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Dear Mr Malone,

**Countryside and Rights of Way Act 2000, s. 68: draft Regulations**

I hope that we are not too late to comment on the above draft Regulations.

Among other guides to the law, we publish *Private Roads: The Legal Framework*, now in its second edition<sup>1</sup>. This is a practical explanation of the law, written for those who live in private roads or who have an interest in them—including local government staff, surveyors, developers and indeed lawyers. We encourage those who use our books to give us feedback about the problems which they experience, and we are thus well placed to comment on the application of the Regulations to private roads.

(May I, in before going further, invite you to add us to your “Vehicular Access Consultation List”; and to note that we would be interested in seeing and commenting on any future proposals involving rights of way, common land, manorial law or related issues?)

Though the consultation papers in some places suggest that the Regulations are intended to apply only to common land, it is in fact clear that they will catch private roads<sup>2</sup>, and will be relevant to those which are not highways<sup>3</sup>.

There are thought to be about 40,000 private roads in England and Wales<sup>4</sup>. Many are residential. The unauthorised use of cars and other motor vehicles in private roads is often a source of concern to residents. While the civil law offers some protection, the criminal law is probably more important. This means particularly, in practice, s. 34 of the Road Traffic Act 1988, where the road is not subject to public access—the “motorised trespassing” offence<sup>5</sup>.

Other offences may be relevant in particular cases, including s. 6 of the Criminal Law Act 1977,

1. Further material, linked to the text, can be found on our website at [www.barsby.com](http://www.barsby.com).
2. Some private roads will be roads over common land; but this letter is concerned mainly with those which are not.
3. There will of course be no need for a private right of way if the land is already subject to a public right of way.
4. The figure was produced by the House of Commons Library, some years ago, in connection with a Private Member’s Bill.
5. See *Kreft v. Rawcliffe*, *The Times* 12 May 1984. Section 34 is an oddly-worded provision, but the intended meaning seems to be a wide one. We can explain further if you wish.

where there is the use or threat of violence—the motorist who insists that he or she is going to drive on to land regardless<sup>1</sup>—and where a private road, or part of it, can be regarded as ancillary to a house and hence “premises” for the purposes of the Act<sup>2</sup>.

Our comments on the Regulations are as follows:

1. We doubt whether there is any real need for the Regulations to apply to private roads which are not roads over common land. We have never heard of difficulties, in such roads, of the sort contemplated by the Regulations. This we think is partly because the law is already so creative. Rights of way can arise by necessity, or under s. 62 of the Law of Property Act 1925, or under the rule in *Wheeldon v. Burrows*<sup>3</sup>. Partly too it may be because once the aggrieved landowner has allowed time to elapse, he is unlikely to obtain an injunction and will have to content himself with a small payment by way of damages<sup>4</sup>. Finally, there is always the possibility of adoption under Part XI of the Highways Act 1980: once a road is adopted by the local authority, there is automatically a public right of way.

2. The consultation document indicates that where the owner of the land is unknown, the dominant landowner<sup>5</sup> cannot obtain an easement. It is in fact very common to find that in private roads the original owner of the land and his successors in title can no longer be traced, and in that sense the owner is unknown. But a presumption applies to roads, whereby the owners of the land either side of the road each own half the width of the road. This suggests that the dominant owner could seek to operate the procedure under regulation 6 by serving notice on all the frontagers in the road, in respect of the land which they are presumed to own, leaving it to them if they wish to show that they are *not* asserting ownership, thus thwarting the application.

This seems unsatisfactory: why should a frontager be put to the trouble of using this device, rather than simply being allowed to refuse a right of way?

On a technical point, the effect of regulation 10 in a private road where the dominant owner is applying to each frontager, on the basis of presumed ownership of half the width of the road, and not all frontagers respond by disavowing ownership, may be to leave the dominant owner with easements only over the parts of the road presumed to belong to the non-responders. Whether or not it is legally possible to have an easement of way between two points neither of which is legally accessible to the dominant owner<sup>6</sup>, this would be a very messy state of affairs. Easements can be and often are registered on the Land Register. The Regulations therefore ought probably to provide that if the dominant owner cannot obtain an easement over the whole of the land over which he needs to pass, his applications under regulation 6 should fail altogether.

We should also mention that it is very common both for the original owner of a private road to be unknown and for the road to be under the *de facto* control of a resident’s association, perhaps in the form of a private company. The association or company will also need to be able to oppose the application under regulation 6, because it may be able to show that use has taken place by express or implied permission and hence that there is no scope for a prescriptive easement<sup>7</sup>.

3. As a general point, much of the legislation concerned with creating rights of way over private roads focuses on occupation and control, rather than ownership: see for example the “Telecom-

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1. In our experience, disputes over unauthorised driving and parking in private roads are often characterised by aggressive behaviour.
  2. See the definition in s. 12(1)(a).
  3. (1879) 12 Ch. D. 31.
  4. See particularly *Bracewell v. Appleby* [1975] Ch. 408.
  5. I.e. the landowner who wishes his land to have the benefit of a right of way.
  6. We suspect not, on the basis that such a right is of no practical use. Where a right of way is to be granted over pieces of land in different ownership, it seems to be usual for the owners to join together in executing a single deed.

munications Code”, in Schedule 2 to the Telecommunications Act 1984, and Part III of the New Roads and Street Works Act 1991. It would be much easier to achieve the desired result by means of a free-standing statutory right of vehicular access, in the same way that the utilities legislation tends to provide for free-standing statutory rights (often called “wayleaves”) for pipes, cables, etc, rather than trying to create easements which are otherwise subject to the common law. But we appreciate of course that this is outwith the scope s. 68 of the Countryside and Rights of Way Act 2000.

4. In theory, the extent of a prescriptive right of way is determined by the use which has actually taken place. In practice, however, the courts are capable of taking a very elastic view of such matters<sup>1</sup>. Regulation 8(5)(c) looks as though it may be intended to help the servient owner in this respect, by allowing the right to be strictly confined to the use which has taken place; but, if so, we think that this provision needs to override regulation 5(c).

5. The draft Regulations put the owners and occupiers of a private road in a very difficult position. Suppose (to take the sort of case in which the Regulations are likely to be relevant) X’s land backs on to a private road, to which he has pedestrian access via a small side-gate. X decides that he will acquire an easement allowing vehicular access and parking, by driving down the private road, and parking near his gate<sup>2</sup>. He duly proceeds, on a regular basis, to drive down the road and park by the side-gate.

What action can the residents of the private road take to prevent the acquisition of the right? As the law stands, residents can only attack the process of creating a prescriptive easement by showing that the use took place by force, secretly, or by permission, or by stopping the use from taking place altogether.

Prosecutions under s. 34 of the 1988 Act will not have any effect on the acquisition of the right. Nor will an injunction, unless the Court can be persuaded to imprison X and thereby stop him driving and parking: but X will no doubt be the first to complain that since Parliament clearly intended him to obtain an easement by breaches of the civil and criminal law, it would be wrong for the Court to obstruct that process by granting an injunction<sup>3</sup>.

Secret use does not permit or require any immediate response. The best that the residents could do *peaceably* would probably be to grant oral permission<sup>4</sup> and thus prevent an easement arising; or alternatively perhaps to submit at once and negotiate the grant of an easement.

On the other hand, self-help and physical action offer much more scope for opposing the creation of the easement. Physical confrontations could be staged, to show that X was using force or threatening to do so. (Hopefully it would not be necessary for anyone actually to get themselves run over by X’s car.) Better still, a security firm could be engaged, to wheelclamp X’s car, and

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7. In principle, as we understand it, a mere occupier cannot grant an easement, but can prevent a prescriptive easement arising by giving permission for use, since the user cannot then maintain as against the true owner that his user was “as of right”: he is simply sheltering behind another trespasser.

1. See for example *Giles v. County Building Constructors (Hertford) Ltd* (1971) 22 P&CR 978, where a prescriptive right of way had arisen for two houses, but the court considered that this was sufficient to allow the land to be used for a block of six flats, a bungalow, and seven garages!

2. It may be more difficult for him to acquire the parking easement. The parking is arguably not in itself criminal, and therefore not covered by the Regulations. Parking by force cannot lead to the creation of an easement at common law; but X will no doubt seek to have the right included under regulation 6(3)(h).

3. A better course would be to provide that an easement cannot be acquired by conduct which is in breach of an injunction; though it would be odd that breaches of the criminal law were no obstacle, but contempt of court was.

4. To avoid the long-term consequences of written permission under s. 2 of the Prescription Act 1832.

quite lawfully levy a substantial sum for releasing it<sup>1</sup>; and by determined physical action on the part of residents, X could probably be prevented from acquiring his easement. The cost would be much less than the cost of mounting civil or criminal proceedings—which would, as the law stands, in any event be futile.

The fact that the Regulations and the Act essentially leave the acquisition (or denial) of rights to be determined by purely physical means is, with respect, disturbing; and in our view merits further consideration. Quite apart from the obvious reason, people tend to think (because they are often encouraged to think!) that the law does not want them to resort to do-it-yourself measures and physical confrontations, and that they can safely assume that legal rights will only be created or ended by some procedure involving lawyers and officials and bits of paper. They tend to be caught off-guard by processes such as the creation of easements by prescription, and of highways by dedication and acceptance. As a result of this attitude, rights tend to go by default.

The Rights of Light 1959 allows a landowner who wishes to prevent a neighbour from acquiring a right to light to dispense with the erection of an obstruction. Instead, it is merely necessary to register a local land charge, describing the notional obstruction. Following this precedent would have the obvious benefit of avoiding physical confrontations and the risk of further breaches of the criminal law. It should thus be possible for a landowner to register a local land charge and thereby establish that he notionally resists physically any attempt to acquire an easement of way over his land by driving over it in circumstances which are criminal, so that a landowner can peaceably oppose the creation of an easement of way by breaches of the criminal law.

In this connection may we also mention the procedure under s. 31 of the Highways Act 1980, which allows a landowner by registering details to protect his land against the creation of highways by dedication and acceptance? The existence of this procedure supports the case for a registration option to allow landowners to prevent the creation of an easement.

An additional reason for providing a peaceful, non-physical procedure by which a landowner can resist the creation of an easement is that it caters for those who are disabled or elderly or otherwise unable to take the necessary physical action. Legislation should not discriminate against such people.

While writing, may we repeat a suggestion we made some months ago to the Department of the Environment, though without response at the time, namely that the Highway Code, which refers to s. 34 of the Road Traffic Act 1988 but does so in very limited terms, should make clear that the law penalises off-road driving generally? Parliament has chosen to put the onus firmly on drivers to make sure that they drive only on roads which are public highways or where they otherwise have a right to go, for example, in the case of private land, the permission of the owner. This should be more widely known.

We would be glad to expand on any of the above points in you would like us to do so. We will post a copy of this letter on our website; and perhaps you would let us know whether you would agree that the text of your reply can also be posted?

Yours sincerely,

**Clare Barsby (Mrs)**  
**A. W. & C. BARSBY**

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1. See *Arthur v. Anker* [1996] 2 WLR 602 and also *Vine v. Waltham Forest LBC* [2000] 1 WLR 2383. Wheelclampers will in due course be regulated under legislation currently before Parliament.