

Protection of Badgers Act 1992 (as amended)

Guidance¹ on ‘Current Use’ in the definition of a Badger Set



Legal protection for badger setts

Protection for badger setts, as opposed to the badgers themselves, was put in place by the Badgers Act 1991. It was this Act that first introduced a definition of a badger sett, which was then carried over into the consolidating Act – the Protection of Badgers Act 1992². This defines a sett as:

“any structure or place which displays signs indicating current use by a badger”.

In the past there has been much debate about how “current use” should be interpreted in this context. This guidance note sets out the view that Natural England takes in relation to its licensing powers under section 10 of the Act. This is provided for guidance purposes only and specific legal advice should be sought, where appropriate, in individual cases.

What *could* be a sett?

Although the definition of a sett in the Act could be interpreted very widely, at the Queen’s Bench Divisional Court in June 2000 it was judged that it applied only to the tunnels and chambers of the sett, and the areas immediately outside the entrances, or to other structures used by badgers for shelter and refuge. So a grass field or a woodland glade, for example, may arguably show signs of “current use” by badgers, such as tracks, trails and foraging signs, but this clearly doesn’t make it a badger sett. On the other hand, badgers will often use, as a daytime refuge, places that do not fit the typical picture of a badger sett. For example, in rocky areas they might use gaps and crevices amongst rocks and boulders, whilst in suburban areas they sometimes use spaces under garden sheds, raised buildings or other structures. Badgers will also sometimes sleep above-ground in a ‘nest’ or ‘couch’ – often tucked under a hedge or bush – and may make a den amongst hay bales in farm buildings. These more temporary structures could also fall within the definition of a sett depending on the specific circumstances of the case being considered at the time.

¹ This guidance relates solely to England. Different interpretations may exist in Wales and Scotland and the relevant licensing bodies in those countries should be consulted for advice.

² Protection of Badgers Act 1992 (www.opsi.gov.uk/acts/acts1992/Ukpga_19920051_en_1.htm)

“Current use”

Although there have been cases in the Magistrates Courts, there appears to have been no case law since the 1991/1992 Acts to assist in interpretation of “current use”. Interpretation therefore relies on the ordinary meaning of the term. The Oxford Dictionary of Current English defines “current” as “belonging to the present; happening now”, indicating occurrence at the present time, or very close to it. It defines “use” as “using or being used; right or power of use; benefit or advantage”. It is conceivable that badgers might make use of a sett in ways other than occupying it, but it would seem unreasonable to suggest that they were not using it whilst they were out foraging at night, simply because they were not actually in occupation at that time. Similarly, it seems reasonable to consider that a sett is still in use if it is occupied during the day intermittently, for example once every few days.

It follows that “current use” is not synonymous with current occupation. To strictly equate the two would be nonsense, as a sett could alternate between being ‘in use’ during the day and ‘not in use’ at night as badgers went out to forage each night and returned each morning.

A further element to the definition of a sett in the Act is that it “displays signs indicating” current use. In practical terms this will often be the key issue in deciding if a sett falls within the definition or not. A sett is defined as such (and thus protected) as long as signs indicative of “current use” are present. Thus, a sett remains protected by the Act until such time as the signs (i.e. ‘field signs’) have deteriorated or decayed to such an extent that they no longer indicate that the sett is in “current use”.

Consequently, for a sett to fall within the definition in the Act, a badger need not be in current occupation, and may not have been for some time. As long as there are signs present indicating “current use” the sett is defined as such in the Act and is therefore protected. The maximum lapse of time between last occupation by badgers and the inspection of a sett for it to be considered in “current use” is how long it takes the signs to disappear, or more precisely, to appear so old as to not indicate “current use”.

Conclusion

A critical issue, in relation to the Protection of Badgers Act, is how long signs might indicate “current use”; effectively, for how long might they appear fresh. Field signs are likely to last a period of weeks, rather than days or several months, but this will be affected by soil type, weather, habitat, other activity at the site, etc. In the absence of scientific data a cautious view needs to be taken. In many cases it may be safer to consider when a sett is NOT a sett, as legally defined; i.e. if the field evidence, absence of signs, debris in sett entrances etc, indicate that it is not in use.

The following guidance is given on interpretation of “current use”, with respect to the definition of a badger sett in the Act:

- *Displaying signs indicating current use* is NOT synonymous with current occupation.
- A badger sett is protected by the legislation if it “displays signs indicating current use by a badger”. A sett is therefore protected as long as such signs remain present. In practice, this could potentially be for a period of several weeks after the last actual occupation of the sett by a badger or badgers.
- It follows that demonstration of the fact that a sett is not occupied by badgers does NOT necessarily exempt it from the protection afforded by the Act if it still displays signs otherwise indicative of current use.
- A sett is likely to fall outside the definition of a sett in the Act if the evidence available indicates that it is NOT in use by badgers; e.g. absence of badger field signs, debris in sett entrances etc. In practice, such a sett may have been unused for several weeks.

And remember, regardless of the presence of signs, the badgers themselves are protected, so a precautionary approach must be taken to interpreting evidence of use at a sett.

Contact Details

Further advice may be obtained from the Wildlife Management and Licensing Team on 0845 6014523 (local rate) or email wildlife@naturalengland.org.uk. This information is also provided on our website www.naturalengland.org.uk/ourwork/regulation/wildlife

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