Environment & Heritage Service

A GUIDE TO PUBLIC RIGHTS OF WAY AND ACCESS TO THE COUNTRYSIDE

Guidance Notes on the Law, Practices and Procedures in Northern Ireland

Environment & Heritage Service
www.ehsni.gov.uk

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SECTION 1: INTRODUCTION

This Guide to Public Rights of Way and Access to the Countryside has been prepared by the Environment and Heritage Service of the Department of the Environment to assist the staff of district councils and others who are primarily concerned, on a day to day basis, with public access to the countryside. It is a practical, working manual which aims to overcome one of the main difficulties highlighted by the 1993 study of Access to the Northern Ireland Countryside, that of a lack of information about the legal position in Northern Ireland and the practice and procedures that should be followed.

The Guide recognises that although there is now a growing acceptance throughout Northern Ireland of the importance of providing for public access to the wider countryside, this still remains one of the most controversial and difficult subjects that any district council has to deal with. It therefore puts forward recommendations for the basis of the approach that each council might adopt and suggests how, in practice, it should possible through the development of recreational paths and networks and long distance routes to secure a wide range of attractive access opportunities.

The main focus of the Guide is on public rights of way. It provides a detailed understanding both of the legislative provisions made by the Access to the Countryside (NI) Order 1983 – referred to in this book as the Access Order - and the underlying framework of common law. It explains how rights of way are established, about the council's duty to "assert, protect and keep open" public rights of way and how these, and the council's other important duties and powers, should be exercised to protect and help manage the public's use of the countryside for recreation. The negotiation of permissive paths is also covered, as are the provisions of the Access Order relating to `open country', that is open, uncultivated land which may have traditionally been used for quiet recreation.

The Guide is not concerned with the provision of specific recreation sites, eg in country parks or picnic sites. Nor has it been possible to cover the practical aspects of footpath construction or maintenance, the preparation of leaflets and guidebooks or the promotion and marketing of access opportunities. Other useful publications already exist on these aspects (and are referred to in appendix 5) although they do not all specifically relate to the circumstances of Northern Ireland.

In using the Guide it is important for councils to bear in mind that, ultimately, it is for the courts to interpret the law. For this reason, the Guide cannot be taken as a definitive statement of the law. Although it is hoped that the advice that is given will be helpful,

the Department also reminds councils that it is their responsibility to ensure that the council is acting correctly at all times in the way it carries out its duties and functions. Therefore, the Guide is not intended a substitute for, nor does it negate the need to obtain, the council's own independent legal advice. Similarly, while every effort has been made to ensure the advice given in the Guide is as accurate as possible, EHS is unable to accept responsibility for any errors or omissions. EHS also takes no responsibility for the contents of linked websites and links should not be taken as endorsement of any kind.

Relatively few rights of way or other access issues have been considered by the courts in Northern Ireland and there is not, as yet, a body of authoritative case law on the provisions of the Access Order. Ultimately, that is something which only the courts can give. But, while the respective legislation in England and Northern Ireland is very different, the two countries share the same foundation of common law on which the legislation is based. By considering the precedents established in the English courts, therefore, it is possible to reach an understanding of what the law in Northern Ireland appears to be and how the courts would be likely to interpret the provisions of the Access Order. This is the basis on which much of the advice set out in the Guide has been developed.

The Guide contains reference to the Antrim Borough Council CD-Rom entitled: Public Rights of Way: Investigation of Route Status and Guidance Policy for Council Decisions. The contents of this are also not definitive statements of law and should not be taken as such.

This is the second edition of the Guide and it takes into account the feedback and practical experience developed by countryside officers in using the first edition. The Department continues to welcome comments on the usefulness and clarity of the Guide, and information on each council's experiences in applying the advice it contains in practice. This will allow the Department keep the Guide under review and to publish amendments or additions from time to time as the need arises.

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SECTION 2: BASIS OF THE APPROACH

This section sets out the justification for action and considers the overall approach which the district council might take. It highlights the importance of developing good working relationships with the farming community; the advantages of establishing a wider consensus of support throughout the whole community; the staffing and organisational structures which are needed for councils to make progress and the benefits of drawing on the help that may be available from volunteers.

2.1 THE IMPORTANCE OF COUNTRYSIDE RECREATION

2.1.1 Use and perceptions of the countryside

The *Study of Access to the Northern Ireland Countryside* carried out in 1993 found that, although Northern Ireland has an excellent range and high standards of site-based provision in its country and forest parks, opportunities to enjoy the wider countryside are much more restricted. Compared with other areas of the United Kingdom and most other European countries, there are far fewer assured access routes available to walkers, riders and cyclists. Despite its renowned beauty, therefore, much of the countryside of Northern Ireland is inaccessible, or its enjoyment is marred by having to walk, ride or cycle on roads that are used by vehicles.

Nevertheless, the use of the Northern Ireland countryside for informal recreation is already very substantial. The responses which councils gave to an Access Study questionnaire show that often the whole of a district is used for recreation with many parts of the countryside being used intensively, including by day visitors and tourists as well as by local residents. The council officers and user groups that were interviewed confirmed that there had been an increase in informal recreation in recent years, reflecting the trend towards a healthy lifestyle and interest in the environment. Some popular sites are showing signs of over use and there is now growing public pressure for greater access to enjoy the beauty and tranquillity of the wider countryside.

It is suggested that the characteristics of visiting the countryside in Northern Ireland are similar to those in England and Wales and which have been extensively researched. These studies show that despite peoples' great love of the countryside, very many visitors lack confidence and awareness. People are often "unsure of

the rules" and look for clear signs and other information to give them reassurance. They will not venture onto any land that "looks private". Nor do people have, or know how to obtain, information about the full range of recreation opportunities that are potentially available. Most people therefore confine their visits to a handful of places that they know already and where they feel they are welcome.

2.1.2 The economic importance of access

There is also now a growing recognition of the economic importance of countryside recreation and the vital contribution that tourists and day visitors can make to the rural economy. Short break and activity holiday packages are among the fastest growing sectors of the holiday markets and ones which Northern Ireland, with its attractive scenery and temperate climate, is potentially well suited to serve.

The Northern Ireland Tourist Board has identified the development of activity tourism as a means of enhancing Northern Ireland's status as a tourist destination and sees the growth of walking holidays as one of the keys to success.

At present, however, the development of these markets in Northern Ireland is severely restricted by the lack of access opportunities. Visitors are often surprised - and disappointed - at just how few routes there are and about how difficult it is to find out about the ones that do exist. Conversely, residents of Northern Ireland wanting to enjoy a short two or three day walking break often find it easier to go outside the country, to Scotland or the Republic of Ireland for example.

A continuing priority must be to develop attractive, well signposted and waymarked routes which offer a choice of opportunities to walk, ride or cycle for a day or half-day, backed up by high quality maps, guidebooks or leaflets. On-going maintenance and monitoring programmes also need to be established to ensure that these routes continue to be enjoyable and rewarding to use, remain sustainable and do not conflict with farming or forestry.

Where there is a good network of routes it will be possible to encourage the development of accommodation, catering, luggage transfer and other services to a sufficiently high standard to meet these needs, and to promote the routes and facilities through attractive holiday packages. In this way it will be possible to ensure that access to the countryside generates substantial and sustainable economic benefits for the whole of

the community.

2.1.3 The district council's role

The value placed on the whole of the countryside by the people of Northern Ireland and the significant economic benefits of developing access opportunities that attract tourists and day visitors emphasise the vital importance of the legislation which governs access to the countryside and the key role of the district council.

The legislation, set out in the Access to the Countryside (NI) Order 1983, places the district council in a unique and powerful position. The council has a statutory duty to identify, record and protect existing access opportunities along public rights of way. It also has wide discretionary powers to help manage and maintain that access and to establish new access opportunities where they are needed. Moreover, such action can *only* be taken by the district council; the powers and duties conferred by the Access Order are not available to any other body or organisation.

In fulfilling its duties and exercising its powers the council will recognise the need to secure the goodwill and cooperation of a wide range of other interests. Access to the countryside has to take place alongside farming, forestry and other important economic land uses. The question of public access is a highly sensitive one for many individual farmers and landowners and the council will need to work hard to overcome that resistance and develop a constructive working partnership with the whole farming community. It is equally important that the council develops a consensus of support among the wider community. With the limited staff and financial resources that are available, much more will be achieved if the council is able to draw on the help of the many other interests that are involved, or might potentially become involved, including community groups and community development associations, countryside user groups and tourism interests.

It follows that the council's role will be as much about developing partnerships and enabling others to take action as it is about meeting its own statutory duties and responsibilities under the Access Order. It might be, for example, that with the council's guidance and support a community group could take the lead - and is better placed - to negotiate any new access opportunities that

are needed; or that a voluntary group might undertake the physical work needed to restore a path to good condition and then look after its on-going maintenance. The promotion of access and the development of day visitor and tourism markets can be expected to similarly involve the council working in partnership with a broad coalition of local interests.

2.2 THE BASIS OF THE APPROACH

2.2.1 The justification for action

Most councils will view their duties and functions under the Access Order, when seen in this broader context, as a means to an end rather than an end in themselves. Although important, they are just one element in four-fold justification for action which comes from the desire:

- to provide a valuable and cost-effective recreational resource, relevant to the growing needs of a wide cross-section of the local population;
- to enhance the facilities and attractiveness of the area so as to promote a positive image, encourage visitors and support tourism and economic development initiatives;
- to fully discharge the council's statutory duties and make effective use of its discretionary powers under the Access Order;
- to strike an equitable balance between the needs of the public and wider community benefits from access provision on the one hand, and the practical and other concerns of the farming community on the other.

The provision of a range of countryside recreation opportunities will often be seen, in turn, as just part of the spectrum of recreational, cultural and sporting facilities that the council wishes to develop, both to benefit local residents and to help promote its area.

2.2.2 Elements of the approach

In implementing this wider approach, the council will need to be able to take positive action to:

- identify, protect, develop and manage existing opportunities for the public to enjoy the countryside in its area;

- secure additional access opportunities where they are needed;

- develop awareness, so that the public can use the countryside with confidence, but also with care and consideration;

- enhance visitors' understanding and enjoyment of the countryside; its natural beauty, flora and fauna, farming practices, and cultural and historical associations;

- work with the farming community to ensure that individual farmers are fully aware of, and respect, the public's rights in the countryside, and have the practical support and guidance they may need;

- develop and draw on a wider consensus of support, including practical help in researching, managing and promoting access opportunities;

- change access routes, as and when necessary, to ensure that public access is not detrimental to other land uses and remains sustainable.

- anticipate potential conflict whenever possible, and work to ensure that any conflicts which do arise are resolved quickly.

2.2.3 The concerns of farmers and landowners

Despite the growing awareness of the importance of public access to the countryside, the issue remains a highly controversial one for many individual farmers and landowners.

This sensitivity may arise from the direct experience that an individual farmer or his or her neighbour has had of public misuse of the countryside. More commonly, however, it will arise from the perception of what might or could happen. The concerns that are likely to be raised include the possibility of vandalism, litter and trespass; of gates being left open or of dogs worrying livestock; and anxieties about the security of the farm holding, loss of privacy or interference with farming practices. The question

of occupiers' liability also invariably arises in any access negotiations.

Underlying these concerns are often deeply held beliefs about the sanctity of private property - beliefs which can conflict with the legal principles governing public rights of way and embodied in the Access Order. While this is not unique to Northern Ireland, the conflict may be more acute because of the large proportion of small owner-occupied farm holdings, the strength of the landowners' convictions and because public pressure to use the wider countryside and the legal requirement for rights of way to be asserted have arisen only recently. As a study of access to the countryside in England and Wales noted, however, the fact that "conflicts are often a product of real ideological differences rooted in different (and sometimes opposing) interests does not mean the reconciliation of such interests is impossible, nor that mutual accommodation cannot be achieved. But it does mean that such divided interests must be recognised - and not wished away - if progress is to be made".

The fact that these concerns can be resolved is borne out by the experience of those councils that have negotiated new access routes or asserted a significant number of public rights of way. Their experience also shows that, despite the fears that are raised at the outset, few problems can be expected to arise in practice once the routes are in use. It follows that the reassurances the council may have to give to meet the landowners' concerns, that paths will be adequately maintained and that action will be taken to deal with any problems should they arise, do not mean that the council is then faced with an unacceptable long-term liability.

2.2.4 The approach to access negotiations

In its approach to access negotiations the council must strive to maintain a sensitive balance. On the one hand, the council must take action to comply with its statutory duties (such as to assert public rights of way and secure the removal of obstructions) or may otherwise need to implement a proposal (such as a new access route) which it believes is essential to benefit the whole of the local community. On the other, the aim must be to proceed by agreement whenever it is possible to so, and to overcome the considerable reluctance of many individual farmers and landowners to permit greater public access to the

countryside.

Key elements that will underlie the development of a constructive working partnership with the whole farming community include the ability of the those acting on behalf of the council to win the farmers' trust and respect; for the council to be firm, but nonetheless fair, in its approach; and for the council to be able to demonstrate that it is alive to the many practical concerns that will inevitably be raised and can take action, as and when it is necessary, to help manage the public's use of the countryside.

An example is in the way the council approaches the assertion of a public right of way. The council must, of course, make it quite clear from the outset that it is required by law to take action. But it should also be able to explain why this is necessary and the advantages, from the farmers' point, in clarifying the line and status of any public rights of way over their land. Similarly the council must not only be able set out its reasons for believing the path to be a public right of way but show that it has considered the consequences of assertion and is ready to help manage the route effectively.

Amongst the measures that might be agreed, especially if the path is to be promoted, are the provision of clear signposts and waymarks to avoid accidental trespass, work to put the path in good condition and help with repairing or replacing any gates and stiles that are the landowner's responsibility. The council should also undertake to inspect the path regularly and may find it helpful to explain the circumstances in which paths can be closed or diverted temporarily should the need arise. Exceptionally, an assertion may give rise to the need to consider whether a permanent change is needed to put the path onto a more suitable route. The assurances which the council can give on the question of occupiers' liability will also be particularly important.

Whenever possible, the approach that is made over any access issue should be a personal one, either on a one-to-one basis or at a site meeting with a small group of those directly affected. Inevitably any negotiations to secure new access opportunities are likely to be protracted and time consuming. Allowance should be made for this at the outset and a realistic timetable set. Negotiations should not be allowed to drag on indefinitely, however, and the council may need to review its position from time to time and

consider what other options are available.

Although such negotiations will normally be undertaken by a council officer, there may be advantages in delegating responsibility to a nominated member of a community group or other responsible body, as suggested in section 2.2.9. The nominee will, of course, need to be carefully briefed (including on the legal basis of access as set out in these *Guidance Notes*) and the council kept fully informed of progress.

A further possibility which the council may wish to consider is that of enabling farmers' to derive some financial benefit from the paths over their land. The experience of experimental schemes in England is that this can have a significant influence on farmers' attitudes, although the basis on which any such payments are offered must be carefully defined. There can be no question of rewarding a farmer simply for acknowledging existing public rights of way, nor for carrying out work which he is legally obliged to undertake (eg for removing an obstruction which the farmer has set up). But it may be both appropriate and cost effective to employ the farmer as a local contractor, working on behalf of the council to restore or improve paths. The tasks that might be undertaken include putting up signposts and waymarks, clearing natural vegetation, repairing or replacing footbridges, small scale surface improvements and on-going maintenance work.

2.2.5 Defining the district council's position

The sensitivity of countryside access and the conflicting public and private interests that are involved mean that the district council has to be clear, in its own mind, about the approach that it wishes to adopt. Working guidelines are therefore needed which define the council's position and which will help:

- provide a framework within which sensitive or controversial decisions can be taken;
- deal objectively with individual cases, as and when they arise;
- ensure that the council can make its position clear from the outset in any access negotiations, and to community groups and others that may be involved in access issues;

- ensure that the staff concerned have a clear understanding of what is expected of them and how to proceed;

- ensure that the council remains consistent between cases and is therefore less vulnerable to accusations of inconsistency, bias or maladministration that might be levelled against it;

- determine priorities for action and programmes of work.

2.2.6 A 'statement of intent'

Setting out the council's position and approach in the form of a concise `statement of intent' will give both officers and elected members the opportunity to review the action it has taken to date and decide how the council wishes to proceed. In addition to considering how to discharge its statutory duties, the assessment that is made might include consideration of how the discretionary powers available to the council can best be used to meet the needs of its area and of how wide an approach it is possible, in practice, to adopt.

The overall rationale for action will normally come from the combination of factors set out above in section 2.2.1. A statement of intent might therefore contain some or all of the following elements:

- A recognition of the importance of ensuring that a range of countryside recreation opportunities exists, both to meet the needs of local residents and the wider population and in terms of the economic benefits of attracting visitors to the area.

- Acknowledgement of the importance of the council's statutory duties under the Access Order, particularly towards protecting and asserting public rights of way.

- Acknowledgement of the value of the council's discretionary powers to enhance, maintain and extend public access opportunities throughout the countryside.

- Confirmation that the council accepts it has on-going

responsibilities towards the public rights of way that it asserts and any other access opportunities that are established. These include ensuring that paths are in a good condition, are clearly signposted and waymarked and are adequately maintained so that their use remains sustainable, and a more general responsibility to endeavour to resolve any problems arising from the public's use of the countryside.

- Confirmation that the council wishes to proceed by negotiation whenever it is possible to do so and to secure and draw on the widest possible consensus of support.

- Recognition that, in carrying out its statutory duties to protect and assert rights of way or in developing proposals that are in the interests of the whole community, it may not always be possible to meet the individual wishes of all the landowners concerned.

- An indication of the priorities the council intends to follow (eg in researching and asserting those routes of greatest recreational value, or in developing new routes to give access to the most attractive areas).

- An invitation to the community, voluntary and other groups to come forward and give their support and an indication of the partnership roles they might undertake.

- An indication that the council will look for ways in which farmers can directly benefit from public rights of way or other public access that takes place over their land.

- An outline of the approach the council will adopt whenever it is necessary to take enforcement action to protect public rights of way.

- The primary allocation of responsibility within the council for rights of way and access issues.

A draft of the proposed statement of intent should be circulated for comments to the bodies and organisations likely to be affected by it, including the farming organisations, local community groups, countryside users and tourism interests. This will help ensure that the council is fully aware of the concerns and sensitivities of others,

generate a wider understanding of the council's position and alert others to the positive roles they might be able to play. Once it has been adopted, the statement should be published and then periodically reviewed in the light of the experience gained.

2.2.7 Organisational and staffing structures

Sustained long-term progress towards ensuring that a range of countryside recreation opportunities are available, and that the council can also fully discharge its statutory duties, will only be possible if the necessary organisational and staffing structures are in place. This includes the allocation of primary responsibility for rights of way and other access issues to a senior officer and a council committee, thereby acknowledging the subject as an important and legitimate part of the council's overall duties and functions, and the allocation of day-to-day responsibilities to other members of staff within clear organisational guidelines.

The Department recognises that the council has also to take into account the overall need for restraint in public expenditure and that, given the other priorities which have to be accommodated, the staff and financial resources that it is possible devote to countryside access may be limited. Nevertheless, if the council fails to provide for the subject or does so inadequately, then not only will it forego any community and economic benefits but it is potentially open to an accusation of maladministration and might, in some circumstances, risk legal action to compel it to carry out its statutory duties.

The 1993 Access Study also highlighted the difficulty of dealing with access issues `on the margins' alongside many other competing demands. Although a number of councils did so, their officers acknowledged that this was unsatisfactory and that many of the councils were failing to meet their statutory duties under the Access Order. This approach is also highly inefficient. Taking action only infrequently and after problems have arisen means that the matters concerned are invariably confrontational and require a disproportionately high input of staff time. Since the approach is uncoordinated, it is also difficult or impossible to secure the full range of potential benefits from the council's actions, while the staff concerned are unable to build up the specialist knowledge and expertise that they need.

2.2.8 Appointment of countryside officers

Countryside Officers generally work directly to, and under the guidance of, the appropriate chief officer.

The demands imposed by the job and the nature of the subject itself mean that an appointee must be chosen with care. Once in post, the council must be prepared to fully support the countryside officer, including making available the necessary legal advice, manual labour to undertake practical projects and administrative support. A budget for small scale, day-to-day access improvement should also be agreed, beyond that for any major projects which might be developed and which would require the council's specific approval.

2.2.9 Use of volunteers

Relatively little use has so far been made of volunteers to help develop or manage countryside access opportunities, nor have the countryside user groups been in a position to offer the substantial voluntary help of their counterparts in England and Scotland. But there are now a growing number of local walking clubs and other local and national groups that are keen to improve access opportunities, and indications that in the future many more people may be willing to volunteer to assist the district council. Several communities are also keen to progress local access initiatives and are looking to their district councils for help, support and guidance. The Conservation Volunteers Northern Ireland (CVNI) and other NGOs may also be able to carry out both conservation and access tasks on a repayment basis and may be able to arrange appropriate skills training for other groups.

To realise the substantial contribution that volunteers might make, it will be necessary to identify and encourage the groups that may be able to help and define specific tasks or areas of responsibility that match the time, interests and skills that are potentially available. Volunteers should not be thought of only as a cheap source of manual labour. While some volunteers are prepared to undertake heavy physical work, others are unable or unwilling to do so. But many volunteers, for example amongst those who are recently retired, have professional backgrounds and a wide range of other skills. By focusing on activities that draw on this range of abilities and which complement the council's working practices, it will be possible to makes better use

of volunteers' capabilities and allow many more people to become involved.

It is entirely legitimate that volunteers should be required to work to the same standards as that which the council adopts. But in order to achieve this the council must be able to motivate its volunteers and ensure they are given the necessary training, guidance and support. This will mean specifying clearly the tasks to be undertaken and the basis on which volunteers are working on behalf of the council, making arrangements where necessary for insurance cover and for the repayment of any out-of pocket expenses, and monitoring the volunteers' performance. Providing these criteria can be satisfied, then a wide range of tasks might be delegated to voluntary groups. They include:

- help in asserting public rights of way by identifying and surveying paths, identifying witness and collecting user statement, and identifying and researching documentary sources of evidence;
- signposting and waymarking paths;
- clearing and restoring rights of way, including repairing or replacing stiles, drainage works, clearing scrub and surface improvements;
- carrying out regular programmes of inspection (eg through `adopt-a-path' schemes), replacing waymarks and other minor, on-going maintenance tasks;
- researching and writing guidebooks and leaflets;
- promoting access opportunities, eg through programmes of guided walks;
- negotiating new access opportunities (especially permissive paths);
- providing voluntary wardening services.

SECTION 3: THE LEGAL FRAMEWORK

All public access to the countryside involves land that is owned by some other person, whether a private individual, company or public body. The council's officers who deal with access issues must therefore have a clear understanding of the legal framework which governs both the public's use of the countryside and the actions which the council may take. This is not simply confined to understanding the provisions of the Access Order - although that is one important element. It is also crucial to understand how the provisions of the common law affect access to the countryside, and to appreciate how the law is defined, in practice, through the interpretations of the courts.

This section outlines the legal basis of access to the countryside, how the legal system works, and the key common law principles relevant to countryside access. It summarises the main provisions of the Access Order and explains the relationship between the Access Order and the common law. The question of occupiers' liability is also dealt with here - hopefully in a way that will enable the council to overcome the concerns about liability that are raised in any access negotiations.

3.1 THE LEGAL BASIS OF ACCESS TO THE COUNTRYSIDE

3.1.1 Differences in types of access

Clear distinctions exist between the legal basis on which different types of access take place. While users of the countryside will normally be unaware of these differences, they are of considerable importance not least because they affect the degree of liability that the occupier of the land may (or may not) have towards the public and determine whether the district council is either required, or has the power, to take action when necessary to protect or help manage the public's access.

In legal terms there are several types of access:

Access as of right. All public rights of way are highways which may be used by anyone, as of right, at any time. The nature of this right, which is a right of passage to cross over the land but not to use the land itself in any way, is explained in more detail in sections 3.3.1 and 4.1.9.

The district council has a statutory duty to assert and protect all public rights of way and wide discretionary powers to take action to help manage or maintain such access if it chooses to do so. The owners and occupiers of any land crossed by a public right of way must, of course, respect the public's rights of passage. But they are not obliged to maintain the path; nor are they statutorily

required to ensure the safety, as such, of anyone using it.
Access by consent. Much of the public access to the countryside of Northern Ireland is enjoyed not as of right but derives from consent or permission granted by the landowner. This includes areas open to the public within country parks, Forest Service property and National Trust lands.

Such access is entirely dependent on the terms and conditions that the owner has set (other than for access along any public right of way that happens to cross the land). The public may be free to wander at will over the land, or they may be required to keep to `permissive paths' ie paths and tracks that people are permitted to use but which are not public rights of way. The fact that people come onto the land as a result of an expressed or implied invitation means that the occupier has a statutory duty of care towards them (see section 3.5).

The district council may decide to allow access by consent to land which it owns (eg a picnic site or country park), or it may seek to negotiate a permissive path over private land as an alternative to creating a public right of way. But it has no specific statutory duties or other obligations towards such access (other than its duty of care towards the public on its own land). Conversely, if a permissive path is closed by the landowner the council's ability to take action will depend entirely on the terms of any agreement that has been made. The council cannot, of course, use any of the powers it has in relation to public rights of way and may in practice be unable to protect such access.

Access by trespass. There are many areas of land which the public use for quiet recreation for which no permission or consent has ever been granted by the landowner. *De facto* access of this kind generally amounts to trespass, albeit that public may have been using the land for many centuries in the belief that they did so `as of right'. Any rights that may have grown up to use the land for `lawful sports and pastimes' will apply only to local people and may be difficult to prove. However trespass in these circumstances is nearly always a civil wrong and not a criminal offence. The occupier's duty of care extends to trespassers but only if certain conditions are fulfilled (see section 3.3.3, 3.5.2).

Much of the land used for *de facto* access will be "**open**

country", which is defined in the Access Order as including mountain and moorland, woods, cliffs and the foreshore. The council has a duty to carry out consultations to ascertain what `open country' land there is in its area and what action should be taken to secure public access to such land for open-air recreation. It also has discretionary powers to make an access agreement or make (and ask the Department to confirm) an access order, giving the public the right to use the land "for the purpose of open air recreation", entitling the owner to limited compensation and enabling the council to manage or improve the land for recreation. No such agreements or order have yet been made, however.

Access to protected areas. Access to land that is an Area of Special Scientific Interest (ASSI) is governed by Article 44 of the Environment (Northern Ireland) Order 2002. This does not given a general right of access to private individuals but provides a right of entry for Department of Environment employees and those authorised by it for the specific purpose of identifying, monitoring and protecting ASSIs. Under most circumstances the landowner should be informed at least 24 hours before the intended visit and the Department is responsible for the behaviour and activity of those entering the land. Under no circumstance does the declaration of an ASSI confer any right of access to any other groups or individuals, although access may be available along public rights of way or permissive paths through the site (see Appendix 13).

3.2 THE LEGAL SYSTEM

3.2.1 Court structure and system of precedents

Northern Ireland shares the same legal system as England, including concepts about the ownership of land and public rights of way, but it has its own court structure, system of precedents and specific access legislation.

The courts are organised in a series of levels, rising in seniority from the local magistrate's court to the House of Lords. A judgement given by a lower court, such as by a Magistrates Court (although clearly important to those directly involved) is not binding on another court.

Although relatively few rights of way or access issues

have been dealt with by the courts in Northern Ireland, and those that do arise normally progress no further than the County Court, a substantial body of case law has been built-up over many years by the High Courts in England. The courts in Northern Ireland are not bound to follow the ruling of the English courts but nearly always do so for reasons of consistency. This body of case law can therefore be used as a guide to the decision that a court in Northern Ireland would be likely take.

3.2.2 Common law and statute law

The law has two sources. What is known as **common law** is a body of principles which have evolved over the centuries through the judgements of the courts. Once a principle has been established it remains in force until over-turned by a decision of a higher court or by an Act of Parliament. The second source - **statute law** - is law that comes either directly from Acts of Parliament or indirectly, from legislation or regulations made under the authority of an Act, eg in the form of a Statutory Instrument. The Access to the Countryside (Northern Ireland) Order 1983, for example, is statute law made under the Northern Ireland Act, 1974 and set out in Statutory Instrument No. 1895 of 1983. It is also for the courts to interpret and apply the statutes. They are entirely independent of Government and the view that a court comes to about what a particular provision in the legislation actually means may not always correspond, therefore, to the intentions stated in Parliament when the legislation was enacted.

Many legal matters, particularly those concerning public rights of way, are governed by both common law and statute; the common law providing the overall framework and the statute making provision for particular circumstances or modifying a common law principle. For example, the owner and occupier of the land have a duty at common law to allow the public a free right of passage along a public right of way. Aspects of this duty are amplified and, to a degree, mitigated by the provisions of the Access Order, such as that which enables the landowner to erect additional gates and stiles (providing consent has been obtained from the district council) or to plough the surface of a path (providing the council is notified and other conditions are complied with). By requiring the district council to "assert, protect and keep open and free from obstruction or encroachment any public right of way" the Access Order effectively gives to the district council the

task of ensuring the landowner complies with his or her common law duties and obligations.

When legislation is enacted it does not necessarily replace the existing provisions at common law; the two may exist side by side. Much will depend on the precise wording of the statute. For example, although the 1983 Access Order provides that a public right of way can be expressly created by agreement or a public path order, there is nothing in these provisions to prevent a public right of way from arising through deemed dedication at common law. New paths can continue to be created, therefore, in this way. The wording of the Access Order makes it clear that the council's specific duties towards a new path (to make sure it is fit for the public to use and is maintained in that condition) apply only to one that has been created under the Order's provision. But both the common law and the Council's general statutory duties (eg to "assert and protect") apply to all new public rights of way, as they do to existing paths. No matter how a path comes into being, therefore, the public's right to use it must be protected by the council.

3.2.3 Criminal law and civil law

A second important distinction is that between the criminal law and the civil law. A breach of the criminal law is an offence for which the offender can be prosecuted. If found guilty he or she may be fined (or imprisoned if the offence is a serious one). In civil law, the action is by one person - the plaintiff - against another - the defendant. If the decision goes against the defendant, he or she is found to be `liable'. The court may then award damages to the plaintiff against the defendant, or may grant the plaintiff an injunction restraining the defendant from specific action (eg from trespassing on the plaintiff's land). A particular incident may give rise to action both in civil and criminal law, although this is comparatively rare in rights of way or access cases.

3.2.4 Applying the law in practice

Ultimately it is for the Courts to interpret and apply the law. Where no statute exists, it will do this by applying the common law principles that are relevant to the circumstances of the particular case. Where statutes exist, then the court will make a judicial interpretation of the legislation. But the court may still need to refer back to the common law in order to come to a view about what

the legislation means or to `fill up the gaps' left in it. For example, although the district council has a statutory duty to protect any "public rights of way" from "obstruction or encroachment", the legislation does not define either of these two terms. In considering any proceeding brought by the council, a court could therefore be expected to have regarded to the common law, in order to satisfy itself both that the path is a public right of way and the matter which is the subject of the prosecution does constitute an obstruction or encroachment.

It is obvious, however, that not all matters can be considered by the Courts; nor is it practical or desirable that each and every case should be taken to court. In practice the district council will often have to rely on its own working understanding of the legal position and take action on that basis.

As noted in section 3.2.1, although a court in Northern Ireland is not bound to follow the precedents created by the English courts it will nearly always do so for reasons of consistency. The shared foundation of common law, and the strong, common law principles governing access to land and the existence and use of rights of way that have been built up by the English courts over many years, means that there should be no difficulty in defining the underlying basis of the council's powers and duties and the approach it should take in administering and applying the Access Order. The fact that public rights of way are also highways helps greatly; there is a strong body of principles relating to highways and going back over many centuries. But it can be less easy to know whether cases that relate to aspects of the English legislation are relevant to Northern Ireland, or to decide on the exact meaning or requirements of the 1983 Access Order given that this is legislation that applies exclusively to Northern Ireland.

The English rights of way and access legislation is both far more extensive and tightly prescribed than that in 1983 Access Order. There is, for example, no equivalent in the Access Order of the statutory definition of the types of rights of way; nor do we have the extensive requirements and procedures governing the preparation of definitive maps and statements of rights of way. It is self evident that a decision by the English courts that relates exclusively to a narrow aspect of the legislation, and which has no direct equivalent in the Access Order, will not be relevant to Northern Ireland. Nevertheless, in giving judgement the

court will often set out or refer to the underlying, common-law principles on which the legislation is based. These principle are both relevant and important to Northern Ireland.

An example is the case quoted in section 4.1.9 which concerned the meaning of the terms *road used as public path* and *restricted byway.* Since these are terms that appear only in the English legislation, the precise meaning ascribed to them is irrelevant for our purposes. In giving judgement, however, the court also set out the classes of highway that exist at common law and which are relevant to Northern Ireland. Any principles that the English courts set out concerning the way in which an authority goes about exercising its powers and duties are also likely to be relevant, albeit that the precise point that is the subject of the legal challenge may not itself apply to Northern Ireland.

The fact that (despite the overall differences) many of the provisions in the Access Order mirror those in the English legislation is also of considerable assistance. A court in Northern Ireland must still be free to make its own interpretation of the Access Order and it is not automatically obliged to follow English precedent - even where the words of the Access Order are identical to those in the English legislation. Nevertheless, in the absence other legal precedents and with the shared foundation of common law, the view taken by the English courts can be regarded as a strong indication of the kind a decision that a court in Northern Ireland would be likely to come to, everything else being equal.

By carefully considering and applying the judgements of the English courts in this way it will generally be possible to decide on the meaning and requirements of the Access Order. The council should therefore be able to undertake its statutory duties and apply other aspects of the Access Order with confidence, even though there is not as yet a specific body of Northern Ireland case law. Matters can be expected to come to court only occasionally, such as when it is necessary to ask the court to vindicate an assertion or, less commonly, when the council has no option but to bring a prosecution. Nearly all such cases will be heard (at least initially) in the Magistrates Court or County Court. Since the magistrates may be unfamiliar with rights of way issues, the council will need to prepare its case carefully, including where necessary reference to the underlying common law principles. Nevertheless, the court must be free to make up

its own mind about the matters that are put before it and the council should not be disheartened by an occasional and isolated rejection of its case.

Very exceptionally a case may arise that can only be resolved by pursuing the matter in the higher courts. A dispute may arise about the extent of the council's powers or duties, for example, or the council may believe a decision by the Magistrates Court or County Court to be wrong in law. Such cases (although very rare) should not be regarded as `something to be avoided at all costs'. Rather they are part of the normal legal process, and the proper way in which uncertainties and genuine disagreements about the meaning of the law can be resolved.

3.2.5 Hierarchy of Legislation

There are a number of different legislative powers by which different statutory agencies can extinguish public rights of way:

DISTRICT COUNCILS - Access to the Countryside (Northern Ireland) Order 1983

DOE – Access to the Countryside (Northern Ireland) Order 1983 - Article 16

DSD - The Planning (Northern Ireland) Order 1991 – Article 102/103

DRD ROADS SERVICE – The Roads Northern Ireland Order 1993 – Article 68

NIHE - The Housing (Northern Ireland) Order 1981 (amended 1992)

Each of these involves procedural requirements which allow for objections to be considered and no statute takes precedence over any other.

3.3 COMMON LAW PRINCIPLES

Key principles of common law that are relevant to countryside access include the concept of public rights of way as a highways, and the principles governing access to land and trespass.

3.3.1 Public rights of way

A public right of way:

- is a highway which any members of the public may use as of right; not a privilege granted by the landowner;
- may be created specifically or through "deemed dedication", ie by the public openly using a path for a period of time (in some circumstances, for as little as a few years) with the knowledge of the landowner;
- may be limited to certain types of user, eg walkers only or walkers and horse riders;
- is a permanent legal entity and remains in existence unless and until the path is extinguished or diverted by due legal process. The maxim is: *Once a highway, always a highway.*
- must be respected by the occupier and landowner who should do nothing to obstruct the right of way or prevent or intimidate anyone from exercising their rights of passage.

The public's right is limited, however, to a right of passage; to pass and re-pass along a defined line. Included in this is a right to do anything that is "reasonably incidental" to that use and to carry or take such things as would be regarded a "usual accompaniment" of someone using the path. It is not a right to use the land as such, or the path, for any other purpose; anyone who does so exceeds his or her right to be on the land and becomes a trespasser.

What is *reasonably incidental* or *a usual accompaniment* is subject to judicial interpretation. There is no hard and fast list of what is, or is not, allowed - it is largely a matter of common sense. It is permissible, for example, to stop to admire the view or take a photograph, sit down for a rest or eat a snack, and to carry a bag or a backpack or wheel a pushchair. Although the point has never been tested, it generally thought that the courts would also regard a dog is a *usual accompaniment*, providing it keeps to the line of the path and is with a path user. Examples of misuse that have been found by the courts to be trespass include using a right of way to disrupt a shooting party by shouting and waving flags, to take notes on the performance of racehorses training nearby and by a person who was "looking for game birds that he did not own".

If a user finds a right of way obstructed, he or she is entitled to remove enough of the obstruction to get past, providing no damage is caused to the owner's property, or to divert around it. But it is not entirely clear whether the person would be trespassing if the diversion takes them onto someone else's land.

3.3.2 Access to land

Customary access to unenclosed, uncultivated land is a *de facto* reality over large areas of England and Wales, as it is to a lesser extent in many parts of Northern Ireland. As noted above, people may have been using such land for centuries in the belief that they do so "as of right". Nevertheless the courts in England have so far refused to accept that it is possible for long use to establish the right to wander over land - known in law as a *jus spatiandi* - as opposed to the rights of passage that may be created along a highway. There have been a number of recent cases on this point and some experts see the judgements given as moving some way towards acknowledging that such rights may be achievable.

Customary rights for local people to indulge in "**lawful sports and pastimes**" over a piece of land are a different issue and have long been recognised at common law. The expression "lawful sports and pastimes" has never been expressly defined but has been judicially accepted as including such activities as flying a kite, dancing around a maypole, playing cricket and simply "idling beside a river".

3.3.3 Trespass.

Trespass occurs when a person:

- goes onto land without any form of legal right or entitlement to do so, or;
- goes onto land lawfully but then contravenes the conditions under which he or she is allowed to be there, or;
- exceeds his or her rights of passage on a public right of way.

In itself, trespass is nearly always a civil wrong rather than a criminal offence. Indeed, there is no statute law on trespass as such, except that which covers special circumstances such as trespass onto railways or military land or trespass in a vehicle. So an individual cannot normally be prosecuted for simply being on another persons land and the familiar

sign "Trespassers will be prosecuted" is misleading. "Trespassers might be sued" would be more accurate, however, since a landowner can seek a court injunction to prevent someone from trespassing persistently and a trespasser may be ordered to pay compensation if actual damage has been done. Any accompanying wrongdoings such as criminal damage or theft are a separate legal matter.

Nor are there any general statutory powers for the landowner or his agent to remove a trespasser from land on the spot; such powers as do exist also derive from the common law. The decision as to whether to remove a trespasser physically is a matter for personal judgement in all the circumstances. A suitable warning must always be given first. A person who is physically removed may have grounds for a civil action for assault and/or wrongful arrest unless the circumstances justify the level of force used, eg because he is causing actual damage or disruption.

3.3.4 Access to the Foreshore

The foreshore is the land between medium-high and medium-low water; at common law it is owned by the Crown but may be leased to a district council, the National Trust or others. Access to the foreshore for recreation, other than for fishing (see below), is often *tolerated* rather than of a right.

Due to the unlikelihood of establishing the line of a path over land which is covered by water twice each day, it is very difficult to establish public rights of way over the foreshore. There is no general right of access across land which adjoins the high-water mark. A public right of way may, however, end at the foreshore and this point may not be avoided in the course of making a public path diversion order.

There is a general right of navigation over the foreshore and this usually prevents the erection of fencing below high-water mark.

Over the exposed foreshore, the public also have common rights associated with the collection of fish and shellfish (molluscs and crustaceans). These rights may be regulated by bye-laws but not extinguished.

The right to dig for bait (eg lugworms) on the foreshore (of Strangford Lough) was the subject of a recent landmark case in Northern Ireland – *Adair v The National Trust 1997,*

judgement of Girvan J. Here it was ruled that such activity was legal if directly related to the public right to fish but not justified for commercial purposes.

3.3.5 Private Rights of Way

This chapter concerns rights of way enjoyed by owners of land over adjoining land which is owned by someone else. These private rights of way fall outside the scope of the Access Order and Councils should therefore always seek legal advice with regard to any related issue.

The following notes may assist in explaining some of the legal background:

Private rights of way are *easements* which allow access to a *dominant tenement* – this is the land to which the right of access applies. The private right of way is granted by the *servient tenement* which is the land over which the access passes through.

Private rights of way can arise by:

- Long Use (also known as *presumed grant* or *prescription*)
- Express Grant – usually by conveyance to a purchaser.
- Implied Grant – not included in conveyance but is necessary for reasonable enjoyment of the land, eg to avoid being *land-locked*.

As with public rights of way, private rights of way can be restricted to certain classes of use, for example on foot only.

Where private vehicular rights exist, they may be limited to avoid interference with others, for example, in some instances, heavy lorries may be considered excessive use.

Private rights of way and public rights of way can exist over the same route; one can be extinguished by a legal process without affecting the other.
Extension of the *dominant tenement,* for example by building an additional house, may constitute excessive use of a private right of way.

Rights usually apply to a defined plot of land and they may not be able to be extended to allow access to a newly acquired adjoining plot.

3.4 LEGISLATION ON ACCESS: THE ACCESS TO THE COUNTRYSIDE (NORTHERN IRELAND) ORDER 1983

3.4.1 Scope of the Access Order's provisions

The Access to the Countryside (NI) Order 1983 (`the Access Order') is the principle legislation on access to the countryside in Northern Ireland. It came into effect on 22 March 1984. The Order deals with both public rights of way and access to open country and its provisions are important to all those concerned with public access to the countryside - the district councils, the Department of the Environment, landowners and occupiers, and users of the countryside.

The Access Order places each district council under a specific duty to "assert, protect and keep open any public right of way" and to "compile and preserve maps and other records" of the rights of way in its area. In effect, therefore, the Order requires the district council to enforce the public's common law rights of passage and to investigate and record where those rights exist, action which would only previously have come about if a member of the public took some form of legal action against the landowner.

Along with these duties, and other duties relating to open country, the council is given wide discretionary powers to take action as and when it is necessary to maintain rights of way or help manage the public's use of the countryside. Exercising one or other of these discretionary powers may give rise to additional duties which the council must then comply with. For example, if the council makes a public path order to divert, extinguish or create a right of way it then has a duty to notify the landowner and to advertise the order so that the public also know about it. If a new public right of way is created, either by agreement with the landowner or by order, the council then has a duty to ensure the path is made-up and is maintained in that condition.

The Department of the Environment has very few powers to initiate action; nor does it have any general powers to act in default of a district council or direct a district council to take action. The Department's role under the Access Order is therefore primarily an enabling and quasi-judicial one. This includes a discretionary power to grant-aid district councils, and a duty hear any objections to a public path order and decide whether the order should be confirmed.

For farmers, landowners and members of the public the impact of the Access Order is different given the various duties and rights that already exist at common law. For the most part, this framework of common law is "taken as read" rather than changed by the Order. The main difference the Order makes is therefore a practical one - of ensuring, through the council's duty to protect and assert, that these common law duties are complied with and the public's rights are recognised and respected.

However, certain aspects of the common law are clarified or modified by Order's provisions. For example, the occupier's common law duty to do nothing which would interfere with the public's rights of passage on a right of way is modified by the statutory rights, granted by the Order, to plough the surface of a cross-field path (providing certain conditions are complied with) and to erect additional stiles and gates (providing the Council has given consent). Members of the public have to accept that their entitlement to enjoy public rights of way is subject to these additional limitations. The Access Order also places the occupier of the land under a statutory duty to ensure that any gates or stiles on a right of way are maintained so as to be safe and convenient to use, and entitles him or her to recover a proportion of the cost (25%) from the council.

Other statutory rights that arise under the Access Order include the rights of landowners, occupiers and the public in connection with any public path orders or access orders that are made. These include the right to be notified or made aware of any such orders, to lodge objections and the entitlement to compensation which may sometimes arise if an order is confirmed.

The key provisions of the Access Order as they relate to these four groups - the district council, the Department of the Environment, landowners and occupiers, and members of the public - are summarised in figure 1. Appendix 1 sets out in more detail the specific duties, powers, rights and responsibilities that arise under each article of the Access Order. These are intended to be no more than a useful quick reference guide and the precise wording of the Access Order itself should be carefully checked before any formal action is taken by the council.

Figure 2: **KEY PROVISIONS OF THE ACCESS TO THE COUNTRYSIDE (NI) ORDER, 1983**

1. THE DISTRICT COUNCIL'S DUTIES AND POWERS

For public rights of way

- **A duty to:**
  - assert, protect and keep open and free from obstruction any public right of way;
  - compile and preserve maps of the rights of way in its area;
  - signpost paths, where necessary, to help anyone who does not know the area;
  - contribute at least a quarter of the cost of maintaining stiles and gates.
- **Powers to:**
  - maintain any public right of way;
  - establish new rights of way by agreement;
  - make orders to divert, extinguish or create paths, and confirm unopposed orders;
  - make and confirm orders temporarily to divert or close any public right of way;
  - authorise the erection of new stiles and gates;
  - take legal proceeding;
  - in some circumstances, act in default of the landowner and recover its costs;

In relation to access to open country

- **A duty to:**
  - carry out consultations to ascertain what open country land exists, and consider if action is needed to secure public access for open air recreation.
- **Powers to:**
  - make an access agreement; or
  - make and ask the Department to confirm an access order, giving the public a right to use the land and entitling the owner to compensation; or
  - acquire open country land compulsorily;
  - enforce the provisions of an access agreement or order.

Other duties and powers

- **A duty to:**
  - have regard to the needs of agriculture and forestry and to conserve the natural beauty and amenity of the countryside.
- **Powers to:**
  - propose long distance routes for walkers, riders or cyclists.
  - provide parking places for those using public rights of way and open country;
  - make bye-laws;
  - appoint rangers;
  - pay or grant-aid anyone assisting the Council's with its main function.

2. DEPARTMENT OF THE ENVIRONMENT'S DUTIES AND POWERS

In relation to public path orders and access order

- **A duty to:**
  - give anyone who has objected the opportunity to be heard, or hold a local inquiry, before deciding if the order should be confirmed;
  - in the case of an access order, not to confirm an opposed order unless it is satisfied of the benefits and until bye laws have been made.
- **Powers to:**
  - confirm, with or without modifications, or not to confirm any orders submitted to it.
  - reserve powers to make orders to divert or close a public right of way to enable development by a government department or with planning permission to proceed.

Other powers

- **Powers to:**
  - approve, with or without modification, proposals for a long distance route;
  - make bye-laws in default of the district council;
  - reimburse or grant-aid expenditure by a district council under the access order, or by anybody in connection with an approved long distance route.
  - acquire, by agreement or compulsorily, open country land for public access.

3. LANDOWNER'S AND OCCUPIER'S DUTIES AND RIGHTS

For public rights of way

- **A duty to;**
  - maintain stiles and gates so they are safe and convenient to use;
  - not permit a bull to be at large in a field where there is a public right of way, except a bull that is under 11 months old, or is not a recognised dairy breed and is with cows or heifers;
  - not to put up a notice likely to deter use of a right of way.

- **The right to;**
  - put up, with the council's permission, additional stiles and gates where they are needed to restrict animals;
  - claim back a quarter of the costs of repairs to existing stiles and gates;
  - plough a right of way across agricultural land (but not along the sides of a field) providing i) it is necessary, ii) the council is notified within 7 days, and iii) the surface is restored, normally within 14 days;
  - apply for the temporary diversion or closure of a path for up to 3 months.

For public path orders and access orders

- **The right to;**
  - be notified of any orders that are made permanently to divert, extinguish or create a public path or to give a right of access to open country;
  - object to such orders and be heard by a person appointed by the Department;
  - claim compensation for any damage or disturbance if the order is confirmed.

In relation to an access agreement or confirmed access order

- **A duty to:**
  - not carry out any work that substantially reduces the area to which the public have access.

4. THE PUBLIC'S RIGHTS

For public rights of way

- **The right to:**
  - be made aware of any orders that are made permanently to divert, extinguish or create a public right of way or to give a right of access to open country;
  - object to such orders and be heard by a person appointed by the Department;
  - ride a pedal cycle on any public right of way created or diverted under the Access Order (ie on a `public path').

In relation an access agreement or confirmed access order

- **The right to:**
  - use the land covered for open air recreation without being treated as a trespasser, providing no damage is caused and subject to any bye-laws or restrictions.

3.4.2 The meaning of "assert and protect"

The courts in Northern Ireland have not yet considered the action a council must take to meet its duty "to assert, protect and keep open and free from obstruction or encroachment any public right of way", or the extent to which the council is required to intervene to take up disputed cases on behalf of the public. However, these duties are similar to those of an English highway authority under Section 130 of the Highways Act 1980 to "assert and protect the rights of the public" to use and enjoy any highway. In the absence of other guidance, the overall principles established in the English courts may therefore be taken as relevant.

The principles are that the highway authority has discretion both over the form and the extent of the action it might take but this discretion is limited. The authority must act within and promote the objectives of the legislation at all times; that is it must protect the interests of those who have rights over the highway. It follows that the discretion must not be exercised in such a way as to favour the interests of anyone who interrupts the public enjoyment of the highway.

The courts have acknowledged that it is not easy to define the precise meaning of "assert and protect". They have taken the view that, in this context, "assert" means "in essence to claim there exists". The word "assert" may stress that the duty is not merely a passive one but requires action to be initiated, as and when it is necessary to do so. But this does not mean that the council must assert a right of way "in which it has no faith". If the highway is seriously in dispute, the council has by implication to investigate the evidence for and against its existence. Where that evidence is found to be fairly evenly balanced the council may not have a duty (and, possibly, may not have the power) to assert and protect the highway. On the other hand, the dispute must be a "serious" in the sense of having some genuine substance to it. The council cannot simply say "We have been told by the landowner that this is not a public right of way and therefore do not propose to take any action"; the council must have a good reason for believing the landowner is, in fact, correct.

The judicial interpretations that have been given also suggest that "assert" and "protect" are not one and the same thing. The council's action in asserting a right of way may not, in itself, meet the obligation to protect the path. Depending on the circumstances, something more may be

required to secure that protection, such as by taking legal proceedings.

A district council in Northern Ireland may be open to a challenge if it commences formal legal proceedings in respect of an alleged right of way that is later found not to exist. This emphasises the importance of fully investigating the status of any disputed rights of way before commencing proceedings or taking other action to protect the public's rights.

The procedure which should be followed in asserting a public right of way are set out in detail in section 4.2.

3.4.3 Difference between a "public right of way" and a "public path"

The Access Order uses both the term "public right of way" and "public path". Confusion can sometimes arise over what the difference is between the two.

The term "public right of way" is defined in the Access Order only as not including a road or any other way that is maintainable by a government department. For a more complete definition one has to rely on the various interpretations at common law (see sections 3.3.1 and 4.1.9). "Public path" is defined in Article 2 as a way over which the public have a right of way on foot, on horseback by virtue of Articles 11, 12, 15 or 16, and on a pedal cycle by virtue of Article 20 of the Access Order.

This means in practice that all public paths are also public rights of way, but that only some public rights of way are public paths - ie those which have been created by the council by agreement or order (under Article 11 or 12), or have been the subject of a public path diversion order made either by the council (under Article 15) or the Department (under Article 16).

In setting out the council's powers to make orders to divert and extinguish paths, the Access Order uses only the term "public path". Article 18, however, extends these powers to cover public rights of way - meaning that any public right of way can be diverted or extinguished. A public right of way that is so diverted then also becomes a public path.

3.4.4 Bye-Laws

Article 41 of the Access Order gives district councils the power to make bye-laws for routes and land covered by the Order. Appropriate clauses include prohibition of damage to the natural environment, the use of vehicles and a range of activities which may annoy local residents other recreational users.

An example to consider is the published booklet:

Banbridge District Council (Access to the Countryside) Bye-laws 1998

3.4.5 Private Rights of Way

This chapter concerns rights of way enjoyed by owners of land over adjoining land which is owned by someone else. These private rights of way fall outside the scope of the Access Order and Councils should therefore always seek legal advice with regard to any related issue.

The following notes may assist in explaining some of the legal background:

Private rights of way are *easements* which allow access to a *dominant tenement* – this is the land to which the right of access applies. The private right of way is granted by the *servient tenement* which is the land over which the access passes through.

Private rights of way can arise by:

- Long Use (also known as *presumed grant* or *prescription*)
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- Implied Grant – not included in conveyance but is necessary for reasonable enjoyment of the land, eg to avoid being *land-locked*.

As with public rights of way, private rights of way can be restricted to certain classes of use, for example on foot only.

Where private vehicular rights exist, they may be limited to avoid interference with others, for example, in some instances, heavy lorries may be considered excessive use.

Private rights of way and public rights of way can exist over the same route; one can be extinguished by a legal process without affecting the other.

Extension of the *dominant tenement,* for example by building an additional house, may constitute excessive use of a private right of way.

Rights usually apply to a defined plot of land and they may not be able to be extended to allow access to a newly acquired adjoining plot.

3.5 OCCUPIERS' LIABILITY AND OTHER LIABILITY ISSUES

3.5.1 The significance of the occupiers' liability issue

The question of occupiers' liability has assumed considerable significance and is invariably raised in any access negotiations. It is commonly believed that the public in Northern Ireland (and in the Republic of Ireland) are particular inclined to press claims for injuries or damage, and that the courts are generally predisposed to find in the claimants' favour and to make what many feel are over-generous awards. Nevertheless, these concerns seem to be largely founded on a fear of what might happen, rather than a history of actual cases, and to reflect a misunderstanding of the legal position. It is notable that the 1993 Access Study found no evidence of frequent or excessive claims being made for injuries sustained on public rights of way, nor of any increase in farmers' insurance premiums as a consequence of public access. A useful link is www.scotcourts.gov.uk/opyions/2006COSOH68.html

3.5.2 Factors determining an occupier's liability

The liability that an occupier has towards a member of the public will depend on the facts and circumstances of each case. Important factors include whether the person concerned was on a public right of way, had permission to be on the land or was a trespasser, and whether the occupier could reasonably have anticipated the person's presence and the difficulties that arose and could have offered some protection.

In the case of a public right of way, any claim would fall to be settled under common law. The long standing principle has been - and remains - that an occupier has no responsibility towards users for the condition or safety of the path, being

"not liable for dangers thereon whether they existed at the time of dedication or come into existence later". A user would need to prove, therefore, that the owner was guilty of misfeasance (ie. doing something that then caused injury or damage, such as a negligent repair) as distinct from simply nonfeasance (ie. failing to do anything to maintain the way). Where the council exercises its powers to maintain a public right of way it similarly may become liable for misfeasance (although this would normally be covered by its public liability insurance).

In other circumstances the liability for injury or damages will be determined by the provisions of the Occupiers' Liability Act (NI)1957 and the Occupiers' Liability (NI) Order 1987. Under the 1957 Act, the occupier of the land owes a "common duty of care" to all visitors; to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe for the purposes for which he or she is permitted to be there. However, the Act does not impose any obligation towards a visitor who willingly accepts a risk. This is a statutory enactment of the common-law principle *Volenti Non Fit Injuria* (a willing person cannot be injured - ie injured in law). In addition, the owner or occupier sometimes may be able to discharge the duty by warning of the danger and discouraging people from taking risks (although not usually where there is a charge for access, or where there is a contract that permits persons who are not themselves party to the contract to enter the land).

3.5.3 Review of the law on public rights of way

Paradoxically, the case which has given rise to much of the concern (Brady v the Northern Ireland Housing Executive and DOE) is one in which both the High Court and Court of Appeal confirmed that, in the case of a public right of way, the statutory occupiers liability provisions do not apply and any claim can only be settled under the common law. This principle was again confirmed in the decision on a subsequent case (McGeown v the Northern Ireland Housing Executive) which was taken to the House of Lords. In giving judgement Lord Keith commented "Rights of way pass over many different types of terrain and it would place an impossible burden on landowners if they not only had to submit to the passage of anyone who might chose to exercise their rights but also were under a duty to maintain them in a safe condition". See Appendix 7 for further details of both cases.

The gap in the law exposed by these cases, which can leave a path user with no redress for any injuries he or she sustains, had already been considered by the Law Commission and the Royal Commission on Civil Liberties (in 1976 and 1978 respectively) without finding a satisfactory solution. Following the decision in the Brady case, however, the Law Reform Advisory Committee for Northern Ireland looked at the problem. Its provisional views, set out in a discussion paper published in April 1993, were that there is a distinction between urban and rural rights of way and that "It should be obvious to users of rural rights of way that the paths have not been made up and that they therefore cannot reasonably expect that degree of maintenance that would be appropriate for a properly constructed urban road or footpath dedicated to public use".

The Committee's tentative opinion was that while some change in the law is necessary, liability should be confined to urban housing developments. The owner of any land crossed by a right of way should not be made liable for nonfeasance as well as misfeasance, nor should responsibility for all rights of way be imposed on Roads Service.

3.5.4 Addressing landowners' concerns

In practice it is most unlikely that the occupier can ever be wholly free of any liability towards the public, if only because of the statutory duty under the 1987 Order towards trespassers and because liability may arise under other legislation that is unrelated to the question of whether or not people have access to the land (eg under the Health and Safety at Work legislation). Occupiers should always be advised, therefore, to ensure they have adequate public liability insurance cover.

Nevertheless, as the law stands at present, it is clear that the occupier has only a very limited obligation towards to users of a public right of way (possibly even less than towards a trespasser). Apart from the landowner's specific duty under Article 5 of the Access Order to ensure that any existing gates and stiles are safe to use (and to comply with any conditions attached to a consent under Article 6 to put up additional ones) a claim against the occupier would succeed only if the plaintiff could prove misfeasance. In simple terms, this means that the occupier must not deliberately set out to injure a path user, nor do anything that is blatantly negligent (such as leaving an open excavation on the line of a path) or which obviously presents a hazard (such as

putting up an obstruction which could lead to injury). But neither the owner or the occupier of the land crossed by a public right of way is specifically required to otherwise ensure the safety of path users. The decision of the Court of Appeal in the Brady case and of the Law Lords in the McGeown case, both of which concern incidents which took place in Northern Ireland, are a useful confirmation of this principle.

The duty of the occupier towards users of a permissive path is far less clear cut. It seems likely that a court would regard any user as being permitted to be on the land under a licence, and therefore as "a visitor" to whom the occupier owes the "common duty of care" under the Occupiers' Liability Act (NI), 1957. Much more would therefore depend on the precise facts and circumstances of the case. The question of how the incident arose, the extent to which the user had willingly accepted a risk or may have contributed to an accident by his or her own behaviour, the wording and effect of any notice which the occupier had put up to warn of danger, and the extent to which the occupier can lawfully disclaim or restrict liability are all matters that could be raised and which would determine the outcome of any case.

3.5.5 Liability for advice

A separate issue is the extent to which the council, or a body such as a community association, may be liable for the advice which it gives. This is relevant both to any advice that may be given to owners and occupiers (such as about whether a particular path is, or is not, a public right of way and about the degree of liability they have towards the public) and "advice" to the public in the form of information or encouragement (eg promotion of a path which may, in fact, lead someone into danger).

Unfortunately this is something of a legal grey area. It is clear that liability *can* arise as a result of negligent advice, but the extent and scope of the liability remains in doubt. No firm legal guidelines exist and the outcome of any case is likely to depend on the specific facts and circumstances. In very general terms, however, anyone giving advice needs to be aware that a potential liability may exist and be willing to assume responsibility for what they say. The district council may need to be particularly careful; one legal commentator has suggested that "a local authority may be liable for making a negligent misrepresentation upon which a person reasonably relies to his detriment".

This is not to say that the council should never tender advice, or should generally try to avoid doing so. There will be many cases in which the council must put forward its opinion and others in which it would be unreasonable (and extremely unhelpful) to refuse. But it would be a wise precaution to also give a clear disclaimer. It might be, for example, that a formal statement advising the occupier of his or her duties can be prefaced with the words "In the Council's opinion ...." or "The Council believes that ...." In responding to an informal request for guidance, the council might emphasise that the information given is to be treated as no more than its own opinion, based on its own understanding of the position. In either case, the council should always recommend that the recipient seeks independent advice from his or her own solicitor or professional advisor.

The same considerations apply to any guidebooks, leaflets or other promotional materials that are produced for the general public. Quite apart from any legal considerations, it is good practice to always give a warning about any hazards or difficulties that might be encountered and any special precautions that should be taken. It will also be helpful to say whether the route is over public rights of way and public roads, or is a permissive path that can only be used with the consent of the landowners. Any guidebook or leaflet should also include a general disclaimer along the line that, although every effort has been made to ensure the accuracy of the information it contains, no liability can be accepted for omissions or errors. The effectiveness of any disclaimer will, however, be subject to the provisions of the Unfair Contract Terms Act, 1977.

SECTION 4: ASSERTING AND RECORDING PUBLIC RIGHTS OF WAY

The duty to assert public rights of way is one the council's most important duties under the Access Order. It is the basis on which the council can establish, and make known to farmers and landowners and the public, what public rights of way exist, where they run and how they can legally be used. In addition, the council will frequently need to assert a path as public right of way before it can take action to protect the path, or to allow the route to be signposted, improved and promoted. This is necessary both to determine the precise line and status of the path, and to ensure that the council is acting correctly and within the powers that are available to it.

This section therefore covers in detail both the legal basis on which rights of way should be asserted and the procedures which the council should follow in practice. Under 4.1 it sets out the approach which the council is recommended to adopt and explains the principles governing dedication of public rights of way at common law, the nature of the public's rights of passage, the sources of evidence the council might draw on and the other matters it must take into account. Section 4.2 is a step-by-step guide to the procedures that should be followed in making an assertion and in securing vindication of that assertion, where necessary, in the magistrates' court. Section 4.3 similarly sets out the steps the council should take to meet its separate duty to compile and preserve maps and records of the public rights of way in its district.

In addition to this book, district councils may also wish to consult Public Rights of Way (A Guide to the Status Investigation Procedure) published by Antrim Borough Council and EHS. Free copies are available from either body.

The Antrim Borough Council CD Investigating Public Right of Way – A Policy and Procedure.
Copies have been supplied to all councils, additional copies may be ordered from Antrim Borough Council.

4.1 THE BASIS OF ASSERTION

4.1.1 The duty to assert and priorities

Article 3 of the Access Order places each district council under a duty to assert public rights of way, and to compile and preserve maps of public rights of way in its district. Neither the term "assert" nor the procedures to be followed are defined in the legislation, but (as noted in section 3.4.2) "assert" has been judicially interpreted as meaning "in essence, to claim there exists". In practice, this involves researching and formally recognising a public right of way by a resolution of the council and, where necessary, asking

the County Court to `vindicate' (or confirm) the assertion.

While many councils have now carried out full or partial surveys of the paths in their area, and keep those records available for inspection as showing `alleged rights of way', to date not every council has been able to formally assert a significant number of public rights of way.

It is clear that the process of asserting and recording rights of way becomes progressively more difficult over time as land management practices and ownerships change and as the number of local residents that can authoritatively testify to the existence of rights of way declines. Councils should not wait until a path becomes obstructed or some other dispute arises since this will complicate the issue and make it more difficult for all parties to agree amicably the line and status of the path in question. Given the growing recreational and economic importance of public rights of way and the paucity of assured routes in Northern Ireland, compared with other areas of the UK, it is hoped that all councils will strive to assert as many routes as possible.

The legislation contains no clear guidance as to what priority might be given to the individual assertions. It is good practice to have an assertion programme. This will often need to include some flexibility and the following points may be considered when selecting the priority of planned assertions:

- It is likely that councils will be urged to act quickly to consider the assertion of routes which may lie within proposed development sites – this is obviously the correct thing to do.

- Other instances are not so clear; for example when individual pressure is brought to bear upon council members or officers. Such pressures may be the result of neighbouring landowner disagreements, rather than reasoned cases for assertion.

- The availability of public right of way evidence is often another problem. There may be a tendency to select priorities in relation to the availability of clear evidence for any particular route.

The Department's view is that, bearing in mind the clear duty to assert all public rights of way and having given consideration to the above notes, priority should be given

to those routes which offer most benefit to users. For urban routes this may be measured in simple convenience terms and likely number of users.

In the case of public rights of way in the countryside, factors to be considered in determining priority might include:

- Length of route.
- Scenic attractiveness.
- Links to sites of tourist interest.
- Likely level of usage.
- Potential inclusion within a network of paths or long distance route.
- Shared use opportunity – bridleways, routes offering access for people with disabilities.

4.1.2 The benefits of an assertion programme

A programme of assertions will help to ensure that:

- farmers and landowners are aware of what legal rights - if any - the public have over their land, so that they are able to take those rights into account in managing the land, be clear about the responsibilities they have towards the public and avoid possible legal action by the council or a path user.

- members of the public know where they may lawfully walk, ride and cycle, and where they may not;

- the council can meet its statutory duty and is fully aware of the public rights of way in its area that it is required to protect and keep open and free from obstruction;

- in taking such action to protect paths, the council is acting within the powers and duties available to it.

An assertion programme will also be important in identifying the paths which the council, or other community groups, might promote as a valuable recreational facility for local residents or to help attract visitors to the area. By defining the correct line and the rights that exist over each path it will be possible to see how each path might be promoted (eg for walking, riding or cycling), what action is needed now (eg signposting, waymarking, repairs to stiles, etc) or might be needed in the future to avoid potential conflict (such as by diverting a path away from a farm

holding), and what additional routes are needed so as to provide a range of attractive opportunities to enjoy the area.

It can be equally important to identify where public rights do not exist. The landowner can then be sure he is acting correctly in asking trespassers to leave his property, and the Council or any community group can be sure that any additional access rights that may be needed have to be negotiated.

4.1.3 The underlying approach

It is important that assertions should be carried out on the basis of agreement with the landowners whenever it is possible to do so. While many landowners will be aware of the existence of a right of way over their land, however, the approach by the council will often give rise to concerns about the consequences of the assertion, particularly if the route is one which has fallen into disuse or is now little used and is proposed for promotion. The conflict between these practical concerns and the very specific, apparently legalistic tests that the council must apply in deciding whether a right of way exists mean that any assertion must be handled with considerable diplomacy. It will be particularly important to demonstrate that the council is adopting the wider approach advocated in section 2.2.4; that it is alive to the landowners' concerns and is willing take whatever action is needed to manage the right of way to help resolve any problems that may arise in practice.

Viewed objectively, however, the process of assertion is concerned solely and specifically with determining what public rights already exist and the nature of those rights. It is not about changing or managing public rights of way, nor is it about creating new ones. It follows that in assessing the evidence that is available about each route, the only test the council is able to apply is "does a public right of way - ie a right of passage - already exist over this line?" If it does then the council has a duty to assert the path.

Given that these are rights which already exist in law, which anyone is lawfully entitled to exercise and which the landowner must respect, any concerns that are raised about the desirability or suitability of the route are not relevant. No matter how sympathetic the council may be, it has no option but to make the assertion - although it may, of course, also consider using its discretionary powers to divert the path onto a more suitable line. Conversely, if

the evidence is insufficient and the test cannot be satisfied then the council has no power to make an assertion, no matter how desirable it may seem for the public to have those additional rights. All the council can do in these circumstances is to consider using its discretionary powers to establish a new public right of way by agreement or order, or endeavour to agree a permissive path.

4.1.4 The principles of dedication at common law

There are no statutory criteria for the presumed dedication of a public right of way in Northern Ireland and the council will therefore need to be satisfied that a right of way can be shown to exist at common law. This involves two essential elements - dedication by the owner of the soil and acceptance by the public. As noted in section 4.1.9, dedication may be as a footpath, bridleway or carriageway.

Since dedication creates a public right of way in perpetuity, only a person with the capacity to bind the land in perpetuity has the capacity to make a dedication. Lessees and others with only a limited interest in the land are not capable of dedicating a way without the concurrence of the freeholder.

The Crown may dedicate a public right of way and the common law principles of dedication apply as they do to a private person (see 4.1.16).

Although there may, very occasionally, be clear evidence to show that the landowner expressly dedicated a public right of way, the great majority of rights of way have arisen through a presumed dedication by the landowner. This means the existence of a public right of way is implied in law from evidence of use of the path by the public on the one hand and the actions (or inaction) of the landowner in accepting that use on the other.
Public acceptance of any dedication is invariably implied from its use.

4.1.5 The evidence needed to show presumed dedication

The evidence needed to show a presumed dedication at common law is evidence which shows:

- that the route in question has been used "as of right" by the general public. Use of a path as a result of the

expressed or implied permission of the owner, eg by employees, social visitors or tradesmen, does not create a right of way.

- that the public's use of the path was open, so that the landowner knew or should have reasonably known about it and did nothing to stop it;

- that use continued, without interruption, for a sufficient period to imply that the owner intended to dedicate a public right of way;

- the route connects two public places or places to which the public regularly and legitimately resort, eg public roads or other rights of way, a church, the seashore, etc;

- that users followed a more-or-less consistent line.

The period of time and degree of use necessary to give rise to a dedication at common law has not been defined and the council must therefore make up its own mind on the facts and circumstances of each case. There is no equivalent in Northern Ireland legislation of the statutory period of 20 years provided for in the English legislation, although that does give a guideline to what might be an appropriate period in some circumstances. It should be noted, however, that in cases where the use of the path has been both very frequent and obvious the courts have been prepared to accept a much shorter period as sufficient to give rise to a presumed dedication at common law (eg periods of eight and six years). Conversely, much longer periods have been accepted where use has been regular but infrequent. The courts have also accepted that the degree of use needed to prove the existence of a public right of way in a remote, rural area may be less than that needed in an urban location.

The presence of a gate or other barrier on a path is not, in itself, inconsistent with the dedication of a right of way; dedication may have been subject to an existing obstacle, or the obstacle may have been erected after the right of way came into being. But the courts have always given weight to any evidence which the landowner can bring forward to show that specific steps were taken to prevent a right of way growing up across the land. In the words of one judgement "a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of

enjoyment". Closure of a path by locking a gate, levying a toll, turning back walkers and erecting specifically worded notices have all been accepted by the courts as such evidence. The action must have been taken, of course, before a right of way has become established (to do so afterwards would amount to obstruction). It must also have been clear to the public that the intention was to stop the use of the path "as of right". Closing a path on one day a year when the public could not be expected to use the path and therefore know about the closure (eg Christmas Day) has been found by the courts to be insufficient.

4.1.6 Sources of evidence

The existence of a public right of way and its status as either a footpath, bridleway or carriageway may already be well known to the landowner. If the owner is willing to sign a simple statement or otherwise acknowledge this (see section 4.2.6) the assertion can proceed on this basis alone and no further evidence is required. But generally landowners will be unwilling to even consider doing so, at least until the council itself can demonstrate that it has some evidence to prove that a public right of way exists. Such evidence can come from witness' statements, from historical or other documentary sources, or from a combination of the two.

The strongest evidence is normally that given by witnesses who have themselves used the path or know from their own personal experience of its use over a long period. When it is necessary to reach back beyond living memory, hearsay evidence of what of what persons now dead told the witness about the route will normally be accepted, but the most important evidence will often be that of people who can who can personally testify to a continuous period of use over many years.

A model witness statement is set out at Appendix 2, together with suggested contacts to help identify witnesses. See also the CD produced by Antrim Borough Council.

Documentary evidence can come from a wide range of sources. Virtually any plans or maps, guidebooks, records of proceeding, title deeds or similar documents might contain evidence which either shows the existence of a public right of way or which can help to corroborate witness' statements or other evidence. The list of suggested sources given at Appendix 2 is unlikely to be comprehensive and further sources remain to be discovered.

The website http://www.planning-inspectorate.gov.uk/pins/appeals/rights_of_way/consistency_guidelines_01.htm

includes much useful information but some of this is only applicable to England.

4.1.7 Matters to be covered in an assertion

The aim in carrying out an assertion is to determine whether or not public rights of passage - ie a public right of way - exists over the land in question and, if so, to define and record:

- the exact line of the public right of way;
- the nature of the public's rights over it;
- the presence and location of any stiles, gates, footbridges or similar features;
- any other conditions or limitations affecting the public's use of the way that are known to exist;
- the width of the right of way, to the extent that this can be ascertained;

These matters should all be set out in a formal assertion statement drawn up by the council, with the line of the right of way and appropriate features being shown on an accompanying map. A model Assertion Statement is included in Appendix 10.

It is the first two of these matters, defining the line of the public right of way and the nature of the public's rights of passage, that are the most important.

4.1.8 Defining the line

For a public right of way to arise at common law, use must have been over a more-or-less consistent line. This does not mean that the route must have been defined on the ground, or that it must always have been followed precisely. Some variations are permissible, for example to avoid obstacles which may have occurred from time to time such as a fallen tree or ground that is periodically muddy. Similarly, the line of the route may have "migrated" slightly over the years. But if people have simply wandered across an area of land at will, without following any consistent line, then a public right of way does not arise.

If the path is still used regularly then the line will often be visible on the ground. If it is not, the line may still be apparent from presence of old stiles, gates, sleeper bridges, boundary walls, etc, or it might be pointed out by witnesses or shown as a feature on the ground on old maps (eg early large-scale editions of Ordnance Survey maps). Where the evidence available is inconclusive or inconsistent it may be necessary to settle the line in discussion with the landowner. But care should still be taken

to determine the line as precisely as possible; this should *not* be regarded as an opportunity to agree an "unofficial" diversion.

4.1.9 Defining the nature of the public's rights of passage

It is important that assertion should also record as fully as possible the nature of the public's rights over the land. These will depend not on how the path is now used, but on the rights that were established (possibly many years ago) during the period when the dedication arose at common law.

While the Access Order does not define firm categories, different types of rights of way are nevertheless recognised at common law. They have been judicially described as follows:

"At common law highways are of three kinds depending on the degree of restriction of the public right of passage over them. A full highway or "cartway" is one over which the public have right of way (1) on foot, (2) riding on or accompanied by a beast of burden and (3) with vehicles or cattle. A "bridleway" is a highway over which the rights of passage are cut down by the exclusion of the rights of passage with vehicles and sometimes, though not invariably, the exclusion of the rights of driftway, ie driving cattle, while a footpath is one over which the only public right of passage is on foot."

The term "carriageway" is often used as alternative to "cartway" in the sense of the above definition.

As this definition makes clear, the greater right is always taken to include the lesser, so that if "cartway" (or "carriageway") rights are shown to exist then the way can also be used by walkers and horse riders, and if "bridleway" rights exist it can also be used by walkers. The right to use a vehicle on a cartway or carriageway includes both horse drawn and motor vehicles (the means of propulsion being irrelevant to the exercise of the right). However any motor vehicle that is taken onto a public right of way must be fully licensed, taxed and insured, and driven considerately, as it would on any other road; nor is there any requirement that the way must be made suitable for use by modern day vehicles.

The growing pressure to find places to ride safely away from roads used by vehicles further emphasises the need to research, as far as is practical, the nature of the rights that exist. It may be, for example, that while witnesses can only testify to use of a track by walkers, the documentary evidence show it to be a bridleway or an old carriage route. Horseriders themselves may

be willing to carry out their own historical researches and bring forward evidence which the council can use.

It should also be borne in mind that not all of the rights that exist will necessarily have been established at the same time, or continue to be exercised up to the present day. A path may have started off as a footpath, for example, which was later used by horse riders for a sufficient period to also establish bridleway rights. The fact that a stile was subsequently put up which restricted use to walkers, or that the path was obstructed so that no one could use it or that it simply "fell out of use" does not take away any of the rights that have become established. They continue to exist in law, may be lawfully exercised by the public and must now be asserted by the council.

Evidence of the use of a way by pedal cyclists, however, will only be relevant in so far as it relates to carriageway rights. Cyclists have no rights at common law to ride on a footpath or bridleway; nor is it possible to acquire such rights by long usage. It follows that evidence of the use of a way by bicycles cannot be used to support a claim that the way is a footpath or bridleway.

An assertion that "under records" a right of way does not take away the "higher" rights that exist over the path, nor does it prevent anyone from exercising those rights. If a right of way is asserted as a footpath, for example, that does not take away any bridleway rights that may exist over the path and anyone who can prove they have those rights is entitled to exercise them. Nevertheless, this can clearly lead to confrontation both with the landowner and other path users and should be avoided if at all possible.

If the situation arises in which it is clear to the council that footpath rights exist, but there is uncertainty (which the council cannot resolve) about the existence of other rights, then the council can only assert the way as footpath. But it should make it clear, both to the landowner and path user groups, that this is without prejudice to the subsequent assertion of any additional rights which may be shown to exist and that the council would need to reconsider the matter should any further evidence comes to light.

4.1.10 Vehicular rights

The discovery of carriageway rights may give rise to particular practical difficulties. Northern Ireland has not yet experienced the substantial conflict that has arisen in England over off-road recreational motoring, involving the use of 4-wheel drive

vehicles and trail riding by motorcycles along unsurfaced tracks. But landowners may still be particularly reluctant to acknowledge any rights which might potentially lead to such use. On the other hand, the council is not at liberty to ignore such rights where they are clearly shown to exist. Vehicle users are as entitled to exercise their rights as are walkers and horse riders, and to expect that their rights will be respected. In addition, carriageways are the only category of rights of way over which cyclists have a right of passage at common law. So failure to recognise them may also deny cyclists their rights, and will preclude the council from meeting the demands which now exist for greater off-road cycling opportunities.

Some comfort can be drawn from the experience of local authorities in England and Wales which shows that (as is frequently the case with rights of way) the concerns that are raised are often no more than a fear of what might happen; in practice, actual incidents of conflict or surface damage from the use of rights of way by vehicles are relatively few and far between. Nevertheless, such problems when they do arise can be severe and the council should therefore ensure that it monitors the use of these routes carefully. Any difficulties which do arise should be discussed at an early stage with the Department. It is possible that Roads Service may be able to make a Traffic Regulation Order in some circumstances so as to prohibit vehicles while still allowing use by walkers, horse riders and cyclists.

The unauthorised off-road use of motor vehicles is a matter for the Police. Offenders may be prosecuted under Article 48 of the Road Traffic (Northern Ireland) Order 1995.

In some situations, landowners or adjoining farmers may have private rights to drive vehicles along public rights of way. There is obviously nothing that can be done to prevent this and, where surfaces are being badly damaged, district councils may be limited to trying to encourage less use in wet weather. Council's may consider paying for the maintenance of such routes and grant aid may be available from EHS to upgrade routes, damaged by vehicles, which are being brought into use for the first time.
(See also 5.2.3)

4.1.11 Stiles, gates and other restrictions

Whenever possible, the council's assertion statement and map should also identify and record the location of any stiles, gates and similar features which limit or restrict the public's use of the right of way, and features such as bridges, stepping stones, causeways, etc which enable the route to be used conveniently. In both cases this should include features that witnesses can testify were present on the line but which are no longer visible, and those which are still present but are in a state of disrepair. Very exceptionally, there may be evidence to show that other restrictions exist on the public's rights of passage or which limit the landowners common law or statutory obligations. These too should be recorded in the assertion.

As section 4.1.5 makes clear, the public's rights of passage are subject to the limitations imposed by any gates, stiles or similar features that were in place at the time when the presumed dedication took place. The landowner then retains the right to have a gate, stile, etc in that position, including the right to put one back where there is not one at present. In theory, any additional gates, stiles, etc that are put up after the right of way came into being constitute an obstruction unless they are specifically authorised (such as by a consent given by the council - see section 5.4.1). But in practice, since it is normally impossible to know when a particular gate or stile was first put up, the assertion can do no more than record all such features that exist or which are otherwise know about at the time of the assertion.

The assertion should not, however, record any other obstructions on the line of the right of way unless - very exceptionally - it can be clearly shown that it pre-dates the path and has always been accepted by the public. The effect of recording the obstruction will be to acknowledge that it is a permanent feature, and thus protect the landowner from any legal action requiring the obstruction to be removed.

Other matters which are likely to arise only very exceptionally, but which must be recorded in the assertion statement when they do, include evidence which the landowner is able to bring forward to show that he or she retains a common law right to plough a right of way (and is therefore exempt from the statutory requirements to give notice and to restore the path surface) and any agreement that is made which provides that the council will take responsibility for matters that would normally fall to the landowner.

The discussions that take place with the landowner over the assertion will often include reaching agreement over the works needed to put gates and stiles back into good order, the removal of any obstructions, the assistance the council might give to help the landowner meet his or her responsibilities and the works the council will itself carry out (eg to repair the surface of the path or restore any footbridges). Although these are all important matters, they should be seen as distinct from the assertion itself. They should not therefore be included in the assertion statement but be set out, where necessary, in a separate document.

4.1.12 Widths

If a path runs between fences or walls it is generally inferred that the land over which the public can pass and repass, and therefore the width of the right of way, extends to whole area and not just the part that may have been made up. In the case of an old drove road or "driftway" this may be quite considerable; widths of up to 70 feet are not uncommon.

This rule is based on the assumption that the fences were put up or the hedges grown to separate the adjoining land from the right of way. The exception, therefore, is when it can be shown that the fences or walls are there for some other reason unconnected with the right of way. Once a right of way has become established, the subsequent removal of one or other (or both) of the boundaries does not change the width of the path; it remains constant. Any attempt to `squeeze' the right of way by reducing its width therefore constitutes an obstruction.

If the path is not defined by physical boundaries, the width is that which has been habitually used by the public. It can often be difficult or impossible to say what the width is in these circumstances. The rule of thumb is usually to assume that a right of way is of sufficient width to allow users to pass each other, eg around 1 -1.5 metres for a footpath and somewhat wider for a bridleway. Although it will generally be acceptable to follow this guideline in carrying out any works to the path, it may be better not to refer to a specific width in the assertion statement.
The fact that the width of a highway is insufficient to allow for the passage of vehicles does not prevent the way from being a carriageway. All other things being equal, however, the width may be important evidence of the kind of past public use.

4.1.13 Human Rights Act 1998 and Public Rights of Way

There are a number of Articles which may be quoted as likely to affect public right of way investigations. The Department believes that appropriate systems are in place to prevent successful challenges to statutory agencies in respect of activities properly carried out by under the Access Order.

ARTICLE 6
…. everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Public right of way assertions can be challenged in the Courts.

Public Path Order inquiries are chaired by an independent Inspector and the validity of any confirmed order may be challenged, within six weeks, by application to the County Court.

ARTICLE 8
….. everyone has the right to respect his private and family life, his home and his correspondence.

The extreme case of a public path order preventing future access to a property is unlikely to be promoted by either a district council or the Department.

It could be argued that failure to divert, or extinguish, a public right of way running close to a dwelling house is affecting the occupier's right of privacy. However, this argument is likely to fail on the grounds that anyone buying a house in such a location should have been aware of the likely proximity of persons using the route.
Where the owner is unaware of a public right of way adjoining his property, any challenge is likely to fail on the grounds that the primary legislation (duty to assert under Art 3 of the 1983 Order) has to be followed and this does not permit personal circumstances to be taken into account.

Article 1 of the First Protocol covers the peaceful enjoyment of possessions. This can be taken to include property and the above paragraphs also apply here.

HUMAN RIGHTS VIOLATION CLAIMS
All claims should be referred to a solicitor. Generally, the following guidelines apply:

- It is for the claimant to prove the type and degree of harm caused.
- Only a victim can bring a claim.
- The harm to an individual needs to be considered against the wider public good.
- Not every adverse effect on residential amenity will amount to an infringement. Cases arising from planning and environmental concerns seem to indicate that interference has to be extreme for a violation to be adjudged to occur.

Specific information on the Human Rights Act and public rights of way is contained on the Planning Inspectorate site www.planning-inspectorate.gov.uk/pins/appeals/rights_of_way/rights_of_way_19.pdf
Note that this refers to GB access legislation.

4.1.14 The Role of the Ombudsman

The public may call upon the services of the Ombudsman if they wish to complain about maladministration by government departments or public bodies. In an access context, it is assumed that this might include such things as failure to exercise duties outlined in the legislation. Examples might possibly include: failure to assert a public right of way or failure to keep such a route open. Any person making a complaint should initially follow the internal complaints procedure of the organisation concerned. If the issue remains unresolved, a written complaint should be made to the Ombudsman by letter or by using a form which is available from:

The Ombudsman
Freepost BEL 1478
BELFAST
BT1 6BR
Tel: (Freephone) 0800 34 34 24 or
(028) 9023 3821

Complaints about government departments or agencies must be referred to the Ombudsman through an MLA.

Further details are available via the website:

www.ni-ombudsman.org.uk

4.1.15 Freedom of Information Act

Information gathered, by district councils, for public right of way research purposes may be accessible under the Freedom of Information Act. Councils will have procedures for dealing with such requests and further information is available at www.informationcommissioner.gov.uk

4.1.16 Access over Crown Land

'Crown land' is land that is owned by a government department, by the Crown Estate, or by the Duchies of Cornwall and Lancaster. It therefore includes land such as that owned by the Roads Service, Forest Service, Water Service and Ministry of Defence, but not that held by a district council or a nationalised industry. It also excludes land owned by a member of the royal family in a personal capacity.

Rights of way can arise at common law through a tradition of use, over Crown Land as they can over any other class of land. The same underlying principles of dedication and acceptance as set out in chapter 3.3.1 apply, therefore, as they do to a private person. However, in general, the Crown is bound by legislation only to the extent provided for within the legislation itself. In the case of the 1983 Access Order, this is to the extent set out in Article 53 which provides that:

- the power to carry out work or provide service or facilities conferred by the Order may - if the appropriate authority consents - be exercised on Crown land (article 53(1)), and

- the Order shall apply to Crown land subject to various modifications. In general these require the council to similarly obtain the consent of the appropriate authority before making any public path order or access order which relates to Crown land, or before acquiring such land under the Order or applying bylaws to it (article 53(2) and (3)).

The 'appropriate authority' is defined as meaning the government department which owns the land.

There are, however, no such qualification with regard to the council's underlying duties to assert, protect and keep open any public right of way, under article 3(1), or to compile and preserve maps and records of the public rights of way in its district under article 3(2). It follows that the council must take action to assert and record any public rights of way over Crown land, and to ensure they remain open and are unobstructed, as it would for any other public rights of way.

4.2 THE ASSERTION PROCESS

4.2.1 The stages in making an assertion

Readers are referred to the CD and booklet produced by Antrim Borough Council (see Appendix 2).

Carrying out an assertion involves;

- making a preliminary assessment of the route and the evidence likely to be available;
- surveying the line to gather information relevant to the assertion and to identify any action that may be needed to restore the path to use and/or manage it effectively;
- identifying those who can testify to the use made of the route and collecting witness statements;
- identifying and researching possible documentary sources of evidence;
- identifying and negotiating with all the landowners concerned;
- evaluating the evidence and deciding, on the balance of probability, whether a right of way can be said to exist;
- if a right of way is found to exist - formally making the assertion by a resolution of the council;
- if the assertion is opposed - asking the County Court to vindicate the assertion.

The process is outlined in figure 3. This should not be seen as an entirely rigid sequence. If it is known from the outset that a number of people can testify to the use of the route, for example, there may be advantages in collecting statements from them before the route is surveyed. The negotiations with landowners, investigation of documentary sources of evidence and collection of further witness' statements will all generally proceed in parallel, while the assessment of the evidence will also normally be an on-going process as the case for or against the existence of public rights accumulates. Contact should always be made with all of the landowners concerned at an early stage in the process, however, and they should be kept regularly informed of progress.

A new landowner can challenge an assertion in court; therefore it is best to go for signed letters from an existing landowner who agrees that a route is in fact a public right of way.

See *Public Rights of Way* (A Guide to the Status Investigation Procedure) published by Antrim Borough Council and EHS. Free copies are available from either body.

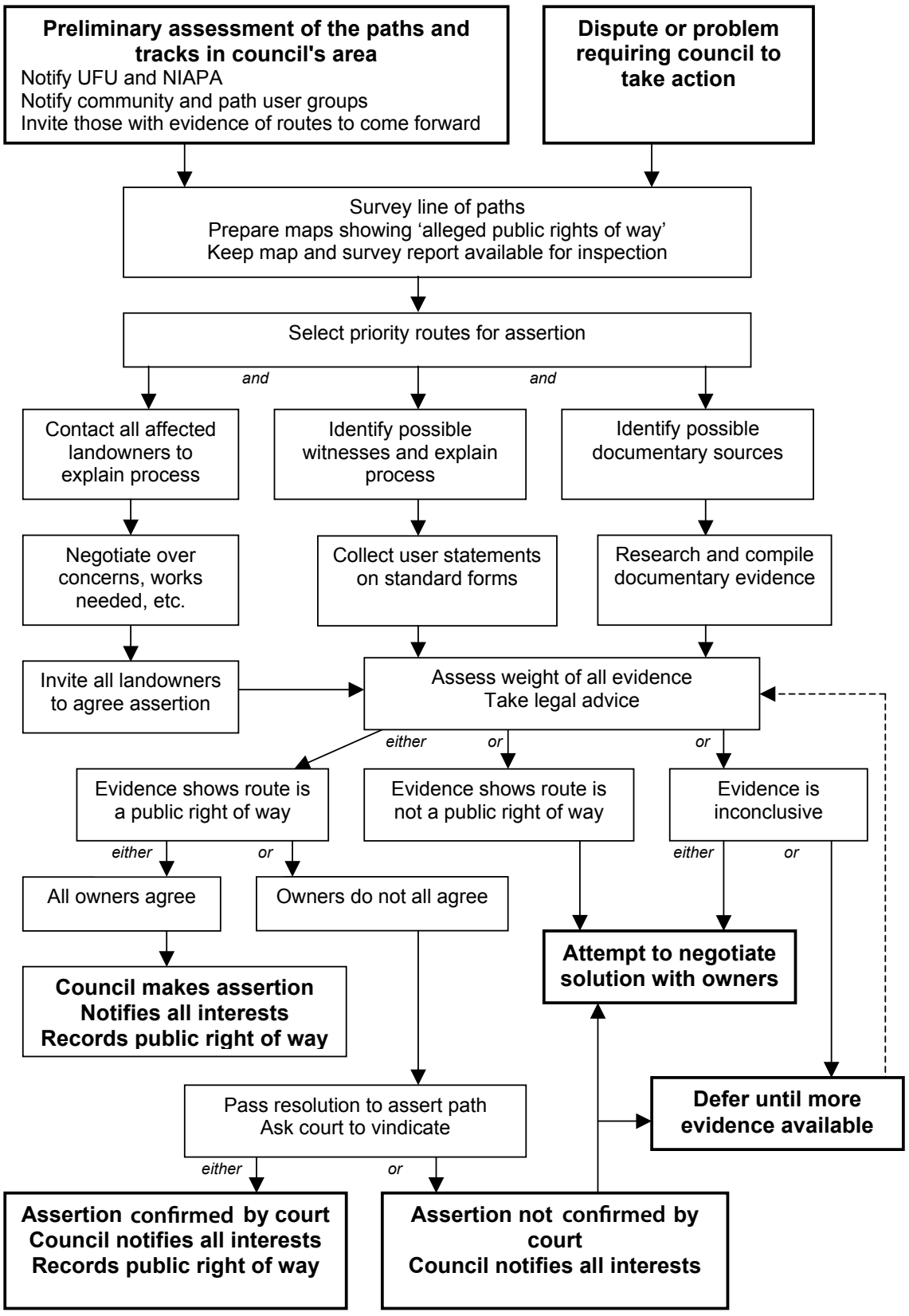
The Antrim Borough Council CD *Investigating Public Rights of Way – A Policy and Procedure*
is also a very useful tool for use in the assertion process.

4.2.2 Preliminary assessment

The starting point will normally be an overall review of the council's area to identify those paths and tracks which might potentially be public rights of way and the sources of evidence (if any) that are known at that stage to be available about the history and use of each route. This should be followed by a preliminary survey of each route to gather information on both the assertion and on the present condition of the path, the need for maintenance or other works and its suitability for promotion.

The Ulster Farmers' Union and Northern Ireland Agricultural Producers Association should be notified of the overall review, as should any local path user groups or community associations know to be interested in the paths in its area. The latter may also be willing to volunteer to help carry out some of the work (see section 2.2.9). More general publicity, such as through local newspaper articles, will be valuable in encouraging those who can give witness statements or who have other information such as old maps or guide books of the area to come forward. On one occasion a public meeting was arranged by the district council and proved to be valuable both in generating public awareness and identifying possible routes and sources of information about them.

Figure 3: **PROCESS OF ASSERTION**



4.2.3 The preliminary surveys and record of `alleged rights of way'

A survey should be made of each route by walking the line and gathering information on:

- the physical evidence of its use and status, eg if it is a well worn path or track or no longer visible on the ground; the evidence of use by walkers, horse-riders, agricultural or recreational vehicles;

- the condition of the route and possible need for improvements; eg if the path is clear or overgrown; the position and condition of any gates, stiles, footbridges, etc; the position and nature of any obstacles or hazards, eg fences, locked gates, areas of boggy or flooded ground, un-bridged water courses, fallen trees, etc;

- the features, view and points of interest along the route; ease in finding and following the route; the need for and position of signposts and waymarks; the degree of physical challenge and suitability for use by elderly or disabled people.

All the potential public rights of way should be marked on a large scale ordnance survey map and a report drawn up as each one is surveyed. Although this preliminary work may have to be carried out in stages, the aim should be cover the whole of the council's area so that the routes can at least be identified and recorded as `alleged rights of way'. Both the map and the survey reports should be kept available for public inspection.

4.2.4 Defining an assertion programme

A more targeted approach may be needed towards the detailed work involved in assessing and (if appropriate) asserting each path as a public right of way. While all of the routes identified in the preliminary survey should eventually be covered, and the council should aim to do so within a reasonable timescale. The programme will also need to include any routes that are currently in dispute, and should remain flexible enough to take on board further disputed routes should the need arise.

The legislation contains no clear guidance as to what priority might be given to the individual assertions. It is good practice to have an assertion programme. This will often need to include some flexibility and the following points may be considered when selecting the priority of planned assertions:

- It is likely that councils will be urged to act quickly to consider the assertion of routes which may lie within proposed development sites – this is obviously the correct thing to do.

- Other instances are not so clear; for example when individual pressure is brought to bear upon council members or officers. Such pressures may be the result of neighboring landowner disagreements, rather than reasoned cases for assertion.

- The availability of public right of way evidence is often another problem. There may be a tendency to select priorities in relation to the availability of clear evidence for any particular route.

The Department's view is that, bearing in mind the clear duty to assert all public rights of way and having given consideration to the above notes, priority should be given to those routes which offer most benefit to users. For urban routes this may be measured in simple convenience terms and likely number of users.

In the case of public rights of way in the countryside, factors to be considered in determining priority might include:

- Length of route.
- Scenic attractiveness.
- Links to sites of tourist interest.
- Likely level of usage.
- Potential inclusion within a network of paths or long distance route.
- Shared use opportunity – bridleways, routes offering access for people with disabilities.

4.2.5 The detailed investigations

If the initial survey was carried out some time ago a further survey should be undertaken at the start of the detailed investigations to check the current position. Several more site visits are also likely to be required, both to inspect the route with landowners and to check the details given in witness statements.

The statements from those who can testify to using the path should be obtained using the model form set out at Appendix 2 or as per the Antrim Borough Council CD (see also Appendix 2). Appendix 2 also suggests various sources that might be

helpful in identifying witnesses. This will involve making detailed enquiries in the neighbourhood and is likely to be time consuming, but if there is an active community or path user group they may be willing to take the lead in approaching potential witnesses on the council's behalf.

A separate witness form should be used for each right of way and care taken to ensure that the evidence collected is as accurate and as comprehensive as possible, particularly as it may ultimately be subject to scrutiny in the courts. The aim, of course, must be to establish the facts of the matter, whatever they may be, and no attempt should be made to lead witnesses in any way. It is especially important to discover whether each witness used the path "in the belief that they did so as of right" or as a result of some form of expressed or implied permission from the landowner. Attention could well focus on this aspect if the matter does eventually go to court and the council must be sure of its ground from the outset.

Although no one statement should be relied on as conclusive proof of the existence of a right of way, it will often be found that three or four statements collected from independent witnesses corroborate each other and build up a broad picture both of the existence of a public right of way and nature of the rights over it. These should be checked for consistency with the survey report and any readily available documentary sources of evidence, such as the early, large scale editions of Ordnance Survey maps or any old guide books to the area.

Strong and consistent preliminary evidence of this nature may in itself be sufficient to persuade the landowners to agree and enable the assertion to proceed on that basis. If it does not, or if or inconsistencies remain, then further witness statements should be obtained and a more thorough search made of the archives for other documentary sources of evidence.

There is no magical number of witness statements required before an assertion can be made. Much will depend on the quality of the evidence they contain, the weight of any other supporting evidence from documentary sources and the path survey, and the strength of any contrary evidence which the landowners may be able to produce. Seven or eight statements will generally be sufficient to satisfy a court providing they clearly testify to public use of the way "as of right" over a substantial period of time. A larger number of statements may be needed where witness are able to give evidence relating only to sections of the path or to use over a limited period of time.

District Council staff may not demand that any person provides evidence or signs an evidence form.

4.2.6 Approaching and negotiating with the landowners

The greater the level of cooperation that can be secured from landowners, the more quickly and efficiently can a programme of assertions proceed. It is therefore important that the landowning community is made aware of the council's intention to carry out any preliminary surveys, and that individual landowners are contacted about the rights of way that may affect their property as soon as possible. Since most rights of way can be expected to cross a number of land holdings, the negotiations will often involve a number of owners.

While landowners will vary in their reaction, the approach by the council will often be unwelcome and must therefore be handled with diplomacy. The key to winning the owners' cooperation will lie in establishing direct, personal contact and in being able to show that the council is alive to, and can address, the many concerns that will inevitably be raised. The wider approach suggested in section 2.2.4 towards asserting and managing rights of way will therefore be important, enabling the council to give a firm reassurance of the action that may be taken as and when necessary to help resolve any problems that do arise in practice. Similarly, the assurance that the council is able to give over the issue of occupiers' liability (see section 3.5.4) will often be crucial.

The initial approach should, ideally, be a personal one which the council then follows up by writing to confirm what was discussed. Where that is not practicable and the approach has to be in writing, the council should offer to meet the landowner on site to discuss his or her concerns (perhaps jointly with other owners that are affected). In either case, the council should explain why it is carrying out the assertion, the reasons why it considers the path to be a public right of way, the nature of the public rights that are believed to exist and the procedures the council is following. The council should also let every landowner have a preliminary draft of the assertion statement and map.

If all the landowners concerned are willing to acknowledge the existence of the right of way, the assertion can proceed on that basis alone. This need not be in the form of a formal document. The council can, if it wishes, supply a simple statement and invite each landowner to sign (for example, as in the Antrim Borough Council CD, see Appendix 2) . But an acknowledgement given less formally through an exchange of

correspondence will also be acceptable providing it covers the essential elements. These are:

i) that it must be given by the landowner (or by someone who otherwise has the legal capacity to bind the land in perpetuity),
ii) it should be clear which path is being referred to and where it runs (eg by reference to the statement and the map prepared by the council),
iii) the acknowledgement must be of a public right of way (not simply a `permissive path') and
iv) all of the public's rights that are believed to exist must be acknowledged (ie rights of passage on foot, on foot and horseback, or "carriageway" rights as appropriate).

In most cases, however, landowners will be unwilling to consider giving such an acknowledgement until they are aware of the detailed evidence which the council has available. There is little point in holding back such evidence. Although revealing it might conceivably put the landowner at a slight advantage if the matter eventually goes to court, it is more likely to be helpful in persuading the owner not to contest the position further. While this will need to include making known what has been said in the witness statements, the names and addresses of those who have given statements should not be revealed at this stage.

The situation will also arise in which a landowner states verbally (or otherwise makes it apparent) that he or she will not formally oppose the assertion but is not prepared to confirm that position in writing. A formal record of any such conversation should be made, including the names of any other people who were present and can testify to what was said, and kept with the case papers. Advice should then be sought from the council's solicitor on whether this constitutes sufficient agreement to allow the assertion to proceed. Much will depend the circumstances of the case, including the correspondence that has taken place and the strength of other evidence. In some cases it might be that the council could write again to the owner stating that, unless it hears to the contrary within a specified time, it proposes to proceed with the assertion on the understanding it is unopposed. If no response is received, a further letter confirming the position should be sent at the end of the period. But if doubts do remain about the landowner's position the council may still need as a precaution to ask the County Court to vindicate the assertion.

4.2.7 Assessment of the evidence

All of the evidence that has been gathered should be reviewed periodically by the officer dealing with the case, with advice from the council's solicitor. While some cases will be clear cut, others will require a careful judgement to be made on the balance of probability. In doing so, it is important to continue to focus only the single question of whether a public right of way can - or cannot - be shown to exist over the route in question. Officers must not allow themselves to be swayed by the desirability or suitability of the route, the costs of restoring the path, the strength of the landowners' feelings or other similar considerations.

The outcome of the review will be either:

- **The evidence shows both that a public right of way does exist and the nature of the public's rights.** The council has a statutory duty to make the assertion. It should be recommended to do so and, if necessary, to seek to have the assertion vindicated in the County Court.

- **The evidence shows that a public right of way does exist, but there is remaining uncertainty over the nature of the public's rights.** If it seems likely that the uncertainty can be resolved by further investigations the assertion should be deferred while they are carried out. If the uncertainty is unlikely to be resolved, the path should be asserted as either a footpath or bridleway (as appropriate). In doing so, the council should make it clear that this is without prejudice to the further assertion of any "higher" rights which subsequently may be shown to exist.

- **The evidence shows that a public right of way does not exist.** A recommendation should be made asking the council to note that the investigation has been carried out and to record the outcome. The landowners concerned and any other people involved in the matter should also be formally notified, and the path removed from the map of `alleged public rights of way'. If the council nonetheless believes that public access over the land is essential or highly desirable (eg to fulfil recreation or tourism objectives) the only options open to it are either to seek to establish a public right of way by agreement or order, or to endeavour to negotiate a permissive path agreement (see sections 7.1 and 7.2).

- **The evidence is inconclusive.** If it is likely that the uncertainty can be resolved by further investigations or negotiations (eg by identifying additional witnesses and/or winning the cooperation of the owners) then the matter should continue to be actively pursued. Where that is not the case, the council may decide to hold the matter in abeyance until further information comes to light. However, public use of the path will then be dependant on the attitude of the landowner and the council will have no formal powers to take action. Otherwise the options are those set out above; of establishing a `new' public right of way by agreement or order or negotiating a permissive path - although it is important to note that neither of these courses would affect any existing rights which might be shown to exist should further evidence come to light.

4.2.8 Making the assertion

The assertion is best made by a resolution of the council and recorded in the council minutes. A formal statement and accompanying map showing the line of the path should be prepared (or the draft statement and map finalised).

The statement should refer to the council's powers under the Access to the Countryside (NI) Order 1983, state that the path is asserted as a public right of way, briefly describe the path (eg by reference to the grid references, direction and length of the route, width of the path, etc) and specify the nature of the rights of passage that are being asserted and any other relevant information. A model statement is included at Appendix 10. The line of the path should also be shown clearly by a distinctive notation on the accompanying map, and the map and statement should be checked for consistency. A report should also be drawn up summarising the evidence which has been taken into account.

Once the assertion has been made, a copy of the statement and map should be recorded in the Council minutes and sent to all the parties that have been involved in the matter or are otherwise likely to be interested in it, including the Ordnance Survey for Northern Ireland. Wider publicity should not be given to the path until any necessary works have been carried out, including the removal of any obstructions and the erection of appropriate signposts and waymarks. If the assertion is opposed, however, the notice that is given should make clear that the assertion is subject to the decision of the court as to whether it should be vindicated. Nor should any work on the path start until the vindication has been settled.

4.2.9 Declaration of confirmation by the County Court

If the assertion of a path is opposed by one or more of the landowners the council may have no option but to apply to the County Court for a declaration that confirms the assertion. While not a specific statutory requirement, this puts the status of the path as a public right of way beyond legal doubt. If this is not done, the status remains open to question; essentially as the council's word against that of the landowner. Users of the path might therefore be turned back, or action which the council takes may be challenged, on the grounds that the path has not conclusively been shown to be a right of way.

Confirmation by the County Court should be sought both in respect of objections which the council consider to be relevant, and those which it does not. The latter will include objections made purely "on principle" and those made on the grounds the path "is not suitable" for the rights that the evidence shows to exist over it. However, the council should point out that these are not matters which it - or the court - can take into account in deciding whether a right of way exists and draw the objector's attention to the consequences that may arise in an award of costs. Occasionally County Court confirmation vindication may also be necessary or desirable in other circumstances, such as when the owner of part of a route cannot be identified or when a landowner refuses to give any indication of whether he or she recognises the public's rights over the land.

The council will, of course, need to prepare its case carefully, including notifying and briefing those it hopes to call as witnesses to support its case. If, in the event, one or more of the witnesses seems unwilling or unlikely to attend the court it may be possible to submit in evidence a signed statutory declaration. The advice of the council's solicitor should be sought both on the likelihood of a declaration being acceptable to the court and on the precise form of words that must be used. This is, however, less satisfactory than having the witnesses attend in person and every encouragement should be given to them to do so.

Since relatively few rights of way matters have come before the courts in Northern Ireland and the County Court may be unfamiliar with the assertion process. The council may therefore also wish to set out for the benefit of the court the basis of its statutory duty and the underlying common law principles, drawing on the advice in sections 3.3.1 and 3.4.2.

If the council has fully and methodically researched the history

of the right of way as set out in this guide, there should generally be no difficulty is securing County Court confirmation of any assertion. But the court must still be free make up its own mind on the facts and the arguments put to it by each side and it cannot automatically be assumed that the court will invariably find in favour of the council. It may be, for example, that the landowner is able to produce evidence of which the council was not previously aware, or that having listened to the arguments presented by both sides the court comes to a different conclusion on the balance of probability to that reached by the council.

Although the council will wish to take any such decision into account in any future cases, it should be borne in mind that a decision by the County Court does not, in itself, create a legal precedent. Certainly, an occasional and isolated rejection of the council's case should not be taken as invalidating a programme of assertions. But any such cases should be fully reported to the Department so that the matter can be kept under review and further guidance given if necessary.

Only very exceptionally, such as when the decision by the County Court appears to be clearly wrong in law, will the question arise of pursuing the matter in the higher courts. The Department's advice should be sought urgently on all such case, as it should in the event that a decision in favour of the council is challenged by the landowner.

If the council is successful in obtaining confirmation of an assertion, the court can normally be expected to award costs against the objector. If the council is unsuccessful, it is likely to have to meet the landowner's costs.

Following the court's decision, the final outcome of the case should be notified to any of the other parties, interested bodies or individuals that were not present at the hearing. The Ordnance Survey should similarly be notified of the final outcome.

A list of some court cases relating to public rights of way is given in Appendix 7.

4.2.10 Archive records

The experience of local authorities in England and Wales is that a change in land ownership, the introduction of new agricultural practices or increased recreational pressures can occasionally

lead to the existence or status of a public right of way being challenged many years after these matters have apparently been settled. A number of authorities have found their position is weakened because they no longer have any records to show why the rights of way in question were entered on the council's definitive map, or any indication of whether the landowners at that time were consulted.

This experience emphasises the importance of keeping a full archive record of the documents and information which the council has taken into account in connection with any assertion. The records that should be preserved include witness statements, copies of any relevant documentary evidence, the survey reports, correspondence with landowners and notes of any key points that are agreed verbally.

An archive record is likely to be particularly important when the assertion is made with the landowners' agreement since there will not then be any other record of court proceeding. The records of the investigations into those cases where a right of way is found not to exist may also prove to be valuable, saving considerable abortive work should the path again be "claimed" as a right of way at some time in the future.

See also the Planning Inspectorate website
http://www.planning-inspectorate.gov.uk/pins/appeals/rights_of_way/consistency_guidelines_24.htm

- note some of the contents of this site apply only to GB.

4.3 COMPILING MAPS AND RECORDS

4.3.1 The council's duty to compile maps and records

Article 3(3) of the Access Order requires the district council to compile and preserve maps and other records of the public rights of way in its area. To meet this duty the council should prepare a set of large-scale maps of the paths it has asserted and an accompanying register containing details of those paths.

Accurate and up to date records of this nature will be essential, not only to the council in knowing which rights of way it is responsible for keeping open and free from obstruction, but to farmers, landowners and members of the public. They will help to ensure that rights of way are respected, that any promotional maps, guidebooks or leaflets (whether prepared by the council itself or some other body) are as accurate as possible, and that the public can use rights of way with confidence.

A useful model document is included within the Antrim Borough Council CD (see Appendix 2).

4.3.2 Routes to be recorded

The maps and register should generally be confined to recording only those public rights of way that the council is certain may be used by the public as of right and which it has a duty to protect and keep open. Any permissive paths that have been formally agreed by the landowners concerned might also be included. But the records should not show those paths that are currently under investigation, which remain to be investigated, or which have been found not to be public rights of way.

It follows from this that a clear distinction must be drawn between the rights of way maps and register, and the maps and reports of alleged rights of way that the council also prepares. The latter will, of course, be important documents in their own right and should also be kept available for inspection. But they are nonetheless temporary working documents, and will often be subject to revision as the line and status of each route is investigated and as other possible routes come to light. By contrast, the rights of way maps and register should be seen as a more formal, permanent record. It will change only as and when rights of way are asserted, new rights of way or permissive paths are created, or existing rights of way are extinguished or diverted.

4.3.3 Preparing rights of way maps

To prepare the rights of way record, a set of Ordnance Survey maps covering the whole of the district at a scale of 1:10,000 should be obtained. Maps to a smaller scale are unlikely to prove satisfactory.

The council should carefully mark on each map the precise line of the public rights of way it has asserted, using a distinctive symbol to indicate the type of rights that have been found to exist over each path (ie rights of passage only on foot, on foot or horseback, or "carriageway" rights). The notation should also show which rights of way are also public paths (ie those that have been created or diverted under the provisions of the Access Order, which the council has a duty to maintain and which are open for use by cyclists). Any permissive paths that are to be shown should similarly be entered carefully onto the map, using a distinctive symbol to differentiate them from public rights of way.

Recommended symbols which the council may wish to adopt (although it is not obliged to do so) are shown in figure 4. Alternatively, or in addition, different colours might be used to depict the types of path. While this can add to the clarity of the original map, the colours may not show up as well on any photocopies that are taken. The use of the colour green should be avoided, however, since this is the colour which regulations specify must be used to depict open country access on any statutory maps of access land (see section 8.4.2).

If anything more than a very small number of paths are to be recorded, a reference number for each path should also be shown on the maps so that the details can be quickly located in the accompanying register.

Figure 4: **RECOMMENDED SYMBOLS FOR DEPICTING PUBLIC RIGHTS OF WAY AND PERMISSIVE PATHS**

Rights of passage:	**Public right of way**	**Public right of way that is a public path**
only on foot	----------	--″---″---″---″---″--
on foot and horseback	-+-+-+-+-+-+-+-+-+-+-	-+-″-+-″-+-″-+-″-+-″-
on foot, horseback and in a vehicle	-H-H-H-H-H-H-H-H-H-H-	-H-″-H-″-H-″-H-″-H-″-

Permissive path that is not a public right of way

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4.3.4 Preparing a rights of way register

The aim of the register should be to bring together in a single volume all of the key documents relating to each public right of way that define where the path runs or the rights that the public have over it. The register should therefore include copies of:

- the assertion reports prepared by the council and the appropriate resolutions of the council;

- any judgements given by the County Court in vindicating those assertions, or relating to any other formal proceedings brought by the council;

- any public path orders that have been confirmed by the council or the Department to create, divert or extinguish a public right of way, together with the appropriate council resolutions and/or decision letters given by the Department;

- any permissive path agreements that the council has formally entered into.

- any other plans or documents that are relevant.

4.3.5 Making the records available for inspection

In addition to being a valuable source of reference for the council, it is important that the rights of way register and maps should be readily available to landowners and members of the public. The council should therefore keep copies available for inspection, free of charge, at its offices and any other appropriate locations. District councils are encouraged to notify all of the bodies that may have an interest in the records, including the countryside user groups, local community groups and the farming organisations. Wider publicity should also be given as appropriate, for example through notices put up at libraries and information centres, so that individual owners, occupiers and members of the public are aware that the records exist and where they can be inspected.

SECTION 5: PROTECTING AND MAINTAINING PUBLIC RIGHTS OF WAY

To realise the full potential of public rights of way and other access routes for recreation and tourism, and overcome the landowners' and farmers' concerns, it is necessary for paths to be brought-up to a high standard and maintained in that condition. This must include ensuring that paths are clearly signposted and waymarked so they are easy to find and to follow; removing any obstructions and clearing overgrowth so that paths are easy to use; and making sure that path surfaces and features such as gates, stiles and footbridges are all in good condition. Regular programmes of inspection are needed to give an early warning of any problems that might be developing.

This section sets out the council's overall powers and duties to help protect and maintain rights of way and suggests how they should be applied. It includes advice on when and how landowners and occupiers should be consulted; what is meant by the term "obstruction or encroachment" of rights of way and how such problems should be dealt with; and how paths should be signposted and waymarked. It also deals with the specific provisions made in Access Order on matters such as the maintenance of gates and stiles and the ploughing of rights of way.

Environment and Heritage Service grant aid may be available for some of this work. See the Natural Heritage Grants section on the website www.ehsni.gov.uk

5.1 THE REQUIREMENT TO PROTECT AND MAINTAIN PUBLIC RIGHTS OF WAY

5.1.1 The legal background

Any person, not just the landowner or occupier, has a duty at common law to respect public rights of way and to do nothing that would interfere with or restrict their lawful use. In the past it would normally have been for the individual path user or a user group to take whatever action they could to try to enforce compliance with this duty - although formal action in the courts was rarely if ever taken.

Article 3 of the Access Order now places each district council under a specific duty to "assert, protect and keep open and free from obstruction or encroachment any public right of way". As noted in section 3.4.1, this effectively requires the district council to take steps to enforce the public's common law rights of passage whenever it is necessary to do so.

The Access Order also makes specific provisions which balance the landowner's and path user's interests over matters such as the need to keep gates and stiles in good condition and the ploughing of rights of way. In these cases the council has both a duty to ensure these provisions are complied with and specific powers to take action, including action in default of the owner.

It is less clear where the duty to maintain any public rights of way might lie. What is certain is that the duty does not rest with the owner or occupier of the land. This long standing principle has repeatedly been reaffirmed by the courts, including in a number of recent cases. The owner may, of course, keep the path in good repair for his or her own use or may chose to repair the surface so it is easier for others to use. But he or she has no obligation, as such, to keep a path in a suitable condition for the public to use.

Historically, the responsibility for repairing any highway was regarded as falling on the inhabitants of the area at large unless and until some other person was proved to be liable. The matter was often one of some contention. Over the years and through successive Acts of Parliament the responsibility for most highways has now devolved to Road Service in Northern Ireland and to local highway authorities in England and Wales. However the Road Service's responsibilities do not extent to maintaining public rights of way; nor is the district council a "highway authority" in the way that a county council in England is.

It is therefore unclear where the responsibility for repairing public rights of way in Northern Ireland might lie. If the path is one that has existed for many centuries, then it is conceivably possible - although unlikely - that responsibility might be found to lie with the district council. But it is much more likely that the courts would find that a right of way is repairable by no-one, and the public must accept the path in whatever condition they find it.

The council does, however, now have discretionary powers under Article 3 of the Access Order to maintain any public right of way if it chooses to do so. With the growing importance of public rights of way for recreation, and the benefits rights of way can bring, the Department would urge every council to be willing to use this power to ensure the paths in its area are in good condition and are easy and enjoyable to use.

5.1.2 The extent of the council's powers

A range of powers are available to the district council under the Access Order to help ensure that rights of way are kept open and available for use:

- In exercising its duty under Article 3 to protect, keep open and free from obstruction or encroachment any right of way, the council has specific powers "to institute proceedings in its own name". Unfortunately, the Access Order does not make it clear whether it is also open to the council to take other steps, such as direct action to remove an obstruction. Legal arguments can be made either way.

- The council also has the power under Article 3 (3) to "maintain any public right of way", providing it first consults the owner of the land (see below). In a slightly different context (that of an English highway authority's duty towards highways that are maintainable at public expense), "maintain" has been judicially interpreted as meaning "to put a highway in such repair as to be reasonably passable to the ordinary traffic of the neighbourhood" and "to restore to a sound or unimpaired condition" any highway or bridge "which has become unsound or impaired through neglect or use". Under this power the council would, for example, be able to repair the surface of a path and remove scrub and overgrowth from the surface. The power does not extend to dealing with man-made obstructions, however, such as by removing a barbed wire fence. Nor does it allow the council to make improvements to the path, other than those which are incidental to any maintenance.

- Where the owner or occupier fails to comply with his or her duty under Article 5 (to maintain existing stiles and gates, etc) or Article 7 (not to plough a headland path and to restore ploughed cross-field paths) the council may, after giving 14 days notice, "take all necessary steps" to rectify the deficiency and recover its costs. Such action must be limited to that which is reasonable to remedy the owner's deficiency. It is not clear whether a court would regard the council as being entitled to cross over other land with machinery or equipment to get to the right of way, or as being indemnified for any damage so caused. Possibly it would not.

5.1.3 Applying the council's powers in practice

In practice the action that the council takes will often depend on what is agreed with the owner or occupier of the land. Whenever a particular problem or difficulty arises or seems to be developing, the council, having first satisfied itself that the path is a public right of way, should always approach the owner and occupier to discuss it with them. The aim should be to reach mutual agreement on exactly what is the wrong, what needs to be done to put it right and who should take responsibility.

Possible options include: securing an undertaking that the owner or occupier will carry out, and pay for, the works that are required; that the council will do so (with the owner's consent, where necessary, eg to gain access to the site); or that the landowner will carry out the work with financial or other help from the council (eg the provision of materials). When it is justified by the circumstances of the case the owner might also be given the opportunity of working for the council on a contractual basis, providing this is cost effective and the work can be carried out to a sufficient standard. Alternatively, it might be agreed that the work will be carried out using any voluntary labour that is available. Whatever solution is agreed, it should be confirmed by the council in writing and a firm date set by which the work will be completed.

It will occasionally be apparent that the only satisfactory long-term solution to a particular maintenance problem is for the path to be diverted onto a more suitable line. The council should nevertheless insist that any deliberate obstructions are removed and ensure natural vegetation is cleared so that the path is kept open, at least at a basic level, while the necessary path order is being made and determined. Not only is it wrong that the public should be denied the opportunity to use the path during this period; if the public's rights are not being respected it is more likely that an order will attract objections. Nor can the outcome of an opposed order necessarily be predicted. Where it is not practicable to put the path into a reasonable condition or this can only be achieved at a disproportionate expense (eg such as for a path which is over boggy ground) a temporary diversion onto a better line might be considered using the council's powers under Article 19 (see sections 6.1-6.2).

Where it proves impossible to reach agreement amicably and there are doubts about the council's powers to take default action, the only option will be to consider legal proceedings. The threat of such action may in itself be sufficient to encourage

the owner to reach a negotiated settlement. But if it does not the council must be prepared to institute proceedings, both to comply with its statutory duty and to keep faith with other owners and occupiers who have honoured their responsibilities.

Legal proceedings, or default action, should only be taken after the council has made certain by following the assertion procedures that the path is a public right of way. If an assertion has already been made but not vindicated, the council should ask the County Court to do so now so that any challenge may be considered and the line and status of the path confirmed before any other proceedings are heard.

The fact that formal legal proceedings have started will inevitably make it more difficult to continue with any negotiations. Nevertheless, the council should make it clear to all those who are involved that it remains willing to do so, and would much prefer to reach an agreed solution if at all possible.

5.1.4 Undertaking consultations and obtaining permission

it is a statutory requirement that the council must consult the owner of the land before it exercises its power to maintain any public right of way (article 3(2)), and also that it consults either the owner or the occupier before it erects or maintains any signposts or waymarks (Article 4(1)). However, it is good practice to consult more widely than this, informing everyone who has an interest in the land crossed by the path and giving them the opportunity to comment before carrying out any work to it.

It is also good practice to carry out a more wide ranging consultation exercise before deciding to promote a public right of way (for example, in a circular walks leaflet) or when planning a major programme of work, even although the council has no statutory obligation to do so. Depending on the circumstances, those to be consulted might include (in addition those with an interest in the land) any local community association, path user group or individuals who are likely to wish to express an opinion, and the local representatives of UFU and NIAPA. The list in the table below should help to determine who must be consulted statutorily, and who should also be consulted on a non-statutory basis on other occasions.

Consulting with the owner or owner does not mean that his or her consent must be obtained – even when the consultation is a statutory one. Nor, of course, does the council need the owner's permission before removing something that has been placed

on the line of the right of way illegally and which is causing an obstruction. (Although the council must still act responsibly by ensuring, for example, that in removing it stock does not then escape.) There are however a number of circumstances where the owner or occupiers specific permission will be required. These are also summarised in the table below. They include permission to cross any land that is not part of the public right of way with machinery or equipment in order to reach the line of the path, and to replace, repair or remove any gate or stile on it that is the owner's property. Permission is similarly required to paint or place a waymark on anything that is the owner's property (including trees) but not to put up a new signpost or waymarking post on the line of the path.

WHEN TO CONSULT OR SEEK PERMISSION

Statutory consultation must be carried out:

- **with the owner of the land**
- before the council exercises its power to maintain any public right of way (article 3(2))
- **with the owner or the occupier of the land**
- before the council erects or maintains any signposts, waymarks or similar works on a public right of way (article 4(1))

Other (non-statutory) consultations are desirable:

- **with anyone else who has an interest in the land** not covered by the above
- before either maintaining a public right of way or signposting or waymarking it
- with the landowner, with anyone else having an interests in the land and with the local community
- before publicising or promoting the path (eg in a walks leaflet).

Permission is needed:

- **from the owner of the land and/or the tenant**
- before repairing, altering or removing any gate, stile or similar structure that is the owner or tenant's property (but not before removing an illegal obstruction he or she may have placed on the line of the path or clearing vegetation growing on the surface of the path);
- before painting or affixing a sign or waymark on any such gate, stile or similar structure, or on any building or tree (but not before putting up a fingerpost or post to carry waymarks, on the line of the right of way);
- before crossing any land that is not part of the public right of way with machinery or equipment in order to reach the path to maintain it.

The table below summarises the steps to be taken in practice when carrying out a consultation or seeking permission and is designed to be used as a checklist. It is important, in particular, that the consultation or request for permission is in writing, that it clearly states why it has been sent, and that the recipient is given enough information to take a view on what is proposed. A reasonable period of time must also be allowed for the recipient to respond. If some or all of the statutory consultees have already been involved in informal discussions and are believed to have no objection to the proposed work, this can be reflected in the wording of the letter. But a letter should still be sent, even if it makes it clear that this is only for the record and that a reply will be necessary only if the recipient has changed his or her mind. Where the consultee has not previously been approached, the letter should include an invitation to telephone the council to discuss the work or to arrange a site meeting.

The council should, of course, remain willing to modify its proposals in the light of the comments it receives. But if significant changes are made and other people are also involved, the whole consultation may have to be repeated since these people may have had no objection to the original proposals but be unhappy with the revised ones. The council should also ensure that everyone who responded to the consultations, and every owner and occupier, whether or not they responded, is informed of the outcome.

THE CONSULTATION PROCESS / SEEKING PERMISSION IN PRACTICE

The consultation or request for permission should:

- Be in writing
- Explain clearly why it has been sent. This will be either
- to give the recipient the opportunity to express his or her views as required by the legislation (statutory consultation);
- to give the recipient the opportunity to express his or her views as a matter of courtesy (non-statutory consultation);
- to ask for the recipient's permission to allow the council carry out the proposed work;
- Describe briefly the work that is proposed;
- Explain why it is considered necessary, and how, when and by whom it will be carried out;
- Give the name of an officer who can be contact for further details or to discuss the matter;
- Allow a reasonable time (2 or 3 weeks) for the recipient to respond;
- State clearly where responses should be sent;
- Include a simple tear-off slip that the recipient can sign

to acknowledge receiving the consultation and/or give permission (if this is being sought), together with a postage-paid return envelope.

Considering the response

- The requirement to consult does **not** mean that the consultee's permission is required.
- The council should, however, considers all the views that have been expressed (including any expressed verbally) before deciding whether to proceed.
- You should try (within reason) to meet any objections that are expressed. If this is not possible, the reasons should be explained to the consultee in writing.
- A brief file note should also be made of way the responses were handled, to be kept available for future reference.

If permission has been sought:

- Try, whenever possible, to obtain this in writing;
- If permission is given verbally, record what was said, when and by whom, in the form of a file note.
- Take note of any conditions or limitations that are stipulated. Make sure that the person who is to carry out the work is aware of any such conditions.

If permission is refused and there is no alternative way of carrying out the work, it may be necessary to abandon it. Seek advice from the council's solicitor.

5.1.5 Fulfilling the consultation requirement where the owner or occupier cannot be identified

The Access Order makes no provision for a situation in which the owner or occupier cannot be identified, even though council's powers to maintain and signpost paths are dependant on their having been consulted. In the Department's view, it would be sufficient to meet the statutory requirements for a consultation letter to be displayed conspicuously on the land, following the procedures for the service of a public path order notice in these circumstances (see section 6.2.5). The letter should be addressed to "the owner or and occupier of the land" and remain in place throughout the consultation period.

5.2 KEEPING PATHS FREE OF OBSTRUCTION OF ENCROACHMENT

5.2.1 The meaning of "obstruction or encroachment"

The council's duties include keeping any public right of way *open and free from obstruction or encroachment* - Art 3 (1). To either obstruct, or encroach onto, a highway is a form of public nuisance and is both a crime at common law and a tort (civil wrong), so that the wrongdoer may be both prosecuted and sued. It may also be a private nuisance for which the wrongdoer can be sued.

The term *keep open and free from obstruction* is not defined in the Access Order but traditionally this was taken as the duty to undertake such work as necessary to enable passage along the route by a reasonably active person, wearing appropriate walking clothes. This should now be reviewed in the light of the Disability Discrimination Act which requires that reasonable provision is made for people with disabilities. It is recommended that, where considered necessary, district councils take appropriate advice on this matter (see 5.2.5).

Vegetation such as fallen trees, dense brambles or nettles may be considered as obstructions; as would any barrier erected across the route which does not permit easy passage.

Minor flooding, long grass or uneven surfaces may not be considered as obstructions.

"Obstruction" has been judicially described as "A nuisance to the way .... which prevents the convenient use of the way by passengers" and as "something which permanently or temporarily removes the whole or part of the highway from public use altogether". The comment has also been made that "It is perfectly clear that anything which substantially prevents the public from having free access over the whole of the highway that is not purely temporary in nature is an unlawful obstruction.

These cases make the point that there does not have to be a complete blockage of the right of way; anything that partially obstructs the path or that makes it inconvenient to use can be regarded as an obstruction, unless it is so minor or temporary as to be inconsequential. Among the wide range of matters that have been accepted by the courts to be an obstruction are:

- replacing a two foot high stile with a five barred gate;
- erecting a gate across a path;

- planting a hedge or putting up a fence so as to reduce the existing width of a path;
- gates across the entire width of a bridleway that were tied together with twine and inconvenient to open;
- erecting telegraph poles, without statutory authority, which interfered with walkers;
- allowing a garden wall to fall onto the footway;
- erecting a building across a public right of way;
- allowing fat to fall onto a paved footway making it slippery.

A growing crop on the line of a public right of way can also constitute an obstruction, depending on the type of crop, its height and characteristics. For example, successful prosecutions have been brought against owners for failing to keep rights of way clear through a field ridged for potatoes, a field of cabbages and corn crops 39 and 45 inches high.

Other matters that might constitute an obstruction include placing barbed wire along the top rail of a stile, placing a post in front of a squeeze stile to stop sheep getting through, putting up an electric fence without the council's authority, dumping rubbish and parking farm machinery for long periods on the line of a right of way.

The term "encroachment" is less clearly defined; generally encroachment has been taken as part and parcel of an obstruction. But the term might include any commercial activities on the adjoining land which "spill over" onto a right of way, allowing an adjoining hedge to get overgrown so that the right of way is difficult to use (see below) and crops that fall over onto the line of the path.

Generally, any works to the surface of a public right of way should result in a situation whereby the route is passable with no more impediments than previously.

Ultimately, it is for the courts to decide in any specific case whether an obstruction has taken place; ie whether the public's rights of passage have been impeded. This can, in turn, give rise to the question of what is a reasonable use of the right of way (see section 3.3.1). But something which is so minor or temporary in nature as to be inconsequential will not be regarded as an obstruction. The guiding principle is what is know as the *de minimus* rule (`*de minimus non curat lex*' - the law is not concerned with trifles). It will also be a defence to show that the matter complained about is something that has always been there or has always taken place, and that the dedication of the right of way to the public was therefore subject to this

limitation. In general, however, the onus will be on the person against whom action is being taken to show that no obstruction has taken place.

5.2.2 Obstruction from natural causes

Obstruction can also arise from an omission - ie a failure to take action - by either the owner or occupier of the land, or any other person. A typical example is where a right of way becomes obstructed through natural causes, such as from an adjoining hedge which gets badly overgrown, a fallen tree across the line of the path or scrub and brambles growing up on the path surface. While all of these matters clearly constitute an obstruction, and therefore must be dealt with by the council, it not always easy to see where the responsibility for them might lie.

The legislation in England and Wales provides that natural vegetation growing on the surface of a right of way is the highway authority's responsibility (by virtue of the fact that the authority owns the surface of all publicly maintainable paths), whereas it is the landowner or occupier who is responsible for natural vegetation growing alongside the path and any crops he or she has planted, whether alongside or on the path itself. Although this legislation does not apply in Northern Ireland, it would seem that the owners' or occupiers' responsibilities at common law are essentially the same as far as problems that arise on land alongside the right of way are concerned. The owner or occupier is therefore responsible for keeping adjoining hedges cut back and for removing any trees that fall across the path. He or she will similarly be responsible for any crops, whether they growing alongside the right of way or on the path surface.

It is less certain where responsibility for natural vegetation growing on the surface path might lie. It might be that a court in Northern Ireland would accept that responsibility at common law also rests with the owner or occupier. But if the need to remove natural vegetation is regarded as part and parcel of the need to maintain the surface of the path then the responsibility may rest with no one. However, a common-sense, practical solution which mirrors the English legislation, would be for the council to offer to assume responsibility and take such action as is needed using its discretionary powers of maintenance.

5.2.3 Dealing with obstructions and encroachment

District councils have a duty to *protect and keep open and free*

from obstruction any public right of way - *Article 3 (1)*.
Councils may also, *after consultation with the owner of the land concerned, maintain any public right of way – Article 3 (2).*

The term *keep open and free from obstruction* is not defined but traditionally this was taken as the duty to undertake such work as necessary to enable passage along the route by a reasonably active person, wearing appropriate walking clothes. This should now be reviewed in the light of the Disability Discrimination Act which requires that *reasonable provision* is made for people with disabilities.
It is recommended that, where considered necessary, district councils take appropriate advice on this matter.

Vegetation such as fallen trees, dense brambles or nettles may be considered as *obstructions;* as would any barrier erected across the route which does not permit easy passage.

Minor flooding, long grass or uneven surfaces may not be considered as obstructions.

Councils may also, after consultation with the owner of the land concerned, maintain any public right of way – Article 3 (2). This can be taken to involve minor works other than that required to keep a path open and free from obstruction.

In Northern Ireland, there is no clear duty placed on anyone to maintain public rights of way but, if district councils assume responsibility as part of their leisure function, a general approach might be based upon the following:

The extent of maintenance is that required to keep the route reasonably passable, at all seasons of the year, for the ordinary traffic of the neighborhood, of all classes entitled to use the way (eg walkers, horses, etc)

Path maintenance should be in keeping with the likely level of usage.
For example a route leading to a church or graveyard might be expected to be maintained to a higher level than a seldom-used remote path in the countryside.

The council should endeavour to take action quickly to deal with any obstruction or encroachment of a right of way that is reported to it, or which it finds from its own inspections. As noted in section 5.1.2 however, there is uncertainty about the council's powers to take direct action to remove a physical obstruction against the wishes of the owner or occupier.

Depending on the circumstances, therefore, the only option may to threaten or to take legal proceedings.

Sometimes, public rights of way can be damaged by the legitimate use of farm tractors (often by the landowner only); other than by persuasion, Councils have no power to prevent this. In extreme cases, EHS can consider grant aid for upgrading such routes to provide a surfaced road suitable for all users.

If the path is one that is being restored to good condition after a period of neglect, the removal of any obstructions will normally be part of a comprehensive programme of work drawn up and agreed with the owners and occupiers concerned. In these circumstances it will clearly be sensible to deal with all natural vegetation at the same time, whether growing from the surface of the path or overhanging from the sides. The division of responsibility suggested above should therefore be applied liberally and the council should be willing (with the owners agreement) to undertake all of the clearance that is required. Alternatively the owner might agree to do so, with a small financial contribution from the council to cover clearance of the path surface.

It should be noted that council's powers to restore a ploughed path (see section 5.4.2) do not extend to dealing with any crops that are growing on the line of a right of way. They must therefore be dealt with as an obstruction.

5.2.4 Alley Gating

The CROW Act in GB contains provisions for the erection of security gates across public rights of way, at defined locations, to restrict anti-social behaviour. There is no such provision in current access legislation here in Northern Ireland.

A proposal to erect alley gates should therefore take into account the existence of any public right of way. It may be possible to have these extinguished or diverted by a statutory process and this should be done before gates are erected by a district council or other authority.

Roads Service has published guidance notes on alley gating on the following website:
www.drdni.net/DRDwww_FOISearch/document.asp?doc=2733

It is recommended that updates are sought from Roads Service before embarking upon any work related to these notes.

5.2.5 Access and the Disability Discrimination Act 1995

Part III of the Act makes it unlawful for a service provider to discriminate against a disabled person by:

- Refusing to provide (or deliberately not providing) any service which it provides to members of the public; or
- Providing service of a lower standard or in a worse manner; or
- Providing service on worse terms,

whether or not there is a charge for the service.

It is also unlawful to fail to make reasonable adjustments which may assist a disabled person to make use of any such service.

Compliance with the DDA will require differing solutions for different situations and the best advice is often to seek professional help from a person with the necessary expertise. Such advice is often available from within district councils and specific issues might be raised with:

Disability Action - www.disabilityaction.org

The Fieldfare Trust - www.fieldfare.org.uk

Disability Rights Commission - www.drc-gb.org/

RNIB - www.rnib.org.uk

Countryside Agency publications - www.countryside.gov.uk/search/jsp/verity/search.jsp

5.3 SIGNPOSTING AND WAYMARKING PATHS

5.3.1 The importance of signposting and waymarking

Clear signposting and waymarking is essential to the enjoyment and good management of public rights of way. It enables path users to find the start of any path, to know how the path can be used and to follow the line with confidence. For the landowner and occupier it will help to ensure that people keep to the line of the path and do not trespass unintentionally.

Once a path is signposted and waymarked, however, many

people will expect to be able to following the path without the aid of a map. This means that signs and waymarks should not be put up randomly but only as part of an overall, coordinated scheme. They also need to be checked regularly to ensure they are still in place and continue to show accurately the line of the path.

5.3.2 The council's powers and duties

Under Article 4 of the Access Order the council has:

- the power, after consulting the owner or the occupier of the land, to erect and maintain signposts or other similar works on any public right of way; and

- a duty to erect such signposts or similar works as are required, in the council's opinion, to assist persons who are unfamiliar with the locality to follow the course of any public right of way.

The reference to "other similar works" will include the erection of waymarks, ie small arrows or other marks to show the direction of the path.

Although the power is dependent on the owner or occupier having been consulted, as explained in section 5.1.4 this does not mean that consent must be obtained. Nevertheless it is important that any signposting and waymarking should be carried out with the owner or occupiers full agreement whenever possible. This should include reaching agreement both on the overall scheme and the precise location of the signs and waymarks. While the council's powers enable it to erect signposts and waymarking post on the owner's land, they do not appear to allow it to utilise the owners property in any way. Consent will therefore be required if, for example, waymarks are to be painted on any trees or buildings belonging to owner or fixed to a gate or stile posts. If consent is withheld, the council may have to go to the trouble of putting up separate posts to carry the waymarks.

5.3.3 Signage

A *Signage Strategy for Long Distance Routes* has been published and may be obtained from EHS or Countryside Access and Activities Network (CAAN). Copies of the guidelines are included on the CAAN website www.countrysiderecreation.com/publications/pubdetails.cfm?id=161
and are available from EHS.

It is hoped that a signage strategy for short and medium distance routes will be produced by CAAN in the near future.

Grant aid for signage provision of off-road routes may be available from EHS, see the website nhgrants@doeni.gov.uk

Where recreational routes require signs to be erected on public roads, the Roads Service document: *Guidelines for the Signing of Recreational Walking Routes* should be consulted.

5.4 ACCREDITATION OF RECREATIONAL ROUTES

Environment and Heritage Service (EHS) has a statutory duty to consider the approval of any proposed long distance walking route (Article 21 of the Access to the Countryside (NI) Order 1983).

EHS has also now agreed to undertake an accreditation role in respect of all recreational routes, this will inform agencies such as NITB and Roads Service. CAAN will assist with this process, where appropriate.

This chapter applies primarily to recreational routes, in rural areas, which are signed along public roads. For reference purposes routes are categorised by EHS and CAAN as:

Long – Over 20 miles; including the Ulster Way and all waymarked ways.
Medium – 6 to19 miles.
Short – Up to 5 miles

5.4.1 Recreational Routes on Public Roads

Roads Service permission is required for the signing of recreational routes on public roads. It has been decided that from August 2005 Roads Service will only consider such approvals where the route promoter has received EHS accreditation. This condition will apply to recreational routes of any length and, as part of this process, EHS will consult with NITB, CAAN and any other agency considered appropriate.

The criteria for EHS accreditation of routes on public roads is as follows:

1. Routes should generally be of a rural nature, in areas having good potential to attract users and should be isolated from

main roads and other areas which attract high volumes of vehicular traffic. The use of A-Class roads should be avoided unless designated walking provisions have been incorporated as part of the route.

2. Recreational routes should only follow public roads where no off-road alternative is feasible. Landowner permission is required for all proposed access to private land. Public bodies, such as Forest Service, will also wish to consider applications for proposed new routes on their land. Depending upon local requirements and grant conditions, maintenance agreements may be required for off-road paths and on-road signage.

3. If at all possible, the start/finish of routes should be served by public transport.

4. No walking route should pass through an area where there is likely to be disturbance of habitats or significant erosion of quality landscapes. Specific advice on these issues may be sought from EHS.

5. Where possible, consideration should be given to shared routes which can be promoted for use by walkers, cyclists and horse riders.

6. The need for visitor accommodation, information and services is to be considered in-line with the length and target user-groups for each route.

7. No area should contain an unreasonable number of routes which may lead to public confusion and a plethora of signs. Applications for EHS accreditation must provide details of existing routes in the locality.

8. Long distance routes, such as the Ulster Way and waymarked ways, may be linear. Other routes should preferably be circulatory and generally should be signed in a clockwise direction in accordance with Roads Service policy, reducing the need for walkers to cross roads at junctions.

9. Walkers should be encouraged to join or leave the routes at safe locations and thought should be given to parking provision where appropriate. Under Article 45 of the Access to the Countryside (Northern Ireland) Order 1983, district councils have powers to provide parking places on long

distance routes and to exercise compulsory purchase powers for this purpose.

10. Signing shall be kept to a minimum consistent with safety and the need to ensure clear directions – all signage on public roads must conform with current Roads Service policy. Signs will generally be needed at all main junctions along the route, at parking places and at defined start/ finish points. Signage on off-road sections should comply with signage guidance published by Countryside Access and Activities Network (CAAN) – for long distance routes see the link: http://www.countrysiderecreation.com/publications/pubdetails.cfm?id=158

11. If a number of routes are concentrated in a local area, route initial letters should be used in preference to trail names. Except where otherwise agreed by Roads Service, white-on-brown signage should be considered as standard on road sections to avoid confusion with other route identification.

12. The full cost of on-road signs, including design, supply, erection and any necessary replacement, shall be borne by the body requesting them. A sponsoring statutory authority, such as the district council, must underwrite this agreement.

13. Roads Service will reserve the right to review routes which may comply with the EHS criteria but which may be contrary to Roads Service policy on traffic management or public safety.

5.4.2 Recreational Routes not on Public Roads

EHS and CAAN encourage quality standards on all recreational routes.
Where application for EHS grant aid is being sought, accreditation through compliance with these standards will normally be a condition of offer.

In addition to relevant parts of the above criteria, the following will apply:

The yellow walking man is to be used for all recreational walking trails, regardless of status or length.

Utility (non-recreational) routes in urban areas should carry the pedestrian walking man (no rucksack) logo.

Apart from long distance walking trails, all other recreational routes should be signed with white-on-brown signage (without logos).

5.5 OTHER SPECIFIC LEGISLATIVE PROVISIONS

5.5.1 Stiles and gates - Articles 5 and 6

When a public right of way is dedicated at common law, the public's rights are accepted as being subject to the limitations imposed by any existing gates, stiles or similar structures that are in place at the time. Any additional stiles and gates that are put up after the right of way has come into being are an interference with the public's rights of passage, and therefore count as an obstruction unless they are specifically authorised. These provisions at common law are reflected in Articles 5 and 6 of the Access Order, which also clarifies the responsibility for maintaining gates and stiles and provides for a division of the costs between the owner and district council.

Article 5 places a duty on the owner of the land to maintain any stiles or gates across a right of way in a safe condition and to a sufficient standard to prevent unreasonable interference with the rights of users. If the owner complies with this duty, he or she is entitled to claim at least a quarter of the cost from the district council. The council may pay more if it wishes to do so. However, if the owner fails to meet his or her duty, the council, after giving not less than 14 days' notice to both the owner and the occupier, has the power to "take all necessary steps" to repair and make good the stile or gate and may recover from the owner all or part of the costs it has reasonably incurred. (See section 5.1.2 about the meaning of "all necessary steps".)

It is important to ensure this duty is complied with - as much from the landowners' point of view as that of the path users. Although the issue has never been tested, it is likely that the owner could be liable for any injuries or damage sustained by a walker or rider as a consequence of his or her failure to meet the duty (eg through a claim for damages for the civil wrong arising from a breach of a statutory duty, or for damages under the Occupiers' Liability legislation).

Relatively few landowners will take the trouble to claim the 25% contribution to which they are entitled. A more practical

approach, which many English highway authorities have adopted and which has been found to avoid the need for further action in all but a minority of cases, is to provide a "contribution" in the form of stile or bridlegate kits. These are put up either by the landowner himself or by volunteers (arranged by the council but acting on the owner's behalf) and a follow up visit made to check that the work has been carried out and is to satisfactory standard. Alternatively, if the path is being upgraded to a high standard and is to be specially promoted, the council may itself undertake to repair or renew stiles and gates as necessary at its own expense.

Article 6 enables the owner, occupier or lessee of the land to apply for - and the council to grant - authorisation for the erection of any additional gates, stiles and similar structures across a right of way. The public's rights of passage are then subject to this extra limitation, providing any conditions attached to the authorisation are complied with. These provisions are restricted to land which is used, or is to be used, for agriculture or forestry and to stiles, gates, etc needed for the efficient use of the land and to restrain animals. The conditions which the council may set are those relating to maintenance of the stile or gate, or which enable the public to use the right of way without undue interference. If the authorisation is given subject to such conditions they over-ride the provisions of Article 5. If authorisation is given without any conditions, then the provisions of Article 5 will apply to the new stile or gate as they do to any existing ones.

There appears to be no power to give permission for a gate or stile to be put up in circumstances other than those set out above, such as a stile on a path over residential property or a gate that is intended to stop vehicles from using a public right of way. Such structures are undoubtedly erected from time to time. But if the council is approached it should make it clear that it has no power to give consent, and point out that the structure might constitute an obstruction for which the owner or occupier could be prosecuted.

5.5.2 Ploughing rights of way - Articles 7 and 8

The ploughing of public rights of way is another matter in which the position at common law is clarified and modified by the Access Order and for which the council is given specific powers of enforcement.

The dedication of a public right of way at common law may (or may not) have been made subject to the right to plough

the path from time to time. Should a dispute arise, however, it would be for the person who carried out the ploughing to prove they had that right; something that would generally be very difficult or impossible to do. A further problem is that the common law does not allow for any subsequent needs that may arise after the path has come into being, such as to bring a new area of land into agricultural production or to cultivate land previously used only for pasture.

To overcome these problems, Article 7 of the Access Order gives the occupier of the land a statutory right to plough a public right of way. However, the right applies only in specific circumstances and only if certain conditions are fulfilled. Anyone who contravenes these provision commits an offence. "Ploughing" is defined as "including reference to the breaking up the surface by any mechanical means for the purposes of agriculture of forestry".

A right to plough a public right of way arises only if each one of the following criteria is satisfied:

- the land is used, or being brought into use, for agriculture or forestry;
- the ploughing is in accordance with rules of good farming or forestry;
- it is convenient to plough the path with the rest of the land; and,
- the path does not follow the sides or headland of a field or enclosure.

While this last criteria means that a field-edge path must never be ploughed, the wording of the Access Order makes it clear that if this ceases to be the case (eg because the fence or hedge alongside the path is removed) then the prohibition no longer applies.

Once a path has been ploughed, then two further conditions must be fulfilled. They are that the occupier:

- notifies the district council within 7 days that the path has been ploughed; and
- he or she reinstates the surface of the path, normally within 14 days or as soon as possible thereafter if prevented by exceptional weather conditions.

Alternatively, the occupier may apply to the council under the provision of Article 8 for an order to be made to temporarily to divert the path and extend the restoration period for up to three months on the ground that it is "expedient in the interests of good farming and forestry" to do so. The procedures that should be followed in determining an application and making an order are set out in section 6.4.2.

If a path is ploughed illegally, or is ploughed legally but not restored, the district council has two options. It can prosecute the person responsible; if convicted he or she may be fined up to ,200. Alternatively - or in addition - it may, after giving the occupier at least 14 days notice, "take all necessary steps" to reinstate the surface of the path and recover the expenses it has reasonably incurred. It is the second of these that is likely to be the preferable option should the need arise. This will ensure the path is restored to use quickly, rather than remaining in an unsatisfactory condition for some months while a prosecution is pending.

The Access Order gives no indication of what is required to meet the occupier's duty to "reinstate the surface of the way". Although "reinstate" implies that the condition of the path should be at least as good as that which existed before the ploughing took place, this will often be difficult to achieve. Given the machinery that is available, most farmers will be able to do no more than roll the line of the path to provide a level and relatively firm surface.

5.5.3 Pasturing of bulls - Article 9

Article 9 of the Access Order makes it an offence - with important exceptions - for the occupier to permit a bull to be at large in a field or enclosure through which there is a public right of way. The exceptions are bulls not more than 10 months old, and those which are not a recognised dairy breed and are at large with cows or heifers. This means that:

- there is no prohibition on any bull aged 10 months old or less;

- a bull that is over 10 months old is prohibited if kept on its own;
- a bull that is over 10 months old and is a recognised dairy breed is prohibited, even if it is with cows or heifers.

The term "recognised dairy breed" is not defined in the Access

Order. (In the comparable English legislation the breeds are specified as being: Ayrshire, British Friesian, British Holstein, Dairy Shorthorn, Guernsey, Jersey and Kerry.) "Field or enclosure" would exclude areas of open hillside. Although Article 9 places no specific duties or responsibilities on the district council, the council should nonetheless be prepared to work closely with the farming community to help resolve the problems that can arise, both for path users and for farmers.

There is no doubt that the presence of any bull, whatever its age or breed, can be a strong deterrent to anyone walking on a right of way. Many farmers too will wish to avoid the situation in which the public can potentially come into contact with any bull on their land. Over and above the requirements of the Access Order, an employer or self employed person has an obligation under the Health and Safety at Work legislation not to put at risk any person not in their employment. If a bull attacks or injures someone the owner would almost certainly be liable to be prosecuted or sued (or both), under this or other legislation or at common law.

The district council should therefore endeavour to ensure that farmers are fully aware of the statutory requirements and help them overcome the practical problems that can arise. Where it is impossible to avoid pasturing a bull in field crossed by a right of way the council should be prepared to consider sympathetically any request to temporarily divert the right of way, or permanently if the circumstances warrant it (see section 6).

Enforcement of the Health and Safety legislation is primarily a matter for the Health and Safety Executive and any incident involving a bull on a right of way, whether or not it is there legally, should be reported to them. Guidance Notes are published by the Executive giving advice on the safe custody of bulls, including in areas to which the public have access.

Although a "Beware of the bull" notice may be put up (and might be advised by the Health and Safety Executive) it should only be in place when a bull is actually present. It is likely that such a notice if it is displayed at other times would be illegal. Notices that are deliberately worded so as to deter use of the right of way or to intimidate people, such as "Dangerous bull - Keep out" or "Entry free - the Bull charges later" are also illegal. (See section 5.5.4)

5.5.4 Misleading notices

Article 10 makes it an offence for any person to put up or

maintain a notice containing a false or misleading statement likely to deter the public from using a public right of way.

What constitutes a "false or misleading statement" has never been tested. The provisions would seem clearly to apply to a notice such as "Warning - Dangerous dog" when the dog either does not exist or does not have access to the path. (If it does, however, then it is likely to constitute an obstruction, as well as any offence which may be committed under the dogs legislation.) But there is uncertainty about a notice which states "Private land" on land crossed by a public right of way, or just "Private" at the entrance to a drive which the right of way follows. The solution adopted by English highway authorities is simply to put up a "Public right of way" signpost near to the owner's notice. Where necessary, this might be reinforced by waymarking the line of the path to give added reassurance.

Under Article 6 of the Fines and Penalties (NI) Order 1984, (as amended), a person who contravenes Article 10 of the Access Order is now liable on summary conviction to a maximum fine of £50:00.

5.5.5 Level of fines

The fines payable under the Access Order have not increased in recent years. Any person who places or maintains on or near a public right of way a notice containing false or misleading statement likely to deter the public from using the way (see Article 10 of the Access Order), shall be liable on summary conviction to a fine not exceeding £50:00.

In addition to the above, the maximum fine under both Art 7 (right to plough) and Art 9 (pasturing of bulls) remains at £200:00.

5.5.6 Abandonment by DRD Roads Service

Article 68 of the Roads (NI) Order 1993 provides for the abandonment of any road and the extinguishment of any public right of way thereupon. However, under Art 68(4), no order shall be made unless DRD is of the opinion that the road is no longer necessary for road traffic (it is understood that this can be taken to include pedestrian traffic) or that alternative facilities are available.

Para 1 of Schedule 8 of the 1993 Order, requires DRD to publicise any proposed road abandonment. Para 2(1) requires that a notice be served on any relevant district council.

The district council may formally object to the abandonment. If that fails, it has been suggested that the council may try either to negotiate the establishment of a new right of way by agreement or to make a Public Path Creation Order and hope that it is eventually confirmed. Councils should note that the second option above may involve a compensation payment to the landowner.

At the very minimum, councils might consider pressing for the abandonment order to be changed to a stopping-up order – this allows Roads Service to restrict the use of the road by vehicles but does not take away their maintenance responsibilities.

SECTION 6 PUBLIC PATH ORDERS

The Access Order allows the district council to make orders to create, divert or extinguish public rights of way. These are important discretionary powers which can be used to ensure that rights of way meet today's recreational need, are sustainable and do not conflict with farming or other land uses.

The powers allow for both the permanent and temporary diversion or closure of existing rights of way. Where new rights of way are needed they should, of course, be secured by agreement whenever it is possible do so (as set out in the next section). But where that is not possible then the powers to make a creation order allow for the arguments for and against the proposal to heard in public, and for an independent decision to be taken.
Any public path order which the council prepares will be an important legal document. If the change is to be a permanent one, then the order must first be advertised and any objections formally determined. For these reasons procedures are laid down which the council must follow. They are set out both in the relevant articles and Schedule 1 to the Access Order, and in the related Regulations - The Access to the Countryside Regulations (Northern Ireland) 1984 (SI No. 342 of 1984) and The Access to the Countryside (Amendment) Regulations (Northern Ireland) 1985 (SI No. 152 of 1985).

Of most interest to district councils are probably the sections dealing with the wording which should be used for public path diversion and extinguishment orders. The respective details are contained within:

***Public Path Diversion Orders** – Form (3) of Schedule (1) of the*
Access to the Countryside Regulations (Northern Ireland) 1984

***Public Path Extinguishment Orders** – Form (2) of the Schedule contained within the*
Access to the Countryside (Amendment) Regulations (Northern Ireland) 1985

It is important that the wording of the forms is followed precisely. Examples of the type wording which might be used for orders made by district councils are included in Appendix 3 but, where doubt may exist, councils are recommended to obtain copies of the Regulations and to seek appropriate legal advice.

This section of the Guidance Notes describes the scope of the powers available to the council and sets out, step-by-step, the procedures that should be followed in making and confirming any public path orders. It also covers the diversion or extinguishment of public paths to allow development to proceed, and the making of temporary public path orders.

6.1 OUTLINE OF THE PROCEDURES AND POWERS

6.1.1 Why public path orders are necessary

The over-riding principle of "once a highway, always a highway" means that once a public right of way comes into being it continues to exist, in law, until such time as it is closed or diverted by due legal process. Although a farmer or landowner may believe, for example, that a particular path has "fallen into disuse and is no longer needed", threatens the security of the farm holding or conflicts with today's farming practices, he or she has no right to divert or extinguish the path, even temporarily. To do so is an offence and the person risks prosecution. Moreover, the public are not obliged to follow an "unofficial" diversion, but if they do it is possible that over time a second, additional right of way will become established at common law. All the farmer or landowner who wishes to change a public right of way can do, therefore, is to persuade a body with the necessary powers such as the district council to make a formal path order.

In carrying out an assertion, the district council similarly has no power to "unofficially" vary the line of the path. If it does it also risks creating a new right of way, in addition to the original line which will continue to exist in law. All the council can do, having asserted the right of way, is to then formally take steps to divert (or close) the path.

While most council's will be prepared to consider making an order to divert or extinguish a right of way, they may have considerable reservations in creating a new path by order. Nevertheless, the ability to make such an order is an important provision and the possibility should never be ruled out entirely.

Linked public path creation and extinguishment orders may sometimes be needed to bring about a change that cannot be secured by a diversion order (see section 6.1.4). A creation order may also be the only way in which genuine conflicts of interest or opinion about the need for a new path can be resolved. It might be, for example, that despite protracted negotiations one or more of the landowners remains unwilling to agree a new path for what he or she sees as perfectly valid reasons, whilst the council, community groups and tourism interests all believe the path is essential and would bring significant benefits to the whole of the area. The ability to make a creation order will also be valuable in cases where there is disagreement over the level of compensation that should be paid, making it possible for the matter then to be referred to arbitration by the Lands Tribunal

for Northern Ireland.

Making a public path order in these circumstances should not be seen as confrontational. Rather, it should be seen as the correct and democratic way in which all the conflicting arguments for and against a proposal can be fully debated, in public, and for an independent, neutral decision to be taken on the merits of the case.

6.1.2 Outline of the procedure

The terminology used in connection with public path orders can be confusing. The district council makes a public path order, but this is the initial stage, not the end of the process. The right to object comes when notice of the making of the order has been published in a local newspaper, served on everyone with an interest in the land (the landowners and any lessees or occupiers) and other "prescribed" bodies, and displayed on the path and elsewhere in the locality.

If no objections are received within 28 days, or any that are received are withdrawn, the district council may itself decide to confirm the order, but can only do so without modifications. If the council wishes to change the order in any way, or if objections have been made that are not withdrawn and the council still wishes to proceed, it must submit the order and the objections to the Department of the Environment. The Department will deal with the order by an exchange of correspondence (the written representations procedure) or, if this does not seem likely to reach a conclusion, by holding a public local inquiry.

The Department may decide either to confirm the order as submitted, confirm the order with modifications or not to confirm the order. However, if the Department wishes to modify the order in a way that affects any additional land (eg by changing the line of the path), it must first give notice of the proposed modifications and allow a further 28 day period for any objections or representations to be made. Any that are received are dealt with as set out above.

If the order is confirmed (whether by the council or the Department) a copy and a formal notice of confirmation is served on those with an interest in the land. The notice is also published in a local newspaper, sent to other interested bodies and put up on the path and in the area. If the order is not confirmed a notice is on served on those with an interest in the land but does not have to be published or put up on the path.

The confirmation of an order does not necessarily mean that the legal change has occurred. When that happens will depend on the wording of the order. In some cases (eg when the path is being extinguished and no alternative path is to be provided) the order may specify that it should come into effect when it is confirmed. More commonly, to give time for any new path to be prepared, the order will specify that it should come into effect a set number of days after the date of confirmation. It is the district council's responsibility to carry out any works that are needed to bring any new path into a fit state for public use (although it may have been agreed that the person who asked for the order to be made will pay or contribute towards these costs) and then to maintain the path in that state.

There is no specific requirement to put up a notice on a path that has been closed, but it is often helpful for this to be done and to indicate where the new path (if any) runs. The Ordnance Survey should also be told about any confirmed path orders so it can take the changes into account when its maps are next revised.

Any temporary path orders which the council makes are not subject to these procedures and come into effect as and when they are made (see section 6.4).

6.1.3 Grounds for making an order and the tests to be satisfied

A public path order may be made by the council as a result of a request made to it, or it may itself decide to make an order without having been requested to do so. However, orders can only be made for one or other of the specific reasons provided for in the Access Order.

Both in making an order and in confirming an order as unopposed, the council must be satisfied that the criteria and tests laid down in the Access Order can be met. If the order is opposed, the council must also be able to demonstrate to the Department that they can be met. The criteria and tests are summarised in figure 6. They include general tests such as being satisfied that the path is needed and it is "expedient" to make the order, and more specific requirements relating to each type of path order.
The term *expedient* is one that is often used in legislation, particularly in relation to the exercise of a body's discretionary powers, but has never been specifically defined by the courts. It is therefore appropriate to give the word its common, ordinary meaning. The Shorter Oxford English Dictionary defines *expedient* as meaning advantageous or advisable on practical

ground. Other dictionary definitions are that it means beneficial, worthwhile, helpful or useful in a particular situation, or suitable for achieving a particular end in a given circumstance.

6.1.4 Concurrent extinguishment and creation or diversion orders

A diversion must commence (or terminate) at some point on the line of the original path. Where the proposed alternative does not join the existing path (eg it runs parallel to it) then the existing path cannot be diverted but only extinguished. However, the Access Order makes it possible for an extinguishment order to be considered concurrently with a creation or diversion order which would, if confirmed, provide an alternative path to that proposed for closure (Article 14(5)). In this case the tests to be applied to the extinguishment order set out in figure 6 are modified. The council, in considering the extent to which the existing path is needed for public use, and the Department, in considering the extent to which the path would be likely to be used, may have regard to the extent to which the creation or diversion order would provide an alternative path.

It is important to note that it is still necessary for each one of the orders separately to meet the appropriate tests and criteria that are laid down. If linked orders are made in this way and objections or representations are made to one but not the other, both orders should be submitted to the Department for determination.

Figure 6: **GROUNDS FOR MAKING A PUBLIC PATH ORDER AND THE TESTS TO BE SATISFIED**

Article 12: Creating a new path

- It must appear to the council that there is a need for a public path and that it is impractical to create it by agreement.

- The council must also be satisfied that it is expedient to create the path having regard to :
  - the extent to which it would add to the convenience or enjoyment of a substantial section of the public or the convenience of local residents, and;
  - the effect which the creation would have on the rights of those with an interest in the land, taking into account the provisions for compensation.

Article 14: Closing (extinguishing or stopping up) an existing path

- Before making an order, it must appear to the council that it is expedient to stop up the path on the grounds that it is not needed for public use.

- Before confirming an order the council or the Department of the Environment must be satisfied that it is expedient to do so having regard to the extent to which the path would be likely to be used and the effect which closure would have on land served by it, taking into account the provisions for compensation.
- Both in making and confirming an order, any temporary circumstances preventing or diminishing the use of the path by the public must be disregarded.

Article 15: Diverting an existing path

- Before making an order the council must be satisfied that it is expedient to divert the path, in the interests of the owner, lessee or occupier of the land crossed by the path or otherwise.

- Before confirming an order the council or Department of the Environment must again be satisfied that it is expedient as set out above.

- The council or Department must further be satisfied that:
  - the path will not be substantially less convenient to the public as a consequence of the diversion, and;
  - it is expedient to confirm the order having regard to the effect it will have on public enjoyment of the path as a whole or on any other public path, on other land served by the existing path, and on land affected by any proposed new path, taking into account the provisions for compensation.

NB: The new route provided by a diversion order may be partially along an existing right of way. But where the whole of the alternative line is already a public right of way, the path is not, in fact, being "diverted" but is being extinguished. In such cases the council should make an extinguishment order.

6.2 THE STAGES OF A PUBLIC PATH ORDER

6.2.1 Preliminary consultation

It is a statutory requirement under Article 18(1) that, before making a public path order (or a public path agreement), the district council shall consult the Department and other bodies representing those who are likely to be affected by the agreement or order. However this should be seen as being the basic, minimum requirement; the council should aim in practice to identify as many of the interests as possible that people have in the right of way and develop proposals that not only satisfy the relevant legal tests but which are broadly accepted as being both necessary and fair. This will often mean considering alternative ideas, and the council should remain willing to modify (or even abandon) its initial proposals in the light of the views expressed.

Such consultations are inevitably time consuming. But they will pay dividends in helping to avoid formal objection to the order when it is made, or in allowing the council (if there are objections) to put forward the strongest possible case. If the proposed change is one that is being requested by a community group, path user group or similar body it may be appropriate for the group itself to take the lead in the consultations. This should, however, always be with the agreement of council and the council should be willing to offer whatever advice and guidance is needed.

It would be unrealistic to expect that agreement can always be reached in every case. Genuine differences of opinion or conflicts of interest will sometimes remain which can only be resolved once an order has been made, either by being debated at a local inquiry or through the written representations procedure. Nor can informal consultations necessarily identify all of the views that people may have or points they wish to raise. New ones may sometimes arise only after an order has been made and advertised, when everyone who may have an interest in the path becomes aware of changes that are proposed.

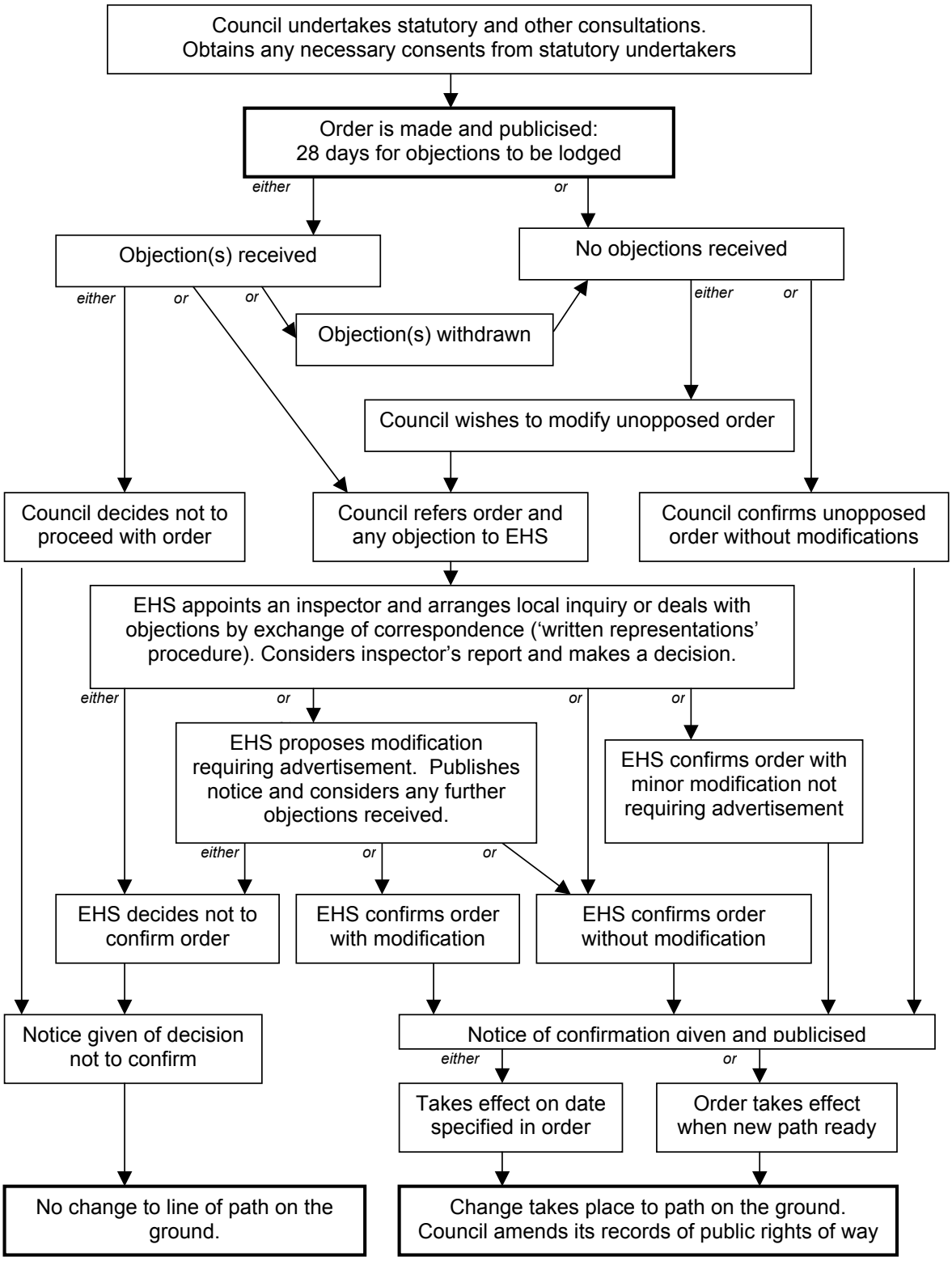
6.2.2 The interests of statutory undertakers and government departments.

A public path order cannot be made or confirmed for any land where there is apparatus belonging to, or used by, a statutory undertaker without the consent of the statutory undertaker concerned (Article 18). Since the apparatus includes that which

may be in or under the land, as well as on, over, along or across it, and may not be apparent, it is essential that all statutory undertakers are consulted at an early stage and their consent obtained where necessary. Consent may not be unreasonably withheld, but may be conditional on the inclusion of a saving clause in the order to preserve the rights and interests currently enjoyed in relation to the apparatus. A suggested list of statutory undertakers is included at Appendix 5 (Contact Addresses 3).

Consent is also required from the government department concerned to the making of an order which affects any `Crown land', that is land belonging to or held by a government department (Article 53). Consent should similarly be obtained from the appropriate Divisional Office of the Roads Service before an order is made for any new path which connects to a trunk road (a trunk road is part of the main system of routes for through traffic in Northern Ireland).

***Figure 7*: PUBLIC PATH CREATION ORDER PROCEDURE**



NB. Chart does not show any subsequent County Court challenge to a decision, or the determination of any claims for compensation that arise from the compulsory creation of a new ROW.

6.2.3 Deciding whether to make an order

The decision whether to make an order is entirely at the discretion of the district council. There is no right of appeal for an applicant should the council decide not to do so, although it is of course open to the council to reconsider its decision at any time.

In addition to taking into account the consultations it has undertaken and any other factors it considers to be relevant, it is essential that the council fully satisfies itself that the purpose for which the order is being made is in accordance with the criteria set out in the legislation and the council must also be of the opinion that it will be able to meet the tests which have to be applied before the order can be confirmed (see figure 6).

6.2.4 Preparing the order and order map

The order must be drafted following as precisely as possible the prescribed words for the relevant type of order, as set out in Schedule 1 to the Access to the Countryside Regulations (NI) 1984 (SI No. 342 of 1984). Form No. 1 should be used for a public path creation order and Form No. 3 for a diversion order. For an extinguishment order, Form No. 2 from the 1985 Regulations is used. A model public path extinguishment order is included in Appendix 14 and a model diversion order can be found in Appendix 15.

In setting the number of days, after the date of confirmation, when the order will take effect it is important to allow sufficient time for any new right of way to be made available for public use. In the case of a diversion order, the existing right of way should not be extinguished until the creation of the new path takes effect.

It is also important that the description of the proposals set out in the order schedule and the accompanying order map are both accurate and clear, and the schedule contains sufficient detail to enable the position of the path to be identified on the ground. This should include a grid reference of the start and end of the path, its general direction, the overall length and length between any intermediate points and (for any new path) details of the width of the path. It is usual for the start of the path, any intermediate points such as a change of direction or conspicuous features, and the end of the path to be referred to as points A, B, C, D etc and for these to be marked on the order map.

The schedule should also set out any limitation or conditions that the council wishes to apply to a new path that is being created. These should only affect the actual public right of way, eg that the public may use the right of way only on foot (if that is the case), and matters such as the position and number of any gates and stiles, etc and who will be responsible for them. The council must be particularly careful not to include any conditions that conflict with the concept in law of a public right of way and which could therefore cast doubt on the validity of the order. (See also section 7.1.3). In the case of a diversion, any limitations or conditions should be no more restrictive than the restrictions (if any) that affect the existing path.

The order map should be prepared using the current edition of the Ordnance Survey map and must be to scale of not less than 1:2,500 unless the Department has authorised a smaller scale (Regulation 3(2)). The scale, orientation and grid references should all be clearly shown and the path(s) depicted as specified in the order (ie coloured purple for any path to be created and brown for any path to be extinguished.) The map should also be endorsed as "Crown-Copyright" and acknowledgement given using the form of words specified by the Ordnance Survey that it is reproduced from (or based on) the OS map. The Regulations provide that, if there is any conflict between the map and the particulars shown in the schedule, the schedule shall prevail (Regulation 3(3)).

6.2.5 Giving notice of the making of the order

The notice that has to be given should similarly be prepared following precisely the form of words set out in the 1984 Regulations (Form No. 1 in Schedule 3). The notice announces that the order has been made and is about to be submitted to the Department or confirmed by the council as unopposed; briefly describes what effect the order will have; states where the order and plan can be inspected free of charge and where a copy can be purchased; and gives the address to which any objections should be sent and the date by which they must be received.

The description of the path and the purpose of the order can be fairly brief but must be sufficient to enable anyone reading the notice to identify the path and understand the fundamental purpose of the order. It is, of course, important that arrangements are made for a copy of the order and map to be kept available for inspection at all reasonable hours, at the address given in the notice, for the whole of the objection period. Copies must also be made available for purchase at a

reasonable charge, as stated in the notice.

The notice must be published in at least one local newspaper and served on every owner, lessee and occupier of the land affected, on every district council for the area and on such other bodies as are "prescribed" or which the district council considers appropriate. (The prescribed bodies are those listed in Schedule 4 to the 1984 Regulations - see also the list *Contact Addresses-2* at Appendix 5 of this Guide.) At least 28 days, running from the date the notice is first published, must be allowed for representations or objections to be made. The timing of publication will therefore need to be carefully coordinated with the service and erection of notices to ensure that the full 28 day period is allowed.

Figure 8: **GIVING NOTICE OF A PUBLIC PATH ORDER**

Not less than 28 days before the closing date for objections the council must do everything set out below, in accordance with Schedule 1 of the Access Order.

- **Publish the notice:**
  - in at least one local newspaper circulating in the locality.

- **Serve the notice**:
  - on every owner, occupier and lessee of any land affected by the order,
  - on every district council for the area,
  - on the bodies prescribed by the Regulations (see Appendix 5) and any other bodies the district council considers appropriate.

- **Arrange for the notice to be prominently displayed:**
  - at the ends of the part of the path to be created, diverted or extinguished by the order,
  - at council offices in the locality,
  - at any other places the council or Department considers appropriate.

If, after reasonable inquiries, the owner, occupier or the lessee of the land cannot be identified, the notice may be addressed to "The Owners and Occupiers" and served by fixing it to a conspicuous object on the land.

The notice which is served on the owner, occupier or lessee must be clearly marked with the words "IMPORTANT - THIS COMMUNICATION AFFECTS YOUR PROPERTY" and should normally be sent as a registered letter or by recorded delivery. If these services are not used, the envelope must also be endorsed with these words (1984 Regulations 6 (5)). The Department expects councils to make every effort to identify everyone with

a direct interest in the land affected by the order. But if this is not possible the notice (endorsed as above) can be addressed to "The Owners and Occupiers" and served by fixing it to a conspicuous object on the land (Schedule 1, paragraph (4) of the 1984 Regulations). This can also be a useful safeguard, should any doubt remain as to whether all the interests in the land have been identified.

The notice that is given to the "prescribed bodies" should be sent to the addresses given in Appendix 5 of this guide. The requirement to serve notice on such "other bodies" the council considers appropriate should be interpreted widely. Copies should be sent to any local walking, riding or cycling clubs, community associations of conservation groups that may have an interest in the order and any other group or individual who expresses a view about the proposal during the preliminary consultations. Translink has asked to be notified of any orders that are made on land adjacent to operational railway lines.

A copy of the notice must, in addition, be displayed prominently at both ends of as much of the path as is affected by the order, at council offices in the locality and at other places the district council considers appropriate. If there is uncertainly about where a site notice should be placed (eg at the point where the path leaves the road, or the point where the diversion is to commence) a copy should be put up at both locations. The council should arrange for the site notices to be inspected from time to time during the objection period and for any that have been torn down or defaced to be replaced.

It is considered that "Council offices" can include any office or building owned or provided by the council that is reasonably accessible to local residents. Other locations where the notice might be displayed (and copies of the order and map kept for inspection) include local libraries, community centres, village halls and village notice boards.

Although it is not a statutory requirement, it is helpful for a map showing the proposed changes to be put up alongside the formal notice. It can also be helpful for short statement to be prepared, setting out the council's reasons in making the order and outlining the procedures that are being followed. This can be included in a less formal explanatory letter sent to those on whom the notice is being served and handed to anyone who inquires about the order.

6.2.6 Objections

Objections (or representations) should be in writing and must reach the council by the closing date set out in the notice. They should state the objector's reasons for opposing the order, but there are no set grounds on which an objection is required to be made. Objections can be made, for example, on the grounds that the tests set out in the Access Order have not been satisfied (eg that a new path is not needed, or that one proposed for closure is needed); to the principle of what is in the order (eg. that a path should not be diverted onto the line proposed, or should not be diverted at all); or to the details of the order (eg. that the proposed new path is not wide enough). All are valid objections.

It is not open to the council to disregarded or dismiss any objection or representation, no matter how trivial or irrelevant it may seem. All the council can do is to contact the objector, explain the purpose of the order and the procedures being followed, and invite the person to clarify the point that they are making or to withdraw the objection.

6.2.7 Unopposed orders

If no objections are received, or any made are subsequently withdrawn, the council may proceed to confirm the order. However, it may only confirm the order as it was made. If the council wishes to change the order in any way it must either start again (by making and giving notice of a new order), or it must submit the order to the Department and ask if it can be confirmed with modifications (see section 6.2.12). The procedures following confirmation of an order by the council are the same as those for an order that is confirmed by the Department (see section 6.2.13).

6.2.8 Opposed orders

If there are objections, the first step should be to consider if there is any way in which the objector's concerns can be met, allowing the objections to be withdrawn and the order to be confirmed as unopposed. Depending on the circumstances, this might be achieved, for example, by agreeing to provide extra waymarking or fencing, by the better management of a diverted path, or by agreeing to establish a new path as an alternative to one which is to be extinguished. However, the council must not modify the order itself in any way.

If the council is satisfied that the objections or representations

cannot be met and are unlikely to be withdrawn, and the council still wishes to proceed with order, it must submit the order together with the objections to the Department for determination.

The position is less clear cut should the council decide, in the light of the objections, that it no longer wishes to proceed with the order. A recent application for judicial review determined in the English courts suggests that it may, in fact, still be necessary to submit the order to the Department for determination. But it does not follow that the council must necessarily continue to support the order and the situation could potentially arise, therefore, in which the council appears at a local inquiry to oppose the confirmation of its own path order.

To try to prevent this happening, it is suggested that the position should first be discussed with the applicant and with any other supporters. If all of these parties also accept that the order should not be pursued, then it may be sufficient for a formal resolution to be passed by the council bringing the procedure to an end. All those who were notified of the making or the order and those who made objections should be similarly notified of any such decision. However, if either the applicant or another supporter still wish to proceed, then the council may have no alternative but to continue with its submission to the Department. It will then also need to decide (and should inform the Department) whether it wishes simply to take a neutral stance or whether to actively oppose the order's confirmation.

The submission to the Department should be made in accordance with Regulation 6(1) of the Access to the Countryside Regulations 1984. The documents that are required, which should be carefully checked prior to submission, are:

a. two original copies of the signed order;
b. a statement of the grounds on which it considers the order should be confirmed;
c. a certificate that the notice of the making of the order has been given as required by Schedule 1 to the Access Order (giving the date of posting or service) together with a copy of the notice and a cutting of the advertisement as it appeared in the local newspaper;
d. a certificate that the necessary statutory consultations have taken place and consents have been obtained, together with particulars of those consultations and copies of any comments received;
e. the representations and objections received to the order

and not withdrawn, together with the council's comments on them;

f. an undertaking that any new path to be provided will be ready for use before the order comes into operation.

The council should also let the Department have any other documents or information that it considers to be relevant, including details of any additional, non-statutory consultations it has carried out. If it seems to the council that the objections could be dealt with by written representations (see below), it should say whether the objectors have agreed to this procedure.

The submission should be sent to:
Environment and Heritage Service
Department of the Environment for Northern Ireland
Commonwealth House
35 Castle Street
Belfast
BT1 1GU

Once the submission has been made, control over the order formally passes from the council to the Department.

6.2.9 Written representations

If there are no more that two or three objections it will often be possible to deal with the order by written representations. The Department will invite each party to comment on views expressed by the other. Correspondence continues to be exchanged, through the Department, until each side has had the opportunity to comment fully on everything the other party has said. An officer of the Department will also make a site visit (normally unaccompanied) before coming to a decision.

6.2.10 A public local inquiry

If there are a larger number of objections, or if the issues raised are substantial or complicated ones, it will normally be more satisfactory to arrange a for public local inquiry to be held at which the arguments and evidence for or against the path order can be heard by an Inspector appointed by the Department.

Under the Personal Social Service (Northern Ireland) Order 1972, the person holding a public inquiry may by notice require any person:
to attend at the time and place set forth in the Notice to

give evidence ….. or, to furnish, such information relating to any matter in question at the inquiry as the person appointed to hold the inquiry may think fit…..

The Department will ask the district council to assist in finding a venue (for example, a suitable room in any council offices in the locality or a local village hall) and to put up supplied notices. The Department will place an advertisement in a local paper and notify each objector of the details of the inquiry. Copies of the EHS booklet *Guidance Notes for Persons Attending Public Local Inquiries Relating to Public Path Orders* will be made available to the council, all objectors and any other persons attending the inquiry.

Once the inquiry has opened, the Inspector has full jurisdiction over the proceedings. He or she will ask for the names of those who wish to speak and, where appropriate, the organisations they represent. An order of appearance will then be decided with allowances made for anyone who has limited time to attend the inquiry, wherever practicable. Anyone can attend an inquiry but only those who have made formal objections have a right to speak. Others may do so at the discretion of the Inspector.

A representative from the council will state its case, calling whichever witnesses it wishes. Statements by such witnesses should be made available to objectors. The objectors are entitled to cross-examine the witnesses but not question the representative. The objectors will then be called upon to make their case and their witnesses may be called and cross-examined. The Inspector may question any of the participants at the inquiry.

Following a closing statement by the council the Inspector may arrange a site inspection. This will either be alone or accompanied by both parties. During the visit the Inspector may ask questions to clarify any of the points raised at the inquiry. However, there will be no re-opening of issues raised during the inquiry. The Inspector may also make an unaccompanied visit before the inquiry without giving notice, or may choose to make an accompanied visit during the course of the inquiry.

The Inspector will then make a written report to the Department describing the path(s), setting out and considering the oral evidence given, and any written submissions presented during the inquiry or received beforehand, and making a recommendation to the Department.

6.2.11 The decision

The decision is contained in a letter which gives a description of the path, either summarises the evidence put forward in the written representations or sets out the Inspector's findings and recommendation, and explains the reasons for the decision. A copy of the letter, and Inspector's report if an inquiry has been held, will be sent to the council, to those who made formal objections and to anyone who requested a copy.

6.2.12 Modifications to the order

It is open to the Department to consider, if necessary, modifying the order. Any minor modifications can be made as part of the decision but if the intended changes affect land that was not affected by the order as submitted (eg such as changing the line of the proposed path to a different route) notice of the intended modifications must be given and 28 days allowed for any further objections or representations to be made. If any are received a second local inquiry may be necessary.

It follows from this that there is little point in submitting an order to the Department which the council wishes to alter substantially. It will invariably be quicker and easier for the council to start again by making a new order.

The Department does not regard its powers of modification as generally available to correct minor errors and defects in an order, and certainly not to correct serious legal errors or discrepancies. In practice, the Department will normally disregard minor errors or defects which it considers do not prejudice anyone's interests and providing the purpose of the order remains clear. If the order is found to contain serious flaws it will have to be rejected, regardless of merits of the proposal. A new order will then have to be made if the council wishes to proceed.

6.2.13 Giving notice of the decision

If the order is confirmed, either by the council as unopposed or by the Department, the council must give notice of its confirmation in the same way as it gave notice of the making of the order. The notice in this case (Form No. 3 at Schedule 3 to the 1984 Regulations) states that the order has been confirmed (with or without modifications); briefly describes its effects; states where the order can be inspected free of charge and where a copy can be purchased; gives the date on which the order becomes operative; and sets out the grounds on which the

validity of the order may be challenged in the County Court. A copy of a model notice of confirmation is included in Appendix 16 of this Guide; this should be revised to suit specific local details.

The notice served on the owner, occupier or lessee must also state that any claim for compensation must be made in accordance with Articles 17 and 49 of the Access Order, and that a copy of the Access Order may be purchased from The Stationery Office or inspected at the council's offices. The notice of confirmation must be endorsed and served in the same way as the notice the council gave when it made the order (see section 6.2.5 above) but should be sent to the address notified to the council in response to the earlier notice. It must also be accompanied by a copy of the order and order map, as confirmed (other than where the notice is to be served by being posted on the land). A notice which is served on any other district council must also be accompanied by a copy of the confirmed order (Paragraph 4 of Schedule 1 to the Access Order and the 1984 Regulations 6).

The notice of confirmation must also be published in a local newspaper, sent to the prescribed and other interested bodies, and put up on the site, at the council's offices and elsewhere in the area in the same way as notice of the making of the order was given. A copy of the confirmed order should be sent to the Chief Survey Officer at the Ordnance Survey so the change can be taken into account when its maps are next revised.

As soon as all these requirements have been complied with, the district council should send a certificate to the Department confirming they have done so (1984 Regulation 6(2)).

If the order is not confirmed, the council must inform everyone who was notified of the making of the order. There is no prescribed form of words in this case (a notice should be drafted using Form No. 3 in the 1984 Regulations as a model) but the formal provisions regarding the service of notice, set out above, still apply. However the notice does not have to be published in a local newspaper or put up on the path and in the locality.

6.2.14 Challenge in the County Court

Once a formal decision has been taken to confirm or not to confirm a public path order, that decision can only be challenged on legal grounds in the County Court. To be successful, it would be necessary to show that the council or the Department exceeded its powers in some way, or that

the requirements of the Access Order or the Regulations were not complied with and that, consequently, the interests of the person concerned were substantially prejudiced. A challenge can only be made within six weeks of the date on which the notice of confirmation was first published.

The Court cannot change the decision, but may suspend the operation of all or part of the order whilst the challenge is being heard and may, if it upholds the challenge, quash the order. If the order is not challenged in the six weeks period, or if the County Court does not uphold a challenge, there is no other way the decision can be overturned.

6.2.15 The costs of public path orders

Before deciding to make a public path diversion order (but not in the case of a creation or extinguishment order) the council may ask any owner, occupier or lessee if they have requested the order to undertake to pay or contribute towards any compensation payable, or any expenses which the council may incur in bringing the new path into a fit condition for use by the public (Article 15(4)). In practice, the owner may prefer to carry out the works that are necessary. A voluntary group that is asking the council to create a new path may similarly offer to carry out any works that are needed to establish the path on the ground. This is entirely acceptable providing it is made clear that the works must be to a standard agreed by the council, and that they must be carried out to the council's satisfaction before the order comes into effect.

There is no specific provision under which the council can require an applicant to meet or contribute towards the cost involved in preparing, advertising and processing any type of order. Nevertheless, these costs can be substantial, and an applicant may be willing to make a voluntary contribution if he or she expects to gain some financial benefit from the proposed order.

There is no objection to the council accepting such contributions, but the Department would expect it to have regard to factors such as the applicant's financial hardship and any potential benefits to the local community or path users from the proposed change. The grounds on which any such contribution is offered and accepted should also be clearly set out. In the Department's view, the fact that an order is not confirmed does not necessarily mean that the applicant would be entitled to a refund. A refund should be made, however, if

the council decides not to confirm an unopposed order or if the order cannot be confirmed because it has been invalidly made.

It is normal policy that the parties at a local inquiry are expected to meet their own expenses, irrespective of the outcome. An award of costs does not follow the decision on merits, therefore, and costs may be awarded only exceptionally if the party, against whom costs are sought, has behaved unreasonably. In the case of a public path creation order, however, a person with an interest in the land who has objected to the order would normally be regarded as entitled to an award of costs if the order is not confirmed.

If the path concerned is partly in one council's area and partly in another, the two councils may agree to share the cost of the order.

6.2.16 Claims for compensation

Any claims for compensation arising from a creation, diversion or extinguishment order must be served on the district council within six months of the date of confirmation, setting out the amount that is claimed and details of the claimant's interest in the land (Article 17). Compensation is payable if the value of a persons interest in the land is depreciated, or if a person has suffered damage by being disturbed in his enjoyment of the land. The Department would expect the level of compensation payable in the great majority of cases to be relatively modest, but the advice of the District Valuer should be sought at an early stage if there is any doubt about the matter.

Any dispute about the level of compensation is not relevant to the question of whether an order should be confirmed but is settled by reference to the Lands Tribunal (Article 49).

6.3 PUBLIC RIGHTS OF WAY AND DEVELOPMENT

Planning of New Developments

In general any existing public right of way within a proposed development should either be incorporated within the site design or be the subject of a public path extinguishment or diversion order. Where possible, existing routes should be retained at a similar, or enhanced, standard for use by pedestrian and other legal users.

Some access routes may be legally subsumed by footpaths adjoining new roads but footpaths which retain a semi-rural feel should be encouraged. Separation from roads by means of grass banks or tree/shrub planting may be beneficial.

To encourage the provision of open space, including linear routes, Planning Service has published Planning Policy Statement 8: Open Space, Sport and Outdoor Recreation. This indicates a presumption against the loss of existing open space with the exception of specific circumstances outlined in Policy OS1 (page 16).

Policy OS2 (page 19) deals with the provision of open space in new residential developments.

Planning Policy Statement 8 is available at:
http://www.planningni.gov.uk/AreaPlans_Policy/PPS/pps8/pps8_1.htm

Where there is a need to protect public right of way, it is recommended that district councils refer to the above when responding to planning applications

6.3.1 Principles applying to the development of land affected by a right of way

The granting of planning permission does not affect any public right of way that exists over the land, nor does it give the developer (or any other person) authority to divert or close the path. This principle applies whether or not the right of way has been asserted.

Before the development of any land crossed by a right of way can take place, therefore, it is necessary to ensure that either:

- the right of way can be incorporated into the development on its existing line, so that the public's

use of the path will not be affected in any way; or,

- a public path diversion or extinguishment order is made and confirmed before that part of the development which will affects the right of way takes place.

"Development" in this context includes any buildings or works requiring specific planning permission, and those which are `permitted development', being covered by the planning permission granted by the General Development Order. This includes, for example, small extensions to existing houses and the erection of most agricultural buildings.

If it is clear that the right of way will be affected only while the development is taking place and can be re-opened or returned to its original line once the development is competed, then all that will be required is for the council to make a temporary public path order as set out in section 6.4 below. However, if the development involves the permanent closure or diversion of a right of way, then a public path order will normally need to be made and confirmed by the Department using the powers available to it under Article 16 of the 1983 Access Order. This section of the Guide explains how rights of way should be identified in development cases and the procedures to be followed in making such orders.

6.3.2 Rights of way and development plans

The Planning Service is aware of the importance of public rights of way and will endeavour to ensure, as far as possible, that their value is recognised and can be enhanced whenever development of the land takes place. *Creating Places*, the Department's design guide for residential development, states for example that any existing rights of way for pedestrians and cyclists should be identified and integrated into the development, making sure they will not be in out of the way places or open to abuse in the form of illegal dumping or other anti-social activities.

The district council should therefore make sure that, whenever it is consulted over the preparation of any development plans, the Planning Service is made aware of the rights of way which exist, or which are alleged to exist, in the plan area so that these can be taken into account. The Council should also, in turn, have regard to the long-term planning strategy for its area, as set out in any area plans, local plans or subject plans, when determining its own priorities for the investigation and assertion of alleged

rights of way. The aim should be to try to ensure that, whenever possible, any disputes are resolved and the exact line and status of all rights of way are determined before the land is due to be released for development. In this way, the rights of way that exist can be drawn to the attention of prospective developers from the outset and taken fully into account in their detailed development plans.

For area plans, further opportunities for provision of information are available when the *Issues Paper* is published and when the draft copy of the *Draft Area Plan* is presented to the District Council prior to publication.

6.3.3 The Department's order-making powers

Specific powers exist under Article 16 of the 1983 Access Order to enable the Department to make a public path extinguishment order or a public path diversion order where it is satisfied that it is necessary to do so to enable development to be carried out in accordance with a planning permission. These powers are not available to a district council, however, and anyone who asks for a path to be diverted or extinguished in these circumstances should be referred to the Department. The way in which such orders are advertised and any objections are determined are similar to those for public path orders made by a district council.

It is important to note that the Courts have ruled (in relation to similarly worded provisions in the English legislation) that the power to make an Article 16 order is no longer available once the development has been completed or substantially completed. If that is found to be the case, the Department will have no option but to refer the applicant to the district council to see whether the council is willing (and is able) to make an order under Article 14 or 15. Similarly, difficulties will arise if development is carried out after an order has been made but before any objections have been determined in that, regardless of the merits of the case, it may no longer be possible for the Department to confirm the order.

6.3.4 Identifying rights of way which may be affected by development

Applicants for planning permission are required by the Planning Service to clearly identify in green on all location or site plans any public rights of way that exist within or adjoining the proposed development. Where a path is shown in this way, it will come to the attention of the district council as part of the Planning Service's normal consultation procedures on the

planning application. It cannot be assumed, however, that all rights of way that are likely to be affected by development will necessarily be identified in this way; for example the applicant may be unaware that there is a path crossing the land or may not fully appreciate its status in law as a public right of way. For this reason the Countryside Officer should make sure that he or she is made aware of, and can check, all the planning applications that are referred to the district council for comments. The Planning Service's should by informed whenever the information given by the applicant is found to be incorrect or incomplete.

The Planning Service will take into account any comments that are made by the district council on the merits of the application, including on the proposed treatment of any right of way, in deciding whether to grant planning permission and on the conditions (if any) that may be imposed. The Service will endeavour to ensure that (regardless of whether the application is approved) the applicant is made aware of any additional rights of way beyond those shown on the application plans to which the council has drawn its attention. If permission is granted and the development is one which appear likely to require the diversion or extinguishment of a public right of way, Planning Service may also issue an informative drawing attention to the need for a public path order to be both made, and confirmed, before the development takes place and advising that an application be made to the Environment and Heritage Service for an order under Article 16.

Planning Service should similarly be informed if it appears that the applicant envisages using a public right of way to provide vehicular access to the land when, in the opinion of the council, the public right of way in question has not been shown to include vehicular rights."

6.3.5 Permitted development

Similar arrangements to those set out above should be made by the Countryside Officer with those colleagues who deal with applications for approval under building regulations, in order to identify any proposal which may affect a public right of way which are permitted development and which will therefore not be the subject of a specific planning application. While the need to extinguish or divert a right of way will not, in itself, justify withholding approval, the council should nevertheless make sure that the applicant is aware of the existence of right of way and appreciates both need to wait for the change to the right of way to be sanctioned before the development takes place and

the complications that will arise if he or she does not. Again, it will be for the Department to make the necessary public path order using its powers under Article 16 and the applicant should be advised to ask EHS to do so.

6.3.6 Making and processing Article 16 public path orders

An application to the Department for a pubic path order to be made under Article 16 will normally be dealt with by the Environment and Heritage Service, who will consult with the district council before making a decision. The Department's order-making powers are discretionary and it does not atomically follow, therefore, that it is obliged to either make or confirm an order in any development case, even where this is necessary to enable the development to proceed. However the powers are specifically intended to allow rights of way to be changed in these circumstances and the fact that planning permission has been granted is clearly an important consideration which must be taken into account.

In drafting an order, the Department will endeavour to ensure that it is the developer who is responsible for the costs of laying out a diverted path and providing a satisfactory surface to the council's standards. If there are other special factors that need to be taken into consideration, these should be brought to the Department's attention from the outset so that they can, if necessary, also be provided for within the order schedule.

Once made, an Article 16 order is subject to the same procedures and regulations as those which apply to public path orders made by the district council, as set out in section 6.2 above. This means that notices must be put up on the line of the path, that the making or the order must be advertised, and that anyone making objections or representations (including the district council) has a right to be heard before a decision is taken on whether the order should be confirmed. Whilst the responsibility for making these arrangements falls to the Department, the council may be asked to assist in, for example, putting up the site notices or ensuring a copy of the order can be made available for inspection at the council's offices.

6.3.7 Protecting rights of way during development.

The procedures set out above should help to ensure that any development that affects a right of way does not take place unless and until a public path order has been made and confirmed.

If, however, despite that advice that is given, the development goes ahead prematurely resulting in the obstruction of the right of way, then it will be for the district council to protect the path in accordance with its duty under Article 3. This may, if necessary, including action to remove the obstruction and legal proceedings to prevent the developer from continuing. Neither the Planning Service nor EHS has the power to order the developer to stop.

6.4 THE TEMPORARY CLOSURE OR DIVERSION OF RIGHTS OF WAY

6.4.1 The importance of the council's powers

The powers the council has to make orders to temporarily divert or close any public right of way for up to three months should be seen as a key feature, helping to manage public access to the countryside and allowing the council to respond to the concerns of farmers and landowners. Such orders can be made and brought into effect quickly and easily, as and when the need arises.

The ability to change or close the line of a path in this way to accommodate farming or other land management operations will often be essential in securing in the agreement of owners and occupiers to the assertion of a right of way or a proposal to establish additional access opportunities. The council should therefore ensure that those it is negotiating with are aware that it has these powers, and give an undertaking that it will deal quickly and sympathetically with any applications it receives for an order to be made.

6.4.2 Making a temporary path order

Under Article 19 the council may make an order to either divert or close a right of way for up to three months if it is satisfied it is expedient to do so and in the interests of farming, forestry or other reasons. A similar but more restricted power is available under Article 8, enabling the council to extend for up to three months the period in which a ploughed path must be reinstated and to divert the path for the period of that extension. In both cases the power only becomes available once an application has been made to the council; the council cannot itself initiate an order without being requested to do so. If the council wishes to refuse an application it is required to consult Department of the Environment (applications under Article 19) or DARD (applications under Article 8).
There are no statutory requirements to consult on, or give

notice or advertise, the making of such orders. Nor is there any provision for objections or representations to be made. Such orders do not need to be confirmed therefore, but come into effect when they are made or on the date specified in the order. Once an order has been made, the council has only to ensure that a copy is displayed throughout the period of the diversion or closure at either end of the affected path.

The council should nevertheless ensure that such temporary changes to rights of way take place with the minimum of disruption to path users and are in place only for as long as is absolutely necessary. In general, the complete closure of a path should be avoided, other than for a period of a few days and where there is no other practical alternative. Similarly, the line of any temporary diversion should be as convenient as it is possible to arrange, have a satisfactory surface and be provided with any gate or stiles that are needed. If the applicant is the occupier of the land he or she may be required to provide such facilities as a condition of the order, or it may be agreed that the council will do so at the applicant's expense.

There is no prescribed form for a temporary path order but the order may be drafted using the form for a permanent order, adapted as necessary to suit the circumstances and specifying the period for which it is to run. The order plan should similarly be prepared in the same way as for a permanent path order. A model temporary path order is included at Appendix 17.

Figure 9: **CRITERIA FOR TEMPORARY PUBLIC PATH DIVERSION OR EXTINGUISHMENT ORDERS UNDER ARTICLES 8 AND 19**

- An application has been made to the council either:
  - by the occupier, under Article 8; or
  - by the occupier or any other person, under Article 19;
- The council is satisfied that it is expedient either:
  - in the interests of good farming or forestry to extend the period in which a ploughed path must be restored, and to divert the path (Article 8); or
  - in the interests of good farming or forestry or otherwise to divert or extinguish the path (Article 19).
- The council has:
  - taken into account the interests of path users;
  - in the case of a diversion, has obtained the written consent from the occupier of the land onto which the path is being diverted and from anyone else whose consent is needed to obtain access to the land.
- Before refusing to make an order the council must consult either:
  - DARD, under Article 8; or
  - DOE, under Article 19.

The copy of the order that is put up at either end of the diversion or closure should include the order plan. Although there is no statutory requirement to do so, it can also be helpful for a brief explanatory statement to be attached to the order and for the alternative line (if any) that users should follow to be temporary waymarks for the period order is in force.

While it is open to the council to extend the period of temporary diversion or closure by making a further order to come into effect immediately after the first order expires, this should be avoided other than in exceptional circumstances. If the need for a temporary order arises frequently, the council should consider using its powers under Articles 14 or 15 permanently to change the line of the path.

SECTION 7 CREATING PUBLIC RIGHTS OF WAY BY AGREEMENT AND PERMISSIVE PATHS

The need for additional access routes for the public to walk, ride or cycle through the countryside can arise in several different ways. New routes may be needed to supplement existing paths that have been secured through assertion; to develop attractive circular walks and rides that will encourage tourists and day-visitors to the area; to support community development or economic regeneration initiatives; or simply to provide an attractive and valuable facility for the local community. The council may also wish to agree a "new" right of way to overcome the difficulty of making an assertion where the evidence of the legal status of the path is inconclusive, or to "adopt" an unofficial path so it can be properly managed and maintained.

Whenever the need for a new path arises the council will wish to do everything possible to endeavour to secure a route in agreement with the landowners. The two possible alternatives, of agreeing a public right of way or negotiating a "permissive" or "concessionary" path, and their advantages and disadvantages are set out in this section.

7.1 CREATING PUBLIC RIGHTS OF WAY BY AGREEMENT

7.1.1 The basis of the approach

Section 2.2.4 sets out the basis of the approach the council should adopt towards any access negotiations. It emphasises the importance of proceeding by agreement whenever it is possible to do so, of being able to win the trust and respect of the farming community and of being able to demonstrate that the council can address the practical concerns that will inevitably be raised. It will be particularly important to be able to give firm undertakings about the way the path will be maintained, managed and promoted and on the issue of occupiers' liability.

The contentious nature of public access also means that the council must be clear in its own mind about the basis on which it is entering into negotiations and that it is consistent in maintaining that approach. The advice given in sections 2.2.5 and 2.2.6 will be relevant. In particular, the council will need to have considered the kind of access that it wishes to achieve and whether its objectives can be met by a permissive path agreement or require that the access be legally secured as a public right of way. It must also know how far it is prepared to press the matter and whether it is ultimately willing to consider making a public path order. This is not to say, of course, that the council must decide from the outset that it will, or will not,

make an order. That decision can only be taken, in the light of all the circumstances, if and when it becomes clear there is no possibility of reaching agreement. Nevertheless, if the council does not address this question from the outset it risks spending considerable time and effort in pursuing negotiations which may prove fruitless or of being accused of subsequently changing its policy and approach.

7.1.2 Making a public path creation agreement

Under Article 11 of the Access Order, the district council may enter into agreement with any person who has "the necessary power" to create a public path. The agreement may provide for payment and for the new path to be subject to limitations and conditions. Once an agreement has been made, the council has a duty to carry out whatever works are needed to bring the path into a fit state for use and thereafter to maintain the path in that state (Article 13).

Since a public path is also a public right of way and will therefore exist in perpetuity, it follows that the person with whom any creation agreement is made must have the legal capacity to bind the land in perpetuity. Almost invariably, this will be the landowner. Any tenants and lessees can also be signatories to the agreement (although they do not have to be) but only to the extent that they confirm their concurrence with it.

There is no prescribed form for a public path creation agreement, but model clauses which the council may use as a guide in preparing its own form of agreement are set out at Appendix 3. The accompanying notes to the clauses give further advice on the matters which can be expected to be covered, including the amount of compensation, the arrangements that might be made over the maintenance of the path and features such as gates and stiles, and the liability of the landowner towards path users.

The only statutory consultations that the council is required to carry out before entering into a public path agreement are with the Department of the Environment and any body representing those who are likely to be affected by the agreement (Article 18(1)). This requirement should be interpreted widely, however, and the council should be willing to consult the national path user groups and any local path user groups, community development associations, conservation groups and other bodies or individuals who may be interested in the paths in the area. Where appropriate, consultation should include asking for views on any limitations or conditions to be included in the

agreement.

The council should also notify these bodies once the agreement has been made, publicise the new path in the locality and ensure that the path is adequately signposted and waymarked. A copy of the agreement should also be sent to the Chief Survey Officer of the Ordnance Survey so that the path can be shown on the OS maps of the area when they are next revised.

7.1.3 Attaching conditions to a public right of way

Although a public path creation agreement (or a creation or diversion order) may be made subject to limitations and conditions, it is the Department's view that any such limitations or conditions must be consistent with the concept in law of a public right of way. If they are not, they may cast doubt on the validity of the agreement.

It is both acceptable and desirable that an agreement should define the nature of the public's right, for example by providing that the path may be used as of right of way only on foot. An agreement may also legitimately define or set conditions on the stiles, gates and similar features that are to be put up on the line of the path; provide that the council will take over responsibilities normally falling to the owner (or vice versa); or provide that the agreement will only take effect once certain conditions have been fulfilled (eg after facilities for the use of the path are provided).

The Department considers that the agreement must not, however, set conditions on, or limit the ability of, any member of the public to use the path as of right at any time. For example, any condition that allowed the owner to obstruct, close or divert the path in any way, that limits use of the path to daylight hours or to use only by local people may be inadmissible and inclusion of such terms is not recommended. Since it is a basic legal concept that a public right of way exists in perpetuity, the Department also takes the view that it is not open to the council to agree that a right of way should be time limited. Local legal opinion may differ from the Department's opinion on this matter and it is for councils to decide which advice they adopt.

7.1.4 Effect on existing public rights of way

It is important to note that a public path agreement cannot take away or diminish any other public rights that may have arisen through deemed dedication before the agreement was made. For example, the fact that an agreement may provide that the

path shall only be used by walkers does not take away any "higher" bridleway rights that might later be shown to exist along the line. Nor does it affect the council's duty to assert and protect those rights. Similarly, if evidence subsequently came to light showing that footpath already existed but on a different line, the agreement would not affect that other path. The public would be entitled to use both paths (and the council required to protect them) until one or other of the paths was formally extinguished.

It follows that although the council may consider agreeing a "new" public path as an alternative to pursing the assertion of a path for which the evidence in inconclusive, the council must still take into account the possibility that the existing path could be a right of way. Nor can a public path agreement be used as means of diverting an existing right of way.

7.2 AGREEING PERMISSIVE PATHS

7.2.1 The advantages and disadvantages of a permissive path

The fact that a public path creation agreement creates a public right in perpetuity and the limited conditions that can be imposed mean that landowners are often unwilling to contemplate entering into such an agreement, even in principle. But it may still be possible for the council to negotiate a "permissive" or "concessionary" path.

A permissive path is not a public right of way and can be provided on whatever terms and conditions, be subject to whatever limitations and endure for whatever period of time, the council and landowner are willing to agree. Such an agreement will normally run for a set number of years, after which there is no further obligation on either the council or the owner (although both are free to renew or re-negotiate the agreement if they wish to do so). Conditions can also be set that would be inappropriate to a right of way, for example that the path will only be open to the public at certain times of the year, that it shall not be used after dark or can be closed or diverted by the landowner whenever he or she considers it necessary.

For the council, although it may be far easier initially to agree a permissive path than a public right of way, much more has then to be taken on trust since it may well be difficult, if not impossible, to enforce the agreement in practice. The council could not, of course, make use of its various powers and duties under the Access Order and could only take action, such as to remove an obstruction, as provided for in the agreement itself. If action in the courts ever became necessary, the matter would similarly

turn solely on what had (or had not) been provided for in the agreement.

There can be no guarantee, therefore, that a permissive path will be good value for money, either in terms of a return on the time and effort required to negotiate an agreement or on the "hard" investment that might have to be made in surfacing the path or providing signs and waymarks, stile, footbridges, etc. The uncertainties may also cast doubt on the strength with which the path can or should be promoted, or relied on as key element in the recreation and tourism strategy for the area.

Of course, the landowner or occupier can be expected strongly to prefer a permissive path to a public path creation agreement - indeed it may be the only option that he or she is willing to discuss, both for practical and psychological reasons. In practical terms, the path will exist only for a limited period of time rather than in perpetuity. The landowner may also feel he or she retains greater control of the use that is made of the path during that period. Psychologically, a permissive path remains no more than a limited concession which the landowner has granted; it does not involve yielding any rights, as such, or giving someone else "jurisdiction" over the land.

What may not be appreciated however is that (as explained in section 3.5) the degree of liability owed to the user of a permissive path is likely to be determined under the Occupiers' Liability Act rather that at common law and therefore to be greater than on a public right of way. It may be possible to come to an arrangement with the council's insurers that would indemnify the landowner against any liability claims (although this could require a formal agreement to be made, sanctioning the council to deal with any matter it regards as a potential hazard). Alternatively, the council might simply reimburse the owner for any additional premium payable on his or her own policy. Nevertheless, the fact that the liability question arises at all may be a psychological barrier to negotiating a permissive path.

7.2.2 Making a permissive path agreement

It is understood that the powers for district councils to make a permissive path agreement are within the scope of the Recreation and Youth Services (NI) Order 1986.
Since a permissive path agreement exists outside the access legislation, there are no prescribed procedures which must be followed and the agreement can be made on whatever terms and conditions the council and the owners and occupiers

concerned are able to agree. Nevertheless, there are a number of considerations that should be taken into account, both to protect the council and the owner and to help avoid any disputes arising that could result in permission to use the path being withdrawn.

The following is a checklist of the main factors that the council should take into account in negotiating and agreeing a permissive path.

- Whatever arrangements are made should be set out in writing, if not as a formal agreement at least in an exchange of correspondence. This can be in clear, simple terms but should, if at all possible, still be legally enforceable by either side. The matters covered should include:

- who the agreement is between;
- the period for which the agreement is to run;
- a description and/or accompanying plan sufficient to allow the path to be identified;
- the uses that are permitted (eg for walking only, walking, riding and cycling, etc);
- any limitations or conditions attached to that use (eg that use will be restricted to daylight hours);
- the circumstance in which use of the path may be suspended;
- details of any responsibilities the council will adopt (eg for signposting, waymarking and maintaining the path);
- the details of any financial arrangements made;
- confirmation that the owner does not intend to dedicate the path as a public right of way;
- ideally, some form of arbitration arrangements (eg reference to a neutral party) in the event of a dispute arising.

- Whenever possible the uses that are agreed should reflect those that are permitted on a public right of way. The agreement should avoid any unnecessary or unenforceable restrictions or limitations.

- The arrangements made should endeavour to offer the public long term security, to allow the path to be promoted, enable confidence in the use of the path to develop and to justify any public investment that is being made in it.

- The agreement must make it clear that it is not intended to dedicate the path as a public right of way. Equally,

the council must point out that agreement cannot take away any public rights that may be found already to exist at common law; that it can not prevent anyone from exercising those rights, nor does it affect the council's duties to assert and protect such rights.

- If closure of the path is to be allowed from time to time, the circumstances and number of days per year should be clearly defined. The agreement might provide, for example, that the path can be closed for up to 10 days a year to allow lambing to take place, and at other times with the prior agreement of the council. Closure of the path on Saturdays and Sundays and at other popular times should be avoided if possible.

- If diversion is to be permitted, the agreement should similarly set out in advance both the circumstances in which this will take place and the alternative route that will be used.

- Agreements made with two or more owners in respect of the same path should be on the same terms and conditions and have common starting and end dates. Ideally, all of the permissive paths which the council agrees throughout its district should, as far as the public are concerned, be subject to the same terms and conditions.

While a promoted path may be partially on permissive paths and partially on public rights of way, it will be obvious that an individual section of path (eg between two roads) cannot be a `mixture' of the two. To do so would create the situation in which a cul-de-sac or isolated section of right of way would remain once the permissive path agreement expires. It follows that if some but not all of the landowners concerned are prepared to agree a permissive path, the council may have no option but either to abandon the proposal or to seek to establish the whole section of path as a public right of way.

Once a permissive path is agreed, the council should arrange for the line of the path to be waymarked as necessary and for notices to be put up at either end of the path. While these should be welcoming and encourage the path to be used, they should also make it clear that the path is only available by permission of the owner and set out any conditions that have been agreed.

7.2.3 Informal, verbal permissive path agreements

Informal, verbal agreements are not satisfactory, as much from the landowner's point of view as from the council's and public's and should be avoided whenever possible. In addition to legal uncertainty about the basis on which the public are permitted to use the path and therefore over the question of occupiers' liability, and the difficulty of resolving any other disputes that may arise, it is possible that over time a claim could be made that a public right of way has arisen at common law. The landowner may then be faced with the difficult task of having to prove what was agreed verbally, possibly many years ago.

If a point is reached in any negotiations at which the owner indicates that he or she is willing to accept a permissive path but is not prepared to confirm this in writing, the council should nonetheless seek to protect the owner's interests by setting out what it understands to have been agreed and inviting the owner to respond. The council should also ensure that the path is clearly signposted as being a permissive path which the public are only permitted to use as a result of the owner's consent.

7.2.4 Model Permissive Path Agreements

Explanatory notes and model clauses for a permissive path agreement may be obtained from the Department; however as explained in 7.2.2, these agreements do not fall under the Access Order and district councils should seek independent legal advice.

A shorter version of a permissive path agreement may be available from Larne Borough Council and the above advice also applies to any subsequent use of this document.
Councils should note that previous permissive path agreements, linked to a former DARD grant scheme, required that payments be limited to a sum of £1:00 - this limit no longer applies.

SECTION 8: ACCESS TO OPEN COUNTRYSECTION

This section deals with the provisions in Part III of the Access Order relating to open country. It explains what is meant by the term "open country"; the duty that the council has to assess the open country land in its area; and the powers available to the council to make an access agreement or order giving the public the right to use such land for informal recreation, or to purchase land for this purpose.

In general the need for action on open country will arise less frequently than action on public rights of way and the subject is accordingly dealt with here less comprehensively than other subjects in these Guidance Notes. Any council that is considering taking such action should first discuss the matter with the Department so that further guidance can be given.

8.1 DUTIES TOWARDS OPEN COUNTRY

8.1.1 Definition of "open country"

"Open country" is defined in Article 25 of the Access Order as meaning "any land appearing to the district council or the Department to consist wholly or predominately of mountain, moor, heath, hill, woodland, cliff, foreshore, bog, marsh or waterway". It follows that the land concerned is not necessarily either open or large scale; the term is mainly one of administrative convenience, empowering the use of access agreements and orders as appropriate on a wide range of land types.

These definitions have not been tested in the Northern Ireland courts and it is not possible to say how these different types of land might be precisely interpreted. It is unclear, for example, whether "woodland" encompasses commercial forests, although it is normally assumed that it does. But "open country" does clearly cover the mountain and hill land (in the Mourne Mountains and elsewhere) traditionally walked over by a small number of people, and which is now increasingly being used by larger numbers as the popularity of hill walking grows. The term will also include many of the smaller, local areas that have traditionally been used by people for quiet recreation, such as areas of woodland and places by the side of a lough or river or at the coast.

As sections 3.1.1 and 3.3.1 explain, it is not possible for the public at large to acquire through long use any legal rights to wander over land or to use land for recreation. No matter how long an area may have been used for *de facto*

access, such use remains a trespass and endures only because of the continuing tolerance of the landowners or because it is impractical to keep people out. The importance of Part III of the Access Order, therefore, is that it provides a means by which this informal, *de facto* access can be secured and the land managed for recreation.

8.1.2 The duty to consult on access requirements and to consider the need for action

Article 27 of the Access Order places a duty on the district council:

- To consult the Department and bodies representing owners and occupiers for the purposes of ascertaining:

- what open country land there is in the district; and
- what action should be taken to secure access to it for open-air recreation. In considering such action, to have regard to all relevant circumstances, including:

- the extent to which public access is likely to be available to any particular land without such action; and,
- the general need in the district for access to open country.

Many councils will take the view that, given the general prevalence of open country land and the tolerance normally shown by owners towards recreational users, this can be regarded as less pressing than the council's other duties towards rights of way. Although this view is understandable, it is still important for the council to be aware of the extent of open country land in its district and the use made of it for recreation, and for this to be taken into account in the council's recreational planning. Similarly, the council should be aware of any problem or concerns which either the landowners or countryside users have about such land.

The Department therefore urges those councils that have not yet done so to meet this duty as soon as possible. In addition to the bodies it is statutorily required to consult, the council should ask the local and national user groups for any information they have about the use of open country in its district and about the areas that may be particularly important. Even with these additional consultations, the task of making an assessment of open country should not be an onerous one or require significant resources.

It is likely that the need to take further action will arise only

occasionally. However, the possibility of doing so, either now or in the future, should never be entirely ruled out. While such action will primarily be justified by the need to protect or secure access for open-air recreation, the council can legitimately take into account other factors. These might include the benefits of being able to make bye-laws or set conditions to regulate the use of the land; of enabling the council to take an active role in managing the land, improving the means of access or repairing erosion or damage; and of enabling the landowner or occupier to receive modest reimbursement. Nor should an access agreement or order be thought of only in terms of extensive areas of mountain or moorland. One might be equally appropriate to help resolve the problems arising from the intensive, *de facto* use of land on the urban fringe or at popular beauty spot, for example, providing the land comes within the broad definition of open country.

8.2 ACCESS AGREEMENTS AND ACCESS ORDERS

8.2.1 Access agreements

The district council has the power under Article 28 to make an access agreement with any person with an interest in the land. There is no prescribed form for an access agreement and an agreement can make whatever provision the parties agree are appropriate in the circumstances. Model clauses that the council may wish to draw on are set out in appendix 4.

The agreement may provide for the council to meet all or part of the expenses incurred by the other party as a consequence of the agreement and for an annual "consideration" in respect of the making of the agreement. Any such consideration must be calculated in accordance with Schedule 4 of the 1983 Access Order (ie the agreed sum must relate to a proportion of the value of the land as assessed by the District Valuer). It is not possible for disputes about the level of compensation in respect of an access agreement to be referred to the Lands Tribunal for Northern Ireland.

An access agreement can be with some but not all of the interests in the land; for example an agreement made with the tenant but not the owner. But such an agreement must not prejudice the interests of any person that is not party to it, nor impose any obligations on that person.

8.2.2 Access orders

Article 29 gives the council the power to make an access order. It should be noted, however, that:

- the council's power only arises if an access agreement under Article 28 is not already in force and the council is satisfied that it is impractical to secure such an agreement;
- an access order does not take effect until after it has been confirmed by the Department. Before that can happen notice of the making of the order must be given and a period allowed in which anyone may make objections or representation;
- the council must submit any access order it makes to the Department. It has no power to confirm an access order itself, even if the order is unopposed; and,
- the Department cannot confirm an access order before bye-laws have been made and confirmed, either by the council (under Article 46) or the Department (under Article 47).

Both the access order itself and the notices about it must be drafted in the prescribed form. These are set out in Schedule 2, and forms 2 and 4 of Schedule 3 respectively of the Access to the Countryside Regulations. Similarly, the order map must be prepared to the scale and using the colours, symbols and notation prescribed in Article 5 of the Regulations. The procedures to be followed in serving notice on the owners and occupiers, publicising the access order and submitting the order to the Department are the same as those which apply to a public path order (see sections 6.2.5 and 6.2.8).

8.2.3 The effects of an access agreement or order

Once an access agreement has been made, or an access order has been made and confirmed, it affects the rights and responsibilities of the public, the owners and occupiers of the land, and the district council.

For members of the public, the main effect is that anyone who enters onto the land for the purpose of open air recreation and without causing damage may do so without being regarded as a trespasser, or incurring any other legal liability simply by being on the land. This right is strictly circumscribed, however; essentially it is no more than a right of access on foot for quiet

recreation.

In addition to any further restrictions which may be set out in the agreement or order itself, or specified in any accompanying bye-laws, the right does not apply to any "excepted land" (see below), nor to a person who does any of the things listed in Schedule 2 to the 1983 Access Order. This includes: driving or riding any vehicle (which thus excludes use of the land by cyclists); lighting fires; having a dog that is not on a lead; disturbing wildlife; engaging in or being equipped for hunting, shooting, fishing or poaching; wilfully damaging or interfering with the land or anything on it; breaking through hedges or walls; leaving gates open; leaving litter; or wantonly disturbing, annoying or obstructing any other people.

For the owners and occupiers of the land the main effect of an access agreement or order (apart from any entitlement to compensation that may arise) is to make them subject to the duty under Article 31, ie to do nothing that would substantially reduce the area to which the public has access. However, this does not preclude turning the land into "excepted land". The agreement or order will also help to clarify - and may possibly reduce - the degree of liability owed to the public using the land (see section 3.5.2). Article 31 also provides that use of the land under the terms of an access agreement or order cannot give rise to the presumed dedication of a public right of way. This, too, will help to protect the landowners' interests.

For the council, the main effects are the additional powers and duties it acquires to help protect, improve and publicise access to the land and to manage the land more effectively. In addition to the powers set out below, these include the power to suspend the public access to the land when it is necessary to avoid the risk of fire (Article 34), to make bye-laws to help prevent damage to the land or to ensure that people behave themselves (Article 46) and to provide a ranger service (Article 48).

8.2.4 "Excepted land"

The right of access does not apply to any land that is "excepted land", albeit that the land may be within the area covered by the agreement or order. "Excepted land" is defined in Schedule 3 of the 1983 Access Order and includes land that was in agricultural use (other than for unenclosed rough grazing) at the date of the agreement or order; nature reserves to which entry is prohibited by bye-laws; buildings and their curtilages; land that is or was used as a park, garden or pleasure ground; land used for a statutory undertaking; and any land used for, or part of, a quarry,

railway, golf course, sports ground, playing field or aerodrome.

8.2.5 Use of land for agriculture, forestry or tree planting

Any person may make representations to the Department of the Environment that an access order or access agreement prejudices the existing or proposed use of the land for agriculture, forestry or amenity tree planting. Representations may be made either at the time an access order is submitted for confirmation, or at any time after an access order has been confirmed or access agreement made. On receiving any such representations, the Department is required to hold a public inquiry to consider the matter or to give the person concerned the opportunity of a hearing.

If it is found that the needs of agriculture, forestry or tree planting outweigh the benefits of the order or agreement to public access then, depending on the circumstances, the Department must either not confirm the access order (if it is one that is awaiting determination) or vary the access order so as to exclude the land (if it is one that has already been confirmed) or require the council to vary an access agreement it has made.

8.2.6 Provision for "safe and sufficient access"

An access agreement or access order may make "such provision as appears expedient .... for securing that safe and sufficient access will be available to the public on the land" (Article 32). Among the matters this can include are the improvement, repair or maintenance of any existing means of access to the land (eg gates, stiles, bridges, etc), the provision of new means of access and works to protect the public from danger or to maintain such protection.

If agreement can be reached, the council may either undertake to carry out the works itself or to meet part or all of the owner or occupier's expense in doing so. If there is no agreement, or an agreement is not honoured, the council may take action in default of the owner or occupier and recover such costs as are appropriate.

8.2.7 Danger areas

Article 42 requires the council, having consulted the owners and occupiers, to exclude from an access agreement or order any land that may present a danger to the public. This provision also empowers the council to take steps or carry out works to protect the public from any source of danger.

8.2.8 Enforcing an access agreement or order

Once an access agreement or order is in force, the council acquires additional powers under Article 33 to enforce its provisions.

If anyone does anything to reduce the area available for access or which is detrimental to the means of access to the land, the council may serve him or her with a notice requiring steps to be taken to remedy the contravention. If the person fails to comply with the notice within the time specified the council may then carry out the work in default and recover its costs.

There is a right of appeal against such a notice to the Magistrates Court on the grounds that too little time has been allowed for the work, that it is unnecessary or has already been carried out, or that no contravention of the access order or agrement has taken place.

8.2.9 Compensation

An access agreement does not give rise to any entitlement to compensation, as such, although it is open to the council make payments to anyone affected by the agreement as set out above.

In the case of a confirmed access order, the council has a duty to pay compensation equal to the amount of any depreciation in the value of any persons' interest in the land, or the amount of damage suffered by any person in by being disturbed in his or her enjoyment of the land. The provisions are set out in Articles 35-38.

Any claims for entitlement to compensation must be made to, and registered by, the council within six months of the date the order comes into operation. However, the calculation of the compensation actually payable is deferred for five years so as to allow the effects of the access order on the land to be assessed. Compensation (together with interest, determined at Government rates) then becomes due only after a claim has been made at the end of the five year period and the amount agreed between the parties or determined, in default, by the Lands Tribunal.

A claim for payment on account of special circumstances may be made at any time during the five year period. If the claimant is aggrieved by the council's refusal to make such a payment or by the sum awarded, he or she has the right to appeal to the Department.

8.3 ACQUISITION OF LAND FOR PUBLIC ACCESS

8.3.1 The powers to acquire open country land

The council also has the power, under Article 39, to acquire open country land for the purposes of informal recreation.

While the acquisition of large areas of open country land will generally be either impractical or prohibitively expensive (or both), the acquisition of smaller areas of land may well be viable and offer significant advantages, particularly if the land is already intensively used or otherwise merits special protection. It will then be possible to ensure that the council has direct control over the land, can give it permanent protection and can manage it in whatever way is necessary.

The criteria that must be satisfied in acquiring land are that:

- the land must either be open country, or give access to open country;
- there is a need for the public to have access to that open country, and it is expedient for the council to acquire the land for that purpose;
- if it is impractical to achieve such access by an access agreement or order or by acquiring the land by agreement, the council may do so compulsorily.

If any land is acquired under Article 39, it must be managed by the council so as to give the public access to as much of the land as is practical. The council also gains the power to carry out any works that are required to provide a convenient means of access to the land or which otherwise meet the purposes for which the land is held.

The Department has similar powers under Article 40 to acquire open country land, either compulsorily or by agreement, so as to make the land available for open-air recreation.

8.4 RECORDING AND PUBLICISING ACCESS TO OPEN COUNTRY

8.4.1 The need for publicity

Any access to open country that it is negotiated or secured should be publicised so that people are aware that the land

is available to them and know how it can be enjoyed. The statutory requirements set out below go part of the way towards meeting these needs but the council will also wish to ensure that any access agreements it makes are widely publicised. This will include both general publicity, such as through articles in the local press and by distributing maps and leaflets to local libraries, tourist information centres and other outlets, and more specific promotions targeted at the clubs, societies and other groups that can be expected to make most use of the land. Similarly, the notices that are put up on the site and the other information produced about it should not just set out clearly the restrictions that apply (although that is, of course, important) but also help people discover and appreciate the attractions and features of the land.

8.4.2 Maps of public access land

Under Article 41 the council has a duty to prepare and keep up to date a map of all of the land in its district covered by an access agreement or access order, or which has been acquired under Articles 39 or 40 (including any land acquired by the Department). The map used must be an Ordnance Survey map to a minimum scale of 10:10,000 (or 1:10,560 where that scale is not available) and must show the boundaries and types of land (eg the order land, excepted land and danger areas) using the colours, notation and symbols specified in Article 5 of the Access to the Countryside Regulations.

A copy of the map, and a notice setting out the restrictions on the use of the land, must be kept available for public inspection at such places as the council may determine (eg at the council's offices, libraries, information centres, etc). Reproductions of the map (to an appropriate scale) and copies of the notice must also be displayed wherever the council thinks fit, including places where the public obtain access to the land concerned.

8.4.3 Boundary notices

Article 43 gives the council the power to put up and maintain notices indicating the boundary of any access agreement or order land, and any excepted land. Such notices are clearly important in ensuring that the public stay within the area to which they have a right of access and will often be valuable in also drawing attention to the availability of the land.

SECTION 9: DEVELOPING RECREATIONAL PATHS AND NETWORKS AND LONG DISTANCE ROUTES

This section is concerned with some of the practical steps that need to be taken if an attractive range of access opportunities to the Northern Ireland countryside are to be secured. It draws attention to the differing requirements of path users; to the development of recreational paths and networks as a means of providing a choice of access opportunities whilst making the most effective use of staff and resources. This section also emphasises the need for the exchange of ideas, experiences and information between all those who are professionally concerned with this important area of work and the wide opportunities that exist for co-operation between councils.

A number of these themes are covered only in outline and the section as a whole is not intended to be a detailed working blueprint of how we should proceed, either nationally or locally. Rather it should be seen as providing a framework which will help each council to decide where its own priorities lie, and how to progress in the most effective way towards meeting the needs and realising the potential that is unique to its own area. This section will also provide a focus for the developing dialogue between the Department and district council about how these and other ideas can best be put into practice and how the assistance which the Department can give can be used to the greatest effect.

9.1 THE BASIS OF THE APPROACH

Section 2 of the Guidance Notes recognises that most district councils see their duties and powers under the Access Order as a means to an end; that underlying the council's approach will be the desire to provide an attractive range of countryside recreation opportunities both for the enjoyment of local people and to attract visitors and tourists to the area. In considering how these objectives can be met, the council will need to have regard to the differing needs of path users and to the type of provision it wishes to make through the development of local recreational paths, recreational networks and long distance routes.

In this context, the term "recreational paths" and "recreational networks" refers to those public rights of way, public paths, permissive paths and quiet country lanes which are developed, managed, maintained and promoted for walking, riding or cycling. They will primarily offer a choice of opportunities for a part of a days' enjoyment of the countryside and have wide popular appeal. "Long distance routes" are routes which have been formally designated under Article 21 of the Access Order and intended to enable the public "to make extensive journeys on foot, pedal cycle or horseback" along a route which, for

the whole or greater part of its length, is not along roads mainly used by vehicles.

Although the distinctions between recreational paths, networks and long distance routes is important, the different types of provision are of course complementary to each other. There is no reason why the council's long-term aim should not be to achieve both an attractive and comprehensive district-wide recreational network and to offer users the opportunity to undertake more extensive journeys. The first priority, however, should be to develop recreational paths and networks. It is this approach that will be of the most immediate benefit to the greatest number of countryside users.

The work involved will also be more effective if the council targets its initial approach on key routes in a selected part (or parts) of the district. This will help ensure that the maximum return on the staff and financial resources that are deployed, allow the staff concerned to build up expertise and the council as a whole to gain confidence, demonstrate its ability to manage access effectively and show the benefits access provision can bring. But a targeted approach can only be taken so far: the initial survey of `alleged rights of way' needs to cover the whole district while the council's general duties and obligations under the Access Order mean that it must also be able to respond to problems and protect the public's rights as and when it is necessary to do so.

9.2 ADDRESSING THE NEEDS OF COUNTRYSIDE USERS

9.2.1 Distinctions between countryside users

The universal appeal of the countryside can mask the fact that countryside users do not all have the same needs and expectations but comprise a number of distinct "recreation markets". The key to successfully developing and promoting routes will lie in matching the recreational opportunities that are provided to the needs of the appropriate market sectors.

The kind of opportunities that best suit an individual user depend on a wide range of factors. These include the time the person has available and distance he or she is willing to travel to reach an area of countryside, the length and degrees of challenge and solitude offered by the walks or rides that are available, and the extent to which any special features or attractions of the paths meet the user's other interests and expectations. The needs of walkers, for example, range from

enjoyable but physically undemanding walks of no more than 15 minutes, to the opportunity to make extensive journeys over several days through the most attractive, remote and demanding upland scenery. Horse riders and cyclists too have a similarly wide range of needs relating both to the requirements of their particular activity and their individual interests and inclinations.

9.2.2 Matching provision to the needs of the market sectors.

In practice, a path or group of paths will often be capable of meeting a range of needs and interests. The inherent appeal of the countryside allows also for a degree of tolerance and means that levels of "customer satisfaction" are generally high; a particular path may still be regarded as rewarding and enjoyable even if it does not conform exactly with the user's ideal wishes. Nevertheless it is important that the council assesses the character of the countryside and features of the paths that are potentially available in its area on the one hand, and on the other the specific needs of the "market sectors" that it aims to serve in developing and promoting those paths for recreation. In addition to the obvious benefits of such an assessment - in ensuring that the routes are, in fact, suited to the needs of the target audience - this will help determine the council's overall priorities, to draw up a detailed prescription of the way each path should be managed and promoted, and ensure the council is realistic in its expectations of the potential benefits. Equally, the assessment will define the limits of what is feasible and the market sectors it is not possible to accommodate.

Tough, physically challenging paths over remote upland terrain, for example, will be especially valued by long distance and hill walkers, many of whom will be attracted to the area by the opportunities such paths provide. They might also appeal to those who wish to enjoying a day's strenuous hill walking while on a general interest holiday and to a minority of the local community. But such paths will not, in general, be suitable for the less experienced or poorly equipped casual path user. In contrast, less demanding lowland, coastal or riverside paths can be expected to have a wide appeal including to family groups, the elderly, those with a "general" interest in the countryside and casual path users. Some of these paths will not be particularly attractive or noteworthy, although they will still be of local importance. Others, however, will have considerable potential to attract day visitors or add to the appeal of the area as a holiday destination and will justify wide promotion.

It follows that both in identifying routes for development and deciding how they should be managed and promoted, the council must take into account the needs of the various "market sectors", ie the different types of path user that it aims to serve. Among the factors that must be considered are:

- **The length of walking opportunities**. While the more dedicated hill walkers will look for longer circuits and routes (eg from 10 to 20 miles or more), casual users require shorter routes, ideally a choice of circular walks and rides offering a few hours or half-days' enjoyment.

- **The standard of path and of signposting and waymarking, etc.** Extensive waymarking will generally be inappropriate in remote upland areas and detract from users' enjoyment of the solitude and remoteness. Such paths can also be fairly rugged; it is more important that they meet the users' expectations of a "wilderness experience" (eg by giving access to ridges and peaks, taking in the finest views, avoiding intrusive roads, etc). On other paths - and for the majority of path users - these priorities will be reversed: it will be more important to ensure that path surfaces, stiles, gates and footbridges are all the highest possible standard, for paths to be comprehensively signed and waymarked and otherwise to give users a high degree of "reassurance".

- **The availability of facilities and services.** In general, the wider the appeal of the path, the more important it will be to ensure that it is supported by facilities such as car parking, picnic sites and toilets. For longer whole-day routes, places on or near the route to buy refreshments will be an important consideration. If a route is being developed to meet one of the more of the specialist market sectors the specific needs of those users must also be taken into account, such as overnight accommodation, drying facilities and luggage transfer services for long distance walkers or repair facilities for cycle touring.

- **The degree of "added value".** Where a route is through spectacular scenery, along the coast or gives extensive views, then the enjoyment of walking, riding or cycling the route will often be a sufficient attraction in its own right. Others paths may be intrinsically pleasant however, and locally important, but require "added value" if they are to be a significant attraction to visitors and tourists. This might be achieved by drawing out existing features (eg if the path gives access to archaeological sites or allows the wildlife

or geology of the area to be appreciated) or it might be `engineered' through the development of a cultural, historical or other theme that is appropriate to the route.

At least some of the paths that are developed and promoted should meet the needs of elderly people and those with disabilities. Simply ensuring that paths are easy to use by replacing stiles with kissing gates and removing other unintentional obstacles will help enormously to increase the enjoyment of the countryside for many people whose mobility is impaired. Paths might also be developed to meet the needs of those with more severe disabilities, for example by providing a smooth, hard surface and stiles designed for wheelchair users. In these cases, specialist advice should be sought at an early stage from one of the bodies (such as the Fieldfare Trust) who are concerned with access to the countryside for disabled people.

Whatever routes are developed, they must be capable of fully living up to the expectations promised in any brochures, guidebooks or leaflets that are produced. They will also be considerably enhanced if users are made to feel welcome by the local community. Conversely, "Keep Out" signs, padlocked gates, stiles topped with barbed wire and other deliberate obstructions, or confrontations with local people, will all engender a sense of unease and deter a return visit. More seriously, if the problem is widespread it will give the area as a whole the reputation of being hostile to countryside users and severely undermine the efforts that are being made by the council and other to attract tourists and visitors.

9.3 RECREATIONAL PATHS AND RECREATIONAL NETWORKS

9.3.1 Potential for developing recreational paths and networks

The Department recognises that many existing rights of way are single routes that do not immediately form part of a network. Such paths may still justify development and promotion on their own as recreational paths, particularly where the path is in good condition, is through attractive countryside or gives access to features of interest. Often, however, the survey of alleged rights of way will show that a potential network of linked routes does exist, or can be established over time by combining existing rights of way with short lengths of new public path or negotiated permissive paths. Minor, lightly trafficked country lanes might also be suitable for inclusion in a recreational

network. But since even a small increase in traffic volumes can have a substantial effect on recreational use, where such lanes are included the council must be prepared to monitor the situation and to find alternative routes should the need arise.

Even a modest network of linked routes is likely to have significant advantages over isolated paths in different parts of the district. By offering a choice of opportunities for walks or rides of varying lengths, including "short-cuts" and circular routes that return to the starting point, it will appeal to a wide range of potential users and encourage regular return visits to be made. Guidebooks or leaflets covering a range of routes will also encourage return visits to the area, be more cost-effective and justify production to a higher standard. A network also offers users a greater guarantee - if one of the paths is closed for any reason other parts of the network should still be available. For the council, the network will help to target resources, be easier to manage and maintain than isolated paths and provide a stronger justification for any related facilities such as parking or picnic area or a part-time ranger service that might be provided.

9.3.2 Elements in the development of a recreational network

Providing, managing and maintaining a network of routes will often be more of an evolutionary process rather than a strict process of development. Initially, the council's firm proposals may well be modest ones but these can be expected to evolve as the council gains experience, is able to demonstrate the benefits of access provision and to win the trust and respect of the farming community. Since the development of a network can be expected to involve a considerable investment of time, however, it is important that both the area of countryside and initial group of paths and tracks on which the network is to be based are chosen with care.

Elements in the development process can be expected to include:

- identifying and investigating suitable paths and tracks and the assertion, where appropriate, of key routes as a matter of priority;

- securing changes to existing rights of way through public path diversion orders or linked creation and extinguishment orders to ensure the paths meet the needs of users, will not give rise to difficulties for farmers and landowners and to assist with on-going maintenance.

This might include the diversion of paths away from farm yards, unstable or boggy ground and sensitive nature conservation sites;

- negotiating any additional routes that are required either as public paths or through secure, long-term permissive path agreements. These might include linking routes to give a choice of circular walks and rides and new routes to give access to viewpoints and special features of interest;

- developing and implementing a programme of works to upgrade existing paths and establish new ones. This will include the replacement or provision stiles, gates and footbridges, the clearance of natural vegetation, undertaking any surface improvements and drainage works required and the provision of signposts, waymarking, mapboards and interpretive materials;

- the provision, where appropriate, of facilities such as car parking, picnic sites and toilets;

- establishing a regular programme of inspections and on-going maintenance to ensure the paths remain to a high standard and are enjoyable to use;

- ensuring that the council can respond rapidly and is able to resolve problems or difficulties reported to it, whether by farmers and landowners or by path users.

- publicising and promoting the network, including the production of high quality guidebooks, leaflets or route cards and, where appropriate, publicity through the specialist walking magazines;

- liaising with local tourism interests both to encourage the provision of accommodation and other services to meet users' needs and to promote the network as part of the attractions of the area.

A key element will be the extent to which the council is able to establish an effective working partnership with the local community. The local farming organisations, path user groups, local tourism interests and community development groups should all be consulted at the outset therefore, including where possible about the anticipated long-term potential of the network beyond the initial set of proposals. Where possible, an on-going liaison forum of the main interests should be established, meeting two or three times a year to advise the

council. This is likely to be particularly valuable both in helping to secure a community partnership and in overcoming the practical concerns about the development of the network that will inevitably arise. Wider publicity might also be given to the development of the network from time to time, for example through local newspaper articles.
As noted in section 2.2.9, there is no reason why a community group or other voluntary organisation should not be responsible for key elements of the work, providing it has the council's full support and guidance. This might include researching existing rights of way, negotiating additional paths, undertaking regular inspections and routine maintenance tasks and researching and writing guidebooks or leaflets.

The successful development of recreational paths and networks will only come about, however, if the council itself is able to give a firm overall lead. Ultimately, only the district council has both the power and responsibility to take action in the interests of the whole community whilst still being able to address the concerns of the farming community and win their respect. Although it takes time and a concerted effort to secure the recreation paths and networks that are needed to meet the public's growing demands for access to the Northern Ireland countryside, the Department believes that this is a realistic objective and one which every district councils is capable of achieving within its area.

9.4 LONG DISTANCE ROUTES

9.4.1 Submission, approval and implementation of proposals

The statutory provisions governing the submission, approval and implementation of a proposal for a long distance route are contained in Articles 21-24 of the Access Order. A formal report must be prepared by the council and submitted to the Department under Article 21. The report should contain:

a. a map showing the route, defining those parts which are over existing public rights of way and the nature of those rights;

b. the council's proposals with regard to the provision, maintenance and enjoyment of the route;

c. separate estimates of the capital costs and annual expenditure likely to be incurred in connection with the

route (whether by the council or by any other body or person);

d. the views expressed to the council in the light of the consultations it has undertaken.

It may also include proposals for:

e. the maintenance and improvement of any existing public path or road;

f. the provision and maintenance of new public paths;

g. the provision and operation of ferries where needed in connection with the route;

h. the provision of accommodation, toilets and facilities for meals and refreshments along the route,

and any recommendations the council wishes to make to restrict traffic on existing roads along which the route passes.

The majority of these requirements can be incorporated into a draft management strategy and which can, in practice, form the basis of the council's submission. The draft strategy should set out in detail how each section of the path is to be provided, improved and maintained (including details of any sections that are to be on permissive paths, and those that are to be on existing rights of way or roads and which are considered to need no additional work or maintenance). It should also include an evaluation of the services that are available in the area to cater for path users and say how, if necessary, these might be improved. Proposals under (g) and (h) for the council itself to provide or assist with the provision of services are likely to arise only exceptionally, however, and should be discussed with the Department prior to the formal submission.

There are no statutory provisions governing the determination of the council's proposals by the Department, nor for formal objections or representations to be made; the only formal requirement is that the Department must consider the report, which it may approve, approve with modifications or reject (Article 22).

If the proposal is approved, the council is then under a duty to secure implementation of the report (Article 22(2)). While the costs of establishing the route would normally be reimbursed in full the only additional powers which the council acquires, as

such, are those under Articles 23 and 24 relating to the provision of any services and facilities in connection with the route. Any new paths which are needed to carry the long distance route must therefore be established in the usual way, either through public path creation agreements or orders under Articles 11 or 12 or negotiated as permissive paths (see sections 6.1 - 6.3 and 7.1 - 7.2). Nor is the Department bound to confirm a public path order simply because the path is required to carry the long distance route - such an order has still to meet the appropriate statutory criteria and be fully justified in the normal way.

See also: Section 5.4 – Accreditation of Recreational Routes

APPENDIX 1

SUMMARY OF THE PROVISIONS OF THE ACCESS TO THE COUNTRYSIDE (NI) ORDER, 1983

This appendix summarises the main duties, powers and rights conferred by the 1983 Access Order as they relate to the district council, the Department of the Environment, the owner, occupier or lessee of the land and members of the public.

The symbol k indicates:
- a basic duty which the council must comply with by taking action as and when necessary (eg to protect public rights of way); or
- a duty or requirement which the landowner or occupier must comply with; or
- a right conferred on members of the public.

If the council exercises one of its discretionary powers, other secondary duties may then arise (eg the duty to advertise any public path orders which the council makes).

Some matters have had to be simplified and the council should not take action without first checking in detail the exact requirements of the Access Order.

PART II - PUBLIC ROWS AND PUBLIC PATHS

Article 3. Protection and maintenance	
District council	• **a duty to assert, protect and keep open and free from obstruction or encroachment any public right of way;** • the power to institute proceedings; • the power to maintain any public right of way; • **a duty to compile and preserve maps and other records of public rights of way.**
Article 4. Signposting	
District council	• the power to erect and maintain signposts, waymarks, etc after consultation with the owner and occupier of the land. • **a duty to erect any signposts, waymarks, etc the council considers are required to help anyone who does not know the area follow a public right of way.**
Landowner and occupier	• the right to be consulted as above.

Articles 5.	**Duty to maintain stiles, gates etc**
Landowner	• **a duty to maintain stiles, gates or similar structures on a public right of way so they are safe and convenient to use.** • the right to be given 14 days notice of any default action by the council.
District council	• **a duty to reimburse at least a quarter of the expenses reasonably incurred by landowners.** • the power to make further contributions. • the power to carry out maintenance in default of the landowner and recover its costs.
Article 6.	**Authorising the erection of new stiles, gates etc**
Landowner, lessee or occupier	• the right: (i) to apply for permission to put up stiles, gates, etc on a public right of way, where needed to restrict animals on land used, or to be used, for agriculture or forestry: (ii) to erect any structures so authorised, subject to any conditions.
District council	• the power to authorise new stiles, gates, etc in these circumstances.
Members of the public	• required to accept that the right of way is subject to the restrictions imposed by any stiles, gates, etc so authorised.
Articles 7 and 8.	**The right to plough**
Occupier	• the right to plough a public right of way that crosses land used, or to be used, for agriculture or forestry (but not a path on the side or headland of a field) subject to: (i) it being necessary and convenient to plough the path with the rest of the land; (ii) the council being notified within 7 days; (iii) the surface being reinstated within 14 days (unless prevented by exceptional weather). • the right to apply for an extension of this period and for the path to be temporarily diverted for up to three months.
Occupier or any person	• **commits an offence if he/she;** **(i) ploughs a public right of way without the right to do so; or** **(ii) fails to notify the council or restore the surface in accordance with (ii) or (iii) above.**
District council	• the power to restore the surface of a public right of way that has been illegally ploughed, or ploughed legally but not restored, and to recover its costs. • the power to make an order to extend the period in which path must be reinstated and to temporarily divert the path for up to 3 months.
Article 9.	**Pasturing of bulls**

Occupier	• **commits an offence if he/she permits a bull to be at large in a field or enclosure where there is a right of way, <u>except</u> for a bull that is:** **(i) less than 11 months old; or** **(ii) is not a recognised dairy breed and is with cows or heifers.**
Article 10. Notices deterring path users	
Any person	• commits an offence if he/she puts up or maintains a false or misleading notice likely to deter use of a public right of way.
PUBLIC PATHS **Article 11. Creation by agreement**	
District council and the landowner	• <u>the power</u> to enter into a public path creation agreement, subject to any payment by the council and other conditions or limitations that are be agreed. • <u>a duty</u> on the council to consult the Department and any body representing those likely to be affected before entering into an agreement.
Articles 12, 14, 15 and 18 and schedule 1. Public path orders for creation, closure and diversion	
District council	• <u>the power</u> to make a <u>public path creation order</u> (article 12) where: (i) creation by agreement appears impractical, and (ii) the council is satisfied the path is needed and about the effect creation would have on those with an interest in the land. • <u>the power</u> to make a <u>public path extinguishment order</u> (article 14) where it appears that a path is not needed for public use. • <u>the power</u> to make a <u>public path diversion order</u> (article 15) where it appears expedient to divert a path. • <u>a duty</u>, before making any such order to: (i) consult the Department and any body representing those likely to be affected; (ii) obtain consent from any statutory undertakers with apparatus on, over or under the land. • <u>a duty</u> to notify all those with an interest in the land, put up notices and advertise the making of any such order and to keep copies available for inspection. • <u>the power</u> to require any owner, occupier or lessee who requested a diversion order to meet the costs of establishing the new path. • <u>the power</u> to confirm (without modifications) an unopposed path order, subject to prescribed tests. • <u>a duty</u> to submit an opposed order (if the council wishes to proceed), or one which the council wishes to modify, to the Department for determination. • <u>a duty</u> to give notice, as above, about any path order which has been confirmed by the council or the Department.
Owner, lessee or occupier and members of the public	• <u>the right</u> to be notified or be made aware of any path order made by the council. • <u>the right</u> to inspect the order and plan. • <u>the right</u> to make objections or representation within 28 days of notice being given, and to be heard by a person appointed by the Department.

Department of the Environment	• a duty to hold a local inquiry or otherwise give any objector the opportunity to state their case. • the power to confirm an order with or without modifications or to reject it. • a duty before confirming an order with any modifications affecting additional land to: (i) give notice of the proposed modifications; (ii) allow a further period for objections/representations; and, (iii) consider, as above, any that are made.
Article 13. Maintenance	
District council	• a duty to make-up and maintain any path created by agreement or order so as to be fit for use by the public.
Article 16. Closure or diversion by the Department	
Department of the Environment	• the power to make a public path creation or diversion order to enable development to be carried out in accordance with planning permission or by a government department. • a duty to give notice of the making of an order and consider any objections or representations; and • the power to determine an order (as for a public path order made by the council).
Owner, lessee or occupier and members of the public	• the right to be notified or made aware of any such orders and; • the right to make objections or representation (as for a public path order made by the council).
Article 17. Compensation	
Owner, occupier, etc affected	• the right to compensation for the loss in the value of the land or any damage or disturbance arising from a confirmed path order, providing a claim is made within 6 months.
District council or the Department	• a duty to pay compensation, as authorised by the District Valuer or Lands Tribunal.
Article 19. Temporary closure or diversion	
District council	• the power, on receiving an application, to make an order to close or divert a right of way for up to three months. • the power to require the applicant, if he/she is the occupier, to provide or pay for any facilities needed on the diversion. • a duty in making an order to take into account the interests of users. • a duty before refusing to make an order to consult the Department.
Occupier or any person	• the right to ask the council to make such an order.
Article 20. Cycling	

Members of the public	• **the right to ride a pedal cycle on any public path, providing he/she gives way to pedestrians and horse riders and subject to any orders or bye-laws made by the council.**
Articles 21 - 24. Long distance routes	
District council	• the power to prepare and submit proposals for long distance routes to enable extensive journeys to be made on foot, by cycle or horseback that are not along roads mainly used by vehicles. • a duty to consult the Department and any person or body likely to be affected before submitting a proposal. • a duty to secure implementation of a report approved by the Dept. • the power to provide or make arrangements to give effect to an approved route, including ferries, accommodation, meals and refreshments, and to acquire land compulsorily.
Department of the Environment	• a duty to consider any such report submitted to it. • the power to approve a report, with or without modifications, or reject it.

PART III ACCESS TO OPEN COUNTRY

NB: **Open country** is defined in article 25 as any land appearing to the district council or Department to consist wholly or predominantly of mountain, moor, heath, hill, woodland, cliff, foreshore, marsh, bog or waterway.

Excepted land is defined in schedule 3 and includes land used for agriculture (other than unenclosed rough grazing) at the time the agreement or order was made, nature reserves to which entry is prohibited by bye-laws, buildings and gardens, golf course and quarries.

Article 26. Public rights under an access agreement or order	
Members of the public	• **a right to enter onto land covered by an access agreement or order for the purpose of open air recreation without being treated as a trespasser, providing no damage is caused and subject to any bye-laws or restrictions in the agreement or order.**
Article 27. Consultations on access requirements	
District council	• **a duty to consult the Department and bodies representing landowners and occupiers for the purpose of ascertain what land there is within definition of "open country" and considering what action should be taken to secure public access for open-air recreation.** • **a duty to have regard to all relevant circumstances in considering what action should be taken, including the extent to which access is otherwise likely to be available and the need for greater facilities for such access.**

Article 28.	**Access agreements**
District council	• the power to make an access agreement with any person with an interest in the land, including for the payment of expenses and a "consideration" based on the capital value of the land.
Articles 29.	**Access orders**
District council	• the power to make an access order where it appears to be impractical to secure access by agreement; • a duty to submit any access order made to the Department. (NB: the order can not take effect until confirmed).
Department of the Environment	• a duty not to confirm any such order: (i) until bye-laws have been made and confirmed under articles 46-47; (ii) if it is satisfied that the benefits would not outweigh the disadvantages to agriculture, forestry or amenity tree planting.
Article 30.	**Land used for agricultural purposes, etc**
Landowner, occupier, etc	• the right to make representations to the Department about: (i) an access order submitted to it for confirmation; or (ii) an access agreement; (iii) a confirmed access order, that the land is used or being brought into use for agriculture or forestry, or is used for amenity tree planting, and access would be prejudicial.
Department of the Environment	• a duty, before determining any such representations, to hold a local inquiry or give the person the opportunity to be heard. • a duty, if it is satisfied that the prejudicial effects of access are not outweighed by the benefits, to either: (i) not confirm a proposed access order; (ii) vary an existing access order; or (iii) require the council to vary an existing access agreement to exclude the land.
District council	• a duty to vary an access agreement if required to do so by the Department.
Article 31.	**Effect of an access agreement or order on those with an interest in the land**
Landowner, occupier, etc	• a duty not to carry out any work that would substantially reduce the area to which the public have access, other than whereby the land becomes excepted land.
Article 32.	**Provisions for securing safe and sufficient access**
District council	• the power, in an access agreement or order, to provide or improve access to the land or protect the public when using it including: - to meet the owner or occupier's costs in carrying out any works; - to carry out works in default of the owner or occupier and recover any costs he/she would normally bear.
Article 33.	**Power to enforce access**

District council	• the power to serve notice on any person who contravenes the provisions of an access agreement or order and (subject to any appeal made to a magistrates court against the notice); • the power to act in default and recover its costs.
Landowner, occupier, etc	• the right of appeal to a magistrates court against such a notice.
Article 34. Suspension to avoid risk of fire	
District council	• the power to direct that public access is suspended when there is a risk of fire.
Articles 35-38. Compensation for access orders	
District council	• a duty to pay compensation (deferred for 5 years to allow the effect of the order to be assessed) for depreciation in value of land or for disturbing a person's enjoyment of land as consequence of an access order. • a duty to keep for public inspection a register of any claims for entitlement to compensation and to notify applicants their claims have been registered. • the power to make payments on account if the council is satisfied that special circumstances exist.
Landowner, occupier, etc	• the right to compensation (deferred for 5 years) for the loss in the value, or damage or disturbance to his/her enjoyment of, the land arising from an access order providing: (i) entitlement to compensation is registered within 6 months of the order coming into operation, and (ii) a claim is made within 6 months of date compensation becomes payable. • the right to ask for payment on account during the 5 year period on the grounds of special circumstances. • the right to appeal to the Department against refusal of an interim payment or the sum offered.
Department of the Environment	• a duty to offer an appellant and district council the opportunity to be heard. • the power to direct the district council to pay on account a sum the Department considers just.
Articles 39 and 40. Acquisition of open country land for public access	
District council	• the power to acquire open country land for public access, including compulsorily where it is impractical to obtain access by an agreement or order. • the power to carry out works on land it has acquired. • a duty to manage such land to give public access for open air recreation in so far as is practicable.
Department of the Environment	• the power to acquire open country land for public access, either by agreement or compulsorily, where it appears expedient to do so.
Article 41. Maps of land subject to public access	

District council	• a duty to prepare and keep for inspection a map of any access agreement or order land or land acquired for public access; • a duty to display the map and a notice of restrictions at places where public gain access to the land.
Article 42. Provisions as to danger areas	
District council	• a duty to exclude from any access agreement or order land that pose a danger to the public, and to protect the public from sources of danger.
Article 43. Boundary notices	
District council	• the power to erect and maintain notices showing the boundary of any access agreement or order land.

PART IV SUPPLEMENTARY

Article 44. Protection for interests in the countryside	
District council	• **a duty in exercising its functions under the Access Order to have regard to:** **(a) the needs of agriculture and forestry, and** **(b) the need to conserve the natural beauty and amenity of the countryside.**
Article 45. Parking places	
District council	• the power to provide parking places to facilitate use of public rights of way and access to open country, and to acquire land compulsorily for this purpose.
Articles 46 and 47. Bye-laws	
District council	• the power to make bye-laws in respect of: (i) any land crossed by a public path, long distance route or public right of way; and (ii) any access agreement or order land, including to prevent damage, ensure people behave themselves and avoid interference with others. • bye-laws may (inter-alia) prohibit, restrict or regulate the use of land by traffic or for any recreational purpose, but shall not interfere with the exercise of any public right of way.
Department of the Environment	• the power to make bye-laws in default of the district council when it has been required but failed to do so within three months.
Article 48. Rangers	
District council	• the power to appoint rangers for any land for which bye-laws can be made, including to advise and assist the public and secure compliance with any bye-laws.

Article 49. Supplementary provisions on compensation	
District council and the landowner, occupier, etc.	• provides for any dispute over compensation for a public path order or access order to be determined by the Lands Tribunal for Northern Ireland. • applies the relevant articles of the Land Compensation (NI) Order 1982 and deals with the interests of mortgagees.
Articles 50 and 51. Financial assistance by the Department and district council	
Department of the Environment	• the power to defray or contribute to expenditure: (i) by a district council in exercising its powers under the Access Order (ii) by any body or person in implementing an approved long distance route.
District council	• the power to defray or contribute to expenditure by any person assisting with the council's function under articles 3 (protection and maintenance of public rights of way), 4 (signposting), 13 (make-up and maintenance of new paths) and some functions under articles 41 to 43 (access to open country).
Article 52. Amendment of Occupiers' Liabilities Act (NI) 1957	
Occupier and members of the public	• provides that a person using land covered by an access agreement or order is not "a visitor" for the purposes of determining occupier's liability.
Article 53. Crown land	
District council	• applies the council's powers to carry out works, make orders, bye-laws etc to crown land, providing consent has been given by the relevant department.
Article 54. Local inquiries	
Department of the Environment	• the power to hold a public inquiry in connection with any of its functions under the Access Order and to make rules regulating the procedures to be followed at any inquiry.
Article 56 and Schedule 5. Statutory Charges Register	
District council	• provides that any public path agreement, public path order, access agreement or access order (or any variation to such an order) shall be a registered in the Statutory Charges Register.

APPENDIX 2

1 PUBLIC RIGHT OF WAY ENQUIRY EVIDENCE FORM

The object of this enquiry is to reach the truth of the matter, whatever it may turn out to be. You are therefore asked to answer the questions as fully as possible and not keep back any information, whether for or against the claim that the route in question is or is not a public right of way. This is important if the information is to be of real value in establishing the status of the route.

File Ref: (for office use only) _____

..... Council is currently investigating whether or not the path from *_____ _____ to *_____ (*describe precisely the starting point and finishing point of the route) is a public right of way for the purposes of the Access to the Countryside (NI) Order 1983.

Full Name: _____ Age: _____

Address: _____ Tel No (day): _____
_____ Tel No (eve): _____

Post Code: _____ Occupation: _____

How long have you lived in the area? _____

Please give a description of the route in question: _____
_____
_____
_____
_____

Townland:_____

Nearest Town/Village: _____

Map Ref. No./s: _____

Does the route link two public places? If so, where?: _____
_____
_____

Believed usage of route e.g. walking, horse riding, cycling: _____
_____
_____

State any features on the route that help define its line:
_____
____

YOU MUST MARK THE ROUTE CLEARLY AND PRECISELY ON THE ATTACHED COPY MAP. PLEASE ANSWER THE QUESTIONS AS ACCURATELY AS POSSIBLE. YOU MAY CONTINUE ON A SEPARATE SHEET OF PAPER IF REQUIRED.

1. Do you believe the route in question to be a public right of way?

Yes _____ No _____ (please tick as applicable)

1a. If so, for how many years have you held this belief?

_____

1b. Please give details as to why you hold this belief.

_____
_____
_____
_____

2. Do you know of any other people who regard the route as a public right of way?

Yes _____ No _____ (please tick as applicable)

2a. If so, who are they?

_____

3. Have you used the route?

Yes _____ No _____ (please tick as applicable)

3a. If so, during which years?

_____

3b. For what purpose? (pleasure, business, work etc.)

_____

3c. How many times a year?

_____

3d. By what means? (e.g. on foot, on horseback etc.)

_____

4. Is the route used by other people?

Yes _____ No _____ (please tick as applicable)

4a. If so, for what purpose? (pleasure, business, work etc.)

_____

4b. By what means? (e.g. on foot, on horseback etc.)

_____

5. Is the route clearly defined on the ground?

Yes _____ No _____ (please tick as applicable)

5b. If so, has it always run over the same route or has it been diverted?

Same route _____ Diverted _____ (please tick as applicable)

5c. If it has been diverted, give details and dates if known.

_____

_____

5d. Is there an acceptable diversion?

Yes _____ No _____ (please tick as applicable)

5e. If so, describe the acceptable diverted route?

_____

_____

6. To the best of your knowledge, have there ever been on the route:

6a. Any stiles or gates?

Yes _____ No _____ (please tick as applicable)

6b. Any notices?

Yes _____ No _____ (please tick as applicable)

6c. If so, please state, with details of locations and dates, where the stiles, gates or notices stood and, in the case of notices, what was said on them:

_____

_____

_____

7. Who owns or occupies the land crossed by the way?

_____

8. If you were working for any owner or occupier of land crossed by the route at the time when you used it, or if you were a tenant of any such owner, please give details and dates. If not please write No.

_____

_____

8a. If you were working for, or a tenant of the owner, did you ever receive any instructions from him/her as to the use of the route by the public? If so, what were they? If not write No.

_____

_____

9. Have you ever been stopped or turned back when using this route?

Yes _____ No _____ (please tick as applicable)

9a. If so, please state when and what happened.

_____

_____

_____

9b. Have you ever heard of anyone else being stopped or turned back whilst using this route?

Yes _____ No _____ (please tick as applicable)

9c. If so, please state when and what you heard happened.

_____

_____

10. Have you ever been told by any owner or tenant of the land crossed by the route, or by anyone in their employment, that the way was not public?

Yes _____ No _____ (please tick as applicable)

10a. If so, please state the date/s and outline what was said.

_____

_____

11. Have you ever known there to be locked gates or other obstruction along the route?

Yes _____ No _____ (please tick as applicable)

11a. If so, please give details.

_____

_____

_____

12. Have you ever seen notices such as "Private", "No Road", "No Thoroughfare" or "Trespassers Prosecuted" either on or near the route?

Yes _____ No _____ (please tick as applicable)

12a. If so, what did these notices say?

_____

_____

13. Have you ever been given permission to use the route?

Yes _____ No _____ (please tick as applicable)

14. Do you know of any other evidence to support or deny a public right of way claim concerning this route? E.g. written historical information, maps, evidence of other people.

Yes _____ No _____ (please tick as applicable)

14a. If so, please give details (use a separate sheet if necessary)

_____

_____

I hereby certify that to the best of my knowledge and belief, the facts that I have stated are true. I understand that I may be required to attend a hearing or Court to give evidence on oath on this matter should this prove necessary.

Signature: _____

Date: _____

Please return to: The Countryside Recreation Officer

.....Council

.....

.....

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2. SUGGESTED SOURCES OF EVIDENCE

(See also the Antrim Borough Council CD – Forms A and D)

A. Verbal evidence - Contacts/Witnesses

1. District Councillors.

2. Local Tourist Officers.

3. Local contacts;
- rambling clubs, amenity societies, angling clubs,
- community development groups,
- tourism associations,
- other inhabitants with particular knowledge,
- landowners and occupier,
- Church Ministers, Post Masters.

4. Articles and notices in local newspapers, on notice boards, etc. requesting those who have used paths or who have information (eg histories, guidebooks, old maps and plans of the area) to come forward.

B. Documentary evidence

1. Records of the Department's Roads Service and Planning Service eg Planning Hazard Maps (contact should be with the appropriate Divisional Office).

2. Records of other government departments or bodies, eg Forest Service, Rivers Agency, Water Service, Education and Library Boards, etc.

3. Local histories, guide books, pamphlets.

4. Title deeds (may be viewed in the Land Registry, {see Appendix 5 for address).

5. Ulster Society for the Protection of the Countryside (USPC), Ulster Federation of Rambling Clubs (UFRC), local history/heritage societies, Ulster Rural Riders' Association (URRA) and other countryside user groups.

6. Records of the National Trust.

7. Newspaper and magazine articles.

8. Aerial photographs.

C. Maps

1. Early large scale editions of Ordnance Survey maps which may show paths or tracks to have existed as a feature on the ground. The Ordnance Survey's *Instructions to Field Examiners and Revisers* manual gave detailed classification descriptions for roads, etc. This evidence has been used in a least one successful local Court case. A copy of the relevant text (Para 85) may be obtained from EHS or OSNI.

2. Current editions of OSNI maps.

3. Plans for railways, canals, road schemes (including those which were never constructed).

4. Any other old maps or plans from whatever source.

APPENDIX 3

NOTES AND MODEL CLAUSES FOR A PUBLIC PATH AGREEMENT UNDER ARTICLE 11

1. NOTES ON THE MODEL CLAUSES

Introduction

These model clauses are derived from agreements used by English highway authorities to establish new public rights of way, adapted to suit the purposes of Northern Ireland.
Although they may be modified as necessary to suit the agreement that has been reached in any particular case, care should be taken not to negate the overall scope and purpose of the agreement which is to establish a public path as public right of way in perpetuity. Care should similarly be taken to ensure that any conditions or restriction that are included in an agreement, beyond those suggested in the model, are not inconsistent with the concept of a public right of way at common law (see section 7.1.3 of the *Guidance Notes*).

The model is not appropriate for permissive path. Some other form of agreement should be drawn up on the basis of the advice in section 7.2.2 of the *Guidance Notes*.

Parties to the agreement

In order to create a public path, the agreement must be between the council and the owner or some other person with the legal capacity to bind the land in perpetuity. A tenant of lessee of the land does not normally have that capacity.

Nevertheless, any tenant or lessee must be kept fully informed of the terms and conditions of the agreement and may (if appropriate) be also invited to be party to the agreement - although this can only be to the extent of confirming his or her concurrence with it. The optional sections included in the draft which recognises the interests of any mortgagee might be adapted for this purpose.

Consideration

The consideration that is agreed should be a `once-and-for-all' lump sum payment that does not exceed that sum recommended to the council by the District Valuer. The sum will normally reflect the assumed diminution in the value of the land as a result of the creation of the public path together, where appropriate, with an element of compensation for any loss of privacy. Separate provision to meet the owner's reasonable expenses in connection with the agreement is made in clause 10.

Clause 1

The description in clause 1 should be sufficient to readily identify the location of the public path and the line it follows. The Agreement should specify a width for the path, define the start, end and any intermediate points at which the path changes direction, give the overall length, and the length and direction between any intermediate points. Any permanent features which allow the line to be identified should also be referred to (eg if the path is along a river bank). The description may, if necessary, be set out separately in a schedule to the agreement.

The agreement plan should be based on a large scale Ordnance Survey plan of the area and include the scale and orientation. It should show the owner's land and the line of the public path exactly as specified in clause 1, and the position and type of any facilities (signposts, stiles, etc) to be provided by the council as specified by clause 4.

Clause 2

It is important both from the owner and the council's point of view that the agreement specifies the nature of the public rights that are being established. This must be consistent with the classes of rights of way know at common law (see section 4.1.9) and will normally be either as a footpath or a bridleway together (in either case) with the right which cyclist have to use that way by virtue of Article 20 of the Access Order.

Sub-clause 2(2) is intended to offer some protect to the owner against the possibility that any further rights of way could arise over the land through deemed dedication. In stating that no other rights are acknowledged by the making of the agreement, it also reserve the owner's position in relation to any right of way that may have become establish before the agreement was made. The owner remains free to dispute the existence of such a right of way (as the council is free to pursue assertion) without being compromised by the agreement. In a case where other rights of way <u>are</u> acknowledged by the owner, this clause should be modified accordingly.

Clause 3

This clause is self explanatory.

Clause 4

Under the terms of clause 4 the council agrees to carry out any

necessary work to bring the path into a fit state for use, to also erect all necessary facilities (signposts, stiles, gates, footbridges, etc) and waymarks and thereafter keep both the right of way and the facilities in good repair. This includes the on-going maintenance of stiles and gates that would otherwise be the landowner's responsibility.

If the council fails to repair the path or any of the facilities within 28 days of being asked, the owner may do so himself and recover his costs from the council. Two exception are provided for sub-paragraphs (3)(a) and (b). They are that the council is not liable to meet the owner's costs if, to carry out the repairs, it is necessary to gain access over the owner's land and consent is unreasonably withheld; nor is the council liable for the cost of repairs that arise as a direct consequence of action by the owner, his employees or contractor. The council would not be liable, therefore, for the cost of restoring the surface if the path is ploughed (whether legally, under Article 7, or not) and any damage (whether accidental or not) such as when a signpost is "lopped" by a hedge flail.

In practice, it will often be possible to agree an accommodation route which the council may use as and when it is necessary to get machinery or materials to the site. In this case, the availability of the route should be referred to in paragraph 4(1) and sub-paragraph (3)(a) deleted or amended.

Clause 5

Clause 5 simply sets out what is, in any event, the owner's basic common-law duty to keep the public path free from obstruction. The clause may be expanded as desirable and providing agreement can be reached, eg to give the council a right to enter onto the land to remove any such obstruction and to recover its costs.

Clauses 6 and 7

Neither of these clauses are essential to establish a public path but they have been included in the agreements made by at least one English highway authority (with the sanction of the council's insurers) to meet the concerns raised by landowners over the question of occupier's liability.

Clauses 8, 9 and 10

These clauses should be self explanatory.

In accordance with Schedule 5 of the Access Order, the agreement should be registered in the Statutory Charges Register under the Land Registration Act (NI) 1970.

2. MODEL CLAUSES FOR A PUBLIC PATH AGREEMENT

THIS PUBLIC PATH CREATION AGREEMENT is made the [day of 19] **BETWEEN** the [ ] Council (hereinafter called `the Council') of first part and ABC [and DEF] of the second part (hereinafter called `the Owner/Owners') of the second part [and GHJ (hereinafter called `the Mortgagee') of the third part].

WHEREAS -

(1) The Owner is seised in fee simple in possession of land situate [in the County of] (hereinafter called `the said land') and shown [ ] on the plan annexed hereto.

[(2) The said land is charged to the Mortgagee by a legal charge dated the day of 19 and made between the Owner of the first part and the Mortgagee of the second part].

(3) It is intended to dedicate a public path across the said land.

(4) The Council has consulted with the Department of the Environment for Northern Ireland and those bodies appearing to the Council to be representative of persons likely to be affected by this Agreement in accordance with Article 18(1) of the Access to the Countryside (Northern Ireland) Order 1983 (Statutory Instruments 1983 No. 1895 (N.I. 18)) (hereinafter called `the 1983 Access Order').

(5) The dedication of the said public path is made in consideration of the payment of the sum of [(,)] and the conditions hereinafter contained.

NOW in pursuance of Article 11 of the 1983 Access Order **IT IS HEREBY AGREED** as follows:-

1. In consideration of the sum of [(,)] paid by the Council to the Owner (the receipt of which is hereby acknowledged) and in consideration of the execution of works hereinafter mentioned and the agreements and conditions hereinafter contained the Owner [with the concurrence of the Mortgagee] herby dedicates for use by the public as a public path **ALL THAT STRIP** of land having a width of [ ] metres running from to and shown [ ] on the plan annexed hereto.

2. (1) The right hereby dedicated shall be a right of way for any member of the public [to pass and repass on foot] [to pass and repass on foot and on horseback or leading a horse (including a pony ass mule donkey or hinny and `horseback' is to be construed accordingly)] and by virtue of Article 20(1) of the 1983 Access Order the right to ride a pedal cycle

(2) No public right except as aforesaid over the said land shall be created or deemed to be created or acknowledged by the making of this Agreement.

3. The Owner shall if called upon by the Council but at the sole expense of the Council prove his title to the said strip of land.

4. (1) The council shall at its own expense and for the purposes of facilitating the convenient use of the public path:

(a) carry out such work as appears to the Council to be necessary in pursuance of its duty under Article 13 of the 1983 Access Order to bring the public path into a fit state for use by the public and shall maintain the said public path in that state;

[(b) erect [a signpost stile gate and footbridge] (hereafter referred to as `the facilities') at the position shown on the attached plan and indicated respectively by the symbol ["SP""ST""G" and "FB"] together with suitable waymarks on the line of the public path and shall at all times thereafter keep the said facilities and waymarks in good repair.

(2) If the public path or any of the facilities or waymarks shall at any time hereafter become out of repair and the Council shall after twenty-eight days notice given in writing by the Owner fail to put the same in proper repair it shall be lawful for the Owner to repair the same and (except as provided for in paragraph (3) hereof) the cost of such repair shall be a debt due from the Council to the Owner.

(3) The Council shall not be liable to the Owner under this Clause where:

(a) it is necessary in order to carry out work to the public path or erect maintain or repair the facilities for the Council to cross over land not forming part of the public path that is in the control of the Owner (including to take over such land any materials machinery or equipment) and consent for the Council to do so is unreasonably withheld; or

(b) the need to repair the public path or repair or replace the facilities arises as a direct consequence of an action by the Owner or any employee or agent of the Owner including (without prejudice to the generality of this paragraph) disturbance of the surface of the public path arising from agricultural or forestry operation (whether such disturbance was lawful or not) and accidental damage to the public path or the facilities by agricultural machinery.

5. The Owner shall keep the said public path free from obstruction at all time so the said right of way may be exercised unhindered.

[6. The Council shall fully indemnify the Owner against all claims of Third Parties arising from the state of repair of the public path and the facilities and against all claims of Third Parties whatsoever where liability should properly rest with the Council.]

[7. It is further hereby declared that the Owner shall only be liable to lawful users of the path according to the general principles of the criminal law and the law of nuisance and negligence other than for negligence concerning the state of the path and necessary facilities which shall be the sole responsibility of the Council notwithstanding Clause 4 hereof and against which the Council agrees to indemnify the Owner by clause 6 hereof.]

8. Nothing in this Agreement shall in any way affect the Council's rights powers duties and discretions towards any public rights of way or public path under the 1983 Access Order or any other enactment except to the extent that the said Order or other enactment allows such rights powers duties and discretions to be varied in any way.

9. The Council shall pay to the Owner reasonable expenses of and incidental to the preparation and completion of this Agreement and any duplicate copy thereof and any stamp duty payable thereon.

10. Any dispute arising under this Agreement between the Council and the Owner as to their respective rights duties or obligations under this Agreement shall be determined by an Arbiter to be agreed upon between the Owner and the Council or in default of agreement to be nominated by the President for the time being of the Royal Institute of Chartered Surveyors and the decision of such an Arbiter shall be final and binding on the parties both as to the matters in dispute and as to responsibility for the costs of Arbitration.

In WITNESS whereof the [ ] Council have caused their Common Seal to be hereunto affixed and the Owner [and Mortgagee] have hereunto set [his/their] respective hand and seal the day and year first above written.

APPENDIX 4

NOTES AND MODEL CLAUSES FOR AN ACCESS AGREEMENT TO OPEN COUNTRY UNDER ARTICLE 28

1. NOTES ON THE MODEL CLAUSES

Introduction

Section 8.2.1 of the *Guidance Notes* outlines the powers that are available to the district council under Part III of the Access Order to make an access agreement with any person having an interest in open country. Such an agreement allows the public to enter onto the land for open-air recreation without being treated as a trespasser and for those with whom the agreement is made to receive limited compensation. It is also possible under an agreement to provide, where necessary, for a means of access to the land, for the council to put up notices showing what land is available and how it may be used, and for the council to make bye-laws, provide a wardening service and generally to help manage the use of the land for quiet recreation.

The is no prescribed form and an access agreement may be on whatever terms and conditions that council is able to negotiate, providing these are consistent with the overall purposes of the legislation. The model clauses set out below are intended as a guide to the matters the should normally be covered in any agreement and may be adapted as necessary to suit local circumstances.

The parties to the agreement

Whenever possible the agreement should be with all of the parties that have an interest in the land, including the owner, any tenants and those with an interest by virtue of a licence or agreement (eg any sporting, fishing, turbary or grazing rights).

Article 28 (5) of the Access Order provides that an access agreement may be made with one or some, but not all of the interests in the land, but must not prejudice the rights or work against anyone with an interest in the land who is not a party to it. A copy of the agreement must be served by the council on any such person.

Schedule 5 of the Access Order requires any access agreement to be registered in the Statutory Charges Register under the Land Registration Act (NI) 1970. This should ensure that anyone who subsequently purchases an interest in the land becomes aware that an agreement has been made.

Consultations and consent

While the council is required to consult the Department and bodies representing owners and occupiers over what open country land there is in the district and what action should be taken to secure access to it for open-air recreation, the council is not specifically required to consult over, or obtain consent to, the making of an access agreement.
Nevertheless, it will be helpful it the council consults both the DOE and DARD, and other relevant bodies or organisation that may have an interest, about any access agreement it proposes to make.

Early consultation with the Department will be essential if the council proposes to apply for grant-aid or if it is to seek approval to any bye-laws in connection with the access agreement. Other bodies that should or might be consulted, once it appears from the discussions with the owners and occupiers that an access agreement is possible, include the Water Service (where any water courses or gathering grounds are included), the Forest Service (where public-sector woodlands will be affected) and the relevant countryside user organisations (eg the Ulster Federation of Rambling Clubs and Mountaineering Council of Ireland).

Notes on the clauses

Access for open air recreation

Clauses 1, 2 and 3 of the model agreement should be self explanatory. They apply the provisions of Article 26(1) of the 1983 Access Order to the access land, giving any member of the public a right to enter onto and use the land for open-air recreation without being treated as a trespasser.

Clauses 4 and 5 and the Second Schedule specify the means by which the public may obtain access to the land, the responsibility for carrying out any improvements or repairs to the means of access, and the provision (by the council) of notices to inform the public about the access land.

The plan which is drawn up (Clause 3) should be based on a large scale Ordnance Survey map and show the land that is subject to the agreement together with any land that is subject to restrictions on access and any `excepted land' or danger areas from which the public are excluded at the time the agreement is made. Although the council is not obliged to do so, it will be helpful the use the notation and symbols specified in Article 5 of the Access to the Countryside Regulations and which must be used on the map the council prepares of public access land (see also Article 41 and

section 8.4.2 of the *Guidance Notes*).

Consideration

Clause 6 provides for the council to pay a consideration for the making of the agreement. This will normally take the form of an annual payment, reviewable at five yearly intervals (providing any one of the grantors requests a review from 12 to 6 months prior to the review date). Grantors are required to agree an apportionment of the consideration amongst themselves and notify the council accordingly.

Since the first payment is made at the start of the agreement, the council is enabled to require repayment of a proportion of the monies when a grantor terminates his or her interest.

The District Valuers advice should be sought on the amount of the consideration that is to be made. Schedule 4 of the Access Order provides that he shall value the land as at the first day of the 12 month period to which the consideration will relate, assuming:

(a) sale on the open market by a willing seller, and

(b) that the use of the land is unfettered by the agreement.

and requires the council to agree with the grantors what proportion of the figure set by the District Valuer should be paid in respect of each 12 month period.

The experience of access agreements that have been made in England and Wales suggests that, particularly where the land in question is already subject to extensive *de facto* recreational use, the agreed consideration may sometimes be no more than a token payment. In these cases, the real "value" of the agreement to the landowners will be the provision by the council of a ranger service, and in enabling bye-laws to be made so as to control and regulate the public's use of the land.

Sub-clause (3)(b) enables the amount of the consideration to be varies at any time should any part of the access land become excepted land. Sub-clause (4) provides for the council to pay or contribute towards the grantor's costs where they carry out agreed works to provide, improve or maintain the means of access to the land.

General undertakings and enforcement provisions

Clause 7 sets out the undertakings that grantors may be expected

to give to respect the access land and the means of access to it. Sub-clause 3 enables the council, after giving notice in writing, to take action to rectify any breach of the undertakings, including powers of entry onto the land and to recover any expenses the council reasonably incurs.

Restrictions on public access

Clause 8 details the restrictions to be observed by the public on the access land.

The general restrictions of the second schedule of the 1983 Access Order should be reproduced in part A of the third schedule of the agreement and any further restriction which may be agreed between the council and the grantors set out in part B. Such restrictions should be limited to those that are absolutely necessary and should, whenever possible, avoid suspending access to the land on Sundays or bank holidays.

Sub-clause 8(1)(c) allows the council and grantors to agree to other restrictions to meet unforseen circumstances that arise once the agreement is in place, eg to prevent the spread of foot and mouth disease or to protect a rare bird while nesting.

Sub-clause (2) provides for a direction to be given by the council under Article 34 of the Access Order, temporarily suspending public access when there is an exceptional risk of fire.

Bye-laws for good behaviour and provision of a ranger service

Clauses 9 and 10 should be adapted to suit the local arrangements that are made, or may be made in the future, to apply bye-laws to the access land and to provide a ranger service. Sub-clause 9(2) recognises that the Department of the Environment may, exceptionally, make bye-laws in default of the council.

Separate, ad-hoc arrangements will need to be made if it is considered desirable that the ranger service should also cover land outside the access agreement.

Duration of the agreement

Clause 11 provides that the agreement shall have effect for 20 years, with break clauses at 6, 11 and 16 years providing 12 months notice is given. Sub-clause (3) enables the council to terminate the agreement at any time if there is a breach of the agreement by the grantors.

Other arrangements and periods are, of course, possible and the model may be varied accordingly. For example, sub-clause 2 may be omitted, the agreement may be for a period other than 20 years, or the agreement could even be made to be irrevocable. In this case, the words "This agreement is irrevocable" should be substituted for the whole of clause 11. The parties would then need to consider whether to retain clause 6, providing for periodic reviews of the amount of the consideration, or provide a `once and for all' lump sum payment at the outset.

Variation to exclude land for agriculture, forestry or amenity tree planting

Clause 12 reflects the provisions of Article 30 of the Access Order which enable representation to be made to the Department, and the Department to require the agreement to be varied if it is satisfied that the land is needed for agriculture, forestry or amenity tree planting and that this outweighs the benefits to public access (see section 8.2.5 of the *Guidance Notes*). In practice, however, the need to so vary the agreement is likely to arise very exceptionally.

Definitions

It will be helpful to make the agreement self explanatory, as far as it is possible to do so. **Clause 13** is intended to help achieve this. The definitions of `excepted land', `means of access' and `open country' are those set out in the Access Order; in Article 26(5) and Schedule 3, and Articles 32(6) and 25(2) respectively.

Sub-clause (2) makes it clear that the agreement does not affect any public rights of way over the agreement land.

Expenses

Clause 14 provides for reasonable expenses incurred by the grantors to be paid by the council, including legal and surveyor's fees and stamp duty.

Arbitration arrangements

Clause 15 provides for arbitration should a dispute arise between any of the parties in respect of the agreement.

2. MODEL CLAUSES FOR AN ACCESS AGREEMENT

THIS AGREEMENT is made the day of 20 **BETWEEN** - the Council (hereinafter called `the Council') of the first part and ABC of of the second part, DEF of of the third part, GHJ of of the fourth part (the parties of the second, third and fourth parts being hereinafter referred to jointly as `the Grantors').

WHEREAS -

(1) Part III of the Access to the Countryside (Northern Ireland) Order 1983 (Statutory Instruments 1983 No. 1895 (N.I. 18)) (hereinafter called `the 1983 Access Order') makes provision for enabling the public to have access for open-air recreation to open country, being land to which the provisions of Article 26(1) of the 1983 Access Order are applied by an access agreement made under that Part of the 1983 Access Order.

(2) By virtue of Article 28 of the 1983 Access Order a district council may make an access agreement with any person having an interest in the land being open country in the area of the Council whereby the provisions in that behalf of Part III of the 1983 Access Order shall apply to the land.

(3) The Council is the district council for the area in which the land comprised in this agreement (hereinafter called `the access land') is situated, such land being open country.

(4) The Grantors named as parties to this agreement have the following interests in the access land -

(a) the said ABC is [the owner in the fee simple] of the access land;

(b) the said DEF is the [tenant] of the access land;

(c) the said GHJ is the [tenant of the sporting rights/owner of a right to [ ]] on or over the access land.

NOW THIS DEED WITNESSETH as follows -

1. (1) Any undertaking or agreement contained herein shall be deemed to have been given or made by or with each of the Grantors jointly and severally.

(2) Any of the Grantors whose interests in the access land is changed or terminated shall within one month thereafter give notice in writing to

the Council of such a change or termination.

2. (1) The provisions of Article 26(1) of the 1983 Access Order shall apply to the access land.

(2) Subject to the provisions of part III of the 1983 Access Order and of Schedule 2 thereto (general restrictions on access to open country under part III of the 1983 Access Order) and subject to the provisions of this agreement any member of the public who enters upon the access land for the purposes of open-air recreation without breaking or damaging any wall fence hedge or gate, or who is on such land for that purposes having so entered thereon, shall not be treated as a trespasser on that land or incur any other liability by reason only of so entering or being on that land.

3. The access land is the land described in the first schedule hereto and delineated on the plan annexed to this agreement but excluding any land which for the time being is `excepted land'.

4. (1) The means whereby members of the public may obtain enter to the access land shall be as [specified in part A of the second schedule hereto and] shown [ ] on the plan annexed to this agreement or as subsequently amended by the agreement between the Grantors and the Council.

(2) For the purpose of securing that sufficient means of access will be available for the public the [Council/Grantors] shall undertake the carrying out of the works specified in part B of the second schedule hereto with regard to the following matters:

(a) the improvement or repair of any means of access to the access land in existence at the date of this agreement;

(b) the construction of new means of access to the access land; and

(c) the maintenance of any such means of access to the access land as are mentioned in sub-paragraph (a) and (b) hereof.

5. (1) The Council shall at its own expense and after consultation with the Grantors erect and maintain suitable and sufficient notices -

(a) indicating the boundaries of the access land [and of excepted land] and the means of access to the access land;

(b) informing persons of [the/any] restrictions upon public access to the access land

at the places listed in part C of the second schedule hereto and at such other places as may be agreed in writing between the Council and the Grantors.

(2) The Council may if it thinks fit provide and maintain -

(a) a map or maps showing the area of the access land and

(b) warning notices informing persons of dangers to public safety at such places as may be agreed in writing between the authority and the Grantors.

6. (1) Subject to paragraphs (2) and (3) hereof the Council shall pay to the Grantors on the completion of this agreement and on the day of [and day of] in each succeeding year the sum of , in consequence of the making of this agreement: provided that if any of the Grantors shall terminate his interest in the access land he shall if so required by the Council repay to the Council such proportion of any payments under this clause as represents the period after the termination of his interest.

(2) Any sum payable under paragraph (1) hereof shall be apportioned between the Grantors in such manner as may from time to time be agreed in writing between the Grantors and any such apportionment shall be notified in writing to the Council.

(3) The amount payable by the authority under paragraph (1) hereof may be varied -

(a) with effect from the dates five, ten and fifteen years respectively from the
[day of 19 /date hereof]; or

(b) at any time in the event of any part of the access land becoming excepted land

such variations to be agreed between the Grantors and the Council. Provided that there shall be no variation under sub-paragraph (a) unless any of the Grantors who desires such a variation shall have given notice in writing of his desire not more than 12 months nor less than 6 months before the relevant date specified in sub-paragraph (a).

[(4) In addition to any sums payable under paragraph (1) hereof the Council shall [pay the total cost/contribute a proportion not exceeding , towards the cost] of any works carried out by the Grantors in accordance with clause 4(2) hereof.]

7. (1) The Grantors hereby undertake that they or any one of them will not destroy remove alter stop up any means of access to the access land

or do or suffer or permit to be done anything whereby the use of any such means of access by the public would be impeded.

(2) The Grantors hereby undertake that they or any one of them will not -

(a) provide or maintain or suffer or permit on the access land any misleading notice;
(b) keep on the access land any animal know to be dangerous;

(c) suffer or permit to be done any other thing which is likely to deter the public from exercising their right of access or endanger the safety of the public.

(3) If the Grantors or any of them fail to comply with the provisions of paragraphs (2) or (3) hereof the Council may on giving the Grantors reasonable notification in writing enter on the access land or means of access to the access land for the purpose of removing any obstruction or any misleading notice or of preventing the Grantors or any of them from doing or continuing to do any other thing which may deter the public from exercising their right of access or endanger the public and the Council may recover from the Grantors or any of them any expenditure which the Council may reasonably incur in such removal or prevention.

8. (1) The restrictions to be observed by persons having access to the land are:

(a) the general restrictions contained in the second schedule to the 1983 Access Order (a copy whereof is set out in part A of the third schedule hereto);

(b) the special restrictions set out in part B of the third schedule hereof;

(c) such other restrictions as may from time to time be agreed in writing between the Council and the Grantors.

(2) If the Council makes a direction under Article 34 of the 1983 Access Order (suspension of public access to avoid exceptional risk of fire) that Article 26(1) of the 1983 Access Order shall not have effect in relation to the access land or any part thereof and the right of persons under this agreement to enter and be on the access land or such part thereof and to use the means of access thereto shall be suspended during the period specified in that direction.

9. (1) It is hereby declared that the bye-laws [shall be] [may be] made by the Council under Article 46 of the 1983 Access Order and approved by the Department of the Environment [(which said bye-laws are specified in part C of the third schedule hereto)] applying to the access land [and

to

the means of access thereto] [and the Council shall consult with the Grantors and the Department of the Environment on any proposal to amend the said bye-laws in so far as they relate to the access land].

(2) It is hereby declared that any bye-laws made under Article 46 of the 983 Access Order by the Department of the Environment (default powers of the Department as to bye-laws) in respect of the access land [and to the means of access thereto] shall have effect as if they had as if they had been made by the Council and approved by the said Department including for the purposes of this agreement.

10. In accordance with the provisions of Article 48 of the 1983 Access Order the Council [shall] [may] appoint such number of persons as appears to the Council to be necessary or expedient to act as rangers as respects land (including the access land [and the means of access thereto]) [in relation to which bye-laws made by the Council are in force] and shall consult the Grantors as to the provision and operation of the ranger service on the access land.

11. (1) Subject to the following paragraphs hereof this agreement shall have effect for a period of 20 years from the [day of 19 /date hereof].

(2) This agreement may be terminated -

(a) by the Council giving to the Grantors; or

(b) by any of the Grantors giving to the Council and other Grantors

12 months notice in writing to expire at the end of a period of six, eleven or sixteen years from the said [day of 19 / date hereof].

(3) This agreement may be terminated forthwith by the Council giving notice in writing to all the Grantors in the event of a breach of any undertakings on their part contained in this agreement.

(4) Termination under paragraphs (2) or (3) hereof shall be without prejudice to any rights of the Council or the Grantors which may have accrued up to the date of the termination.

12. (1) Where as respects any of the land comprised in this agreement the Grantors or any of them or their successors in title represent to the Department of the Environment that the conditions specified in paragraph3(a) or (b) hereof are fulfilled and the Department of the Environment is satisfied as so stated and notifies the Council in writing accordingly then the Council and the Grantors shall (except as provided for paragraph (2)

hereof) vary the agreement so as to exclude that land.

(2) If the concurrence of the Grantors or any of them or their successors in title cannot be obtained to the variation of the agreement, the Council may by order made with the approval of the Department of the Environment so vary the agreement.

(3) The conditions specified are that the land comprised in this agreement or any part of the land -

(a) is used or being brought into use for agriculture or forestry and that the application of the provisions of Article 26 of the 1983 Access Order (rights of the public where access agreement or order is in force) would prejudice the use or proposed use of the land; or

(b) is used for the growing of trees so as to be of value for the amenity of the neighbourhood and that the application of the provisions of Article 26 of the 1983 Access Order would prejudice the growth or regeneration of the trees

and the said Department is satisfied that the conditions specified in (a) or (b) are fulfilled and outweigh the benefits arising from the increased facilities for public access afforded by this agreement.

[(4) The fact that this agreement is expressed to be irrevocable shall not prevent the variation of the agreement so as to exclude land in accordance with provision of this clause.]

13. (1) For the purposes of this agreement -

`excepted land' means land which for the time being is of any of the following descriptions that is to say -

(a) land used for agriculture (other than land used for open hill and unenclosed rough grazing for livestock) being land which was so used on the [day of 19 /date hereof];

(b) land comprised in a declaration under section 13 of the Amenity lands Act (Northern Ireland) 1965 (declaration of land as a nature reserve) in so far as that land is subject to bye-laws prohibiting the entry of persons;

(c) land covered by buildings or the curtilage of such land;

(d) land used for the purposes of a park garden or pleasure ground being land that was so used on the [day of 19 / date hereof];

(e) land used for the getting of minerals by surface working (including quarrying) land used for the purposes of a railway (including a light railway) or land used for the purposes of a golf course, sports ground, playing field or aerodrome;

(f) land (not falling within sub-paragraphs (a) to (e)) covered by works used for the purposes of a statutory undertaking or the curtilage of such land;

(g) land excepted from the application of Article 26(1) of the 1983 Access Order in accordance with Article 30 (provisions as to land used for agricultural purposes, etc);

(h) land as respects which development is in course of being carried out which will result in the land becoming such land as is specified in sub-paragraphs (c) (e) and (f).

Provided that land shall not become excepted land by reason of any development carried out thereon or any change in use made thereof if the development or change of use is one for which planning permission is required and either that permission has not been granted or any condition subject to which it was granted has been contravened or has not been complied with;

`means of access' means any opening in a wall fence or hedge bounding the land, with or without a stile, gate or similar structure for regulating passage through the opening, any stairs or steps for enabling persons to enter on the land, or any bridge, stepping stone or other works for crossing a water-course, sheugh or bog, on, or adjoining the boundary of that land

`open country' means any land appearing to the Council or the Department of the Environment to consist wholly or predominantly of mountain, moor, heath, hill, woodland, cliff, foreshore, marsh, bog or waterway.

(2) Nothing in this agreement shall be taken as to adversely affect any public right of way over the access land.

14. The Council shall pay the reasonable expenses incurred by any of the Grantors themselves and their reasonable legal costs of and incidental to the preparation and completion of this Agreement and any duplicate copy thereof and any stamp duty payable thereon.

15. Any dispute arising under this agreement between the Council and the

Grantors (or between the Grantors) shall be referred to and determined by an Arbitor to be agreed between the parties to the dispute or in default of agreement to be nominated on the request of the Council or the Grantors, or any one of the Grantors, by the President for the time being of the Royal Institute of Chartered Surveyors and the decision of such an Arbitor shall be final and binding on the parties both as to the matters in dispute and as to responsibility for the costs of Arbitration.

In WITNESS whereof the [ ] Council have caused their Common Seal to be hereunto affixed and the Grantors have hereunto set their respective hands and seals the day and year first above written.

FIRST SCHEDULE

Description of Access Land

SECOND SCHEDULE

Part A Means of Access

Part B Access works to be undertaken by the Council/Grantors

Part C Notices

THIRD SCHEDULE

Part A Restrictions contained in the Second Schedule to the 1983 Access Order

Part B Special restrictions
[Including

1. There shall be no right of access for members of the public during the period from to in any year.

2. Members of the public shall not be permitted to bring dogs onto the access land unless the dogs are held on a lead at all times.

3. Members of the public shall not be permitted to bring or ride a horse on the access land except with the consent of the occupier.]

[Part C Bye-laws]

APPENDIX 5

FURTHER READING

1. Legal References

Garner's Rights of Way and Access to the Countryside by J F Garner (edited by A R Mowbray, et al) Longman, ISBN 0752-0000-98.

Highway Law by Stephen J. Sauvain Sweet & Maxwell (the Local Government Library) ISBN 0-421-31190-8.

Rights of Way: A guide to Law and Practice by John Riddall and John Trevelyan. (The Open Spaces Society and Ramblers Association - Available from The Ramblers Association)

Road Research: An Introduction to Rights of Way Evidence by Tim Stevens (Available from Tim Stevens at 101 Square Lane, Ormskirk, Lancashire, L40 7RG).

Northern Ireland Environmental Law by Sharon Turner/Karen (Morrow) 1997

The Legal System of Northern Ireland by Brice Dickson. Fourth Edition 2004 (SLS Publications)

Irish Land Law by JCW Wylie. Third Edition 1997 (Butterworths)

2. Construction and maintenance of rights of way and use of volunteers

Footpaths; A Practical Handbook by Elizabeth Agate (The British Trust for Conservation Volunteers - Available from BTCV, 36 St Mary's Street, Walligford, Oxfordshire OX10 0EU).

Rights of Way: An Action Guide (CCP 375) The Countryside Agency (Available from Countryside Agency Postal Sales, PO Box 124, Walgrave, Northampton NN6 9TL).

Rights of Way Design Guide by Denis Nightingale (Northamptonshire County Council)

Waymarking Public Rights of Way (CCP 246) The Countryside Agency (Available from Countryside Agency Postal Sales, PO Box 124, Walgrave, Northampton NN6 9TL).

See also the Countryside Agency's Catalogue of Publications, free from the above address).

CONTACT ADDRESSES

1. Government Departments and Agencies

For Government Departments, see NICS website - http://www.nics.gov.uk/gov.htm

Northern Ireland Tourist Board
St Anne's Court,
59 North Street,
Belfast BT1 1NB

Sports Council for Northern Ireland
House of Sport,
Upper Malone Road,
Belfast BT9 5LA

Ordnance Survey
Colby House
Stranmillis Court
Belfast BT9 5BJ

Valuation & Lands Agency
Queen's Court
56-66 Upper Queen Street
Belfast
BT1 6FD

Registry of Deeds
27-45 Great Victoria Street
Belfast
BT2 7SJ
Tel. (02890) 251756

Land Registry
27-45 Great Victoria Street
Belfast
BT2 7SL
Tel. (02890) 251515
Fax. (02890) 251550

Public Record Office of Northern Ireland
66 Balmoral Avenue
Belfast
BT9 6NY
Tel: (02890) 251318

Statutory Charges Registry
27-45 Great Victoria Street
Belfast
BT2 7SL
Tel. (02890) 251644

2. Prescribed Bodies

(Bodies to be served with notice of any public path order or access order in accordance with Schedule 4 of the Access to the Countryside Regulations (NI) 1984.)

British Horse Society (Northern Ireland Region)
House of Sport
Upper Malone Road
BELFAST
BT9 5LA

Ulster Federation of Rambling Clubs
10 Strangford Avenue
BELFAST
BT9 6PG

Ulster Society for the Protection of the Countryside
166 Mount Merrion Av
BELFAST
BT6 0FT

Federation of Mountaineering Clubs of Ireland
Chrome Hill
8 Ballyskeagh Road
Lambeg
Lisburn
BT27 5SY

3. Statutory Undertakers

To be consulted prior to making a public path order - see Access Order Art 18(7)

Planning Service HQ
Department of the Environment
Millennium House
Gt Victoria St
Belfast

Roads Service HQ
Department of Regional Development
Clarence Court
Adelaide St
Belfast

Water Service
Department of Regional Development
Northland House
Fredrick St
Belfast

Environment and Heritage Service
Commonwealth House
35 Castle St
Belfast
BT1 1GU

Northern Ireland Electricity
120 Malone Rd
Belfast
BT9 5HT

Phoenix Natural Gas
19 Clarendon Rd
Belfast
BT1 3 BG

Vodafone (Northern Ireland) Ltd
16 Wellington Pk
Belfast BT9 6DJ

BT Northern Ireland
5 Lanyon Place
BELFAST
BT1

Forest Service Headquarters
Dundonald House
Upper Newtownards Rd
BELFAST
BT4

It is also good practice to include any other provider of public services whom you consider may be affected by the order.

4. Other main countryside and user organisations

British Horse Society
HOUSE OF SPORT
UPPER MALONE
BELFAST

Conservation Volunteers (Northern Ireland)
159 RAVENHILL RD
BELFAST

Countrside Access and Activities Network (CAAN)
THE STABLEYARD
BARNETTS DEMESNE
UPPER MALONE

Countryside Recreation Network (CRN)
SHEFFIELD SCIENCE PARK
HOWARD ST
SHEFFIELD
S1 2LX

National Trust
ROWALLANE HOUSE
SAINTFIELD

Northern Ireland Agricultural Producers Association
15 MOLESWORTH ST
COOKSTOWN

Northern Ireland Environment Link
77 BOTANIC AV
BELFAST

Rural Community Network
38a OLDTOWN ST
COOKSTOWN

Sustrans
89/91 ADELAIDE ST
BELFAST

Ulster Farmers' Union
475 ANTRIM RD
BELFAST

Ulster Wildlife Trust
CROSSGAR NATURE CENTRE
3 NEW LINE
CROSSGAR

SUPPLIERS OF WAYMARKS, SIGNS, COUNTRYSIDE FURNITURE ETC

SIGNAGE

- Delta Signs, Carn Business Park, Carn Road, Portadown, 028 38350698
- Signiatec Ltd, Castlehale, Co Kilkenny, 00353 5164 8484
- Walkway Services, Joe McKelvey, 14 Willowbrokk, Letterkenny, Co Donegal, 00353 7427206
- Shelley Signs Ltd, Eaton on Tern, Market Drayton, Shropshire, 01952 541483
- Gilmore Signs, Middlepath Street, Belfast, BT5 4BG, Tel 028 90455419
- NM Screen and Display, Rathdown Close, Lissue Industrial Estate West, Moira Road, Lisburn, 028 8262 1666
- Dennis D Evans & Co Ltd, 391 Holywood Road, Belfast, 028 9065 2220
- PWS Ireland Ltd, Unit 6 Greenbank Industrial Estate, Warrenpoint Rd, Newry Tel 028 30264511, Email@infor@pwssigns.com
- BPF recycling plastics, 86 Annacloy Road, Downpatrick, 028 44383 1673, bpf.recycling@virgin.niet
- Urban Engineering Ltd, 77 Clanconnel Gardens, Waringstown, Craigavon, BT66 7RR, Tel 028 38881124, www.jtmarketing.co.uk
- Fitzpatrick Woolmer Design, Unit 3, Lakeside Park, Neptune Close, Rochester ME2 4LT www.fwdp.co.uk

INTERPRETATIVE PANELS/DISCS

- Connswater Graphics Unit, 1 Dargan Ct, Dargan Cres Belfast Tel 90777395
- Countryside Management Services Ltd, Shildon DL4 2RF www.cms-ne.co.uk
- Panels/waymark discs - Fitzpatrick Woolmer Design, Unit 3, Lakeside Park, Neptune Close, Rochester ME2 4LT www.fwdp.co.uk
- Panels/waymarkers - A partnership of Design Ethos, 2 Lord Wardens View, Bangor (design work), working with the IMET Group, Galgorm Industrial Estate, Ballymena, BT42 1QA (manufacture)
- Panels/waymark discs - Riada Signs, Ballybrakes Business Park, Ballymena Tel 2766 2845

DISCS

- Black Sheep Communications, Upper Newtownards Rd, Belfast 9065 7407

PATH PROTECTION

- STRI, Bingley, BD16 1AU (01274 565131)

PEOPLE COUNTERS

- Ashley Gauton, Instep Solutions
  Bro Dawel, Wynne Road
  Blaenau Ffestiniog, Gwynedd LL41 3UF
  07789 543036
  info@instepsolutions.co.uk

Sensor types:

Pressure slabs	-	open paths, mat wells
Moving magnets	-	gates, boardwalks, stiles
Air switch	-	stiles, boardwalks
Optical	-	buildings, narrow gaps
Inductive loop	-	cars, bicycles
Piezo wires	-	mat wells
Thermal	-	stiles, paths, kissing gates

Logger devices with LCD readout for use in both indoor and outdoor locations.
Software to analyse data.

TRAIL/PARK FURNITURE

- Timber Recycling Eco Enterprise (TREE) 301-303 Donegall Rd, Belfast 028 9023 3375 - Recycled timber products.
- Diamond & Son (Timber) Ltd, 35 Newmills Road, Coleraine – suppliers of timber kissing and field gates.
- Patrick J O'Neill, Moneyneena, Draperstown – manufactures and installs wooden stiles, kissing gates, footbridges, waymarkers etc.

BRITISH STANDARD

BS 5709:2001 Gaps, Gates and Sites - Specification

USEFUL WEBSITES

Countryside Access and Activities Network (CAAN)
http://www.countrysiderecreation.com/

British Trust for Conservation Volunteers – series of manuals on-line
http://handbooks.btcv.org.uk/handbooks/index

Countryside Agency
http://www.countryside.gov.uk/ http://www.prowgpg.org.uk/gpg/

Countryside Recreation Network
http://www.countrysiderecreation.org.uk

Scottish Natural Heritage – design sheets
http://www.snh.org.uk/publications/on-line/accessguide/design_sheets.asp

http://www.outdooraccess-scotland.com/default.asp?nPageID=76&nSubContentID=0

Department of Environment, Food and Rural Affairs – English legislation
http://www.defra.gov.uk/wildlife-countryside/cl/publicrow.htm

The Ramblers Association
http://www.ramblers.org.uk/

The Institute of Public Rights of Way Officers - see Good Practice Guide
http://www.iprow.co.uk/

Sustrans – cycle route design details
http://www.sustrans.org.uk/

British Upland Footpath Trust
http://www.mtnforum.org/resources/library/buft99a.htm

British Horse Society – access leaflets
http://www.bhs.org.uk/Content/leaflets.asp?id=19&page=Access&area=3

Fieldfare Trust - good practice guide to countryside access for disabled people
http://www.fieldfare.org.uk/cd-gpg2005.htm

Public Rights of Way Good Practice Guide
http://www.prowgpg.org.uk/gpg/

Paths for All Partnership
http://pathsforall.org.uk

Byways & Bridleways Trust
http://www.bbtrust.org.uk/seymour.html

APPENDIX 6

GUIDANCE NOTES FOR DISTRICT COUNCILS ON THE PREPARATION OF AN ACCESS STRATEGY

The rationale for district councils to provide access opportunities and their legal responsibilities in this regard are clearly set out in section 2 of this guide. Particular attention is drawn to sections 2.2.5 and 2.2.6 which underline the need for clear guidelines and an agreed stance by the council concerned. The Department's policy is to encourage and facilitate the councils in adopting a strategic approach to the provision of access in their area and such a strategic approach should normally relate to the whole of their district. It is envisaged that such a strategy would normally be prepared by the council's own Countryside Officer, although it is accepted that in certain circumstances, where the required expertise does not exist 'in house', it may be necessary to contract in temporary staff. In either case, this guidance note is designed to outline the procedure which it is recommended should be followed.

STATEMENT OF INTENT (see 2.2.6).

A statement explaining what it is the council are trying to achieve and why. It may also outline what the council considers to be priority matters and what, for example, it considers to be the desirable level of community or voluntary involvement. Section 2.2.6 provides a full list of suggested elements and considerations. The Statement of Intent provides the basis for the council's position and approach to access matters.

In addition to a statement of intent an access strategy should include the following:

- a profile of the area
- an evaluation of the area's existing access situation (both positive and negative)
- identification of the demand for access
- the potential opportunities for access
- financial implications of access development
- a programme of action

1. PROFILE OF THE AREA.

Consideration should be given to the access resources and associated facilities the area offers to both local residents and visitors; the potential for tourism development within the area; and the opportunities, through the provision of access, for the economic regeneration of rural areas. An attempt should be made

to make such an appraisal as realistic as possible. It may be the case, for example, that part of an area may have little to offer in the way of resources such as attractive countryside or wildlife but, because of its location, it is still likely to come under considerable pressure for use.

2. THE AREA'S EXISTING ACCESS SITUATION.

The following is recommended as a minimum of data surveys required to assess the existing access provision in an area.

(a) Present pattern of use.
This includes identification of:
- the activities in which people participate in, e.g. walking, cycling and horse riding
- types of users, e.g. local, visitors, specialists, less abled, disabled
- intensity of use for each activity, e.g. changes in daily, monthly, seasonal, annual participation
- patterns of use

(b) Location and provision of existing access resources and associated facilities.
This includes location and mapping of:
- all areas and paths which the public has legal, permissive or de facto access to, e.g. existing rights of way, Forest parks etc.
- all access facilities, e.g. trekking or cycle hire establishments, information centres, toilets, car parks, lay-byes
- features of interest, e.g. historic monuments, archaeological sites, views
- path furniture, e.g. stiles, bridges and signposts

In addition, it is also important to identify areas where present path location does not agree with OS mapping, details of land ownership for each of the areas/routes, and details of past and present access agreements with landowners.

(c) Location of route problems.
This includes identification of areas where defects occur, e.g. missing or dangerous bridges, the need for stiles and gates, and difficulties due to soil erosion, path damage and vegetation overgrowth.

(d) Location of areas with access constraints.
This includes examples of path obstructions; inferior parking and toilet facilities; dangerous junctions; routes through farmyards, and seasonal problems associated with farming practices.

(e) Location of environmentally sensitive areas.
This indicates protected areas and locations which are vulnerable to damage.
(The Department can provide advice and assistance in this respect)

(f) Location of hazardous areas.
This indicates areas and locations where the public would be at risk, e.g. cliff tops.

3. THE DEMAND FOR ACCESS AND THE POTENTIAL OPPORTUNITIES FOR ACCESS.

From the surveys carried out on the intensity and pattern of use the demand for access from all user types will become apparent. The areas of under-provision and over-provision should be identified and mapped and the general priorities for change stated. These might include:

- diversion of existing routes
- maintenance of existing routes
- creation of dual surface routes (provision for walkers and cyclists)
- creation of themed paths, creation of circular routes – short and long
- creation of long distance routes
- creation of linear routes
- creation of local walks from cities, town and villages
- creation of an urban fringe network and the creation or routes for the less abled bodied

Consideration should then be given to the location and nature of additional facilities required in response to the establishment of new access developments. These may include: signs and way markers, information panels, and road signs; provision of car parks, picnic tables and toilets; publication of guidebooks, leaflets and route cards; the need for path maintenance, safety features and localised constraints. (e.g. no access in windy conditions).

4. FINANCIAL IMPLICATIONS FOR ACCESS DEVELOPMENT.

Before deciding on a programme of action, account will need to be taken of the financial implications of providing additional facilities. Grant-aid for various work may be available from the Department, but consideration should also be given to other sources of funding.

5. A PROGRAMME OF ACTION.

This should normally take the form of a written report and accompanying maps. It should identify and prioritise proposals and include a time-tabled programme of work. At this strategic stage it is not necessary to delineate exact routes on the ground or the exact nature of work, rather a map should show preferred options, access corridors, suggested links etc.

Consideration should also be given to desired courses of action with respect to 'theming' of routes, corporate design and the nature and content of interpretative material to ensure that works commenced at the outset comply with the council's aspirations in this regard and do not have to be re-done at a later date.

APPENDIX 7

SUMMARY OF COURT CASES:

RELATING TO PUBLIC RIGHTS OF WAY

1 ARDS BOROUGH COUNCIL v D & N FRANKLIN (1 July 1996)

This was a Newtownards County Court judgement concerning an alleged PROW near Donaghadee Golf Course.

The Borough Council argued that there had been a long history of uninterrupted use of the route by the public.
Judgement on the case was strongly influenced by the question of *tolerance* – the landowner had considered that those who used the path were entitled to do so on the basis of their leases (but, in fact, only some users were the landowner's tenants).

The Council's case failed but, since the judgement was in the County Court it does not create a legal precedent.

A copy of the full judgement is held by the Department.

2 BRADY v DOE and NIHE (1990)

Mr Brady tripped on an unadopted path within an NIHE housing estate at Turf Lodge in Belfast. The path was not finished to the standards of an urban footpath but was frequently used by pedestrians. Mr Brady's claim against DOE and NIHE was dismissed by the County Court, as was an appeal to the High Court. It was held that the path owner (NIHE) was not guilty of misfeasance (negligent repair) and was therefore not liable.

The plaintiff then went to the Court of Appeal. The Court held that a person using a public right of way was not a visitor and therefore the 1957 Occupiers Liability Act did not apply. The Court also confirmed the principle of Gautret v Egerton (1867) that, since the defect was caused by nonfeasance (non-repair) rather than misfeasance, the plaintiff had no claim for negligence.

3 McGEOWN v NIHE (1995)

Ms McGeown's claim was similar to the Brady case. The House of Lords rejected her appeal and Lord Keith held that:
.. rights of way pass over many different types of terrain and it would place an impossible burden upon landowners if they had not only to submit to the passage over them of anyone …. but also

were under a duty to maintain them in a safe condition.

4 PLAINTIFF v DOWN DISTRICT COUNCIL AND NIHE

This case involved a claim against the Council following alleged misfeasance (defective repair of a pothole on a public right of way). Neither of the defendants admitted to owing the land but the Council agreed that it had undertaken repairs to the area. It is understood that the Judge indicated that the parties settle out of court.
A report may be available from the Council.

5 NEWRY & MOURNE DISTRICT COUNCIL v F & M McGEOWN

Vindication of a public right of way (Bells Lane) claimed, by the defendant, to be long since abandoned. The Plaintiff produced Ordnance Survey field traces indicating that the route was originally classified as a road. The Judge ruled that mere disuse of the route did not preclude the public from resuming the exercise of their right to use when they thought proper.
A brief report of the case is available from Newry & Mourne District Council or EHS.

Note: The 1912 Ordnance Survey manual *Instructions to field Examiners and Revisers* states that classified roads can include: metalled roads, occupation roads, carriage drives, etc. Not all of these may be public rights of way but, depending upon inspection of maps and other information, Ordnance Survey classification as a road may well be important evidence.

6 LISBURN BOROUGH COUNCIL v TB GEORGE & DR J ADGEY

Although the two cases were heard as one, because of the similarities and the fact that some of the witnesses were the same, in essence there was two separate routes, which were traditionally used by large numbers of people to gain direct access to the towpath of the Lagan Valley Regional Park (LVRP). The towpath runs for approximately 11 miles between Lisburn and Belfast and is subject to a Public Path Creation Agreement between both relevant Councils and the then owner, the Department of Agriculture – Rivers Agency.

SEYMOUR HILL TO LVRP TOWPATH: Mr George lived on an island between the River Lagan and the abandoned Lagan Canal. The path, which provided a link from the Seymour Hill housing estate to the LVRP towpath, was part owned by Mr George, the Northern Ireland Housing Executive and Rivers Agency. In the early 1980's

Mr George erected gates at either end of his section of the path. Initially they were open during the day and so whilst local people objected they were still able to get access to the towpath. However Mr George eventually closed the gates on a permanent basis in 1988. Following failed attempts to negotiate with Mr George, the Council was presented with a petition with almost 1500 names, stating that the path was a Public Right of Way (PROW) and that under Article 3 of the Access to the Countryside (NI) Order 1983 the Council had a statutory duty to keep it open.

DRUMBEG TO LVRP TOWPATH: Dr J Adgey, was a relatively new owner of property which included a link from Drumbeg Village to the towpath of the LVRP along a track known locally as Mossvale Lane. It was well used by locals before Dr Adgey erected gates at either end of the lane thus preventing access. Again local people petitioned the Council alleging that the lane was an existing PROW.

Vindication Surveys and Reports were completed on both paths over a period of 3 months and included evidence both for and against the claim that the paths were existing public rights of way. The reports included literally dozens of witness statements and old maps showing the paths existed as far back as the 1830's. Following consultation with the Council's solicitor, (Belfast CC – Legal Services Department) legal proceedings were issued against both Mr George and Dr Adgey. It took almost 2 years between gathering the evidence and getting a decision from the courts.

SUMMARY OF JUDGEMENT: The judge stated that a PROW may be created in two ways, either by statute or by dedication and acceptance. However formal dedications are very rare. It is more likely that a PROW is inferred by a landowner who tolerates public use over a long period of time. The period of time must be sufficient that it comes to the notice of the landowner, so that he/she is aware that the public is using the path as a right and is therefore consenting to the user.

The judge made clear distinctions between types of user, including those that he regarded as relatively recent users, those using the path as a route to work and those that worked for, or were known by, the family who originally owned the lands. The later were classified by the judge as "consensual user".

Lieutenant Charley, a surviving member of the family that originally owned the lands on which both paths lay appeared as a witness for the defendants. His evidence was in direct contradiction to that of the users, referring to his recollection of the family being aware of the need to close the path at least one day in the year and to the fact that as far as he could recall there was "Trespassers Prosecuted. All dogs shot" signs on the lands.

The intention of the landowner is crucial, as mere public usage is not enough to establish a PROW, even if the public genuinely believe it to be so. The landowner may allow certain individuals to use the path for a variety of purposes without necessarily dedicating it a PROW.
The Judge clearly states that the burden lies with the Plaintiff to prove that the landowner intended to dedicate a path as a PROW. In both cases he ruled that the Plaintiff failed to do so and awarded costs against the Council.

As the case was heard in the County Court, it did not set a precedence in Law.

LAW REFORM ADVISORY COMMITTEE DISCUSSION PAPER
(See 2 & 3 above)

This 1993 study reviewed liability owed to users of public rights of way and suggested that consideration should be given to introducing statutory liability but that this should be confined to urban housing developments. A copy of the study report is available at EHS.
No legislative change has arisen to date.

RELATING TO OCCUPIERS LIABILITY

1 STEVENSON v CORPORATION OF GLASGOW (1908 SC. 1034 @ 1042)

In this case, Lord Kinnear ruled that:
"... a person going upon property, even by invitation, express or implied, is expected to use reasonable care for his own safety. He is to look out for all the ordinary risks that are necessarily incident to the kind of property that he is going upon, but, on the other hand, it is held that he is not to be exposed to any unusual danger known to the proprietor, and not known to people who may come upon premises with which they are not familiar. If that be the law, it seems to me clear enough that it imposes no duty upon the owners of public parks to fence every stream of water or every pond which may happen to be found in a public garden".

2 DUMBRECK v ADDIE & SONS' COLLIERIES (1928 SC)

Lord President Clyde, drawing on Stevenson, stated:
"It is important in this connection to observe the distinction which

has long been recognised between (1) sources of danger arising from physical features of the ground, whether natural or artificial - such as a precipice or an excavation, natural water of an artificial pond; and (2) sources of danger arising from mechanical and similar contrivances - such as the haulage system in the present case. The former are presumed from their own character to constitute obvious and usual dangers against which people, be they adults or children, must protect themselves."

3 GRAHAM v EAST OF SCOTLAND WATER AUTHORITY
(2002 SCLR 340)

Lord Emslie held that there was no duty imposed upon an occupier of land to fence the edge of a reservoir. In explaining this opinion he said:
"In my opinion, the danger alleged here by the pursuer falls within the intended scope of the authorities concerning obvious dangers on land, against which no duty to fence is incumbent on an occupier."

APPENDIX 8

LIST OF RECENT PUBLIC PATH ORDERS

1) BALLYCROCHAN AND GRANSHA
PUBLIC PATH EXTINGUISHMENT ORDER

This 1990 order made by North Down Borough Council concerned a route in Bangor within an area being developed for private housing. The Council made the order only two years after assertion of the PROW and at a time when part of the route had been obstructed.

Following the Inspector's recommendation to confirm, DOE received a claim that the Council had made no attempt to assess the *need* and that without the removal of obstructions; the need could not be assessed. The Council had contended that, based upon past experience, there was no *need* and the inspector supported this case. It was further argued that Art 14(6) was not given due weight, presumably on the basis that the fences were *temporary circumstances.*

The Order was eventually confirmed by the Department.

2) NORTH DOWN BOROUGH COUNCIL
PUBLIC PATH CREATION ORDER 1990
BALLYSALLAGH ROAD TO CLANDEBOYE AVENUE

This is one of the rare examples of an Article 12 order. The route is part of the Ulster Way near Clandeboye Estate and the Borough Council had undertaken improvement works before the ownership of the land became firmly established.

After consideration the Council elected to make a Public Path Creation Order and this was subsequently confirmed by the Department in 1992. A file is held by EHS Countryside Access Officer.

APPENDIX 9

LEGAL TERMS

Force Majure – An event which could not have been anticipated or controlled.

As of a right – nec vi (without force), nec clam (without secrecy), nec precario (without request).

Collective Tresspass – Criminal Justice and Public Order Act 1994 – travellers, hunt protesters, etc.

Cuius est solum, eius est usque ad coelum et ad inferos – The owner of the soil, is taken to own everything up to the sky and down to the centre of the earth.

De jure – By law.

Easement – Right enjoyed by one Fee Simple owner against another.

Inter alia – Among other things.

Fee Simple –Freehold, absolute ownership.

Encroachment – Unlawful interference on another's land.

Interrogatories – Affidavit aimed at limiting scope of inquiry.

Law reports – Published court decisions.

Nonfeasance – Failing to do anything to maintain.

Misfeasance – Negligent repair.

Omnia praesumuntur rite esse acta – It is presumed that things were done correctly.

Prima facie – On the face of it.

Quantum – The amount.

Quasi-judicial – Seems legal but is conducted by others.

Quid pro quo - Exchange.

Sine die - Indefinitely.

Stare Decisis – Binding force of precedent.

Sub judice – Under judicial consideration – not for publication.

Ultra vires – Beyond the power.

Volenti non fit injuria – In law, a willing person cannot be injured.

APPENDIX 10

PUBLIC RIGHT OF WAY ASSERTION STATEMENT

……. Borough Council in accordance with the provisions set out in the Access to the Countryside (Northern Ireland) Order 1983 herby asserts a Public Right of Way over those lands at …… as more particularly described and delineated on this Statement and the attached Map.

Details of Path being Asserted:

Name of Path: ……
Status: ……

Location:

Grid Reference: ……

O.S. Map Sheet No. …….
Scale: ……
Townland: …….
Route: ……..
Orientation: ……..

Description:

Length: …… m
Width: …….. m

Description of Route/Features (existing):
…….
…….
…….
…….
…….

Features (to be included by permission):

…….....

Signed: _____
Mayor

Signed: _____
Chief Executive

Signed: _____
Chairman, Development & Leisure Services Committee

Date: _____

APPENDIX 11

PATH CONSTRUCTION STANDARDS

It is always worth seeking advice from other district councils and EHS.
Specific advice may be available from staff at appropriate locations, for example:

DCAL – Paths beside watercourses.

EHS Peatland Park – Paths over wet terrain.

National Trust / Mourne Heritage Trust - Upland paths.

Other helpful information is available from the following organisations: (contact details are included in Appendix 5)

Sustrans – Technical Guidelines (1997)
Making Ways for the Bicycle (1994)
Information Sheets

Countryside Agency – On the Right Track: Surface Requirements for Shared Use Routes (CRN 96)
Managing Public Access: A Guide for Land Managers (CA.210)

Scottish Natural Heritage (SNH) – Countryside Access Design Guide (2002)

British Trust for Conservation Volunteers – series of manuals on-line.

British Upland Footpath Trust – for info on upland path construction and maintenance.

Fieldfare Trust - good practice guide to countryside access for disabled people

British Horse Society (BHS) – information on bridleway construction in GB, most of which is applicable to Northern Ireland, is included below:

Standards and Dimensions for Bridleways, etc

Some practical recommendations from BHS

Introduction

The British Horse Society is often asked to provide various specifications for rights of way. It is also asked for advice on other facilities such as margins alongside roads, or bridges over roads or streams. Some standards are required by law, others have been agreed with the Department of Environment, Transport and the Regions (DETR). In most cases a desirable specification is given and it is stressed that this "Recommended standard" is to be regarded as the norm, and that the minimum will only be acceptable in exceptional cases.
Conditions of terrain and soil type etc. in different areas mean that riders adapt to different local situations. Therefore, each case should be considered on its merits in consultation with the Society's local access representative.

Recommendations

1. Widths

i. In modification orders

The Society will object if the width stated is not backed by evidence, or if a simple whole route width is stated where the path is demonstrably wider in places.

ii. In diversion orders

- The Society encourages order-making authorities to adopt a "Recommended Standard" of 5m (16_ ft) width for diverted bridleways.

- The Society will usually object to bridleway diversion proposals where the width of the replacement bridleway is less than 4m (13ft) unless exceptional circumstances apply.

iii. In creation orders

- The Society encourages order-making authorities to adopt a "Recommended Standard" of 5m (16_ ft) width for new bridleways. For Greenway routes and those considered to be of strategic importance, 10m (33ft) allows for better segregation of different classes of user and for the provision of trees and hedges and benches for resting walkers, so making the route more pleasant for all users.

- The Society welcomes new bridleways with a width of 4m (13ft), but recognises that sometimes it is necessary to have

a lesser width in order to create the path at all. However, 4m should be regarded as standard whenever possible.

iv. For general maintenance purposes

- Where there is no evidence of an existing width, the Society will request that a width of no less than 3m (10ft) is cleared.

v. General points

- Where it is required to turn a horse (e.g. in order to close a gate), the minimum space required is a diameter of 2.9m (9ft).

- Width between gateposts (S.145 Highways Act 1980):
  5ft on a bridleway
  10ft on a carriageway

- The entrance to a bridleway must be at least 1.5m (5ft) wide, whether or not a gate is provided, with greater width immediately before and after the point of entry. To avoid injury, posts should be rounded off, and there should be no barbed wire for at least 2m on either side of the gate.

Advice on the design of bridleway gates is given in the BHS publication Bridleway gates: a guide to good practice available from the Access & Rights of Way department.

2. Overgrowth

Overgrowth at the sides of a bridleway, byway or road should be cleared to a height to allow a rider to pass. 12ft (3.7m) is preferred, with a minimum of 10ft (3m).

3. Underpasses

Where underpasses are constructed to conduct riders across the line of a road:
desirable height 3.7m (12ft), minimum 3.4m (11ft) ; desirable width 5m (16_ft), minimum 3m (10ft).
Further information is available in the BHS leaflet Horses Crossing.

While the Society seeks the desirable height for underpasses, in exceptional circumstances a lower height may be tolerated. When "cattle height" for an underpass is locally agreed as acceptable for riders, they would be expected to dismount. In this case, a mounting block about 0.75m (2_ ft) high, in the form of stone or concrete steps, should be provided at either end.

4. Bridges

i. Over major roads

To DETR specifications in BD52/93. These include the heights of parapets (1.8m/6ft) and the provision of an infill at the bottom (0.6m/2ft). Solid parapets are preferred and have been successfully used in a number of cases. Desirable width 3m (10ft), minimum 2.2m (7ft).

ii. Over major rivers

The Society recommends the use of DETR specifications for bridleway bridges over roads (as above).

iii. Over streams or ditches (Span upto 8m)

Width 2m; solid kickboard at bottom 225mm (9inches); parapet 1.2m (4ft) minimum. If the river is wider than 8m or the crossing is of byway status the width should be at least 4m with a kickboard of at least 250mm. However, consultation with the local BHS representative is advised, as some minor bridges may need to be built to different standards.

If gates are on the bridge, the bridge must be 2.9m (9ft) wide to allow the rider to turn his horse in order to close the gate behind him. Where a rider is required to negotiate gates near a bridge an enclosure of at least 2.9m square is required. A diagram of a suitable pen can be found in the BHS booklet Bridleway gates: a guide to good practice.

Bridge surfacing

The deck of the bridge must be stable and made of a substantial, non-echoing material with no gaps in the decking through which the river below can be seen. The surface must be non-slip. Decking boards should not run parallel to the direction of travel. A hard wearing non-slip surface can be created by coating a wooden deck with epoxy resin and bauxite grit. Cross-struts as on cattle transporter ramps may be inserted on slopes. Metal is noisy and alarming to horses; Wood is slippery, non-slip matting dulls noise, and is therefore preferable.

5. Fords

Where a proposed bridleway will pass through a ford, the Society expects the standards for gradients to be complied with (see below).

Where the ford is through a river which has a strong current at times,

no sharp or dangerous objects should be close to the path on its downstream side. Stepping stones or footbridges for pedestrians should always be on the upstream side of the equestrian crossing (to ensure the horse is not swept towards any sharp edges on the stones).

6. Fencing

As a general guide the following types of fencing are suitable for horses and ponies, and can be used safely alongside rights of way, although some are more desirable than others: post and rail wooden fencing; post and rail impact resistant plastic; post and rail - solid uprights, flexi-rails (PVC or rubber-coated webbing). Wire fencing (both plain or barbed) is less desirable and potentially injurious. If barbed wire is proved to be a nuisance it is illegal (S.164 Highways Act 1980).

Electric fencing should never be used alongside bridleways.

7. Gradients

For general purposes, a gradient of 1 in 12 is the ideal maximum for ridden use. However, account must be taken of the geographical features of the area and discussion between CABO and highway authority is essential.

On very steep routes it is sometimes necessary to cut steps into the path to facilitate passage. For ridden use the specification is:

Length of step: 2.9m (9ft) (to allow horse to stand on all fours on each step)
Height of riser: 150mm (6inches)

In order to make use of limited land space, it is acceptable to allow a slight slope downwards towards the riser.

8. Road surfaces

The more modern types of road surfacing tend to be more slippery for horses as they are proportionally less slippery for motor traffic. Depending on the surface, "roughening" of some kind will be necessary, especially on humps used as "sleeping policemen."

The presence of at-grade crossing points can be emphasised to motorists by installing white rails for a short distance alongside each end of the bridleway, at right angles to the carriageway.

9. Other surfaces

The BHS publication A guide to the surfacing of bridleways and horsetracks is available from the Access department.

10. Road signs etc.

Regard should be given to the siting of these and other "street furniture" so that they do not block riders' passage and sight lines. Sharply pointed signs should not be level with the head of horse or rider.
Major signs should be placed at a height that allows riders to pass safely underneath.

11. Margins

Margins should be provided where it would be hazardous for riders to use the carriageway (S.71 Highways Act 1980) especially where the road forms an essential link to the rights of way network. Where there is significant usage a path may be hardened for riders' use (DETR Advice Note TA57/87).

Road margins should not be allowed to become dumps for spoil. Verges are often legally part of the carriageway and should not be obstructed. They form a vital safety zone for riders.

(The BHS leaflet Highway margins and verges gives further information on this.)
It is recognised that verges are sometimes used for conservation or ornamental purposes but care should be taken to ensure that such use does not impede the passage of the public.

This information should be read in conjunction with other BHS advice which can be requested from:

Access & Rights of Way Department, British Horse Society, Stoneleigh Deer Park, Kenilworth, Warwickshire, CV8 2XZ, tel. 01926 707700.

APPENDIX 12

ACCESS AND ARCHAEOLOGY

Environment and Heritage Service identifies, protects, records, investigates and presents examples of Northern Ireland's archaeological heritage. Many sites are in state care or scheduled but planned works may affect other unrecorded features.

There is always a possibility that works associated with access routes may damage important archaeological sites. Even relatively shallow digging and the driving of fencing posts can cause sites to be disturbed. Projects which require planning permission are usually referred to EHS but, in areas where there may be archaeological sites, it is good practice to refer all proposed works to:

EHS Built Heritage
Waterman House
5-33 Hill Street
BELFAST
Bt1 2LA

Tel: 028 90543034

Many archaeological sites have traditions of public access but it should not be assumed that these are public rights of way or even permissive paths.
If in doubt, access history should be investigated by seeking the views of EHS and the landowner. This is particularly important if access to remote sites is to be encouraged by signage or publications.
Some sites are dangerous – especially ruined churches and castles. Built Heritage should be consulted about plans to open up sites for visitors and any remedial work or pathways may require scheduled monument consent.

APPENDIX 13

WORKS LIKELY TO IMPACT UPON AREAS OF SPECIAL SCIENTIFIC INTEREST (ASSIs)

Access works likely to have an impact upon the features of an ASSI are governed by Articles 38 to 40 of the Environment (Northern Ireland) Order 2002. Article 39 requires public bodies to give notice of any planned access works either inside an ASSI or outside but likely to impact the designated site to the Department prior to the commencement of any operations. In response the Department may issue a notice assenting the proposed operations, with or without conditions, or saying that it does not assent them. If the Department has not responded within 28 days the District Council can assume that the proposed access works will not be assented. The District Council is advised to make contact with the Department to discuss the matter under these circumstances. Article 40 deals with the assent process where the District Council is giving permission for the access works to be carried out.

APPENDIX 14

MODEL PUBLIC PATH EXTINGUISHMENT ORDER

PUBLIC PATH EXTINGUISHMENT ORDER

Access to the Countryside Order (Northern Ireland) 1983

(Anyname District Council)

(Anytitle) Public Path Extinguishment Order

Whereas it appears to the **(Anyname District Council)** that it is expedient that the public path to which this order relates should be closed on the ground that it is not needed for public use.

And whereas the **(Anyname District Council)** have consulted with the Department and other appropriate bodies under Article 18(1) of the Access to the Countryside Order (Northern Ireland) 1983 (hereinafter called the order).

Now therefore the **(Anyname District Council)** in exercise of the powers conferred on it by Article 14 of the Order and of every other power enabling it in that behalf hereby make the following order :-

1) The public right-of-way over the land described in the Schedule and shown coloured brown on the map annexed shall be extinguished at the expiration of **** days from the date of confirmation of this order.

2) This order may be cited as the **(Anyname District Council)** and **(Anytitle)** Public Path Extinguishment Order 20_ _.

(Authenticate by Council)

Date

……

ADDITIONAL TEXT IS NEEDED IF ANY OF THE FOLLOWING APPLY:

* The extinguishment order is linked to another public path creation or diversion order.
* Shared route between district councils.
* Expenses are to be included - see Article 18(5).
* Rights are reserved by a statutory undertaker.

APPENDIX 15

MODEL PUBLIC PATH DIVERSION ORDER

PUBLIC PATH DIVERSION ORDER

Access to the Countryside Order (Northern Ireland) 1983

(Anyname District Council)

(Anytitle) Public Path Diversion Order

Whereas it appears to the **(Anyname District Council)** that in the interests of the **(owner/ lessee / occupier) (give name)** of land crossed by the public path referred to in paragraph 1 of this order it is expedient that the line of the path referred to in paragraph 1 of this order should be diverted.

And whereas the **(Anyname District Council)** have consulted with the Department and other appropriate bodies under Article 18(1) of the Access to the Countryside Order (Northern Ireland) 1983 (hereinafter called the Order).

Now therefore the **(Anyname District Council)** in exercise of the powers conferred on it by Article 15 of the Order and of every other power enabling it in that behalf hereby make the following order:-

1) The public right-of-way over the land described in A of the Schedule hereto and shown coloured brown on the map annexed to this order shall be extinguished at the expiration of **** days from the date of confirmation of this order.

2) There shall be at the expiration of ***** days from the date of confirmation of this order a public path over the land described in B of the said Schedule and shown coloured purple on the map annexed to in this order.

3) This order may be cited as the **(Anyname District Council)** and **(any path title)** Public Path Diversion Order 20_ _.

(Authenticate by Council)

Date

……..

ADDITIONAL TEXT IS NEEDED IF ANY OF THE FOLLOWING APPLY:

* The route is being diverted for some other reason, other than as in the first paragraph.
* Shared route between district councils.
* Compensation has been agreed.
* There are limitations & conditions (for example, the right to erect a gate)
* Rights are reserved by a statutory undertaker.
* There are provisions for maintenance.

APPENDIX 16

MODEL NOTICE OF CONFIRMATION OF PUBLIC PATH ORDER

NOTICE OF CONFIRMATION OF PUBLIC PATH ORDER

Access to the Countryside (NI) Order 1983

Anywhere Borough Council - Path between Anyroad and Somewhere – Public Path Diversion Order 20___

Notice is hereby given that on …… , the Department of the Environment confirmed the above order.

The effect of the order as confirmed is to divert the public right of way from ……. to ……. ……..to a line from …… to ……..

A copy of the order as confirmed and of the map contained in it has been deposited at Anywhere Borough Council Offices, …… and may be inspected there free of charge during office hours.
Copies of the order may also be obtained at a charge of £…….

The order becomes operative as from …….. 20….. , but any person aggrieved by the order who desires to question the validity thereof, or of any provision contained therein, on the ground that it is not within the powers of the above Order or on the ground that any requirement of that Order or of any regulation made thereunder has not been complied with in relation thereto, may, within 6 weeks from …… 20….. , make an application for the purpose to the County Court.

Date ……. 20….

……..

……..

APPENDIX 17

MODEL PUBLIC PATH TEMPORARY CLOSURE ORDER

PUBLIC PATH TEMPORARY CLOSURE ORDER

Access to the Countryside (Northern Ireland) Order 1983

_____ BOROUGH COUNCIL

Public Path Temporary Closure Order 200_.

_____Road to _____Road

Whereas it appears to _____ Borough Council, in exercise of the powers conferred on it by Article 19 of the Order and of every other power enabling it in that behalf, that it is expedient that the public path to which this order relates should be temporarily closed on the grounds of public safety.

Therefore _____ Borough Council hereby makes the following order:-

1. The public right of way running from _____Road to _____ Road shall be temporarily closed for a period of three months from the date of confirmation of this order.

2. This order may be cited as _____ Borough Council __/__ Public Path Temporary Closure Order 200_.

Date:

Signed:

_____
Chief Executive Officer

Environment & Heritage Service
www.ehsni.gov.uk

Our aim is to protect and conserve the natural and built environment and to promote its appreciation for the benefit of present and future generations.

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