was satisfied with regard to her capacity to dedicate. In the absence of evidence that there was a mortgage with terms which would prevent dedication, I consider, on the balance of probabilities, that it has not been demonstrated that there is a lack of capacity to dedicate a bridleway on the part of any of the landowners.*

### 13.3.9 On safety and exit on to the existing highway network

Heidi Cruickshank FPS/ G3300/7/91

11. *The junction to the road at Vobster Cross is not relevant as this is an existing road which all users have a legal right to in any event.*

## 14 Examples of subsequent cases.

Since the Vobster Inquiry the necessary ingredients for express dedication at common law have been considered in other cases

Point made: in each case inspectors have considered whether an express dedication has been made as an alternative to the statutory or common law position of implied dedication.

### 14.1 Surrey County Council Footpath No. 160 (Woldingham) 2011 Order FPS/B3600/7/106

Confirmed 30 September 2014. Relevant paragraphs from the decision letter:

11. *With respect to evidence of the existence of a highway, Section 31 of the Highways Act 1980 ('1980 Act) states that where a way, which is of a character capable of giving rise to a presumption of dedication at common law, has been enjoyed by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it ...*

12. *It is also open to me to consider whether dedication of the way as a highway has taken place at common law. This requires me to examine whether the use of the path by the public and the actions of the landowners or previous landowners have been of such a nature that dedication of a right of way can be shown to have occurred expressly or, alternatively, whether dedication can be inferred. No prescribed period of use is required at common law; the length of time required to allow such an inference to be drawn will depend on all the circumstances. The burden of proof lies with the persons claiming the rights.*

53. *I consider that, when combined with the clear dedication of Nethern Court Road as a public footpath, the evidence of use of the woodland section of the Order route, together with the acquiescence of the landowner, shows that a route through the wood can be presumed on the balance of probabilities to have been dedicated as a public footpath at common law ...*

55. *Given my conclusions above in connection with dedication at common law, it is not strictly necessary for me to consider the statutory position ....In case I am wrong with regard to common law dedication I will also address the statutory provisions.*

### 14.2 Appeal against Kent County Council by Shorne Parish Council FPS/W2275/14A/15

Appeal allowed 24 August 2015. Relevant paragraphs from the decision letter:

11. *Dedication can be inferred at common law, with express or implied dedication by the owner and acceptance by the public creating a highway. The question of dedication is one of fact to be determined from the evidence. Use by the public provides evidence, but is not conclusive evidence from which dedication can be inferred. There is no minimum period of use at common law but the legal burden of proving the owner's intentions remains with the claimant.*

12. *In all cases, the test to be satisfied is on the balance of probabilities.*

### 14.3 Appeal against Nottinghamshire County Council FPS/L3055/14A/14

Appeal allowed 9 March 2016. Relevant paragraphs from the decision letter:

*8. A highway may be created at common law with the acceptance and use by the public. Dedication may be express or implied. Dedication is inferred where the acts of the owner point to an intention to dedicate. Use by the public of a way 'as of right' for a sufficient period could be evidence of an intention of the landowner to dedicate a public right of way. ...The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. User, which is acquiesced in by the owner, is 'as of right'....Before there can be a dedication or implied dedication of a public right of way there must be an owner of the land legally capable of dedicating the way as public.*

## APPENDIX

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### 1. Documents referred to in the paper.

- 2008 Plymouth City Council publication 'What is a right of way
- 2016 The Ramblers guide to the creation of highways ([www.ramblers.org.uk](http://www.ramblers.org.uk))
- 1991 Attorney General *ex relatio Yorkshire Derwent Trust Ltd and Another v Brotherton and Others 1991* (House of Lords) Judgment Ref (1991) 3 WLR 1126
- Halsbury's Laws of England (edition not specified)
- Sauvain's Highway Law third edition
- 2012 Express Dedication letter from Department for Environment Food and Rural Affairs to Natural England 19/11/12 (Waterman / Johnson)
- 2012 Planning Inspectorate decision: Appeal Ref: FPS/G3300/14A Inspector Peter Millman MA Upper
- 2013 (confirmed 2014) Planning Inspectorate decision: Order Ref: FPS/G3300/7/91 & FPS/G3300/7/91M Inspector Heidi Cruickshank BSc (Hons), MSc, MIPROW Upper Vobster
- 2014 Planning Inspectorate decision: Order Ref: FPS/ B3600/7/106 Inspector Helen Slade MA FIPROW Woldingham
- 2015 Planning Inspectorate decision: Appeal Ref: FPS/W2275/14A/15 Inspector Heidi Cruickshank BSc (Hons), MSc, MIPROW Shorne Parish Council
- 2016 Planning Inspectorate decision: Appeal Ref: FPS/L3055/14A/14 Inspector Michael R Lowe BSc (Hons) appeal by Stephen Parkhouse
- 2000 Rights of Way Law Review January 2000 Section 6.2 Jonathan Mair, LL.B Dip.L.G., Principal Solicitor, Dorset County Council: Express Creation at Common Law.
- 2000 Secretary of State v Baylis / Bennett (2000) (2) - David Braham QC discusses a case reported in The Times 16 May 2000. Rights of Way Law Review October 2000 Section 6.2: Creation at Common Law.
- 2012 Bristol City Council (Glenavon Park dedication) Legal Procedure 15 March 2012
- 2013 South Downs National Park Authority Report by Director of Planning PC 25/13 re planning application SDNP/13/00854/FUL 11 April 2013: proposed construction of a (crushed limestone surfaced) bridleway alongside the River Ouse.
- 2014 Dyne Solicitors Specialists in Regulatory Law and Advocacy, News February 2014
- 2012 St John's Chambers paper on *Ways and Highways & Highways maintainable at public expense: the differences and defences* 26/04 2012 by Matthew White.
- 2017 Matthew White (St John' Chambers) advice to The Trails Trust <http://bit.ly/2xQ00vA>

## 2. Terminology

- *Route* – a physical path or track
- *Right* – the legal freedom to use a route
- *Highway* – any route along which the public have the right to pass and re-pass; *minor highways* are footpaths, bridleways, restricted byways and byways open to all traffic; *major highways* are carriageways or roads open to all users
- *Rider* and *riding* means of a horse and *cyclist* is a user of a pedal cycle
- *Roads* are generally understood to be used predominantly by motor vehicles and to have a *sealed surface*, usually asphalt or ‘tarmac’
- *Unclassified roads* and byways open to all traffic may have an *unsealed surface* of stone, bedrock, gravel or sand which is natural or made (to varying extent)
- *Off-road* is widely used to mean free from motor traffic or used predominantly by non-motorised users
- *Unsurfaced* generally means not surfaced with asphalt or consolidated stone, although there may be such a surface that has been covered with soil or vegetation and is not apparent, or there may be no supplementary surface at all
- *Utility journeys* are non-recreational, such as to reach work, school or services, but may offer a benefit by providing exercise in a pleasant environment.

## 3. Highway Creation File Bundle examples (following pages) as set out in the table

A: Map showing the proposed route on 1:25,000 Ordnance Survey
B: Notice alerting unidentified landowners to the proposal (original or copy), plus photographs of erected notices and record of notices being visible on site
C: Copies of any written consents granted from others with an interest in the land and / or the local planning authority
D: Dedication document for each holding owner D: Dedication plan attached to the dedication document E: Copies of any other documents relating to the dedication
F: Works schedule, plan and before and after photographs G: Maintenance plan, schedule, structure photographs
H: Copies of any newspaper, magazine or website articles referring to an opening event using newly dedicated route J: User photographs K: User statements plus signed plan (use either the same for all users or individual plans corresponding to statements)
L: Explanatory letter to local authority with enclosures or attachments.
M: Copies of deeds, land registry searches, signed statements and statutory declarations

N: Remind the authority of its duty when necessary
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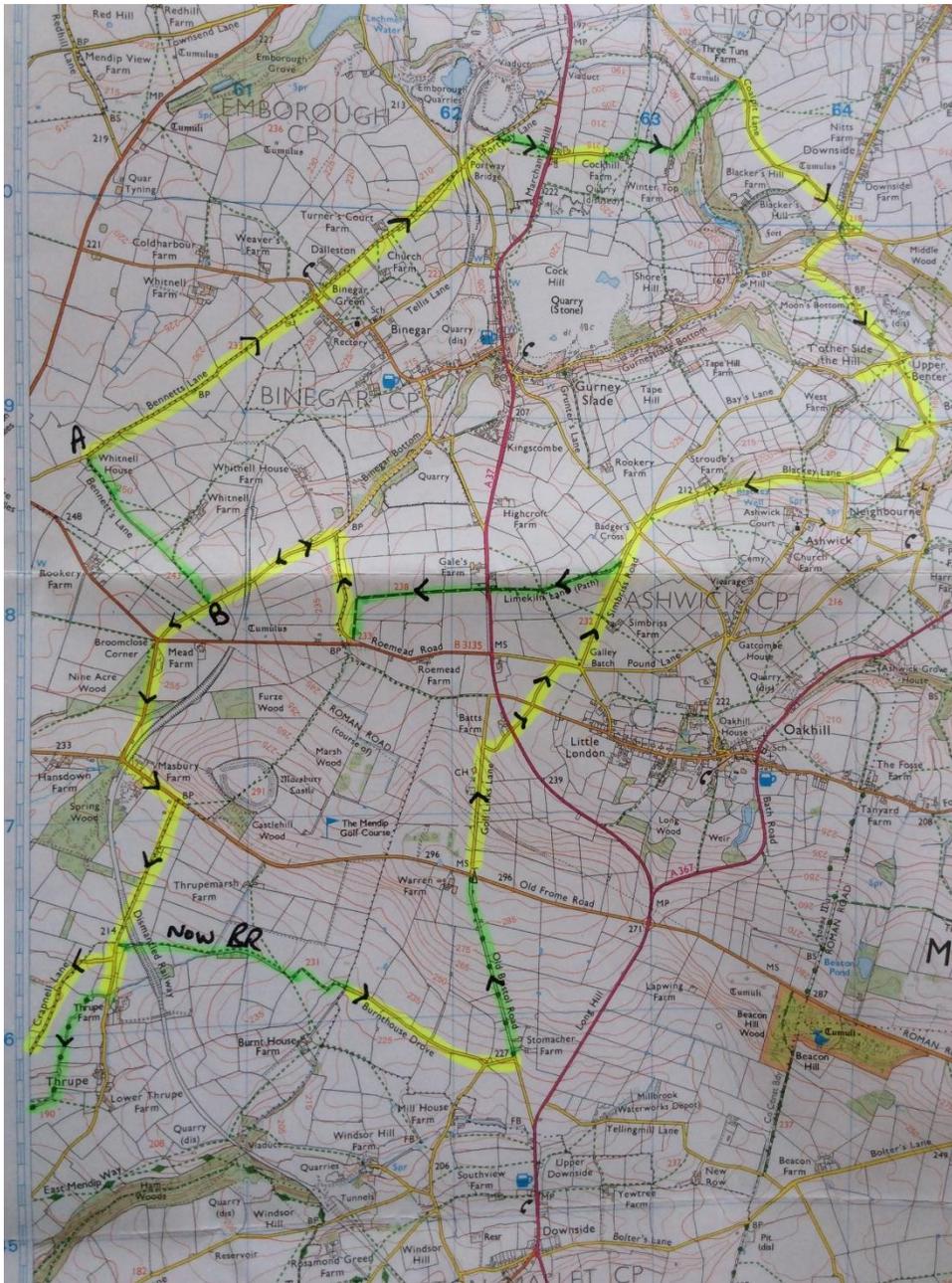
P: Copy of s38 agreement for file (no copy available)
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**Please note: the following bundle example documents and maps are for illustration purposes only and do not necessarily represent what has happened on the ground.**

## FILE BUNDLE EXAMPLE A

This map shows how the proposed brideway route marked A-B links to the existing network of quiet lanes (highlighted in yellow) and public brideways (highlighted in green) in the local area.

The proposed route A – B extends the usable network and provides a safe alternative to the B3135 Roemead Road.



MAP REPRODUCED UNDER OS LICENCE 100049658

FILE BUNDLE EXAMPLE B

## Notice of Intention to Dedicate a Public Bridleway

To: whom it may concern. Take note that:

I/we

of [address]

*(List the name and addresses of each dedicating landowner)*

give notice that (*I / we being*-delete as necessary ) the freehold land owners of the land outlined in pink on the plan below, intend to dedicate a public bridleway over the land marked on the same map in green.

The law presumes that adjacent freeholders own the subsoil of the land marked in green in the absence of any known owner.

If you believe that you own the land marked in green, over which the dedicated bridleway will pass, or have an interest in it, please contact:

[insert contact]

Date notice and plan posted:

Site Visits Schedule to check the notice is in situ (replace as necessary).

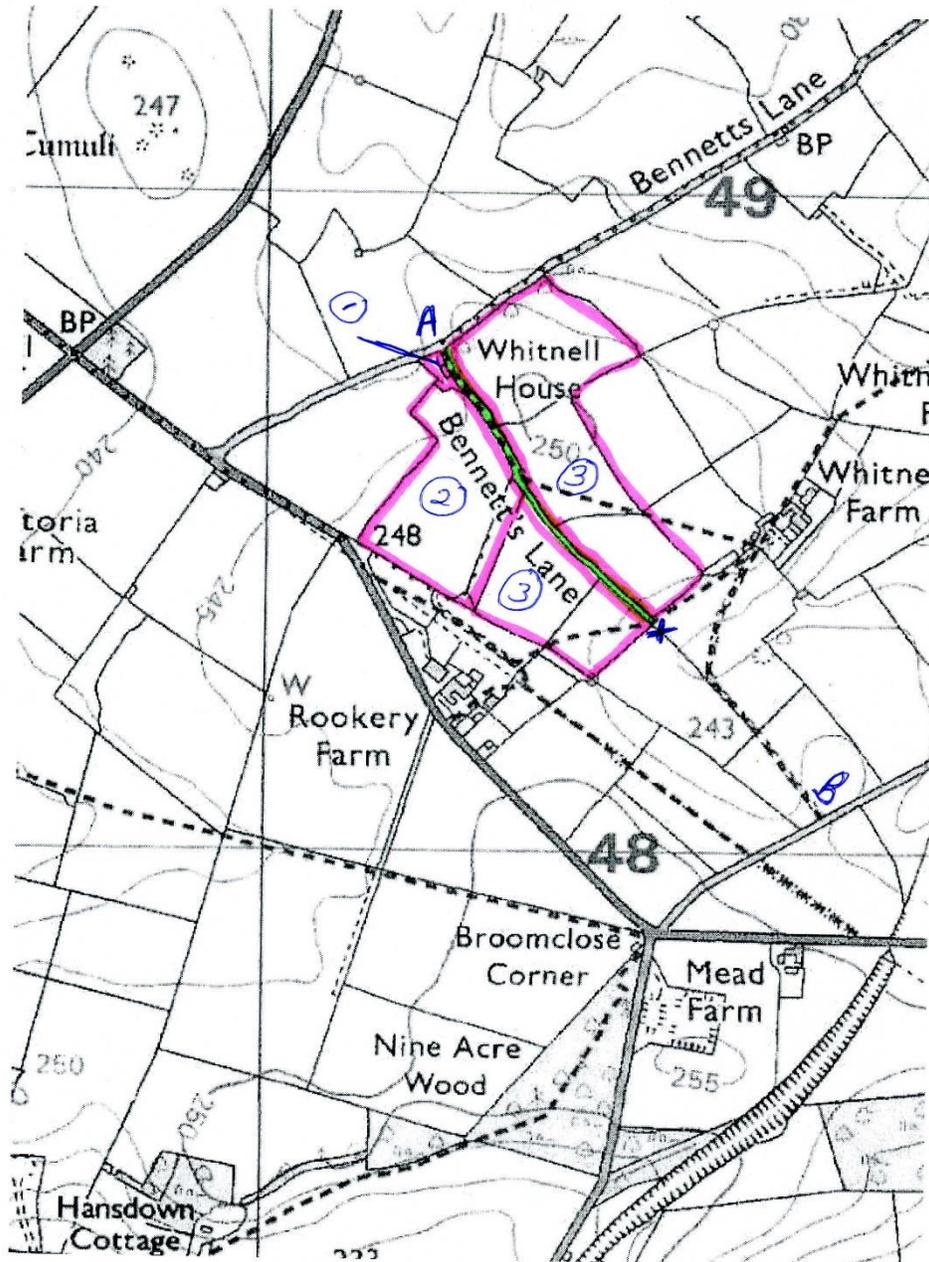
Date posted	Actual date checked	Comment	Signed
Week 1			
Week 2			
Week 3			
Week 4			

Attach photographs of the notice taken each week

FILE BUNDLE EXAMPLE B (Plan)

**Notice of Intention to Dedicate a Public Bridleway Plan**

The section of route which the adjacent owners intend to dedicate as a bridleway is marked A – X and shown in green on the plan below. The land owned by the adjacent owners (1,2,3 owners - as described in the notice above) is outlined in pink.



OS LICENCE 100049658

FILE BUNDLE EXAMPLE C – consent from a third party

Broomclose Farm

Etc etc

Dear (Bridleway Project officer)

I am the tenant farmer occupying land adjacent to and east of the lane known as Bennett's lane. The land is owned by Mr Jones who has made me aware that he is intending to dedicate a public bridleway over the land which I farm.

I am writing to confirm that I consent to the proposed bridleway. However I should like to be consulted on the proposals since this may affect the way in which I farm the land.

Please would you be kind enough to contact me on this number xxx so that we can meet on site?

Yours sincerely

Farmer Smith

FILE BUNDLE EXAMPLE D – Landowner’s dedication document

**DEDICATION OF PUBLIC BRIDLEWAY**

Bridleway description: The bridleway leads from / to

The bridleway is shown coloured green on the attached plan.

The bridleway is approximately Xkm in length and xm wide and passes over land presumed to be owned/ owned (*delete as appropriate*) by:-

*Landowner’s name:*

The landowner(s) by virtue of owning the freehold / adjacent freehold\* hereby agree that this bridleway is dedicated to the public as a highway in perpetuity under Common Law.

\* The land owned is shown bordered in pink on the attached plan.

The (*name of organisation*) hereby agrees to lay out the route on behalf of the public and to carry out works according to the landowner’s instructions.

Signed by the landowner (s) .....

Address.....

.....Date.....

Witness (name) .....

Address.....

.....Date.....

Signed by (*Organisation*) .....

Address.....

.....Date.....

Witness (name) .....

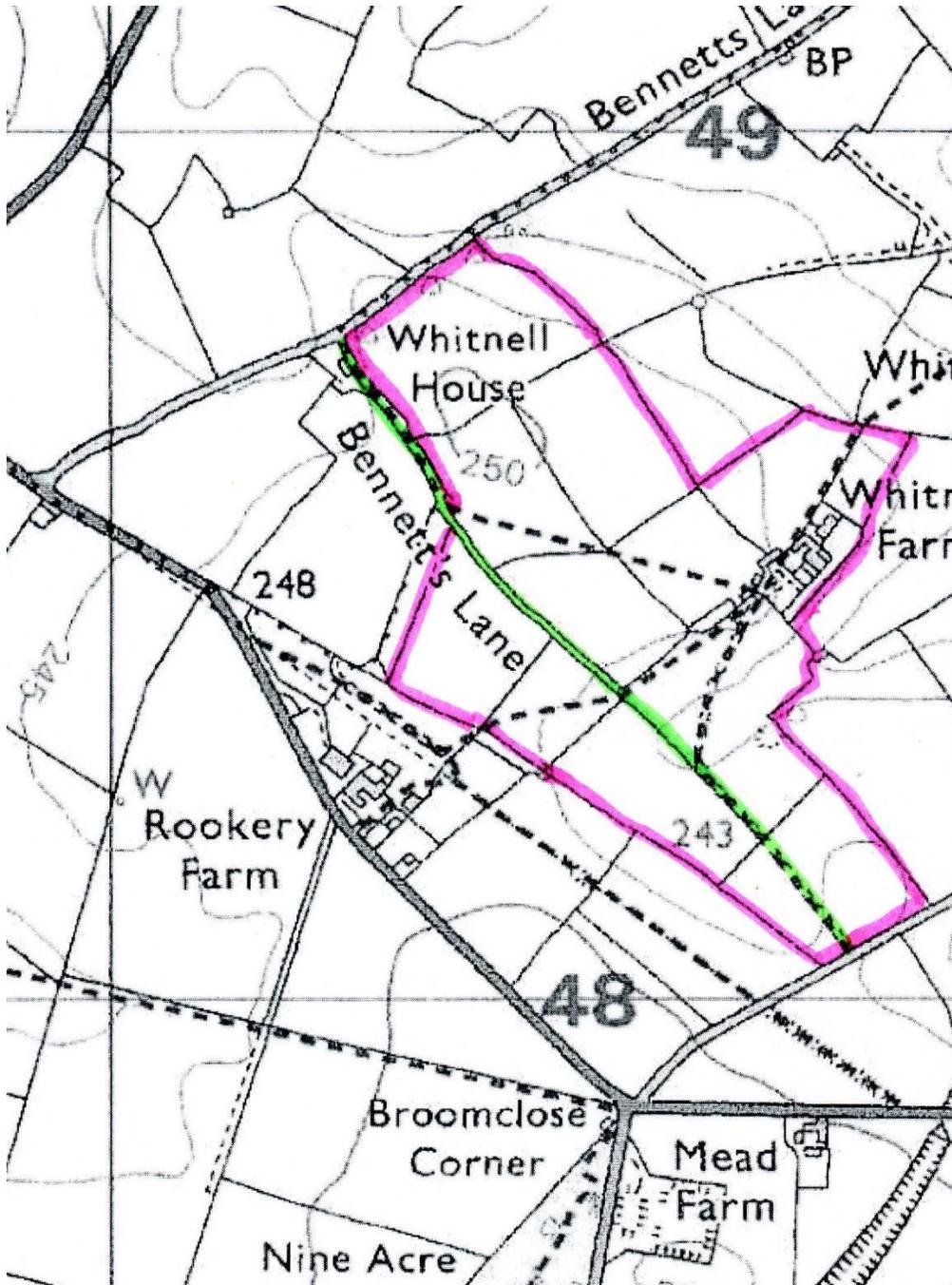
Address.....

.....Date.....

*Attach signed plan.*

FILE BUNDLE EXAMPLE D – Landowner’s dedication plan

PLAN SHOWING DEDICATION OF BRIDLEWAY ACROSS LAND OWNED BY  
(LANDOWNER NAME) (SEE DEDICATION DOCUMENT ATTACHED)



KEY TO PLAN. PINK = LAND OWNED BY (LANDOWNER NAME)

GREEN = DEDICATED BRIDLEWAY

SIGNED..... (Landowner) DATE.....

FILE BUNDLE EXAMPLE E

Note: Other documents relating to the dedication may be letters or emails such as this letter to a dedicating landowner.

**Three Counties Bridleway Association  
Upper Reach Farm  
West Lay**

January 10<sup>th</sup> 2016

Dear Mr XXXX  
Bennett's Lane Proposed Bridleway

Thank you so much for agreeing to dedicate a public bridleway across your land. This will make a huge difference us all in the community in bypassing a dangerous road to access the other routes in our local countryside.

As agreed at our recent meeting I now enclose your copies of the dedication agreement and plan, works and maintenance schedule and plans - all of which have been signed by all parties.

I confirm that our contractor will be commencing work on February 14<sup>th</sup>. We expect the work to take two days. I will be on site some of the time to ensure everything goes to plan!

I also confirm that we agreed to pay you a capital sum of £xxx as a one off payment for the new bridleway right. I will phone you to make arrangements to pay 50% before work commences and 50% on completion of the works to open the route up.

I am also happy to tell you that Jo, our local Rights of Way Officer, as agreed with you, has inspected the line of the proposed route. Following this the Council has agreed to adopt the new route for maintenance purposes, which is very good news indeed. I have noted this on the maintenance schedule.

Since you confirmed to me that the land over which the new bridleway will pass is registered, please may I pick up a copy of the land registration when I call in? The Council will need this as proof of ownership so that the route can be added to the Definitive Map and Statement.

Please do call me if you have any concerns and thank you so much yet again. The bridleway association committee is looking forward to organising an opening ceremony so stand by with the scissors!

All best regards

Chairman Three Counties Bridleways Association

## FILE BUNDLE EXAMPLE F

**Proposed Works Schedule For Bennett's Lane, Binegar in the district of Mendip, County of Somerset.**

Description of bridleway route: the route runs from Bennett's Lane (tarmac highway) along a green lane (continuation of Bennett's Lane) adjacent to Whitnell House and thence along a hedge line through a small paddock to meet the Whitnell Farm Drive. The route continues the farm drive to exit onto the Binegar Bottom tarmac highway. The route is marked AXYB on the attached plan.

Landowners: Farmer XX (Whitnell Farm)

Presumed landowners (green lane section A – X) Mr AA, Mr BB and Farmer XX

**Proposed Works**

## 1. Bennett's Lane (green lane section)

Point A is open to the existing highway and will remain ungated. Potholes along the stone track by Whitnell House are to be excavated and topped up with stone to dust. (Stone kindly donated by Flintstone Quarry, Binegar). Hedges between A and X and surface grass to be cut by farmer XX.

2. Point X. Existing broken wooden gate to be replaced by a new 2 in 1 14' York field with integral bridle gate supplied by Centrewire. The field gate section can be locked by farmer XX if required to prevent trespass by unauthorised vehicles.

3. The section between X and Y is to be fenced at a width of 3 metres from the base of the existing hedge using horse safe post and rail fencing. The fencing will have three rails on the bridleway side and three strands of barbed wire on the field side. The existing hedge will be cut back by farmer XX.

4. At Y the existing footpath stile to the right of the existing farm gate is to be replaced with a 5' wooden bridleway gate fitted with a stock proof trombone handle and self - closing hinge set affixed to 2 x 7' x 6" x 6" posts (treated and with weathering). Gate furniture to be supplied by Centrewire. Gate and posts to be supplied by local timber merchant (Fred Wood Products Ltd). For stock security the bridleway gate is to open right to left and must slam on the field side of the post.

5. Y – B is an open farm track with an open access at B onto the tarmac highway at Binegar Bottom. No access works are required along this section.

6. Wooden public bridleway signs (supplied by Fred Wood Products) are to be erected at public road exit points A and B (to be supplied by Fred Wood Products Ltd.)

7. Public bridleway markers / please close the gates signs (supplied by James' Signs Wells) are to be positioned on gate posts at X and Y.

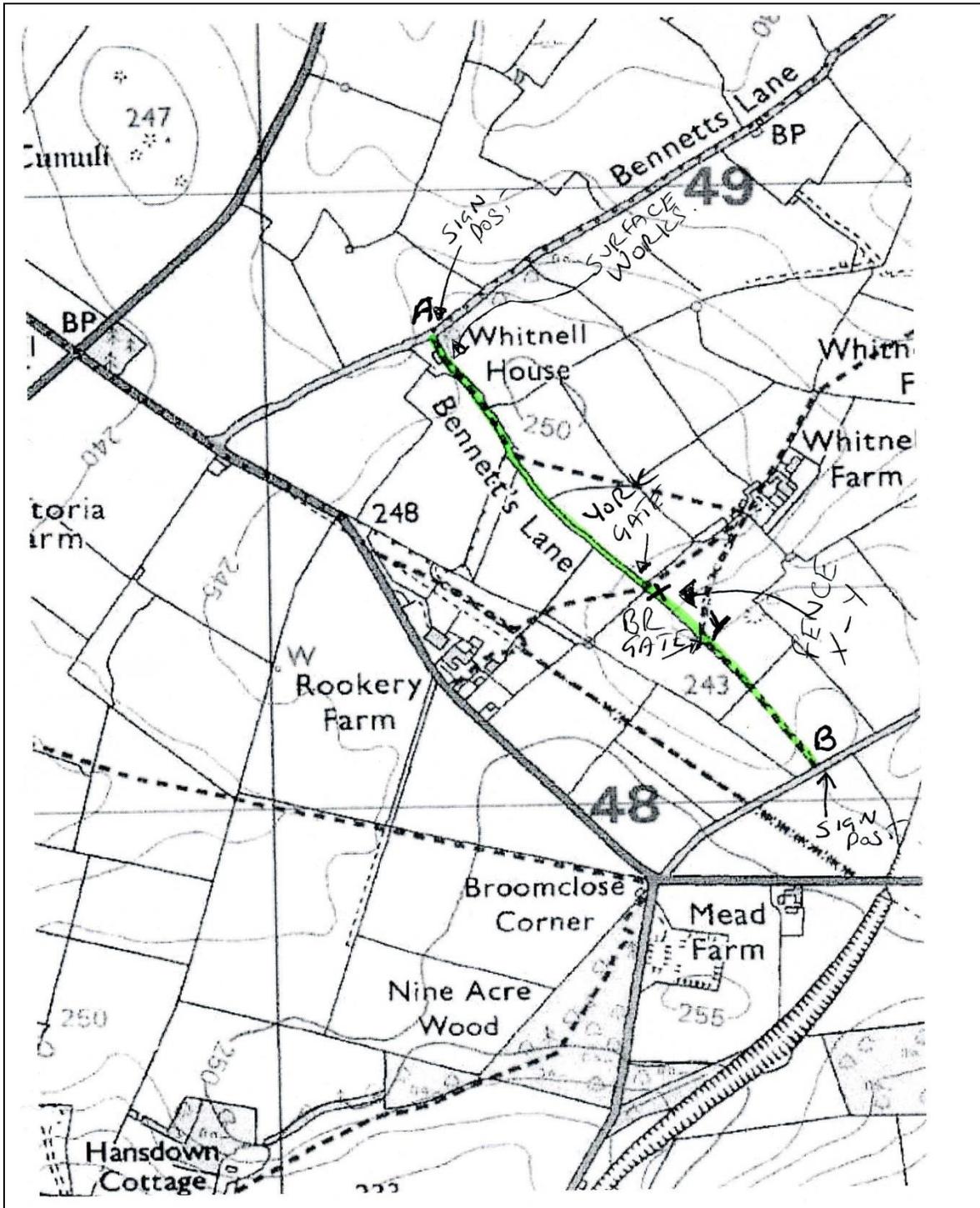
The above works will be carried out by John Welly Contractors and have been agreed by:

John Welly Contractors signed.....Date

Farmer XX signed .....Date

Three Counties Bridleways Association ..... Date

FILE BUNDLE EXAMPLE F: Proposed Works Schedule Plan for Bennett's Lane, Binegar in the district of Mendip, County of Somerset.



FILE BUNDLE F BEFORE AND AFTER PHOTOGRAPHS – taken at Murder Combe bridleway created



at Whatley, Somerset.

FILE BUNDLE EXAMPLE G Proposed Maintenance Schedule For Bennett's Lane bridleway,  
Binegar in the district of Mendip, County of Somerset.

The route is shown AXYB on the attached plan (**plan as works schedule – see F**)

Structure	Location	Maintenance	Frequency	Ownership	Responsibility	Why
Hedges	A to X, X to Y	Cutting	Annually (in season)	Land owners	Farmer XX	Farmer responsibility
York gate	X	As required	When fault reported	Land owner	3 Counties BRA	As needed for horse access
BR gate	Y	As required	When fault reported	Land owner	3 Counties BRA	As needed for public access
Lane Surface	A X (stone section)	Repair pot holes	When agreed	Land owners	All parties	Access for house / land / right of way
Lane / corridor Surface	AY (grass)	Mowing	In season	Land owners	Farmer XX	Farmer happy to do.
Fenced corridor	XY	Fencing	As required	Land owner	Farmer XX	Farmer accepts responsibility for stock fence
Farm entrance track surface	YB	Repair	As required	Land owner	Farmer XX	Farmer accepts responsibility for existing farm entrance
Signposts / waymarks	AXYB	Reinstate as necessary	As required	3 Counties BRA	3 Counties BRA	Ensure route defined / no trespass

This maintenance schedule agreed with the provision that the local highway authority may adopt the route for the purposes of maintenance and may therefore take future responsibility for public access furniture (gates) and surface.

Farmer XX signed .....Date

Mendip Riders Association ..... Date

FILE BUNDLE EXAMPLE G: photographs of existing structures to be enable access provision to or along the newly created route.

Before and after pictures of an existing pack horse bridge repaired by Somerset County Council to facilitate bridleway access at Great Elm in Somerset.





FILE BUNDLE EXAMPLE H: 2004 opening event at a bridleway creation at Ditchat in Somerset. This picture was used by the local press and posted on the Mendip Bridleways & Byways Association website. The press release has not survived and would be a good record of acceptance.



FILE BUNDLE EXAMPLE J: User photographs: taken in 2006 at the Murder Combe bridleyway at

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## FILE BUNDLE K EXAMPLE Statement of use / acceptance

<b>Full name:</b>	<b>Age:</b>
<b>Address:</b>	
<b>Post code:</b>	<b>Number of years at address:</b>
<b>Employment:</b>	
<b>Bridleway description:</b> The route of the bridleway is from OS 603488 starting on the public highway Bennetts Lane, and leads in a generally south easterly direction down a green lane adjacent to Whitnell House – also known as Bennetts Lane - in the parishes of Binegar / St Cuthbert Out, along a field edge and along the Whitnell Farm drive to emerge onto the public highway known as Binegar Bottom at OS 601481 - <b>as shown on the attached map which I have signed. Amend the right hand column below as appropriate.</b>	
I understand that the route was dedicated as a public bridleway and I have used it:	<b>State years of use onwards</b>
I have used the route (state frequency of use) e.g. weekly x 2 (times), monthly x 3 times 1-2 per wk, 1-2 per month etc.	<b>Daily / weekly / monthly / yearly (say)</b>
I have used the route on (delete as needed)	<b>Foot / horse / bicycle</b>
I confirm that I am not the landowner, lease holder or tenant. I have never worked for or been related to the landowner, leaseholder or tenant. I have not been given any instructions regarding my use of the route by the landowner, leaseholder or tenant. I have not asked for or been given permission to use the route.	<b>Confirm statement is correct say YES / NO If no please say why.</b>
I confirm I <b>have / have not</b> met the landowner / leaseholder / tenant / other <b>Delete as necessary.</b>	<b>I have / have not met the landowner / leaseholder or tenant.</b>
I also confirm have I always understood that the route is a public bridleway. I have not seen any notices saying that the route is not a bridleway or been prevented from using it. Neither do I know of anyone else who has been prevented from use it	<b>Confirm statement is correct say YES / NO If NO please say why.</b>
I frequently meet other horse riders / walkers / mountain bikers on the route.	<b>Confirm statement is correct say YES / NO</b>
I ride with:	<b>Say who</b>
This route is important to me because (e.g. circular / safe / access to place etc)	<b>Say why</b>
<b>Signed</b>	<b>Date</b>
<b>Email:</b>	<b>Tel:</b>

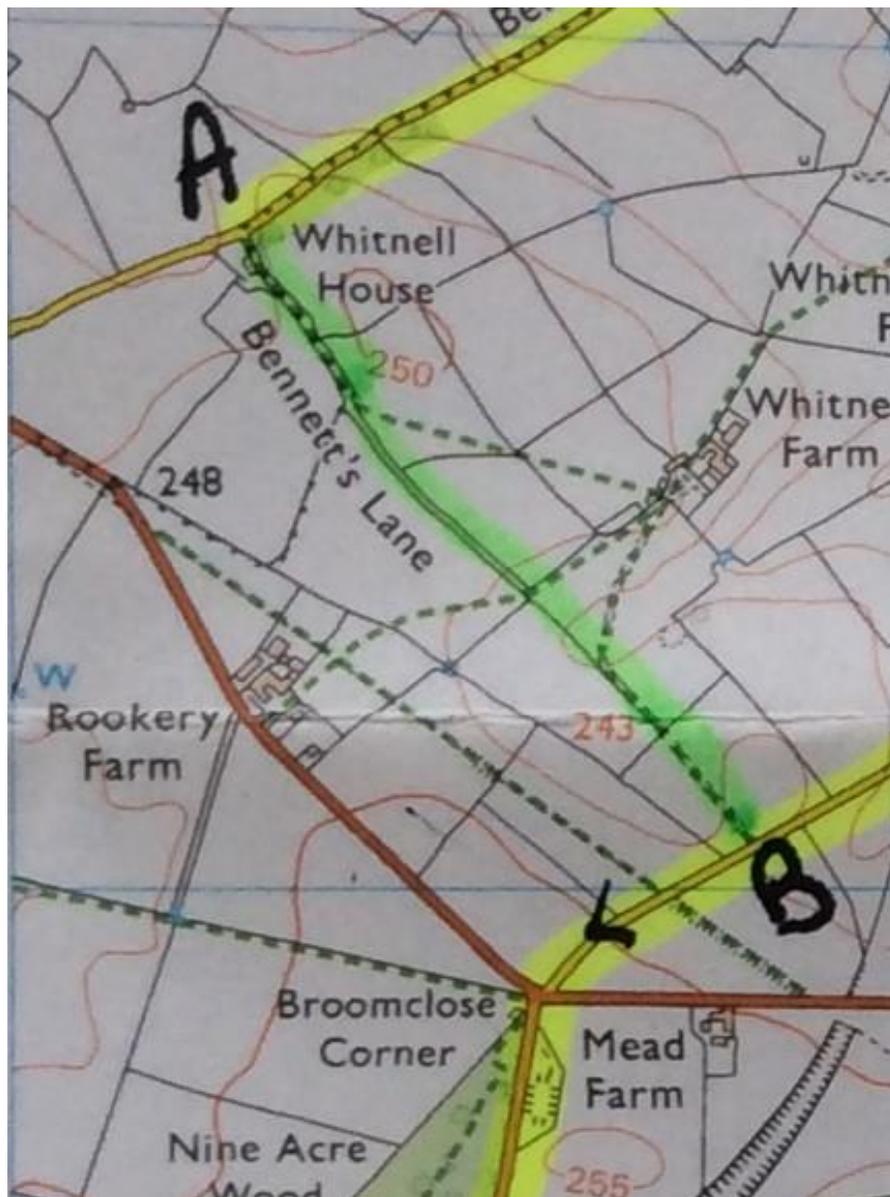
Make other comments on the reverse or another sheet if you wish.

## FILE BUNDLE K EXAMPLE of signed user acceptance plan

The dedicated bridleway is shown on the map in green and marked A – B.

The bridleway is within the parishes of Binegar / St Cuthbert Out starting at OS 603488 on the public highway Bennett's Lane. The bridleway continues in a generally south easterly direction down a green lane adjacent to Whitnell House – a continuation of Bennett's Lane - along a fenced field edge and down the Whitnell Farm drive to emerge onto the public highway at OS 601481 on the lane known as Binegar Bottom.

I have used the bridleway marked A – B, shown in green on the plan below. (Sign beside plan)



FILE BUNDLE EXAMPLE L: explanatory letter to local authority

**Three Counties Bridleway Association, Upper Reach Farm, West Lay**

To County Solicitor  
XXX County Council etc

Copy to Rights of Way Manager

Date

Dear Mr XXXX

**Public bridleway created at XXXX**

I am writing on behalf of the Three Counties Bridleway Association to advise that a public bridleway has been created in the area (parish of xxx) to which your Authority's Definitive Map relates.

I am enclosing the following documents which we understand you, as surveying authority for this area, require in order to record the route on the Definitive Map and Statement.

- 1) Location map showing the route and the benefit it provides by connecting to the wider community network.
- 2) Dedication documents and plans (showing the route in relation to each of the dedicating landowners' holdings).
- 3) Copy and photo of the notice (plus record) erected on the green lane corridor section of the route for which no owner can be identified.
- 3) Written agreement from one tenant farmer affected by the route.
- 4) Works schedule and plan for the works carried out by Welly Contractors on 28<sup>th</sup> February 2016 plus before and after photographs.
- 5) Maintenance plan agreed by all parties (please see below).
- 6) Press cutting from XXX Journal of the opening ceremony held on (date).
- 7) Ten user statements and a signed plan from riders and cyclists who regularly use the route.
- 8) Copies of land registration for land belonging to landowners X and Y plus a declaration from Z whose land is unregistered.

The bridleway association understands that the legal process is for the local authority to record the new right of way by a legal event order. The association would be grateful if this could be dealt with by the authority within a reasonable time frame as the committee consider that it is important for the using public to be informed of the new right as soon as possible.

The association also understands that you as local highway authority have the power to adopt the new route for maintenance purposes and we therefore request that you consider this.

Three Counties Bridleways Association looks forward to hearing from you at your earliest convenience.

Yours sincerely

FILE BUNDLE EXAMPLE M: copy of deeds (proof of ownership) relating to a bridleway dedication in Shipham in Somerset. Note these deeds run to 6 pages, only the first is shown in example here.

L9.

Title Number : ST95784

This title is dealt with by Land Registry, Plymouth Office.

The following extract contains information taken from the register of the above title number. A full copy of the register accompanies this document and you should read that in order to be sure that these brief details are complete.

Neither this extract nor the full copy is an 'Official Copy' of the register. An official copy of the register is admissible in evidence in a court to the same extent as the original. A person is entitled to be indemnified by the registrar if he suffers loss by reason of a mistake in an official copy.

This extract shows information current on 28 MAR 2006 at 11:51:24 and so does not take account of any application made after that time even if pending in the Land Registry when this extract was issued.

REGISTER EXTRACT

Title Number	: ST95784
Address of Property	: Shipham Hill Quarry, Shipham Road, Cheddar
Price Stated	: Not Available
Registered Owner(s)	: CAMAS UK LIMITED of Bardon Hall, Copt Oak Road, Markfield, Leicestershire, LE67 9PJ
Lender(s)	: None

FILE BUNDLE EXAMPLE N: reminder letter to local authority

**Three Counties Bridleway Association  
Upper Reach Farm  
West Lay**

To County Solicitor  
XXX County Council etc

Copy to Rights of Way Manager  
Date

Dear Mr XXXX

**Re Public Bridleway creation at xxxx**

I am writing to ask what action the Authority intends to take to record the newly created bridleway at xxx on the Definitive Map and Statement (DMS).

We wrote to you two months ago, enclosing a number of documents as evidence that a public bridleway has been created in the area to which your Authority's map relates. Unfortunately this Association appears to have received no response other than an acknowledgement.

XXX County Council is the Surveying Authority for this area and as such has a legal duty to keep the DMS up to date and to inform the Ordnance Survey (and thereby the public) of changes to the public rights of way network.

Please could we remind you that an express dedication / public acceptance of bridleway constitutes a legal event for the purposes of section 53(2) and 53(3)(a) of the Wildlife & Countryside Act 1981. We therefore request that your Authority make a legal event order as soon as practically possible. Please would you be kind enough to confirm when this can be done.

We are sure that you are also aware that XXX County Council, as highway authority has a duty under section 130 of the Highways Act 1980 to assert and protect the rights of the public to the use and enjoyment of all the highways in their area - whether or not they are recorded on the DMS and including any created through express dedication at common law.

In addition we await the Authority's decision on whether or not it will adopt the new route for maintenance purposes. We understand that this can be done under section 38 of the highway act.

If there is any further information that you require or any assistance we can give to expedite this matter, please do let us know.

Looking forward to an early response

Yours sincerely