

Preventing rights of way becoming public

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Property owners who allow the public to exercise rights of way over their land are at risk of the way becoming a public right of way, unless they make clear to anyone using it that they have no intention of permitting the way to become public. This principle has recently been confirmed by the House of Lords in two test cases.

Dedication

The process by which a right of way is deemed to have become a public right of way, by virtue of the public using it for an uninterrupted period of twenty years, is referred to as "dedication". Once a right of way has been dedicated as a public right of way in this manner, it can be shown on a statutory map, maintained by the county council, and known as the "definitive map". This map shows all footpaths, bridleways and roads used as public paths which the council considers to be public rights of way. It can obviously be very unsatisfactory for a landowner to have a way over their land added to this map. However, a landowner can defeat an application to have a way dedicated as a public right of way if it can show that it had no intention to dedicate it. The House of Lords considered the extent to which a landowner is obliged to communicate such intention to the public, in order to defeat a claim.

Evidence of lack of intention

In one of the cases the landowner tried to rely on a letter it had written to the county council during the 20 year period that the public had used the way, referring to illegal access by trespassers. In the other case, the land was subject to a tenancy agreement which contained a covenant obliging the tenant to prevent trespassing by unauthorised persons, and not to allow footpaths to be created. The landowner argued that the tenancy agreement constituted sufficient evidence of intention to defeat an application to have the way added to the definitive map. The issue in both cases was that neither document was publicly available. Both the High Court and the Court of Appeal held that the lack of intention to dedicate does not have to be communicated to the users of the path, and that the paths should not therefore be added to the definitive map.

The House of Lords' decision

The House of Lords disagreed. It held that a landowner **must** communicate its lack of intention to dedicate a right of way to the members of the public using the path.

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The test which will be applied is whether a reasonable user of the path would have understood that the landowner wished it to be known that it did not intend that the path be dedicated as a public right of way. In both cases, the landowners were unable to demonstrate this. Neither the letter nor the tenancy agreement would have been available to the users of the right of way.

How can landowners protect themselves?

The decision will not be welcomed by landowners, who should make sure that they do communicate to any members of the public using paths or ways across their land, that they do not intend for the way to be dedicated as a public right of way. This can be done either:-

- Erecting a sign to that effect; or
- Putting up a barrier; or
- Ensuring that the way is closed to the public for at least a day a year, so that it is not possible for the 20 years' uninterrupted use to accrue.



For more information please contact

Delia Curtis Tel: 01932 590569
 E-mail: delia.curtis@mundays.co.uk

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Mundays LLP
 Cedar House
 78 Portsmouth Road
 Cobham
 Surrey KT11 1AN

DX 36300 Esher
 tel +44 (0) 1932 590500
 fax +44 (0) 1932 590220
 email enq@mundays.co.uk
 web www.mundays.co.uk