

Report to:	South Lincolnshire and Rutland Local Access Forum
Date:	17 January 2013
Subject:	Enclosing Public Rights of Way – Rights and Responsibilities

Summary:

A report exploring the problems caused by the enclosing of public rights of way and considering possible solutions.

Recommendation(s):

- i) That the forum notes the contents of the report.

Background

At the last meeting of the forum members were advised there had been an increase in the number of farmers fencing in paths. Unfortunately there is no available data on the issue so it's impossible to quantify the extent of the problem. In my experience this is primarily, but not exclusively, a problem affecting headland paths around pasture. Due to growing safety concerns farmers are increasingly seeking to separate the public from livestock and it is not uncommon to receive applications to divert cross field paths to field edge so that they may be more conveniently enclosed.

This can cause a range of problems for the highway authority. By fencing paths off landowners are effectively removing them from general farm management practices. Once paths are enclosed farmers seem less likely to keep the hedges cut back. Surface growth that may previously have been kept in check by grazing can become a new maintenance liability for the highway authority.

Further issues may arise when insufficient width is left between a hedge and an enclosing fence. Many public rights of way in Rutland do not have a width recorded in the definitive statement so there may be some ambiguity as to whether an enclosing fence might be considered to be an obstruction and the question of 'a reasonable width' must be addressed. Even where a width is recorded where should it be measured from? If it is the root of hedge as some landowners assume then the path is almost certainly obstructed already by the growth of the hedge.

Detail of report

The issue was raised at the last regional meeting of the ADEPT countryside group. It does not appear to be a significant issue in the region based on the responses

received from the authorities represented. Subsequently, none of those present at the meeting could recall any occasions when their respective authorities had tested claims that a right to deviate had been acquired. It should also be noted that in 2009 the Institute of Public Rights of Way Officers (IPROW) considered the issue and sought guidance from both the Health and Safety Executive (HSE) and Natural England, without success. Unfortunately the matter was not pursued due to time constraints.

In Rutland there are only a few new cases of paths being enclosed recorded each year so the annual increase in the overall cost of maintaining the network is quite small, although we are not currently in a position to quantify it. Over time however, only after the cumulative nature of the increases are felt will the implications of enclosing paths be fully realised.

Recommendations

The fact of the matter is that highway authorities have always been responsible for maintaining the surfaces of public rights of way. The duty to maintain is not well defined and there is no suggestion that paths must be cut every year in order to comply. However paths cannot be allowed to fall out of repair so it would appear prudent for regular cutting to be undertaken. Another way at looking at it is that where a path has been grazed the highway authority's duty to maintain has been fulfilled at no expense to the public.

Where a hedge overhangs an enclosed path so as to obstruct the passage of lawful users a highway authority has existing powers under section 154 of the Highways Act 1980 to require the owner or occupier to lop or cut back the overgrowth.

In certain circumstances a landowner may become liable to repair / maintain a highway by reason of inclosure. Such a liability cannot be established unless it can be proven that the public has been deprived of a right to deviate. The idea originated in a time when unmade roads across unenclosed lands were common. When the general line of the highway was in a poor condition (founderous) it was accepted that the public could lawfully deviate from the recognised line. If a landowner erected a fence between his land and the highway so that the public could no longer deviate around the founderous sections then the principle was that he became liable for maintenance of all (or only half the width, if he only fenced one side) of the highway.

It seems clear that authorities must be aware of possible hidden financial implications from a path becoming enclosed when considering applications to divert cross field paths to field edge. Authorities may seek to deter farmers whom they suspect to be seeking to enclose a path following a diversion by insisting on a greatly increased width for the diverted section of the path.

Another possibility has been canvassed in the past in connection with diversion of cross-field paths to the field-edge (where the surface maintenance burden would fall on the authority). This is that an agreement could be entered into between the authority and the landowner that would be enforceable under section 33 of the Local Government (Miscellaneous Provisions) Act 1982 (which means it would run with the land) and that would provide for the landowner to carry out the authority's duty to maintain the surface. Legal advice is now being sought on whether it is possible to enter into such an agreement.