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Dear Paul

EXPRESS DEDICATION AT COMMON LAW

1. This letter is intended to offer 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 administration of the Paths for Communities Scheme (P4C).

2. The guidance is non-statutory and has no legal effect. It is for landowners, and users (or proponents) of the way, and ultimately for the courts, to settle these issues in relation to any particular case. However, it represents our view of the current law and we are content for it to be circulated as general guidance to interested parties such as local community groups who are contemplating making a bid for P4C funding, and local authorities.

EDCL as an alternative to statutory path creation mechanisms

3. 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:

- with a local authority, under section 25 of the Highways Act 1980, or
- with the parish council, under section 30 of the same Act.

Capacity of a landowner to dedicate at common law

4. At common law, subject to what follows, the freehold owner of land may unilaterally dedicate a new public right of way across it or a higher right along an existing public right of way over his land, for example converting a footpath to a bridleway.

5. By making an EDCL, the freehold owner of 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. So it is important that anyone contemplating this step gives the matter careful consideration, and takes independent legal advice on its implications as necessary.

6. Subject to acceptance by the public (see below), 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.) It is not necessary for him 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. Following this good practice will help 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, subject to what follows.

Factors affecting capacity to dedicate

7. Anyone contemplating EDCL should bear in mind that before recording the new right on the DM&S, the surveying authority will need to be satisfied on a number of detailed points that have a bearing on capacity and therefore on whether the right is actually created. This is equally true of rights of way created by statutory agreement. The following are relevant considerations:

- a) There needs to be reliable evidence that the dedicator currently owns the freehold of the land in question. This may take the form of an entry in the register of title recorded in the Land Registry, or (if one is not available) the dedicator's title deeds showing this. Subject to (d) below, it is not enough merely for the dedicator merely to assert that he owns the land.
- b) The dedicator must be the person or organisation named in the register of title or deeds as the freehold owner. If, for example, ownership actually rests with a company or a settled trust or charity, it is that body that needs to make the dedication, not the individual in control of day-to-day management of the land.
- c) If there is any legal charge holder, such as a bank or mortgage company with a loan secured against the land, or anyone else with a legal interest,

such as a leaseholder or tenant, there must be evidence of their consent to the dedication.

- d) 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 the other considerations in this letter.
- e) If the route would cross or affect an ancient monument, or a site of special scientific interest, special protection area or special area of conservation, the relevant statutory authority (English Heritage or Natural England, respectively) should be asked for advice ahead of dedication and will be able to advise whether its prior statutory consent to dedication is likely to be required in the particular circumstances of the case.
- f) An existing highway (such as a public footpath) may not be upgraded if the dedication of higher rights (such as bridle rights) would cause a nuisance to existing users of the highway. In our view, a nuisance will seldom arise so long as the upgraded highway is capable of accommodating all users. But a nuisance may arise where the upgraded highway is particularly narrow, or otherwise unsuitable for new classes of users.

The common law requirement for public acceptance of the right

8. Where through EDCL the freehold owner of land dedicates a new or upgraded public right of way, 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.

9. In our view the standard of proof of acceptance is relatively low. It is only necessary for evidence to be produced that the route has come into actual use subsequent to the execution of the dedication deed. In the case of a P4C project it may be possible to place a contractual requirement on the local community group seeking P4C support to submit evidence of such actual use within a short period after the signing of any EDCL deed. This might take the form of a simple document detailing one or more occasions when named individuals actually used the whole of the dedicated route for its intended purpose – perhaps supported by photographs of the use taking place.

10. It does not matter whether this use takes place spontaneously, or is encouraged by the local community group that made the P4C bid, perhaps through an organised event. What counts is that there is some evidence that the use actually took place. Nor does it matter whether the use documented is by local residents or by members of the wider public.

11. The requirement for evidence of acceptance should not be confused with the requirement for evidence of long use of a claimed way as of right. It is not necessary in the case of EDCL to show that a dedicated way has been used by significant numbers of people, or for a substantial period of time, or that the use was 'as of right'. It is necessary only to show that the route has come into actual use.

12. The fact that the use actually takes place in effect discharges the second of the two requirements for EDCL, and brings the right of way into existence. The existence of the public right of way does not depend on its having been recorded on the DM&S.

What is the correct mechanism for recording an EDCL on the DM&S?

13. 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.

What are the highway authority's duties towards the new right of way?

14. 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 the highways in their area, including any created through EDCL; and to prevent so far as possible the stopping up or obstruction of all such highways, including by adjoining crops, overhanging vegetation etc. There is a range of more detailed duties and powers that the highway authority also has including those in relation to signposting and waymarking and dealing with any misleading notices, unlawful cultivation or failure to restore a right of way after cropping.

15. 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. We note that under agreed P4C projects, the initial establishment costs for an upgraded route are likely to have been met by the project.

Can an EDCL agreement recognise existing or proposed limitations on the right such as gates etc?

16. Yes. The right is created at common law subject to the presence of any existing or proposed limitations of this type that are recorded on the EDCL document referred to in paragraph 6, and that are consistent with the right intended to be created by the document. These limitations will then be recorded

on the DM&S and will not require authorisation by the highway authority.

17. Any additional limitations on the exercise of the right of way that are not recorded on the EDCL document (and subsequently on the DM&S), but are then proposed in the future, will either require the prior consent of the highway authority, or may be unlawful.

Yours sincerely

A handwritten signature in black ink, appearing to read 'D. Waterman', with a stylized flourish at the end.

DAVE WATERMAN
Landscape & Outdoor Recreation