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## PUBLIC PATH ORDERS

### Loss of views at stately home outweigh arguable minor benefit to mobility-impaired people

Chichester DC made four orders to divert or extinguish rights of way at Tillington, West Sussex. Orders 'A' and 'B' would divert FP 1027/1 and BR 1027 respectively, orders 'C' and 'D' would extinguish FPs 1052 and 1049 respectively. West Sussex CC objected, as did the RA, the OSS, and 12 others. Inspector Mr Peter Millman held a public local inquiry at Lodsworth Village Hall on 16–19 October 2007. Mr G Limbrick, Solicitor, represented the order-making authority; Mr R Walton, of counsel, represented West Sussex CC; Mr Michael Wood represented the applicant, the Hon Charles Pearson. Mr Denis Holmes represented the Sussex Area of the RA.

Pitshill was a Grade II listed park and house, the house built in 1760, and now somewhat dilapidated. Mr Pearson had acquired it ten years ago, and had applied to West Sussex CC for the diversion and extinguishment of these routes. He then applied to the DC, whose officers did not recommend the making of the orders; but the Area Development Control Committee overruled the officers' views and resolved to make the orders.

Mr Pearson argued that the diversions were expedient in his interests as landowner because, he said, the paths as presently sited were a threat to his family's privacy and safety, and to his security. The CC argued that these matters could not be taken into account, since Pitshill was currently not restored and unoccupied. The Inspector disagreed: security could be a problem though the place was unoccupied, and so found that the diversions would be in the landowner's interests as cited in the diversion orders.

The diversion orders also stated that the diversions were expedient in the public interest. Concerning this, the OSS argued that the diversion must provide a 'definite and positive public benefit'. This the Inspector accepted as a reasonable gloss on the words of the statute: the diversion must provide a better path, whether in relation to views, safety, or other factors. Here the DC maintained that it was 'in the interests of the public for the restoration of this historic house and the stable block to be ... completed without delay.' The Inspector said that he recognised that the restoration of such buildings may be more than just a private concern, but it was incidental to

the criteria for deciding whether a diversion was in the public interest. It was not necessary to divert the paths to enable these works to happen; if it had been, no doubt the matter would have been dealt with under the TCPA 1990.

It was said on behalf of the landowner that diversion would raise levels of public safety, since the routes carried private vehicular rights. But West Sussex CC said that the Inspector should weigh the issue as it was at present, not with regard to prospective increases. Anyhow, since the landowner said he would not go ahead with the works unless the orders were confirmed, it could not be said that volumes of vehicles would increase. The Inspector accepted this; s 119 was in the present tense—'is expedient'—and was not about whether it would be expedient if possible future events occurred. It did not seem that the 'merely possible' could be material, said the Inspector.

Considering order B, the Inspector weighed the issues of safety and gradient: first for equestrians and cyclists, second for pedestrians. With Pitshill unoccupied, the amount of motorised traffic was very low (two surveys showed this). A consultant from RoSPA produced a report which focussed entirely on the situation as it would be after restoration. The proposed bridleway rose steeply—as much as 1:5 on one section. The BHS (who were neutral) thought that horses would probably be cantering on this stretch, since it would take some impulsion to get up such a slope; and care would be needed going down it. Cyclists' speed might be a concern. One witness from the Pony Club thought that the slope would not be too difficult; but the owner of a local riding school thought it was too steep for children and novices to tackle. On balance the Inspector found that the proposed bridleway was safer and easier to use than existing one for horse-riders, and for cyclists there was not much difference between the two. For pedestrians, though, he found that the gradient would put some pedestrians at a disadvantage. He also found that some walkers would be slightly disadvantaged if order A was confirmed.

There were conflicting opinions concerning the merits of the views from the existing and proposed routes. Some spoke of the dramatic views of the Downs from the proposed routes, others of the views of the house from the existing routes. The Inspector found that the loss of the views of house and parkland outweighed

the advantages to be gained from the panoramic view if order A were confirmed. And while order B if confirmed would result in an attractive ride through woodland, the views of listed parkland would not be replicated or replaced. In terms of views, it was not in the public interest to divert the bridleway.

It was said on behalf of Mr Pearson that he had made 'great efforts' to ensure that parts of the proposed diversions were usable by people with impaired mobility. The Inspector found that the woodland bridleway would provide someone with a mobility impairment to go on a fairly level woodland path and then return on it. Counsel for WSCC conceded that there would be limited advantages for some mobility-impaired users, but said that there was anyhow no evidence of volumes of use by people in that category, which made Chichester DC's 'reliance on the point so unsound'. This, said the Inspector, did diminish the otherwise appreciable weight he might have placed on the provision of a route which would have been of some benefit to disabled people.

On balance the Inspector found that the orders were not in the public interests as cited, particularly given the significant loss of views and the increased gradient.

He therefore declined to confirm orders A and B. Orders C and D depended on the confirmation of A and B so did not need to be considered further.

Ref: Chichester District Council (Parish of Tillington Footpath 1027/1—Part) Public Path Diversion No 1 Order 2006. Planning Inspectorate ref: FPS/L3815/4/1; Chichester District Council (Parish of Tillington Bridleway 1027—Part) Public Path Diversion No 2 Order 2006. Planning Inspectorate ref: FPS/L3815/4/2; Chichester District Council (Parish of Tillington Footpath 1052—Part) Public Path Extinguishment No 2 Order 2006. Planning Inspectorate ref: FPS/L3815/3/1; Chichester District Council (Parish of Tillington Footpath 1049—Part) Public Path Extinguishment No 1 Order 2006. Planning Inspectorate ref: FPS/L3815/3/2. Order decisions issued 08.11.2007

### **Footpath diverted but important conditions are removed**

An order was made to divert part of FP 193/195 in the Parish of Rushbury, Shropshire. Inspector Mark Yates held a public inquiry on 18 October

2007 and confirmed the order subject to modifications, importantly the removal of the second and third limitations and conditions contained in Part 3 of the order schedule which could ultimately change the intended character of the new footpath.

The council claimed that the diversion would benefit the landowners for reasons of privacy and security, as the footpath proceeded partly across lawns and close to the property known as Lutwyche Hall ('the Hall'). The objector argued that the proposed diversion passed close to the busy B4371 carriageway and this would have an impact on the noise levels in comparison to the silence enjoyed from the present path. The objector also argued that the public would lose the best views of the front of the Hall, which was a listed building. Although the Inspector accepted that some people could find the proposed path less enjoyable due to the loss of views and the proximity of the road, he also considered it likely that others would not find it less enjoyable as it would avoid the need pass over private gardens and close to a residential property.

The original order contained three limitations and conditions: (i) steps on the diversion route were to be replaced; (ii) trees on the house side of the diversion route were to be thinned out to create better views of Lutwyche Hall; and (iii) trees were to be planted along the road side of the diversion route so providing denser woodland to lessen any noise that might be heard from the road. The Inspector modified the order by removing the second and third 'conditions' as he did not consider that the planting of trees and the removal of vegetation in relation to land away from the footpath to be limitations or conditions affecting the public's right.

At the inquiry Shropshire CC stated that there were some outstanding works to be undertaken in connection with the path. However, as the second and third paragraphs of the limitations and conditions were to be removed the Inspector admitted that 'there is no certainty that these measures would be properly implemented.' He modified the order so that it clearly became operative on the date that all of the works in connection with the proposed path had been completed to a reasonable standard. This now only included the replacement of the steps on the diversion route.

*Comment:* By removing the certainty that the other works would be carried out it could be argued that the intended nature of the alternative route had been fundamentally altered. By way of contrast, the objector did suggest an alternative route but the Inspector believed it was not appropriate to consider that. Although Inspectors are able to modify orders there is a limit to what can be considered as a mere modification and what constitutes a completely new proposal.

The order was confirmed.

Ref: Shropshire County Council (Footpath FP 195 (part), Rushbury) Public Path Diversion Order 2007. PINS ref: FPS/Y3235/4/22, decision issued 12.11.2007

### **Inspector gives no weight to ‘promises’ of alternative routes**

*Ron Williams, North Wales Area Secretary for the RA, highlights the messy background to an order in his territory.*

Flintshire County Council made an order under HA 1980 s 118 to extinguish a 256m length of Footpath 5 in the Community of Buckley. Inspector Susan Arnott held an inquiry at Buckley Town Hall in Flintshire on 30 October 2007. At the time of the inquiry there were three outstanding objections.

In the 1980s an industrial estate had been built on the edge of this North Wales town. One of the units was built across Buckley FP 5. At the rear of this factory unit there was a landfill site. When the unit was first constructed two alternative routes for the footpath were available providing some mitigation for the loss. One of these used the access road to the landfill site and then joined the path at the rear of the factory unit. The other went along Brookhill Way (the front of the factory unit) to join FP 5 some 250m further away.

A boundary fence was then erected between the factory unit and the landfill site which obstructed the first alternative route. Flintshire CC then made an effort to formalise the situation by making a creation order for Buckley FP 5a, the second mitigation route, mostly along Brookhill Way. This road was busy and one of the units employed so many people that they parked their cars on the road and pavement. North Wales Area of the RA were not happy with this situation and had long campaigned for a diversion along a former drive which formed a dead end at the

landfill site and then along the edge of the site to directly join Buckley FP 4. The situation which Flintshire CC had allowed to develop necessitated a 250m walk along roads between the factory unit and the start of Buckley 4.

Flintshire CC consulted the RA about a proposal to extinguish FP 5 under s 118 HA 1980 and the local footpath secretary objected. Despite this, in June 2005, the council went on to make the order. Three objections were received, one from the footpath secretary, Dai Rowlands, and two from other RA members. In 2007 the council and the Planning Inspectorate consulted possible dates for the inquiry. Despite the RA identifying a date on which Dai Rowlands was unavailable that date was chosen and the inquiry went ahead, with another footpath worker, Clive Menzies, stepping in to take on the case.

A key issue at the inquiry was that the landfill site was almost full, and restoration of the site was due to commence in March 2008. The site would be turned into an amenity area with footpaths. Some of these would be dedicated as rights of way. Despite this promise the RA decided to continue with its objection because the planned restoration scheme for a neighbouring landfill site had not resulted in the footpaths being restored or any new ones being created.

The Inspector heard all the arguments, which centred on convenience and amenity. Mr Bright, a local resident, gave powerful evidence about why he did not use the alternative route offered by FP 5a. Those on the site visit saw evidence of drug abuse taking place on that route.

The Inspector, Susan Arnott, in her analysis said ‘... the restoration plans are unconfirmed. Consequently, the council is presently unable to confirm that any proposed paths within the area will be dedicated as public rights of way. Accordingly I do not consider I can attach significant weight to the plans in terms of providing definitive access in place of the order route. The order route provides the only public right of way into and through the land to be developed for public use.’

*Ron comments that the RA was puzzled as to why this order was progressed at the time it was. It always made sense for the path to be diverted as part of the restoration plan. In the same week as the decision was published the local newspaper carried a story about a plan for a recycling facility on the landfill site. This did not feature on the current restoration plan. Had this section of Buckley 5 been deleted it would have*

been very inconvenient for the new proposal as it appears to cross the area identified for this proposed development.

Ref: Flintshire County Council (Footpath 5 Buckley) Extinguishment Order 2005. PINS ref: A6835/W/2007/514970, decision issued 08.11.2007

## **DEFINITIVE MAP MODIFICATION ORDERS**

### **Landowners' assertion of locked gates insufficient to satisfy proviso**

Kent CC made this order on 29 January 2007 under s 53(2)(b) of WCA 1981 to add FP TRX3 Ramsgate, over land at Ramsgate Synagogue owned by the Montefiore Endowment, to the definitive map and statement, based on the 20 years' use prescribed in s 31(1) of HA 1980. An objection was placed, and a public inquiry was held by Inspector Mr Martin Elliot on 14 November 2007.

The Inspector accepted 2005 as the date on which the public right to use the way was brought into question for the purposes of s 31(2), that being when a gate was erected and locked. There was no evidence of obstruction on any other date. So the 20-year period would be 1985–2005.

Evidence forms alleged that 13 individuals used the way for the full 20 years. Nine used it for part of that time, five of them for a substantial part. The earliest recorded use was in 1927. The alleged use was usually weekly or even daily, without interruption (until 2005). Some users saw others using the way. Some mentioned gates, but unlocked or in disrepair. A Ms Whelan mentioned that in her younger years a gate was locked once yearly over the way, but this was in a period predating the material one. Several people testified at the inquiry. A Mrs McCaughen said that she had used the way for 20 years commencing 1987, about thrice a week. She recalled a gate secured by chicken wire but it did not prevent use. A Mrs Lillywhite used the way from 1993 without challenge, to take her children to school and for other purposes; she said that her mother had used it from the 1930s and had mentioned no obstructions. A Mr Kirkaldie used the way from 1963 when he was aged 11, sometimes to access school playing fields, frequently daily then, and sometimes daily 1985–2005. A Mr Hall used it sometimes four times a day from 1987 without being obstructed. Statements from other witnesses provided further evidence of user.

Kent CC contended that this showed use of a well-defined route. Though the objectors

asserted that gates had been locked, only one witness referred to this happening.

Mr L Gubbay, objecting, said that a particular gate had for 30 years been locked, denying use to the public. He referred to evidence from a Mr da Costa, during whose chairmanship of the Endowment a gate had been closed annually. No records were kept, and there may have been three years when this did not happen. Once the gate was vandalized, after which a gate in a different place was locked instead. Mr Gubbay did not deny the amount of user, but disputed unrestricted use; the CC's statements that the gates were never locked were at variance with the Endowment's assertions that they were.

Having regard to the evidence as a whole, the Inspector said that it appeared that the public had enjoyed use of the way for the full 20 years. The user forms were consistent with the evidence given at the inquiry. Though the objector testified to the closure of the gates, this did not appear to have resulted in interruption of use of the way. 'For an interruption to be effective it must be shown that the gates actually prevented use', said the Inspector. There was no evidence that gates were forced, so use was *nec vi*. Though it was finely balanced, the Inspector found the evidence indicated 20 years' sufficient uninterrupted use by the public during 1985–2005 as to raise the presumption of dedication as a public footpath.

Having so found, it was necessary to consider whether evidence of no intention to dedicate was manifested during the relevant period: 'evidence of some overt acts on the part of the landowner such as to show the public at large, the public who used the way, that he had no intention to dedicate'. The CC submitted that even if the gates were locked on one day a year, that was not sufficient to bring to the attention of the public that there was no intention to dedicate. They added that, given their concern, it was surprising that the Endowment had not put an appropriately worded sign on the way. The evidence of locking was largely in the correspondence, and one letter said 'shut', not 'locked'. The CC asserted that there was a lack of consistent direct evidence of gating, and though

the objector had raised the question of gating, the case was not sufficiently credible to outweigh the user-evidence. A letter from the daughter of a former minister at the Synagogue showed that the path may have been annually closed in the 1930s; but, as the Inspector found, this pre-dated the material time. The same was true of gating which occurred in the 1950s and 1960s.

The Inspector found that the landowner may have erected gates and sometimes locked them; but there was no direct or corroborated evidence about this, or when it took place. It appeared that the locking took place at one time, but had lapsed. Information about maintenance was imprecise. No conclusions could be drawn about whether gates were locked in the relevant period.

In contrast the user-evidence, some of which was tested by cross-examination, indicated that user was uninterrupted. There was no evidence to suggest that the public were aware that the landowner did not intend dedication. 'If the locking of the gate were to be sufficient evidence the action should provide an effective interruption and the public must acquiesce in it', said the Inspector.

Though the evidence was finely balanced, there was insufficient evidence to demonstrate a lack of intention to dedicate the way as public.

That being so, the Inspector confirmed the order with a minor modification to correct an inconsequential clerical error.

Ref: The Kent County Council (Public Footpath TRX3 Ramsgate) Definitive Map Modification Order 2007. Planning Inspectorate ref: FPS/W2275/7/43, order decision issued 04.12.2007

### **Pastoral Measure 1983 s 56 insufficient to demonstrate lack of intention to dedicate**

Worcestershire CC made this order under s 53 of WCA 1981 to modify the definitive map and statement so as to show a public footpath (FP709) in Alfrick, part of which runs over consecrated ground belonging to St. Mary's Church. Worcestershire CC was directed to make the order following a successful appeal to the Secretary of State by the applicant. There were six objections outstanding at the inquiry which took place on 20 November 2007, conducted by Inspector Martin Elliot.

Unlike the vast majority of cases involving HA 1980 s 31 the objectors did not challenge the claim that members of the public had walked the order route for the full twenty year period. Instead the points made by the objectors related to the ability to dedicate a footpath on consecrated ground, which was subject to s 56 of the Pastoral Measure 1983.

In opposition to the Order, Mr A Duncan, on behalf of the Reverend Andrew Bullock and the Parochial Church Council, asserted that footpath had never been dedicated as a highway because churches and consecrated land were protected by s 56. This stated that it was unlawful to 'sell, lease or otherwise dispose of any church or part of a church or the site or part of the site of any church or any consecrated land belonging or annexed to a church except in pursuance of powers under this Part or Section 30'. Mr Duncan submitted that the creation of a footpath abridged the rights of ownership over the surface of the land and would prevent burials from taking place on this land. It was also submitted that a private path had been sanctioned under licence dated 19 March 1976 granted to Malvern Hills District Council by the Rector authorised to enter into the agreement by a faculty issued 23 January 1976.

It was submitted that the Pastoral Measure 1983 had the effect of prohibiting the creation of any interest in consecrated land except with a licence granted under the authority of faculty. Such a provision was not curtailed by HA 1980 s 31(1) which was a deeming provision as opposed to a statutory power contained within the 1983 Measure; therefore, s 56 of the 1983 Measure took precedence over HA 1980 s 31.

In support of the Order, Mr D Elvin QC submitted that consecrated ground was not held for public or statutory purposes but for ecclesiastical purposes. The Church did not owe a public duty and was not accountable under public law; whilst the Church may take into account the public good, the land was not held for public purposes; nor was it in public ownership.

Supporters of the order thought that the basis advanced by the objectors was misconceived in three ways: (i) presumed dedication did not require the actual dedication, disposal or alienation of consecrated ground; HA 1980 operated generally to create highways through long use absent of contrary intention to do so; (ii) the Pastoral Measure 1983 was not directed to the issue of dedication but to issues arising from redundant churches; (iii) the Ecclesiastical Courts

did not go as far as suggested by the objectors and actually supported the possibility of presumed dedication and presumed faculty.

When considering the Pastoral Measure 1983 and the requirement of faculty, the Inspector concluded that 'there was nothing put before him to suggest that the land over which the way would pass is being sold, or disposed of. The dedication of the right of way would result in a right over private land, the ownership would not change.'

The Inspector then considered the argument that the existence of the footpath would prevent burials. He concluded that this situation must have been considered when the 1976 agreement was made; as such burials would have been limited as a result. If there was any intention to carry out burials in this part of the churchyard then any footpath could be diverted subject to the relevant criteria being met.

Next, he considered the submission that the Pastoral Measure 1983 s 56 took precedence over HA 1980 s 31. He concluded that 'the Pastoral Measure 1983 relates to redundant churches and churchyards.' Furthermore, 'HA 1980 s 31 provides for a statutory dedication,

subject to certain criteria; it is not a deeming provision but a statutory provision. Once the criteria have been met and in the absence of a contrary intention to dedicate, it is presumed that the landowner intended to dedicate the way as a highway. There is nothing to suggest, in presuming the dedication of a way, that other actions, such as granting faculty, should occur.'

The order was confirmed.

Ref: Worcestershire County Council Order (Footpath 709, Alfrick) Definitive Map Modification Order 2006. PINS ref: FPS/E1855/7/15, order decision issued 14.12.2007

Don't forget that all PINS rights of way decisions for England, issued after 19 February 2007, are now available on-line at [http://www.planning-inspectorate.gov.uk/pins/appeals/rights\\_of\\_way/rights\\_way.htm](http://www.planning-inspectorate.gov.uk/pins/appeals/rights_of_way/rights_way.htm)

## **FROM PARLIAMENT**

### Written answer (Commons), 8 October 2007 Rights of Way

*Mr. Hancock:* To ask the Secretary of State for Communities and Local Government pursuant to the answer of 23 July 2007 (see FPW 25/1, p 16), Official Report, column 752W, on rights of way, whether the Independent Planning Commission will be required to undertake consultation with (a) the public and (b) user groups to ascertain whether alternative rights of way are being provided or the current rights of way are not needed.

*Mr. Iain Wright:* Further to the answer given to the Hon. Member on 23 July 2007, Official Report, column 752W, the Infrastructure Planning Commission will only take decisions about closure and/or diversion of public rights of way, where this is requested in an application for the development of a nationally significant infrastructure project. Any applications made to Infrastructure Planning Commission will be judged in a public and transparent manner as set in chapter 5, paragraphs 5.21–5.38 of 'Planning for a Sustainable Future' (cm 7120). This process contains public consultation at its heart, and all i

interested parties will be able to submit their evidence to the examination.

### Written answers (Lords), 17 October 2007 Rights of Way: Flooding

*Lord Greaves asked Her Majesty's Government:* Whether an assessment has been made of the impact of the summer flooding on footpaths, bridleways and other recreational rights of way; what estimates have been made of the costs of necessary repair and restoration works; and how such work will be funded.

*The Minister of State, Department for Environment, Food and Rural Affairs (Lord Rooker):* Local highway authorities have been carrying out assessments of the impact of recent flooding on their rights of way and estimating the costs of repair and restoration. These estimates are not collected centrally. The funding for the repair of flood-damaged rights of way is a matter for local highway authorities.

### Rights of Way

*Lord Greaves asked Her Majesty's Government:*

What progress has been made on the Discovering Lost Ways project; whether changes have been made in its objectives and methods of working; and what is the programme and timetable for progress on the project.

*The Minister of State, Department for Environment, Food and Rural Affairs (Lord Rooker):* To date, the Discovering Lost Ways project has concentrated on the development of research procedures and has focused primarily on Cheshire and Shropshire. It is expected that research in these counties will be completed shortly.

Natural England is currently undertaking a review of Discovering Lost Ways. This review aims to define the most cost-effective approach to the project. A report on this will go to my Defra ministerial colleagues and me at the end of 2007.

Written answers (Commons), 17 December 2007  
Farms: Public Footpaths

*Mr. Laurence Robertson:* To ask the Secretary of State for Environment, Food and Rural Affairs who is responsible for changing gates on footpaths across farmland in order to comply with the Disability Discrimination Act 2005; and if he will make a statement.

*Jonathan Shaw:* The Disability Discrimination Act now ensures that private or public landowners, who are 'service providers', will also be subject to the new provisions of the Act. They are required to take reasonable steps to remove, alter or provide a reasonable means of avoiding physical features, e.g. stiles, which act as barriers to disabled people accessing their services. However, the Act and its implications for rights of way are complicated and in many cases the full extent of its application will need to be established by case law.

*Mr. Laurence Robertson:* To ask the Secretary of State for Environment, Food and Rural Affairs what obligations there are on local authorities to display information on behaviour to be adopted when walking across farm land; and if he will make a statement.

*Jonathan Shaw:* There are no obligations on local councils to display signs on behaviour in the countryside when walking across farm land. However, the Countryside Code, which applies in England and Wales and has been widely publicised, makes it clear what the responsibilities are for both the public and the people who manage the land.

Written answer (Commons), 9 January 2008  
Wind Power: Tourism

*Mr. Paterson:* To ask the Secretary of State for Business, Enterprise and Regulatory Reform what assessment he has made of the effect on the level of tourism income of the installation of wind turbines in the countryside.

*Malcolm Wicks:* The Department has not made such an assessment. However, we are not aware of any evidence to suggest that the level of tourism income has been affected by the installation of wind turbines in the countryside.

The UK's first commercial wind farm at Delabole in Cornwall received 350,000 visitors in its first ten years of operation.

A MORI poll in Scotland (October 2002) showed that 80 per cent. of tourists would be interested in visiting a wind farm. Furthermore, wind farm developers are often asked to provide a visitor centre, viewing platforms and rights of way to their sites.

## PUBLICATIONS

**The Planning Inspectorate: Annual Report and Accounts 2006/07**

*Published by the Stationery Office (TSO); price £18.00. Purchase on line at [www.tsoshop.co.uk](http://www.tsoshop.co.uk) or telephone 0870 6005522*

In England the Planning Inspectorate reports that the number of rights of way cases received in the financial year 2006/07 showed a small decrease on the previous year. They met their targets for

dealing with cases by written representations and inquiry, but failed to meet their target for cases decided by hearing. The shortfall in their performance against target is going down and they anticipate that their performance will continue to improve with a more flexible allocation of hearing dates.

In 2006/07, for the first time, a target was introduced for dealing with appeals under Schedule 14 of the WCA 1981. In 56% of cases Inspectors' recommendations were submitted

within the target period of ten weeks. PINS viewed this as a creditable performance given that this was the first year in which they had to prioritise this type of work to meet a specific target.

In Wales, 16 inquiries were held during the year with a further ten cases dealt with by the written representations procedure. Four unopposed orders were confirmed on behalf of the National Assembly without recourse to an Inspector. No hearings were held. Four requests for the National Assembly to direct a council to determine orders within a specified period were also dealt with.

### **Walkers with dogs: good practice guide published**

Paddy Harrop and Stephen Jenkinson

In partnership with the Kennel Club, the Forestry Commission has published the first good practice guide about managing access for walkers with dogs.

For various reasons, traditional management approaches are perceived to have been inadequate, with the result that dogs remain a key issue for public access. This guide aims to address such deficiencies by providing relevant practical advice for those people seeking to develop a more effective approach.

Building on recent research and workshops with staff, *Managing dogs in the wood* provides specific guidance for all land and access managers, whatever the access or landscape type. By taking a more proactive, integrated and engaging approach, the advice aims to improve matters and reduce conflict for dog walkers, other access users and land managers alike.

The ten-page guide is supplemented by on-line case studies, featuring good practice from across the UK, on both Forestry Commission land and access managed by other public and private bodies. The website also contains other useful documents and links for access users and managers, to provide a central repository of research, support and advice.

Given that Forestry Commission and Natural England figures show that between a third and a half of countryside visitors have a dog with them, the guide aims to promote a balanced approach to managing walkers with dogs, as one of the most frequent, year-round access users. Whilst the UK's 6 million pet dogs provide many

social and health benefits, such as making people feel more confident and motivated to go out for a daily walk in all weathers, there are also understandable concerns about problems caused by irresponsible owners.

The guidance explains that the way to more effectively minimise negative impacts is by influencing owner behaviour through engaging with the positive aspects of dog ownership in a balanced and pragmatic way. Many access managers have found to their cost that dog owners can make formidable and vociferous adversaries, and this guide aims to prevent such needless conflict arising for the benefit of all concerned.

In the past, information and management has often relied on restrictive and negative messages, with little done to positively engage with dog owners as legitimate access users. The National Audit Office's 2006 report into the right of access to open countryside also highlighted deficiencies in engaging with walkers with dogs, during the implementation of Part I of the Countryside and Rights of Way Act 2000, which gave open access to mountain, moor, heath, down and common land.

The guide crucially makes the point—that can equally apply to any type of access user—that management based on generalisations and anecdotes is neither justified nor effective. Local circumstances will always be a major influence on how best to deal with a particular issue. Both the Kennel Club and Forestry Commission accept that some types of activity can, at sensitive times and places, be potentially damaging or excessively disruptive to other interests. The guidance highlights that identifying and quantifying the specific unwanted behaviours is more likely to lead to effective solutions, within a 'least restrictive' approach.

A key stage in this approach is understanding what is causing the unwanted behaviour, rather than just trying to suppress or displace the symptoms. In reality these principles are not specific to walkers with dogs; they are the foundations of equitable and effective resource management for any access user group. They also reflect Defra guidance on Dog Control Orders (see p 15 of this edition of FW), in that such restrictions must be a 'necessary and proportionate' response to a specific problem.

The guidance also emphasises that access managers need to retain a balanced sense of perspective about perceived impacts of any access user. For example, whilst in some quarters much

is made about impacts of access users on nature conservation, official Natural England figures (Sites of Special Scientific Interest condition survey 2007) show that all types of public access usage (with or without dogs) accounts for only 1.98% of the reasons why important wildlife sites are in a poor condition. Land management practices are far more damaging, for example overgrazing (degrading 30% of sites), moor burning (24%) and drainage (11%). So whilst all path users need to be responsible to protect already threatened flora and fauna, walkers are in truth rarely a significant reason for reductions in biodiversity.

Sensitive areas—such as nesting sites for rare birds and children’s play areas—may need restrictions on dogs at certain times (eg on lead) or, in some cases, dog bans. The guidance emphasises that management will be most effective by providing dog walkers with information that is clear, consistent and credible, whilst also looking to accommodate incompatible activities on alternative sites. Access managers also need to recognise how management and information needs differ between dog owners living locally, and those on holiday or day trips.

To influence behaviour, access managers need to communicate with dog owners in a way that is relevant, engaging and accessible to this specific audience. This is especially so as many interpretive opportunities, such as visitor centres and guided walks, exclude dogs altogether or have

other practical limits on their accessibility. Dog ‘pit stops’, where owners get free dog food samples from a ranger, have developed rapport about responsible behaviour in a positive and engaging way. Organising on-site dog training sessions—for example on Thames Chase and the Malvern Hills—has also been worthwhile in improving dog recalls and walking on the lead without pulling. Apart from effectively improving dog control and ability to comply with restrictions, these approaches also help foster wider rapport and mutual respect, when they are seen to be ‘pro-responsibility’, rather than just ‘anti-dog’.

The guidance booklet can be downloaded at [www.forestry.gov.uk/england-dogs](http://www.forestry.gov.uk/england-dogs) with case studies and other useful materials. A limited number of printed copies are available from the authors below. The website will be updated in light of ongoing research in Hampshire, training events for access staff and additional case studies.

For more information contact: Paddy Harrop, Recreation and Public Affairs Manager, Forestry Commission, 9 Clifton Moor Business Village, Clifton Moor, York, YO30 4XG (tel: 01904 696300; [paddy.harrop@forestry.gsi.gov.uk](mailto:paddy.harrop@forestry.gsi.gov.uk)) or Stephen Jenkinson, Kennel Club Access Advisor, PO Box 3715, Field End, Hope Valley, S33 8XZ (Tel: 01433 623129; [steve@sjacm.co.uk](mailto:steve@sjacm.co.uk)).

## COURT CASES

### It’s not always straightforward

*John Hague of the RA’s Isle of Wight Area tells the story of Newchurch FP NC 36 on the Isle of Wight which demonstrates that dealing with footpaths is not always as you might expect.*

In 2005 the new owner of Holliers Farm consulted about a diversion to the path to enable an organic agriculture regime to be established. As Area Footpath Secretary at the time I arranged for the Footpath Committee and the Newchurch Footpath Representative to visit the site and consider the proposals. We decided the diversion would be appropriate. There was also a proposal to construct a pond further along NC 36, in a marshy area. I decided to photograph the path in this marsh area, with walkers using it, as a record of how it looked before the pond was built. The

path ran in the marsh, in part some way from the boundary fence.

The landowner indicated that the pond silt would be deposited over the habitual line of the path and that a flat top to the slope would be provided for the path, following consolidation. On completion of the dredging and landscaping the habitual path was covered with silt and an earth bund had been constructed on part of the line. The new line of the path had been dug between the bund and the fence, in places constricted between them. The path surface formed a ditch, partly filled with water and in places impassable due to the water depth. It was wholly unsuitable as a path: the plantings on the bund would obstruct the view across the pond and the pleasant nature of the path would be reduced.

Meantime the path had been temporarily closed for the works by the council, with a nearby

alternative available. It was understood that discussions were taking place between the council's rights of way team and the landowner; the RA was not involved at this stage.

I was then told by rights of way staff that they were taking the landowner to court under HA 1980 s 131A (inserted by Rights of Way Act 1990) whereby an offence occurs if 'a person, without lawful authority, disturbs the surface of a footpath so as to render it inconvenient for the exercise of the public right of way'. The defendant was pleading 'not guilty'. I was asked to be a witness and to produce my photographs; and another RA member, Jill Green, was asked to be a witness due to her knowledge of the path over many years.

The preliminaries dragged on but eventually the case came to trial in the magistrates' court on 16 November 2007. We were told that a District Judge would hear the case because the landowner was calling the High Sheriff as a witness. (Since the High Sheriff has responsibility for magistrates there could have been a conflict of interest.)

The landowner had decided to conduct her own defence rather than instructing lawyers. The council instructed a barrister.

Jill gave evidence first, followed by myself. Under cross-examination the landowner seemed to be trying to establish that the path was now usable (the offence took place in November 2006), and that the RA had no cause for complaint. Her questioning became obscure at times and the judge stopped her on occasion as her questions were beyond my sphere of knowledge.

The definitive map officer gave evidence which seemed quite straightforward. Cross-examination attempted to show that the council had not conducted the matter properly and that the defendant had done her best to comply, having discussed the situation with the rights of way team.

Eventually the judge stopped this line of questions as it was repetitive. The defendant then referred to a letter she had sent to the council which didn't seem to be in the bundle of deposited papers. The judge admitted this. She then highlighted a specific paragraph in this letter in which she had stated that she had disturbed the surface of the path. The judge then indicated that this was an effective admission of guilt!

At this stage (after almost 3 hours) the case was adjourned to enable the defendant to

consider her position. After lunch we returned and the defendant was asked if she wanted to alter her plea. She changed it to 'guilty'.

The judge heard in mitigation that further work had since been carried out on the path. He also heard that the farm existed currently only on agricultural payment schemes, had made no profits in trading and remained subject to capital investment by the owner.

The council asked for costs of nearly £4000. The judge decided that some of the matters raised in mitigation should be considered—the further work undertaken and also in the change of plea. He took into account the financial circumstances. He recorded a fine of £500 and costs of £1000. The owner was given two months to pay. No order was made regarding the path.

The council then proposed to keep the path closed for the time being, see how it was affected over the winter and then to consider their options.

I had not come across a case under this section before—I certainly don't think there had been one on the Island. Readers can now see how protracted and complicated these matters can be and how costly prosecutions can become. Maybe better negotiations and communication would have solved the matter out of court. Maybe it could have been resolved before work commenced. Who knows!

At least such a case demonstrates that the Isle of Wight Council means business and a message will have been sent out to other landowners.

### **Trail riders prosecuted**

2007 saw two prosecutions of trail riders at Skipton Magistrates' court. In August, John McGuinness from Morecambe pleaded guilty to riding his bike at Force Gill on Blea Moor where a Traffic Regulation Order was in place. He was fined £250 and ordered to pay £45 costs. In October, David John Bleasdale from Ashton-on-Preston was fined £100 and ordered to pay £35 costs for riding a motorbike on a bridleway at Horsehead Pass, between Halton Gill and Yockenthwaite.

In an effort to reduce such problems and reduce conflict between trail riders and other users, the Yorkshire Dales National Park Authority, in partnership with the TRF, Natural England, North Yorkshire and Cumbria County Councils, Nidderdale AONB, and North

Yorkshire and Cumbria police, has produced a leaflet entitled 'Trail Riding in the Yorkshire Dales'. This spells out the need for trail riding to be undertaken in a responsible and legal fashion and makes it clear that the police will take action if bikes are being ridden where they should not be, or if they are not road-legal. Confiscation of bikes, fixed penalty notices and cautions can result. Seven key advice points are set out:

- Use only motor vehicular rights of way
- Make sure that you and your vehicle are fully road-legal
- Respect the life of the countryside
- Travel at a quiet and unobtrusive pace
- Keep to the defined track
- Be aware of how the weather and seasons affect routes
- Help protect routes

For further information visit

[www.yorkshiredales.org.uk/green\\_lane\\_management](http://www.yorkshiredales.org.uk/green_lane_management)

### **Section 130A in South Somerset**

This is a report of a case heard in South Somerset magistrates' court between Peter Kidner (applicant) and Somerset County Council (defendant) and Mr and Mrs Herrick (interested parties).

It concerned the obstruction of FP Y24-10 (Barcroft Lane) at South Petherton. South Petherton Fruit Farm was purchased by Mr and Mrs Herrick about six years ago and renamed Barcroft Hall. The farm house required substantial works, being in a run-down condition. At the time of the purchase the new owners were aware of the existence of FP T24-10 and other rights of way over the property.

In 2001 Mr Herrick erected a set of 17ft wide wooden gates across Barcroft Lane at the site of the present obstruction. He claimed that the gates were for stock control and to prevent access by unauthorised vehicles. No application had been made to the highway authority for the erection of a gate over the right of way under section 147 of the Highways Act, and no previous authorisation existed for such a structure.

Subsequently these wooden gates were replaced with the current set-up: brick and ham stone fly walls, three matching pillars, double vehicular gates and a side pedestrian gate. The pillars were 2.5m tall, and the gates in excess of that height. The double gates were electronically

controlled (either via a keypad or a handheld control). Anyone requiring access to the footpath through the gates needed to use an intercom to speak to the residents of the Hall so that the gates could be opened.

The gated end of the lane was landscaped by the Herricks with the installation of kerb stones, a gravel surface, a rockery and garden shrubs and trees. A CCTV was installed for security reasons. A permissive footpath was created 25m to the right of the definitive path to provide an alternative route. In his ruling, District Judge David Parsons said he was certain that Mr Herrick's claim that the gates were primarily for stock control was a pretence; these works were part of the re-branding of the property, intended to improve its amenity and value, and to gain privacy.

The Judge said that he had heard weighty and impressive evidence from Peter Kidner and others about the route which was described as 'an ancient sunken driveway, beneath South Petherton's earliest known (pre-Roman) settlement, bordering Saxon lynchets, giving a wide, unrestricted perspective as an ancient wooded highway.' Witnesses said that they had felt intimidated by the works and that they had been confused by the barrier and the new permissive route which was not consistent with what was shown on the map. Howard Brunton, a wheelchair user, said that prior to the alterations the lane had been a route which he could negotiate in his wheelchair. Since he could not get through the new gates he was compelled to use the permissive route. He pointed out that if the landowner had applied for authorisation to erect the gates under s 147 of the Highways Act the authority would have had a duty under s 147 (2A) to have regard to the needs of those with mobility problems. Kate Ashbrook, General Secretary of the Open Spaces Society, also appeared as witness for the applicant and was in no doubt as to the deterrent nature of the gates for the majority of the population. The judge also noted evidence that the gates and associated works served to reduce the width of the path by more than 2m.

Somerset County Council had previously sought to bring action against Mr Herrick for obstruction of the path under s 137 HA 1980. He had pleaded not guilty, but after seven hearings had been found guilty on 23 June 2006. On that occasion he was convicted, given an absolute discharge, and ordered to pay £742 in costs. He

was also required to disable the electronic mechanism on the gate within 56 days.

In August of that year Mr Herrick ordered a gate engineer to fit two handles to the gates and to override the electronic mechanism to allow manual opening. Mr Herrick accepted that this did not allow reliable access to the lane because the gates were vandalised on a number of occasions and closed shut. This was consistent with evidence from Mr Kidner and others that the gates were securely closed or difficult to open on various occasions in the late summer and autumn of 2006. The control panel and speaker set into one of the pillars remained in place until August 2007.

The judge was in no doubt that ‘without lawful authority the Herricks built a barrier, physically obstructing an historic path, to a design that conveys a psychological message, “Keep Out Private Property”. The gates prevent free access to the highway, particularly to those with mobility problems, and have on numerous occasions been locked or difficult to open.’

Turning to the action under s 130A HA 1980, the judge noted that the principal parties were Mr Kidner and Somerset County Council. The Herricks were not full parties but derived a limited voice as the persons who were for the time being responsible for the obstruction in question. In this capacity they raised a number of legal submissions. Firstly they argued that the highway authority, in bringing the initial prosecution and obtaining an order for the removal of the obstruction, had, in effect, discharged its duty under s 130 to prevent as far as possible the stopping up or obstruction of a highway and that as a consequence the powers under s 143 to compel the removal of an obstruction were no longer available to it. The judge was not persuaded by this line of argument, noting in particular that a prosecution under s 137 was not even described as an exercisable power in the context of s 130A, unlike s 143 which was specifically mentioned. Their second submission related to *estoppel in rem* (the declaration that that status of some particular subject matter eg a marriage or divorce or declaration about the status of a street is binding upon all the world). In order to create issue *estoppel in rem judicatum* three requirements have to be satisfied:

(i) the judgment must be from a court of competent jurisdiction; must be final and conclusive; and must be decided on the merits of the case;

(ii) the parties in the earlier action must be the same as those in the later action in which the *estoppel* is raised;

(iii) the issue in the later action must be the same as that decided by the judgment in the first. Fresh evidence is admissible if it has become available to show the earlier judgment was wrong.

The District Judge did not agree that he was bound by the magistrates’ ruling in the s 137 case for a number of reasons. Firstly there was no accurate and accessible record of their judgment. All that was available was the attendance note prepared by Mr Herrick’s solicitor, and the court register which simply set out the verdict and orders and these were capable of conflicting interpretation. It was regrettable that there was no record of their extemporaneous judgment but this meant he could not identify their methodology or analysis. Secondly, the issues and purpose of the proceedings were materially different. S 137 was intended to punish for criminal mischief but s 130A was a civil matter: its intention was to compel a highway authority to carry out its duty in respect of the assertion and protection of the rights of the public to use a highway. Thirdly, different parties were involved: specifically Mr Kidner was one of the primary parties and, said the judge, ‘Mr Kidner through the presentation of evidence is able to make a valuable contribution, in a matter of considerable public importance, and it would be inappropriate to deprive him of his s 130A rights.’ Fourthly, different evidence had been presented to that heard by the magistrates, in particular that from users of the path and the expert evidence of Kate Ashbrook. Finally, there was the question of the standard of proof. The s 137 case was a criminal matter, the present case was a civil proceeding. In *Hunter v Chief Constable of West Midlands and another* [1981] 3 AER 272, Lord Diplock’s judgment had established the principle that a civil action raising an identical issue decided against the plaintiff in a competent court of criminal jurisdiction was immaterial, since if the issue had been proved against the plaintiff beyond reasonable doubt in the criminal court, it would be wholly inconsistent if it were not decided against him on the balance of probability in the civil action.

In the final part of his judgment, District Judge Parsons was highly critical of Somerset County Council’s handling of the matter. He said ‘Their approach demonstrates limited understanding of the statutory scheme and the arsenal of remedies and penalties available to

them. Their investigation had been uncoordinated, confused and fruitless. The judge further stated that 'I am satisfied that at all times Mr Herrick has understood that he was acting outside the law when building the obstruction, he has taken a calculated risk, relying on his considerable business skills and financial weight to confuse and intimidate Somerset County Council, actively contributing to their disoriented investigation and attempts to protect public rights of way.'

Being satisfied to the civil standard of proof that all of the tests within ss 130A–130B had been met and that the public would suffer a grave and continuing loss of an amenity if the structures were not removed, the judge ordered the removal, within the next 70 days, of all gates, pillars, fly walls, controls and mechanisms that are within a six-metre width across the lane.

This judgment was delivered on 15 October 2007 but it was subsequently learnt that Mr and Mrs Herrick have issued a Notice of Appeal in Taunton Crown Court. Their grounds are that (i) the alleged obstruction is not one to which s 130A applies because the alleged obstruction is not without lawful authority; (ii) the alleged obstruction is not one to which s 130A applies because the powers of the council as highway authority conferred by ss 143, 149 or 154 HA 1980 are not exercisable in respect of it; (iii) the obstruction does not interfere significantly with the exercise of the public right of way; and (iv) the complaint and the order are in any event an abuse of process.

The date of the Crown Court hearing has yet to be fixed. We will report further in due course.

## **DEPARTMENTAL NEWS**

### **Exemption under s 67(3)(a) of the Natural Environment and Rural Communities Act 2006**

(By Graham Plumbe, FRICS, FCI Arb)

An interesting situation developed in Devon (Morchard Bishop) as to the meaning of s 67(3)(a). This provides for exemption from extinguishment of public vehicular rights where 'before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic.' The Minister made it abundantly clear that this was intended to refer to BOAT applications outstanding at commencement (2 May 2006 in England) and the current Defra website guidance (Version 4) is worded accordingly.

Devon CC made a bridleway order of its own volition (ie, not based on a BOAT application) but an Inspector decided that vehicular rights existed. NERCA was by then in force, and he decided that no exemptions applied so restricted byway status was the answer. This was opposed by the TRF who argued that, read literally, s 67(3)(a) embraces applications that were made at any time in the past, irrespective of what happened to them. As there had been a BOAT application in 1983, this qualified for exemption even though it had been rejected in

1987 and the applicant had not appealed. The Inspector took advice from Defra who agreed with the literal construction, and proposed to modify the website guidance. The Inspector then proposed a modification to show the route as a BOAT (see Order Decision dated 10 May 2007, ref FPS/J1155/7/46M, available on PINS website). Objectors to this modification obtained the opinion of George Laurence QC who expressed the view that purposive construction of s 67(3)(a) meant that it does indeed refer to outstanding applications only, and does not include those that were finalised by commencement, whether by confirmed order or unappealed rejection.

This view was passed to Defra which took its own legal advice. The conclusion was that George Laurence is correct, and Defra wrote an open letter to PINS (see below). The matter has been referred back to the Inspector with a request that he confirm the order as modified to show a restricted byway.

Had the original Defra advice been correct, all lower-than-BOAT entries on the definitive map, put there following compliant s 53(5) BOAT applications in the past, would be vulnerable to new BOAT applications made at any time in the future. The same would apply to ways where such applications had been rejected and not appealed.

Letter from Dave Waterman, Head of Rights of Way Policy & Legislation at Defra to Annie Owen, Rights of Way Section Manager at PINS

We have reviewed and revised our interpretation of the exception in s 67(3)(a) of the NERC Act 2006.

In November 2006, Defra's published advice on the exception in s 67(3)(a) was questioned by one of the rights of way Inspectors. This advice, as set out in version 4 of Defra's online guidance on Part 6 of the NERC Act is that the exception in s 67(3)(a) is engaged only where a DMMO application was made before the relevant date and was still outstanding (ie not decided) at commencement (of ss 67-71 of the NERC Act). This is consistent with the policy intention behind this part of the Act. Paragraphs 33-41 and flowchart 3 in Defra's guidance refer.

It was put to Defra that the wording of s 67(3)(a) refers simply to applications made before the relevant date and the exception is not therefore confined to applications that were outstanding but is engaged in all cases where an application for a BOAT had been made before the relevant date, regardless of whether the application had been decided before commencement. At that time Defra agreed that the wording of s 67(3)(a) leads to that interpretation and undertook to revise its online guidance.

However, following a challenge to this view from an objector in a current case, where the interpretation of s 67(3)(a) is a key issue, Defra agreed to review its interpretation of s 67(3)(a). Having done so, Defra has concluded that its original advice, as contained in version 4 of its online guidance was correct and that the exception in s 67(3)(a) is engaged only where a DMMO application for a BOAT was made before the relevant date and was still outstanding (ie not decided) at commencement. The reasons for this are as follows.

We believe that a literal interpretation of paragraph (a) would be to take it out of context. The purpose behind section 67 is to extinguish certain existing unrecorded public rights of way, but to preserve certain others in limited circumstances and for limited reasons. Paragraph (4) sets out the two relevant dates by which applications made under section 53(5) must have been lodged to be preserved by the legislation. It is therefore implicit that paragraph (a) only applies to applications which were outstanding at the relevant date.

This is borne out in the explanatory notes to the statute (paragraph 183) which deals with subsection (3) of section 67. These say 'These exceptions relate to cases where an application to record a public right of way for mechanically propelled vehicles has already been lodged. Under paragraph (a), all applications made under Part 3 of the 1981 Act to record rights for mechanically propelled vehicles which were lodged before the relevant date will be preserved and dealt with under the old law.'

It would clearly be against the purpose behind the legislation and contrary to statements made by Government Ministers during the passage of the NERC Bill if, in cases where an application for a BOAT was determined before the relevant date and it had been found against there being a BOAT, those cases were now to be re-opened so as to allow for a second determination of the question.

### **Dog Control Orders**

The Clean Neighbourhoods and Environment Act 2006 has caused particular concern to footpath workers because it introduced the concept of gating orders of which local authorities are making a great deal of use. Another part of the Act which has caused less interest in rights of way circles but which is of relevance nevertheless is that which introduced Dog Control Orders. There may be situations where footpath workers wish to lobby for the introduction of such orders to solve problems being caused by irresponsible dog ownership, or simply to comment on orders when they are proposed.

The following information is reproduced from 'Dog Control Orders: Guidance on Sections 55 to 67 of the Clean Neighbourhoods and Environment Act 2005' (Publication No. PB 11577g, Crown Copyright). The complete text is available on the Defra website at <http://www.defra.gov.uk/environment/localenv/legislation/cnea/dogcontrol-orders.pdf> or from Defra Publications, Admail 6000, London, SW1A 2XX (tel. 08459 556000).

### **Overview**

1. This guidance covers the Dog Control Orders (Prescribed Offences and Penalties, etc.) Regulations 2006 and the Dog Control Orders (Procedures) Regulations 2006, which implement sections 55 and 56 of the Clean Neighbourhoods and Environment Act 2005 (prescribing offences

and penalties to be contained in, and procedures and forms for making, dog control orders), together with the other sections of the Act relating to dog control orders. Dog Control Orders replace the previous system of byelaws for the control of dogs, and also the Dogs (Fouling of Land) Act 1996, which has been repealed.

2. This guidance is intended for local authorities, parish councils and for other bodies with powers to make dog control orders; these are defined in the Clean Neighbourhoods and Environment Act 2005 as either primary or secondary authorities (see paragraphs 17 and 18 below). It will also be relevant for those interested in seeking to introduce dog control orders, and for dog owners who may be affected by them.

3. The two sets of Dog Control Order Regulations can be found at: [www.opsi.gov.uk](http://www.opsi.gov.uk)

#### General Principles

4. The Dog Control Orders (Prescribed Offences and Penalties, etc.) Regulations provide for five offences which may be prescribed in a dog control order:

- (a) failing to remove dog faeces;
- (b) not keeping a dog on a lead;
- (c) not putting, and keeping, a dog on a lead when directed to do so by an authorised officer;
- (d) permitting a dog to enter land from which dogs are excluded;
- (e) taking more than a specified number of dogs onto land.

5. The penalty for committing an offence contained in a Dog Control Order is a maximum fine of level 3 on the standard scale (currently £1,000). Alternatively, the opportunity to pay a fixed penalty may be offered in place of prosecution.

6. Both primary and secondary authorities may make Dog Control Orders, provided that they are satisfied that an order is justified, and have followed the necessary procedures (see part 2). The offences are described and the forms of the orders are prescribed in the Schedules to the Dog Control Orders (Prescribed Offences and Penalties, etc) Regulations, and the exact wording of the description of the offence must be used (minor variations of the wording in the other parts of an order are permissible). A Dog Control Order may be brought into force no sooner than 14 days (or longer if preferred) after it has been made; there is no requirement for an order to be confirmed by the Secretary of State. The transitional arrangements for moving from current

arrangements to the new system are described in paragraphs 24–27. In brief, existing dog byelaws and designations under the Dogs (Fouling of Land) Act 1996 are not affected by the introduction of the new system.

#### Land subject to dog control orders

7. Under section 57 of the Clean Neighbourhoods and Environment Act 2005 a Dog Control Order can be made in respect of any land which is open to the air and to which the public are entitled or permitted to have access (with or without payment). As for the provisions on litter, land which is covered is treated as land ‘open to the air’ if it is open to the air on at least one side.

It therefore applies to any covered place with a significant permanent opening on at least one side, such as a bus shelter or garage forecourt that remains open to the air at all times.

8. Section 57 gives the Secretary of State power to designate types of land which, although they fall within the definition above, are not to be subject to all or some Dog Control Orders. The Control of Dogs (Non-application to Designated Land) (England) Order 2006 designates:

- Forestry Commission land in respect of all Dog Control Orders;
- roads (including highways) in respect of a Dog Control Order excluding dogs from land specified in the order.

9. A ‘road’ is defined in section 142 of the Road Traffic Regulation Act 1984 as (in England and Wales) ‘any length of highway or of any other road to which the public has access, and includes bridges over which a road passes.’ This is a wide definition, and includes not only public rights of way, including footpaths, but also ways to which the public has access by permission of the landowner, rather than by right. It therefore includes roads and footpaths through private estates provided the public has access to them.

10. All other land that meets the definition in section 57 (other than that exempted under the provisions described in the next paragraph) may be made subject to a Dog Control Order (but see paragraph 31). In particular, the restrictions on the types of land that could be made subject to designation under the Dogs (Fouling of Land) Act 1996 do not apply to Dog Control Orders in respect of dog fouling. There are special consultation and notification requirements for access land under the Countryside and Rights of Way Act 2000; see paragraph 32.

[Paragraphs 11–27 not included here.]

#### Making a dog control order

28. The procedure for making a Dog Control Order is set out in regulation 3 of the Dog Control Orders (Procedures) Regulations 2006. It is important that this procedure is adhered to, since a failure to do so will invalidate the order.

29. It is also important for any authority considering a Dog Control Order to be able to show that this is a necessary and proportionate response to problems caused by the activities of dogs and those in charge of them.

30. The authority needs to balance the interests of those in charge of dogs against the interests of those affected by the activities of dogs, bearing in mind the need for people, in particular children, to have access to dog-free areas and areas where dogs are kept under strict control, and the need for those in charge of dogs to have access to areas where they can exercise their dogs without undue restrictions. A failure to give due consideration to these factors could make any subsequent Dog Control Order vulnerable to challenge in the Courts.

31. Authorities should also consider how easy a Dog Control Order would be to enforce, since failure properly to enforce could undermine the effect of an order. This is particularly the case for orders that exclude dogs completely from areas of land. These will be easier to enforce if the land is enclosed. However, such orders should not be ruled out for unenclosed land where a special case for them can be made, for example to provide dog-free sections on beaches.

32. If an authority is considering making a Dog Control Order which would affect open access land (land subject to Part I of the Countryside and Rights of Way Act 2000) it must consult the appropriate access authority (the local highway authority or, the National Park Authority for land within a National Park); the relevant authority (the National Park Authority for land within a National Park; the Forestry Commission for land that has been dedicated as access land under section 16 of the Countryside and Rights of Way Act 2000 and which consists wholly or predominantly of woodland, or Natural England in all other cases) if it is not also the access authority; and the local access forum. There are already comprehensive dog control provisions which may be applied to access land, including if

necessary the banning of dogs. An authority should therefore pay particular attention to the views of these bodies in deciding whether any proposed order affecting open access land is necessary.

#### Procedures for making a Dog Control Order

33. The Dog Control Orders (Procedures) Regulations 2006 require that before it can make a Dog Control Order, an authority must consult any other primary or secondary authority within the area in which a Dog Control Order is being made.

34. Authorities must also publish a notice describing the proposed order in a local newspaper circulating in the same area as the land to which the order would apply and invite representations on the proposal. The notice must: (a) identify the land to which the order will apply (and if it is access land state that that is the case); (b) summarise the order; (c) if the order will refer to a map, say where the map can be inspected. This must be at an address in the authority's area, be free of charge, and at all reasonable hours during the consultation period; (d) give the address to which, and the date by which, representations must be sent to the authority. The final date for representation must be at least 28 days after the publication of the notice.

35. At the end of the consultation period the authority must consider any representations that have been made. If it then decides to proceed with the order, it must decide when the order will come into force. This must be at least 14 days from the date on which it was made.

36. Once an order has been made the authority must, at least 7 days before it comes into force, publish a notice in a local newspaper circulating in the same area as the land to which the order applies stating: (a) that the order has been made; and (b) where the order may be inspected and copies of it obtained.

37. Where practicable, a copy of the notice must also be published on the authority's website. Also, where the order affects access land the authority should send a copy of the notice to the access authority, the local access forum and Natural England.

38. If, after considering representations on a proposal to make an order an authority decides significantly to amend its proposal, it must start the procedure again, publishing a new notice describing the amended proposal.

## LETTERS TO THE EDITOR

Madam,

I refer to the September 2007 issue of Footpath Worker and Steven Wallsgrove's reply to my letter in the previous edition.

I accept that ownership of the highway under the HA 1835 s 23 refers to the parish forever thereafter keeping the highway in repair. However, the HA 1980 s 263 refers to vesting of the highway and the scrapings thereof in the highway authority, not the parish. In 1835, the highway authority was 'the parish ratepayers in vestry assembled' but later (in about the 1880s), the highway authority became the district council, and then the county council in about 1960. In the meantime, it has been established by case law that ownership of the surface of a vehicular highway (carriage road/BOAT/restricted byway(?)) is vested in the highway authority to whatever depth and width is needed to construct a made-up, metalled carriageway suitable for vehicular use by the public. When adopted, possession of this then becomes vested in the highway authority, but the landowner remains owner of the subsoil. Private roads occupied by bridleways and footpaths may not need a metalled carriageway and their maintenance remains the duty of the landowner or authorised users under the HA 1980 s 50. Their widths and surface quality is whatever has been agreed with the parish council and/or highway authority under the HA 1980, ss 25, 26, 27, 30 or 31, but they must still be maintained to a high standard for the safety of pedestrians or horseriders. The Highways Act of 1835, s 80 prescribed the minimum width of a cart road to be 20 feet plus 3 feet for a footway if there was room between the fences. In the Concise Oxford English dictionary, the term 'vesting' implies possession of the right, rather than ownership of the land, but only a lawyer would quibble over the difference. The actual owner is whoever owns the fee simple. The issue is discussed in the new blue book, Section 2.5, but after the many social changes that have occurred over the past couple of hundred years it is sometimes difficult to discover who the actual owner is. Width includes ditches and verges, or adjoining land that can be described as roadside waste. The highway authority has a duty under the HA 1980, s 130 to protect the highway from encroachment, by court action if necessary; but in urban areas, most

highway waste has been mopped up by developers.

The issue is a bit of a grey area, but was clarified in the High Court to some extent by Lord Justice Geoffrey Lane in R v Surrey CC ex parte Send Parish Council (1979).

Eric Fowler, Local RA Footpath Secretary for Mole Valley District

Madam,

21 years to replace a footpath—is this a record?

1986 In January 1986, Sue Cooper, of Colchester Group, reported to me a missing footbridge over the River Blackwater on the Kelvedon–Great Braxted border. Located at TL 855173, it was added to a short list of bridges held by Essex CC officers. Eventually it came to the top of the list as it was a useful link and also gave access to a road crossing under the A12. It would be done eventually; all we had to do was be patient—it was in the programme.

1994 Plans were made for the erection of the bridge and the parish councils were consulted. Kelvedon PC objected on the ground that it was an excessive cost in view of the county's limited rights of way budget. The county then decided not to proceed, so in May 1994 I served a s 56 notice which resulted in it being re-programmed for 1995/96.

1996 As April 1996 approached we asked where the bridge was and were told that it would be erected in the not-too-distant future as a diversion has been suggested.

1997 With little progress, Kevin Ascott, then district footpath secretary, served a second s 56 notice, but we agreed to a diversion. There were initial delays while Essex CC were investigating landownership near the A12. This was not resolved with the DETR until 1999.

1999 With land ownership settled, one part of the farm land changed ownership. The new owner was not happy.

2003 The new owner agreed to the diversion proposals, but details of the new bridge had to be approved by the Environment Agency. This was sought in 2004 and agreed in June 2005. It then took six months to build the bridge, off-site.

2006 More negotiations. Access to erect the bridge was agreed.

2007 In early 2007 the diversion order went through unopposed, to come into force on Sunday 28 October 2007. The new bridge is just north of the old, and close to the south side of the A12, at TL 855176.

The moral of this story? We are sometimes accused of being awkward, but by our helping out here and agreeing to the diversion, the public has lost many years' use of a right of way!

John Dowding, Essex Area Footpath Secretary

Madam,

Early in 2000, our parish council applied to the county council for a definitive map modification order to add to the map a beautiful riverside footpath, walked by some villagers for more than 50 years without interruption.

In the autumn of 2000, the final phase of a new housing development was completed. This phase comprised five properties whose rear gardens overlooked the agricultural land through which the footpath passed.

The farmer who owned this land then swore an affidavit that he had never intended to dedicate the footpath and, six days later, sold off the land to four of the occupiers. Against advice, two of the latter fenced off their plots and the path, so preventing access to the kilometre stretch of the path beyond.

A county legal officer then delineated the footpath behind the five properties, not on the line of the established path, not on the line of the path applied for by the parish council but, following a private consultation with an owner-occupier, on a line agreed with him. This line literally abutted the river-bank, making it unsafe for the disabled and the less mobile.

The DMMO inquiry took place in 2004. This was won by the village and the footpath was re-opened. The owner-occupiers of one property appealed to the High Court against the Inspector's decision. To everyone's amazement and despair the appeal was successful and the footpath was immediately closed.

In his 'setting the scene', the judge appeared to adduce some sympathy for the appellants in stating '... if the footpath is truly to be recognised ... people will be able to walk through their garden and that, again for obvious reasons, they do not regard as satisfactory.' The plot could not be used as a 'garden'. An application by the previous owner for 'change of usage' had been refused. Understandably, the

judge clearly accepted at face value all the appellants' evidence, but does state in his judgment 'Truthfulness is important.'

However, one of the main witnesses for the appellants, a neighbour, subsequently, in the presence of several villagers, admitted fabricating his evidence: ie, it comprised pre-meditated, calculated lies in support of the appellants' case on a pivotal matter. It also implicated another main witness.

This, together with other evidence, challenged the credibility of much of the appellants' submission. Defra were approached and they appealed in the Court of Appeal against the High Court judge's decision to allow the first appeal. The appeal was rejected. The quite damning new evidence was not raised. Apparently 'procedures' had prevented the admission of this absolutely vital evidence so central to this case.

Villagers present at the hearing saw it as a very expensive charade, one that defiled justice and seriously diminished respect for the law.

As lay people, we cannot understand why the admission of the appellants' witness, together with other new evidence, could not immediately have been conveyed to the Court of Appeal, leading to an automatic review of the initial appeal. Villagers (over 800 supported the application) are dismayed and incensed. They find it unacceptable to lose this beautiful footpath in this way. It is the only riverside walk we have.

There must be a wealth of experience and expertise amongst the RA's activists. Can anyone offer us advice? A point of contact? An expert in law? An investigative journalist, or politician with a special interest in such matters? Can we approach the High Court directly?

If you can possibly offer advice or help in any way will you please, in the first instance, contact the editor of 'Footpath Worker'.

Name and address supplied.

*Editor's comment:* We have corresponded with the writer of this letter, with Defra, with PINS and with the relevant county council, and it seems that the only way forward is for a new DMMO to be made. We hope that the county council can be persuaded to do this of its own volition, and that it will not be necessary for the parish council to make a new application. The *Godmanchester* and *Drain* ruling in the House of Lords should strengthen the parish council's case considerably since the High Court ruling in this case relied on *Godmanchester* and *Drain* in the Court of Appeal.

## TRAINING COURSES

### IPROW

Finance Act and Tithe Evidence Archivists at the National Archives will look at Finance Act and Tithe evidence in relation to public rights of way emphasising variations in documents and maps, finding evidence and what to look for, as well as interpretation of the evidence for rights of way cases depending on the nature and context of the evidence.

To be held at the National Archives, Kew, 21 April 2008, cost to be confirmed.

Construction and Maintenance Looking at accessibility issues, pitfalls of design, livestock needs, surfaces, avoiding erosion, maintenance implications, bridges for inaccessible sites and other difficulties of practical construction and maintenance for public paths.

Venue, date and costs to be confirmed.

Further information on IPROW courses available from Geri Coop at [training@iprow.co.uk](mailto:training@iprow.co.uk) (tel. 07000 782319).

### Rights of Way Law Review

Barriers and Furniture (16 April 2008) This seminar will study a highway authority's duty to keep the highway open and to protect the rights of its users, whilst responding to the pressure to restrict activities such as fly-tipping and the illegal use of motor vehicles on public rights of way. The conflict between barriers and disabled access will be examined, as will the litigation risks of allowing unauthorised structures. There will be an opportunity to discuss these issues in the context of Rights of Way Improvement Plans as well as day to day enforcement cases. This course will be of interest to Rights of Way Managers, maintenance and enforcement officers, and ROWIP teams.

Adapting the Rights of Way Network for Cyclists (18 June 2008) This course will provide up to date information on the government's cycling promotion policy and examine the legal methods by which the rights of way network can be adopted for this purpose. The reaction of walkers, horse-riders and other vulnerable path-users to increasing cycling pressure will be examined. There will be opportunity to discuss the challenge

of balancing the promotion of cycling on rights of way with the highway authority's responsibilities for safety and care as well as its duties under the Disability Discrimination Act. This course will be of interest to rights of way staff, ROWIP officers, cycling officers and transport planners.

Rights of Way Improvement Plan Projects versus Statutory Duties—striking the right balance (24 September 2008) Will the implementation of ROWIP projects be at the expense of the highway authorities' core duties of recording, protection and maintenance? The course will examine this potential conflict in priorities by considering the consequences of failing to meet statutory duties as well as looking at the political attraction of securing outside funding for non-statutory projects. This course will be of interest to elected members of local authorities, policy makers, rights of way managers and staff, and members of user groups.

### Preparing to Close the Definitive Map in 2026

This course will examine the cut-off provision in the CRWA 2000 and analyse the risk of a significant proportion of the rights of way network being extinguished on 1 January 2026. Emphasis will be placed on discussing examples of situations where rights of way might be lost, eg diverted routes not covered by legal event orders or unrecorded village paths which might be incorporated into adjacent land. The implication of the Discovering Lost Ways project will also be examined, particularly in relation to those routes which have been discovered, but taken no further. This course will be of interest to rights of way managers, definitive map staff and members of user groups.

The venue for all RWLR course is Wolfson College Oxford. For details of course fees and to book contact RWLR ([RWLR@dial.pipex.com](mailto:RWLR@dial.pipex.com); tel. 01249 740273).

### Blue Book Extra website

The latest cumulative supplement to the blue book, with updates up to 14 December 2007, is now available for downloading on the BBE website at: <http://www.ramblers.co.uk/files/BB4%20cumulative%20supplement%20at%202007.12.14.pdf>